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Grappling With The Regulatory Environment For Chinese Public Procurement

The regulatory environment for public procurement in China continued to be marked by uncertainty in 2005, creating practical problems for market participants. However, 2005 also evidenced some government efforts to improve the situation.

The problem stems from the existence of China's Tender and Bidding Law (1999) (T/B Law), as separate from China's more recent National Government Procurement Law (2002) (GP Law). Moreover, within these two legal regimes, various agencies vie for a regulatory role. All this has created uncertainty over which institutions ultimately make or enforce China's procurement rules. The problem now dwarfs the expected problems associated with introducing market-based procurement rules into a traditionally state-run economy.

The uncertainty in Chinese regulation of public procurement is compounded by a variety of factors: (1) vague or misunderstood provisions found in the T/B Law and the GP Law, and their underlying regulations; (2) the lack of adequate interpretative mechanisms (arguably a regular feature of the Chinese legal system) to clarify the rules and increase overall understanding of their use and application; (3) inadequate training to strengthen compliance with the new procurement rules; (4) corruption; and (5) inconsistent messages to the public on the techniques, purpose and general operation of a modern government procurement regime. Being aware of the unique legal, administrative and policy issues affecting Chinese public procurement is critical to those interested in selling to government departments and some state-owned enterprises.

Historical Foundation—After more than a decade of experiments with the use of tender and bidding in various forms in China, the National People's Congress passed the national Tender and Bidding Law on Aug. 30, 1999. The law took effect Jan. 1, 2000, and applies to any mandatory or optional bidding activity carried out in the People's Republic of China. T/B Law, Article 2. Under the T/B Law, bidding is required for contracting out any large construction projects and related equipment and material purchases that (a) affect public interest or common security (*guanxi shehui gonggong liyi, gongzhong anquan de xiangmu*); (b) use state-owned invested funds (*guoyou zijin touzi*) or state financing (*guojia rongzi*); or (c) use loans from foreign governments or multi-lateral lending agencies. T/B Law, Article 3. In addition, many lower-level regulations require public bidding for a variety of transactions, e.g., transfer of land rights, award of public concessions or non-construction purchases by state-owned enterprises; so the law applies extensively to a host of activities, many public, others purely commercial. In fact, commercial bidding disputes may end up subject to Chinese administrative law by virtue of the long regulatory reach of the T/B Law.

The mandatory application of the T/B Law does not turn on whether the purchaser is governmental or private. Instead, coverage is triggered by the public character of the purchasing activity—as determined by the type of funds used or the large public impact of the project. Funding sources that trigger the Tender and Bidding Law—namely state-owned invested funds (*guoyou zijin touzi*) or state financing (*guojia rongzi de xiangmu*) are distinguishable, with some conceptual difficulty, from money sourced from governmental budgets, the latter referred to as “fiscal funds” (*caizheng zijin*). As discussed below, the use of fiscal funds for purchases triggers application of China's GP Law. Few Chinese citizens would pretend to know where the expenditure of fiscal funds ends and state-owned investment funds or state financing begins. Similarly, any distinction separating state-owned investment funds from state financing—as referenced in the T/

B Law itself—would largely be considered a distinction without a difference.

The T/B Law promotes uniform practices for bidding in a variety of transactions, but does not significantly alter the environment for procurement regulation in China—a setting where the oversight and implementation of public purchasing is carried out by a host of administrative departments. For example, the purchase of imported equipment is largely supervised by the Ministry of Foreign Trade and Economic Cooperation, now merged into the Chinese Ministry of Commerce. Purchase of medicines and equipment for public hospitals remains largely the province of the Ministry of Health and its local counterparts. And procurement of construction, including construction by government agencies, is subject to strong intervention by China’s former State Developing and Planning Commission, now the State Development and Reform Commission (SDRC), or China’s Ministry of Construction.

The T/B Law deferred the delegation of overall regulatory supervision of bidding activities, speaking of oversight in noncommittal terms. Article 7, ¶¶ 2–3, obliquely states:

[R]elevant Administrative Supervision Departments carry out supervision of bidding activities according to law and investigate and handle any illegalities in bidding activities according to law. The administrative supervision over bidding activities and the specific division of responsibilities among the relevant administrative departments will be determined by the State Council [the Chinese Executive].

Similarly, at Article 65, the law allows the reporting of violations to a not yet designated “relevant administrative supervision department.”

Persons familiar with the drafting of the T/B Law were long aware that the SDRC was a driving force behind the promulgation of the law. But it was not until May 2000, with the issuance of the “State Council Opinion on the Division of Responsibilities for Administrative Supervision Among the Relevant Administrative Departments Carrying Out Tender and Bidding Activities” (Office of the State Council Document No. 34-2000)(2000 State Council Opinion), that the SDRC’s role was formalized. The 2000 State Council Opinion did not vest complete regulatory authority with the SDRC, but instead left ample supervisory roles over the bidding process for China’s other interested agencies, and said nothing

of the emerging role of the Finance Departments in regulating purchases by government agents using fiscal funds. The nagging issue of the respective roles of the Ministry of Finance and SDRC did not appear forcefully until the drafting process for the GP Law.

Consequently, although the 2000 State Council Opinion tasked the SDRC with policy leadership over bidding activities, it did not designate the SDRC as the sole source for setting the regulatory framework. Except for bidding on large-scale construction projects, ¶ 1 of the 2000 State Council Opinion identified the SDRC as just one of many agencies empowered to issue bidding regulations, making the SDRC a king among autonomous princes. Oversight of bidding procedures to guard against illegalities such as disclosure of confidential procurement information, collusive bidding practice, or discriminatory elimination of bids, and resolution of complaints alleging such illegalities, are still subject to the authority of the agency closest to the specific bidding activity. In distributing regulatory authority, the State Council Opinion identified the departments of trade and industry, water, transportation, railroads, aviation and information technology as potentially exercising regulatory roles, depending on the type of project at issue (2000 State Council Opinion, ¶ 3).

For construction projects, the primary focus of the T/B Law, the 2000 State Council Opinion perpetuated a regulatory role for China’s Ministry of Construction (and lower-level construction departments) over bidding procedures for building construction and related procurement of wiring, piping and other materials and equipment (¶ 3). A direct oversight role for the SDRC was retained only for “large scale construction projects” (¶ 5). The circumstances under which construction graduates from small-scale to large-scale, and shifts regulatory supremacy from the construction department to the SDRC is not specified. The SDRC issued its “Stipulations on the Scope and Size Standards for Tender of Construction Projects” (May 1, 2000), which details the types of construction projects subject to mandatory bidding requirements, but this regulation is no help in determining the boundary between the respective supervisory roles of the SDRC and Ministry of Construction over Chinese construction bidding.

Impact on Market Participants—The 2000 State Council Opinion did not vertically distribute regulatory power over tender and bidding, but di-

vided regulation along functional lines, where the potential for overlapping regulation was great and where jurisdictional boundaries remained ill-defined. For agencies involved, it served their traditional penchant for self-regulation and reaffirmed the notion that no Chinese agency (except the State Council) had the power to tell another agency how to behave. For market participants, however, it created a costly regulatory environment, with substantial risk of violating conflicting regulations.

Take, for example, the establishment of qualification standards for “Tender and Bidding Agencies,” which are private, state-owned or quasi-governmental entities authorized to carry out bidding for a host of project owners. T/B Law, Articles 12–14; and GP Law, Article 19. See also Measures for Qualification Recognition for Tender Agencies in Construction Projects, Ministry of Construction Document No. 79, June 30, 2000; Measures for Qualification Recognition for Agencies in Government Procurement, Ministry of Finance Document No. 31, Dec. 28, 2005). The 2000 State Council Opinion, at ¶ 5, entrusts the qualification of these tendering agents to various government departments, depending on the types of projects that the tender agent might handle. The practical effect of the Opinion on these bidding agencies (if they want to adequately protect themselves) is to require them to meet the qualification requirements of many government departments or, at minimum, to ensure that before they handle bidding for a particular project, they have adequately complied with all the requirements of the agency “most interested” in the particular procurement. Determining the “most interested” agency for a particular project, however, may not always be clear, and many agencies, depending on the circumstances, could be equally “interested” in a particular procurement.

The case *Hebei YanZhao Eng'g and Constr. Management Co. v. The State Development and Reform Commission of Hebei Province* (Intermediate People's Court of Shijiazhaung Municipality, First Level Admin. Div. Dec. No. 00011 (2005)) demonstrates the dilemma. There, plaintiff Hebei Yanzhao, a tender and bidding agency, appealed a fine imposed by the provincial SDRC in Hebei Province. The local SDRC imposed the fine after determining that Hebei Yanzhao, when serving as a tender and bidding agency for the purchase of boiler equipment for Yanshan University, failed to advertise the bid-

ding in the proper media. Hebei Yanzhao, a construction company handling a construction-related purchase of boiler equipment, submitted for publication its solicitation for bids to the local QinHuangDao Municipality Exchange Center for Construction. Ultimately, however, the advertisement was not placed in all the required media, as mandated by the provincial SDRC, and therefore the local SDRC fined Hebei Yanzhao.

The Court's limited analysis struggled with the uncertainty engendered by the 2000 State Council Opinion, which gave the SDRC responsibility for tender and bidding policy—including the designation of the proper medium for project advertising—but left day-to-day enforcement of bidding rules to the agency with the greatest connection with the project (in this case, arguably, the local construction department). The Court also grappled with a local regulation, the “Hebei Provincial Measures for the Implementation of the “Tender and Bidding Law of the People's Republic of China,” which also ambiguously divided regulatory authority over bidding activities. Hebei Provincial Measures, Article 4. The Court ultimately upheld the fine on the dubious basis that, although local laws and regulations did not clearly identify the agency with the power to assess administrative fines for violating bidding rules, the local rules also did not clearly exclude the local SDRC from possessing that inherent power. *Hebei Yanzhao* Opinion (on file with author). Consequently, Hebei Yanzhao became a victim of the unpredictability stemming from the 2000 State Council Opinion.

Establishing An Administrative Coordination Mechanism—The *Hebei Yanzhao* case illustrates that uncertainty in the Chinese regulatory environment is not an abstract dilemma of interest only to political scientists, but a practical problem for participants in the Chinese public purchasing market. Fortunately, the State Council has recognized that the problems plaguing China's tender and bidding system cry out for solutions. On July 12, 2004, the State Council issued its “Certain Opinions About Furthering The Standardization of Tender and Bidding Activities” (State Council Issuance No. 56 [2004]) (Opinions on Standardization). The Opinions on Standardization highlight the positive influence of the development of China's bidding market system, and note that the system has become an important part of economic life in China. The Opinions decry a host of problems that “can no longer be ignored,” such

as parties avoiding mandatory bidding requirements, monopolistic practices, sham bidding procedures, local protectionism, collusive bidding, fraudulent contract awards, corruption and the failure of government agencies to handle complaints properly.

Paragraph 7 of the Opinions, “Implementing Management According to Law and Improving The Tender and Bidding Administrative Supervision System,” directly addresses the systemic administrative problem in the current bidding system. Unfortunately, ¶ 7 identifies problems but does little to correct them. A direct, not contextual, translation of ¶ 7 is provided below to give the flavor of the message sent by the central government:

The relevant administrative supervision departments should each carry out their respective functions, closely coordinate, strengthen management, and reform and improve administrative supervision work over tender and bidding, in strict accordance with the Tender and Bidding Law and the division of responsibilities stipulated by the State Council.

The SDRC will strengthen its coordination and guidance toward tender and bidding work; strengthen supervision and investigation in construction tendering and bidding within the construction process for large-scale construction projects, and strengthen supervision and enforcement of tender and bidding activities in industrial projects. The Water and Irrigation, Transportation, Railroads, Aviation, Information Industries, Construction and Commerce departments, shall according to relevant laws and regulations, strengthen supervision and enforcement over illegal activities such as discrimination and elimination of bids, collusive bidding, collusive tendering, disclosure of base prices, and disclosure of confidential information in tender and bidding processes in their corresponding areas, increase the investigation and handling of assignments and illegal subcontracting of contracts. As to activities such as complete assignment of project awards, partial assignment of contract awards, illegal [change of project scope], the successive subcontracting of key work, and the co-opting/piggybacking on qualified or highly qualified units and their names to bid, as well as the borrowing of other units qualification certificates, the relevant administrative departments

need to assess fines, confiscate illegal gains, order suspensions and corrective action and other penalties, and if the circumstances are serious, cancellation of operation licenses by the Industry and Commerce administrative management agencies. Concurrently, as for the entities receiving project assignments and illegal subcontracts, they should be timely accounted for and reversed.

The relevant administrative supervision departments must not violate law and regulations for such administrative approval matters, such as establishing project approvals, examinations and authorizations, and registrations involving the tender and bidding. All previous approvals that are illegal should be similarly cancelled. There should be an acceleration of functional transformation and a change from the administrative tendency to emphasize approvals and neglect subsequent oversight, as to strengthen supervision and enforcement over the entire tender and bidding process. As for tender activities carried out for matters not approved, there should be timely assessment of penalties by the approval departments. There must be the establishment and improving of just and effective system(s) for handling complaints, and the timely acceptance of complaints and the investigation of illegal activities. Any government department or individual, especially leading cadres at various levels, must not use power for personal ends, or employ methods such as hints, inciting, making calls, passing notes, assigning or arbitrarily giving orders as to interfere or manipulate specific tender and bidding activities. The various levels of administrative supervisory departments should strengthen their supervision of enforcement activities for tender and bidding and sternly investigate and handle corruption or malpractice in tender and bidding activities. The People’s Governments at various levels should, according to the requirements of the Administrative Licensing Law, standardize the work of the supervision departments in tender and bidding activities, strengthen the formation of investigative teams for supervisory management in tender and bidding, and raise the level of administration according to law.

The above passage helps explain the problems troubling the Chinese bidding system, but fails to clarify the uncertainty on who ultimately sets and enforces the rules for public bidding. The repeated references to poorly identified “relevant departments” for approvals, implementations, supervision, etc. perpetuates the uncertainty and allows agencies to claim they have been invited by the State Council to regulate bidding activities. A corresponding absence of jurisdictional boundaries makes it hard to determine agencies’ respective oversight authority. Paragraph 7 of the Opinions on Standardization admonishes agencies to act according to the T/B Law and the Division of Responsibilities Stipulated by the State Council, namely the 2000 State Council Opinion. But, as explained above, this “division of responsibilities” suffers from inconsistencies and ambiguities that are exacerbated by the 2004 Opinions on Standardization. Moreover, ¶ 7 encourages roles for other agencies, such as the Departments of Industry and Commerce (for the cancellation of business licenses) and the Departments of Supervision (for the investigation of corruption and malpractice) inviting them to join the regulatory “free for all.”

On a more positive note, the SDRC is more forcefully asserting its lead role in supervising bidding activities. In July 2004, it issued “Measures for Handling Complaints Regarding Tender and Bidding Activities on Construction Projects,” setting procedures and standards for handling complaints. Unfortunately the regulation perpetuates the traditionally diffuse oversight by allowing agencies to set up their own bid protest mechanism or use the regime being established at the SDRC. On Sept. 11, 2004, the Ministry of Finance enacted its separate “Measures for Handling Supplier Complaints in Government Procurement,” again highlighting the tension between China’s “tender and bidding system” and its “government procurement” system. Moreover, in response to the concerns raised by the State Council in the 2004 Opinions on Standardization, the SDRC issued its “Temporary Measures on the Inter-Departmental Coordination System for Tender and Bidding Activities” (SDRC Document No. 1282, Sept. 1, 2005) (Coordination Measures). The Inter-Departmental Coordination System represents an honest attempt to make sense of the chaotic regulatory environment for bidding in China, but it, too, may fall prey to the pathologies promoting diffuse regulation.

Although the SDRC is the leading agency for the Inter-Departmental Coordination System, it is an initiative formed by 11 Chinese government departments, including the agencies recognized in the 2000 State Council Opinion as possessing some regulatory responsibility over bidding activities. It also includes the Finance Departments and Supervision Departments (Coordination Measures, Article 3). The Inter-Departmental Coordination System is intended to promote uniform promulgation and enforcement of rules governing tender and bidding, with the goal of timely and effectively solving the “prominent contradictions” and problems in the administration of tender and bidding activities. (Coordination Measures, Article 2). The Inter-Departmental Coordination System identifies a number of goals, to be served by cooperation in the following areas: (1) formation of regulations; (2) carrying out of research; (3) establishing links between agencies on the administration of tender and bidding activities; and (4) handling of complaints (Coordination Measures, ¶ 4). It establishes, among other things, a deliberative process grounded in annual meetings held in July. It encourages agencies to designate personnel who will actively participate in the consultations and requires those officials to prepare adequately to contribute to the consultations (Coordination Measures, ¶¶ 6 and 8). The format for this dialogue is collective discussion, with the goal of unanimity through consultations. It seeks to impose some discipline by requiring participants to request immediate guidance from superiors on any major issue confronted and, after meetings conclude, to report quickly to superiors and ensure implementation in the participant’s home departments (Coordination Measures, ¶¶ 6–7). Overall, the Inter-Departmental Coordination System attempts to ensure that the SDRC and other interested agencies vet any new rules, initiatives or key cases on the regulation of bidding activities.

The prospects for the success of this new “talking shop” in strengthening the regulatory framework for bidding activities are unknown. The establishment of the Inter-Departmental Coordination System by the SDRC is a positive sign, but it relies too heavily on the unsettling “distribution of responsibility” system originating in the 2000 State Council Opinion. It is a relatively soft challenge to this diffuse, horizontal regulatory structure. As the coordination efforts get underway, one hopes the SDRC will increasingly use the new Inter-

Departmental Coordination System to assert greater control.

Dividing the Rest of the Regulatory Pie—The Inter-Departmental Coordination System expressly excludes tender and bidding activities for government procurement of supplies and services, as well as tender and bidding for quotas for the export of products and overseas foreign economic cooperation and foreign assistance projects. Thus, the Inter-Departmental Coordination System fails to unify China's public procurement regulation and may actually reflect the SDRC's attempt to strengthen the regulatory divide between China's broad-based tender and bidding system (manifested largely in the public construction system) and the narrower context of purchasing by government departments under China's 2002 GP Law.

The GP Law applies to purchases of goods, construction, and services by government organs (*zhengfu jiguan*), as well as social institutions (*shiye danwei*) and public organizations (*tuanti zuzhi*) that use fiscal funds (*caizhengxing zijin*). In contrast to the T/B Law—application of which depends solely on the type of purchasing activity and the character of the money used—the GP Law emphasizes equally the character of the purchaser. Oversight for application of the GP Law rests firmly with China's Ministry of Finance and lower-level Finance Departments (although such oversight is not necessarily exclusive) (GP Law, Article 13). This contrasts with the absence of an express agency for oversight under the T/B Law and the 2000 State Council Opinion, which authorizes multiple agencies to operate within the regulatory fray for bidding activities.

During the drafting of the GP Law, the awkward relationship between the two purchasing regimes played out to an incomplete conclusion. Officials from the SDRC argued that construction should not come within the definition of government procurement, and, therefore, the law should cover only purchases of goods and services using fiscal funds. That strategy conflicted with the emerging global harmonization of government procurement law, which uniformly includes purchases of goods, construction and services in government procurement systems. Hence, construction remained within the definition of government procurement (GP Law, Article 2, ¶ 2).

This, however, left the dilemma of how to regulate (or who would regulate) construction by government-related entities using fiscal funds. Article 4 of the GP

Law represents a compromise: "For the government procurement of construction and engineering that is carried out through tendering and bidding, the Tender and Bidding Law should be used." When the GP Law was issued in 2002, it was unclear whether public construction using fiscal funds was subject to the T/B Law for procedural purposes only, thus leaving substantive oversight with the Finance Departments, or whether oversight of public construction reverted entirely in favor of the SDRC and the fragmented regulatory framework under the T/B Law.

To date, the Ministry of Finance and local finance departments, in theory, maintain that the GP Law envisions their supervision of public construction. But, in reality, this role is nominal or nonexistent, and the Ministry of Finance has retreated from this role, as evidenced by its issuance of a separate Tender and Bidding Regulation, applying only to government procurement of goods and services. The Ministry of Finance has its own supplier-complaint regulation, which should also cover protests related to construction procurement. But the Finance Departments will, for the immediate future, primarily handle protests related to the procurement of goods and services.

The involvement of the Ministry of Construction and local construction departments in nearly all conventional construction overshadows a potential oversight role for the finance departments. A protester on a bidding for public construction using fiscal funds might be wise to file protests with both the relevant finance departments and the relevant construction departments to avoid the jurisdictional pitfalls associated with the tension between China's T/B Law and GP Law.

Impaired Regulation of Government Procurement—The Ministry of Finance's supervision of government purchasing follows logically from its responsibility for managing and protecting the public fisc. However, this clashes with China's socialist traditions that dictate a prominent role for the planning agency, e.g., the SDRC's predecessor. The presence of two conflicting purchasing regimes is a by-product of China's transition to a market economy. Moreover, there seems to be a deliberate effort to ensure two separate regulatory regimes, with the SDRC avoiding any connection between it and the government procurement system, and using propaganda and training programs designed to solidify the notion that tender and bidding is a distinct system. This public

education campaign has created a misunderstanding that the tender and bidding system for construction is distinct from government procurement.

Other factors impair the Ministry of Finance's mission under the 2002 GP Law of overseeing public purchases of construction, as well as goods and services. First, most finance departments cannot match the resources and expertise of the SDRC and Ministry of Construction, which arise from their traditional role in overseeing infrastructure development and construction. Second, the Office for Government Procurement is relegated to a third-level office within the Ministry of Finance, making it even more difficult for this office to make demands on other agencies. Finally, there is a troubling unwillingness by the Finance Departments to assert their new regulatory authority, especially on sensitive procurement issues. Trends suggest that, rather than the Ministry of Finance moving towards regulation of construction bidding, the SDRC is increasing its oversight of government procurement of goods and services. The SDRC recently co-issued with the Ministry of Finance government procurement regulations on establishing product specifications for both energy-efficient products and wireless technologies.

Two cases demonstrate the apparent reluctance of China's Finance Departments to assert their responsibility over government procurement: the Beijing-Microsoft case from 2004 and the pending complaint of Modern Wo'Er Trade Co. Ltd., now sitting in the Chinese court system. The Beijing-Microsoft case involved the purchase of Microsoft operating software for use by municipal government departments in Beijing. The Beijing city government awarded the contract to Microsoft on an undeclared sole-source basis, without any competition. This award followed similar awards to Microsoft by the Shanghai and Tianjin municipalities, but, unlike the earlier awards, the Beijing purchase prompted objections by local software producers questioning the city government's failure to comply with Article 10 of the GP Law, which requires domestic preferences for local producers (essentially a Buy China provision). Local producers spearheaded the outcry and had strong support from China's Ministry of Information Industries. The case also received intense scrutiny by the Chinese media. It was a hopeful time for China's nascent government procurement system, as it appeared that the local producers would file formal protests forcing the government to make important

choices on the overarching policy of open competition in government procurement versus the subsidiary policies, sole-source purchasing rules and domestic-preference rules (as an exception to full competition). Another interesting intellectual property policy also lurks in the emerging debate—how to correct prior illegal use of pirated Microsoft products.

The Microsoft matter presented an important opportunity for the local finance department in Beijing to assert its leadership role under the GP Law. It was well positioned to make the necessary policy choices and establish itself as the true arbiter of China's government procurement rules. But it failed to seize the moment. Instead, the contract was simply cancelled by higher levels in Beijing's municipal administration, the fanfare went quiet, and the case was resolved largely behind the scenes. The debate over domestic preferences in government software purchases continues in the software industry and international trade associations, but has receded as a larger public issue.

The pending case of *Modern Wo'Er* similarly demonstrates the reluctance of the Ministry of Finance to forcefully supervise government procurement. The case also raises questions on the relationship of the SDRC and the Ministry of Finance in China's overall public purchasing system.

Modern Wo'Er involves the National Medical Treatment and Cure System procurement managed jointly by China's SDRC and Ministry of Health. These purchasing agencies entrusted the procurement procedures to a tender and bidding agency. Modern Wo'Er submitted a timely bid, but the award went to another supplier whose price was higher than that of all other offerors. Modern Wo'Er asserted that its bid met the solicitation requirements and that the award to a supplier with the highest price violated China's equivalent of a best value rule for purchases. As China's GP Law requires, Modern Wo'Er first submitted an inquiry with the purchasing agencies. Both the SDRC and the Ministry of Health failed to respond. The tender and bidding agency handling the procurement submitted a response, but Wo'Er viewed it as inadequate.

Pursuant to the procedures in the GP Law (Articles 51–58), Modern Wo'Er filed a complaint with the Ministry of Finance, which also failed to respond substantively. Instead, it referred the matter to the SDRC and the Ministry of Health for resolution. Modern Wo'Er then had no choice but to file a com-

plaint in the Beijing Intermediate People's Court, alleging that the Ministry of Finance failed to carry out its administrative duty and should be compelled to act on the complaint. As the case proceeded, the Ministry of Finance continued to avoid exercising its power, holding that this project was within the jurisdiction of the SDRC and the Ministry of Health. This led to reports in the Chinese press that the Ministry of Finance was "kicking the ball," in other words, "passing the buck." See Legal Daily, Evening Edition, May 20, 2005. The remaining question is will the Court in Beijing also pass the buck, or will it order the Ministry of Finance to rule on Modern Wo'Er's complaint? Once again, an interested market participant sits sidelined while the administrative agents jostle.

Conclusion—The uneasy arrangement between China's government procurement system, under the tentative leadership of the Ministry of Finance, and its broader tender and bidding system (or some might say, broader public procurement system), under the titular leadership of the SDRC and its Inter-Agency Coordination System, remains a regular feature of the Chinese purchasing regime, to the dismay of market participants. But this is just one manifestation of a fundamental problem running through the core of China's public administration structure. Correction of this problem requires the commitment of China's political leadership as much as the technical skills of procurement professionals.

Commentators have urged the Chinese State Council to create a new independent agency to regulate all public-purchasing activities, whether such activities operate under the T/B Law or the GP Law. Creation of yet another administrator for Chinese public purchasing might, however, simply add another competing agency that vies for regulatory share with the SDRC, Ministry of Finance and other agencies.

Perhaps some diffusion (and, yes, some confusion) in the regulatory structure is necessary and can be offset by creating a review panel above all the current agencies (and current chaos) to hear appeals from protests under the SDRC and Ministry of Finance complaint measures. This approach avoids the near impossible task of dismantling the present system and would be less threatening to vested regulatory interests. It would also create a source for interpretation of all procurement rules and promote uniformity in procurement practices over time. Of course, such a

strategy will depend on existing interested agencies respecting and complying with the rulings of any new appeal board, and the willingness of the appeal board to bravely rule on violations of China's procurement laws and varied procurement regulations.



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