

# News and Analysis

*China*

## **Waiting for Leviathan: A Note on *Modern Wo'er Trading Co Ltd v Ministry of Finance of the People's Republic of China*<sup>1</sup>**

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☞ China; Courts' powers and duties; Public procurement procedures

### **1. Introduction**

China's so-called "first government procurement case" has taken seven years to adjudicate, even before any substantive review of the allegations of the supplier's bid challenge complaint. The saga of *Modern Wo'Er Trading Company Ltd v The Ministry of Finance of the People's Republic of China* raises compelling questions about the relationship of China's 1999 Tender and Bidding Law and China's 2002 Government Procurement Law, the nature of administrative power in China, and the ability of Chinese public procurement law to offer justice to aggrieved suppliers.

Before proceeding to a description and analysis of the *Modern Wo'Er* case, however, some context is needed. Section 2 below offers a short description of the origins of China's 1999 Tender and Bidding Law and China's 2002 Government Procurement Law and how, from these two procurement laws, arise multiple Chinese bid complaint mechanisms.

### **2. Context**

#### *2.1 A Short Tale of Two Laws*

China's 1999 Tender and Bidding Law was spearheaded by China's National Development and Reform Commission<sup>2</sup> and other Chinese construction regulators. It represents China's first national legislation setting out mandatory procedures for awarding publicly financed (and even some privately financed)

<sup>1</sup> No.1 Intermediate People's Court of Beijing Municipality, First Level Administrative Division Decision No.432 (2005) and No.1 Intermediate Court of Beijing Municipality, First Level Administrative Division Decision No.433 (2005), both decided per judicial opinion dated December 8, 2006, sustained in High Court of Beijing Municipality, Final Administrative Decision No.245 (2007) and High People's Court of Beijing Municipality, Final Administrative Decision No.247 (2007) both appellate decisions decided per judicial opinions dated November 21, 2012. The two cases, stemming from the same primary procurement project, are nearly identical in facts, argument and judicial analysis, so are treated as a single case for purposes of the Note. The use of *Leviathan* in the title of this Note is borrowed from Thomas Hobb's 1651 classic of political philosophy of the same name, used to refer to a "Commonwealth" or "State."

<sup>2</sup> Formerly the National Development and Planning Commission, the key regulator of China's planned economy.

construction projects. The drafters of the tender and bidding law were focused primarily on controlling construction quality and preventing corruption in the construction contract award/performance process. The law became part of China's 9th Five-Year Legislative Plan (1995–2000), promulgated in August 1999, effective January 1, 2000.

Belatedly China's Ministry of Finance realised that the Tender and Bidding Law was also in nature a public procurement law, with real implications for the public budget and best value procurements.

Since the tender and bidding law was, accordingly to plan, issued in 1999, all the Ministry of Finance could do was get the drafting of a "government procurement" law into China's 10th Five-Year Legislative Plan. That later plan should have focused on expanding the original tender and bidding law into a full-fledged public procurement law. Unfortunately that is not how things proceeded, and a government procurement law was issued separately. For over a decade now, China has been saddled with two public procurement regimes (a tender and bidding system and government procurement system) co-existing uneasily.

The drafting process for the 1999 Tender and Bidding Law was itself a contest for regulatory control over tendering and bidding concerning a host of construction activities, a contest that still plays out in one form or another (see section 2.2 below). This turf battle expanded as the Ministry of Finance sought sole supervisory role over all purchases by the Chinese government, pursuant to the drafting process of China's 2002 Government Procurement Law.

Amazingly, supplier representatives were completely absent in the drafting process for China's 2002 Government Procurement Law. Instead, the battling constituents were mainly government departments, with a lone representative of a state-owned commercial procurement intermediary.<sup>3</sup> Led by a legislative drafting team from China National People's Congress (the Chinese legislature), Finance and Economic Law Committee, and heavily influenced by representatives from China's Ministry of Finance, the process was aided by Chinese academics and foreign experts.

During the drafting process of the 2002 Government Procurement Law, NDRC's efforts to keep construction outside the definition of the government procurement, and thus outside the supervision of China's Ministry of Finance, were far from subtle.<sup>4</sup> Fortunately, arguments that the international definition of government procurement includes the purchase of goods, construction and services won the day.<sup>5</sup> That victory was ultimately compromised, however, with the addition of art.4 of the 2002 Government Procurement Law which states that "[w]here government procurement of construction takes the form of public bidding, then the tender and bidding law should be used".<sup>6</sup> Thus the question of which law substantively applied to the government procurement of construction, and which agency was the supreme regulator of public construction, were deferred to a later day.<sup>7</sup> Indirectly, these issues are now being played out in the *Modern Wo'Er* litigation.

## 2.2 China's Multiple Bid Challenge Mechanisms

Among the innovations of China's 2002 Government Procurement Law are the designation of China's Ministry of Finance and local finance departments as chief policy-makers and supervisors for the Chinese government procurement system, and the strict separation of procurement oversight functions from the

<sup>3</sup> Article 12 of the 1999 Tender and Bidding Law and art.18 of the 2002 Government Procurement Law contemplate public purchasers entrusting commercial bidding intermediaries for implementation of procurement competitions.

<sup>4</sup> Equally forthright was the representative of the Chinese military, who confidently, articulately and successfully spelled out how military purchases should be exempt from coverage of the then pending government procurement law. The result is art.86 of the law which states that "laws and regulations for military procurement shall be separately formulated by the Central Military Commission."

<sup>5</sup> 2002 Government Procurement Law, art.2 defining government procurement as the purchase of goods, construction and services.

<sup>6</sup> 2002 Government Procurement Law, art.4.

<sup>7</sup> For an exploration into the implications of art.4 of the 2002 Government Procurement Law see Wang, Ping and Xinglin Zhang, *Chinese Public Procurement Law: An Introductory Textbook* pp. 88–90 available at <http://www.nottingham.ac.uk/pprg/publications/short-textbooks.aspx> [Accessed March 20, 2013].

purchasing functions of other government departments.<sup>8</sup> Equally important is the Government Procurement Law's establishment of procedures for disappointed suppliers to file complaints asserting improprieties/illegalities in the procurement process. The law sets out three stages for the processing of such complaints: (1) The complaining supplier must first file a query with the purchaser, or the purchaser's bidding agent, inquiring about problems in the procurement process.<sup>9</sup> If the supplier is unsatisfied by the response of the purchaser, it can then proceed to (2) file a complaint with the finance department at the same level of government as the relevant purchase.<sup>10</sup> Under the law, the relevant finance department has thirty days in which to respond to a supplier's complaint.<sup>11</sup> If the supplier is not satisfied with the response of the finance department, it can then proceed to (3) file actions under China's administrative legal system, namely seeking administration reconsideration at the next level of Chinese government and/or filing administrative litigation in the Chinese Courts.<sup>12</sup>

In contrast, China's 1999 Tender and Bidding Law remains silent as to chief regulator. Moreover, it simply offers the right to complain, but no complaint procedures.<sup>13</sup> These deficiencies were later corrected in part by 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 State Council Document No.34, 2000) (hereinafter referred to as the State Council 2000 Opinion). The *State Council 2000 Opinion* distributes supervisory powers over tender and bidding activities loosely among eight different agencies depending on the nature of the relevant construction activity involved. Consequently, China's National Development and Reform Commission was granted general policy leadership over tender and bidding and specific supervision over "national large-scale construction projects," China's Ministry of Housing and Urban and Rural Construction (formerly China's Ministry of Construction) was allocated oversight of tender and bidding for general construction, China's Ministry of Transportation was granted regulatory power over tender and bidding of highway construction, China's Ministry of Water Resources was granted regulatory authority over tender and bidding for waterworks projects, China's Ministry of Railways granted authority over tender and bidding for railway construction, etc. More recently, China's State Council issued Implementing Regulations for the Tender and Bidding Law of the People's Republic of China (State Council Order No.613, 2012) which largely restate, indeed compound, the ill-defined regulatory roles first articulated the *State Council 2000 Opinion*.<sup>14</sup>

Under the *State Council 2000 Opinion*, Chinese departments tasked with supervision of tender and bidding activities were also instructed to accept and handle complaints by bidders and other interested parties according to the division of work contemplated by the Opinion.<sup>15</sup> It was not until June 2004, however, that China had any national-level complaint rules for supplier bid challenges related to the tender and bidding system, when the forerunner of the NDRC and seven other construction regulators passed

<sup>8</sup> 2002 Government Procurement Law, articles 13 and 60. Remarkably, ten years from the passage of the law, the separation of supervisory functions from purchasing functions still remains a challenge. The Henan Provincial Finance Department recently admonished local finance departments to implement the separation and refrain from "having two signs, but one set of personnel" for government procurement. *Guiding Opinions of the Henan Province Department of Finance Regarding Progressing and Strengthening Government Procurement Work*, Henan Finance Department, Office of Government Procurement Document No.19 (2012) at para.3 available at <http://www.hnfp.gov.cn/gongyi/zcfg/sjfgzd/webinfo/2012/12/1356309589686291.htm> [Accessed 13 March, 2013].

<sup>9</sup> 2002 Government Procurement Law, articles 51 and 54.

<sup>10</sup> See above at art.55.

<sup>11</sup> See above at art.56

<sup>12</sup> See generally, 1989 Administrative Litigation Law of the People's Republic of China and 2000 Administrative Reconsideration Law of the People's Republic of China.

<sup>13</sup> 1999 Tender and Bidding Law of the People's Republic of China, art.65 (creating a basic "right to raise objections to the bid inviter or file a complaint with [a then unknown] relevant department of administrative supervision").

<sup>14</sup> 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 1, 2012) at art.4. Available in English, with subscription, at <http://www.lawinfochina.com> [Accessed March 13, 2013]. Interestingly, art.4 of the Implementing Regulations for the Tender and Bidding Law of the People's Republic of China adds an oversight role for supervisory departments, (China's administrative supervisor and counter-corruption agency). It also surprisingly includes a general monitoring role for China's finance departments, in the area of "budgetary performance and the implementation of government procurement policies on government procurement projects that are subject to bidding."

<sup>15</sup> *State Council 2000 Opinion*, para.3.

rules governing bid protests, allowing these Chinese departments to separately set up their own bid complaints system.<sup>16</sup> Almost two months later, seemingly tit-for-tat, China's Ministry of Finance established rules for implementing the bid challenge procedures of the 2002 Government Procurement Law.<sup>17</sup>

Unsurprisingly, the dissected governance model for Chinese public procurement spawned a number of bid protest mechanisms among a diversity of government departments, at all levels of government throughout China.<sup>18</sup> In *Modern Wo'Er*, the hapless supplier is snared in a grey area between two such mechanisms.

### 3. Background on the Modern Wo'Er Case

In October 2004, Modern Wo'Er Trading Company bid to sell the Chinese Government blood gas analysing equipment. This medical equipment procurement contract was a very small part of a very large three-year project to construct a "Public Health Rescue and Medical Treatment System" throughout China.<sup>19</sup> In charge of this project, and thus serving as the relevant procuring agencies, were NDRC and China's Ministry of Health.

Modern Wo'Er's bid was unsuccessful, despite offering the lowest price of all participating bidders. Confused about why it had lost the competition, and why the award went to the highest priced bidder, Modern Wo'Er filed an inquiry with the NDRC and MOH. Through a procurement intermediary, these purchasers' provided a response to Modern Wo'Er query, the contents of which consisted of irrelevancies and equivocation. Unsatisfied, and undeterred, Modern Wo'Er then filed a complaint with China's Ministry of Finance alleging a number of irregularities in the procurement process.

According to China's 2003 Government Procurement Law, the Ministry of Finance is required to provide a response to a supplier's complaint within thirty working days of receipt of such a complaint.<sup>20</sup> Modern Wo'Er submitted its complaint to China's Ministry of Finance on December 21, 2004. Seven years on, however, investigation of these alleged procurement irregularities has not even commenced. In the interim, what has transpired, or indeed not transpired, is disheartening.

Failure of the Ministry of Finance to rule on its procurement complaint forced Modern Wo'Er to seek relief from the Chinese judiciary. Unfortunately, this did not mean the opportunity to submit its full substantive bid protest to a Chinese court. To the contrary, "in [Chinese] administrative litigation, the competent court examines only whether the administrative review body properly handles the supplier's complaint against the procuring entity or whether the administrative reconsideration organ properly deals with the supplier's complaint against the administrative review body's decision; it has no power to deal with the original dispute between the supplier and the procuring entity".<sup>21</sup> In *Modern Wo'Er*, the allegations of procurement law violations are even further removed, with the Courts focusing solely on whether the

<sup>16</sup> Measures for Handling Complaints Concerning Tender and Bidding for Engineering Construction Projects, (National Development and Planning Commission, Ministry of Construction, Ministry of Transportation, Ministry of Information Industries, Ministry of Railways, Ministry of Water Resources and China Civil Aviation Administration Order No.11 issued June 21, 2004, effective August 1, 2004). Available in English, with subscription at <http://www.lawchinainfo.com> [Accessed March 4, 2013]. These Measures were supplemented by the recent *Implementing Regulations for the Tender and Bidding Law of the People's Republic of China* (Chapter 5, articles 61–62).

<sup>17</sup> Measures for Handling Complaints of Government Procurement Suppliers, (Ministry of Finance Order No. 20 issued August 11, 2004, effective September 11, 2004). Available in English, with a subscription, at <http://www.lawchinainfo.com> [Accessed March 4, 2013].

<sup>18</sup> Research on local bid challenge administration will reveal a host of such regimes. See e.g. *Dalian Xinsheng Fire Engineering Company Co v Dalian M&E Engineering Equipment Company*, Shenyang Municipal Intermediate People's Court, Civil Division No.3, First Instance Decision No.7 (2005) (dealing with, among other things, a municipal bid protest mechanism under the local aviation regulator) and *Television Broadcasting Bureau of Huaihua Municipality v Construction Bureau of Huaihua Municipality*, Intermediate Court of Huaihua Municipality, Hunan Province, Administrative Division First Level Decision No.7 (2004) (assessing a bid complaints process statutorily imposed on a local construction department, against bid complaints handling by a local communist party counter-corruption organisation). An analysis of *Television Broadcasting* is provided below in section 4 of this note.

<sup>19</sup> "Notice of the State Council Turning Over Planning and Construction of a Public Health Rescue and Medical Treatment System to National Development and Reform Commission and Ministry of Health, Office of State Council Document No.82 (2003). The project followed the SARS outbreak in China, a crisis which laid bare shortcomings in China's then health emergency response systems.

<sup>20</sup> 2002 Government Procurement Law, art.56.

<sup>21</sup> Wang, Ping and Xinglin Zhang, fn.7 above, p.135.

Ministry of Finance acted properly in not answering the complaint. Moreover, the nature of the available lawsuit—a claim of administrative nonfeasance against a government department—offers very limited relief.<sup>22</sup> When Chinese agencies neglect or refuse to carry out administrative responsibilities, such as the responsibility to rule on complaints, Chinese courts can only order the relevant agency to carry out the required administrative act, no matter how derelict the government department, and maybe assess monetary penalties against the agency.<sup>23</sup>

The Ministry of Finance's sole defence in *Modern Wo'Er* is that Wo'Er improperly filed its complaint with the Ministry. As support for its position, the Ministry contends that the proper handling of the complaint rested with the NDRC, noting that the NDRC had primary supervisory role for tender and bidding on "national large-scale construction projects" by virtue of the division of responsibilities over tender and bidding activities as directed by China's *State Council 2000 Opinion*.<sup>24</sup> The "emergency health response" project, insisted the Ministry, constituted just such a "national large-scale construction project," coming within the regulatory province of the NDRC. Indeed, soon after receiving the *Modern Wo'Er*'s complaint, the Ministry of Finance referred the matter (the written complaint and relevant documentation) to the appropriate office at the NDRC. Consequently, argued the Ministry, it had already properly carried out its administrative responsibility.

The trial court rejected the Ministry of Finance's explanation. Never addressing the issue of whether the relevant project was a "national large-scale construction project" subject to the supervision of the NDRC, the lower court focused instead on the definition of "government procurement" under Chinese law.<sup>25</sup> Drawing upon the language of China's 2003 Government Procurement Law, the lower court reaffirmed that "government procurement" is the "purchase of goods, construction and services using fiscal funds." In turn, the Court found that the specific contract at issue as the purchase of goods; hence government procurement. Finding further that the Ministry of Finance was the designated supervisory department for government procurement under the law, and thus tasked with handling complaints derived from the procurement process, the trial court ruled that it was the administrative responsibility of the Ministry of Finance to handle *Modern Wo'Er*'s complaint.<sup>26</sup> Accordingly, in a judicial opinion dated December 8, 2006, the trial court ordered the Ministry of Finance to do so.<sup>27</sup>

Soon afterwards, on December 22, 2006, the Ministry of Finance appealed the trial court's opinion. A hearing on that appeal was held on June 7, 2007.<sup>28</sup> Inexplicably, the appellate opinion did not issue for over five years until November 21, 2012, despite their being no factual disputes in the case, only issues of law.

Although the appellate court ultimately sustained the trial court's opinion, it failed to expressly reaffirm the lower court analysis that the contract at issue were a goods purchase using fiscal funds and, as such, were "government procurement" as defined by law (thus triggering the Ministry of Finance's duty to rule on the complaints as the designated supervisory agency under China's 2002 Government Procurement Law). Rather, the higher court simply faulted the Ministry of Finance for failing to notify *Modern Wo'Er*

<sup>22</sup> 1989 Administrative Litigation Law of the People's Republic of China, art.(11)(5).

<sup>23</sup> *XinMi Construction Bureau v XinMi ShaungFu Construction Co*, High Peoples Court of Henan Province, Final Administrative Decision No.18 (2000) where the appellate court criticised the *lower court* for ruling on the substance of a bid protest originally ignored by a local construction department, instead returning the complaint to that department and ordering that department to pay ¥ 200 per day until a ruling was issued (on file with author). No such accruing penalty was imposed on the Ministry of Finance in *Modern Wo'Er*, thus aiding the Ministry's reluctance to act on the complaint.

<sup>24</sup> Citing the *State Council 2000 Opinion* and the "Temporary Measures for Supervision of Tendering and Bidding on National Large-Scale Construction Projects", NDRC Document No.18 (January 10, 2002).

<sup>25</sup> Daniel Mitterhoff *Beijing Court Orders Ministry of Finance to Rule on Supplier's Complaints, But Skirts Broader Issue of Schism in China's Procurement Supervision* (West Thompson, 2006) 3 International Government Contractor, para.98 available at [http://works.bepress.com/daniel\\_mitterhoff/2/](http://works.bepress.com/daniel_mitterhoff/2/) [Accessed March 13, 2013].

<sup>26</sup> See above.

<sup>27</sup> See fn.1 above.

<sup>28</sup> Xu Hao, *The Ministry of Finance Loses "The First Government Procurement Case"*, China Management Report (November 24, 2012) available at <http://www.cb.com.cn/1634427/20121124/428857.html> [Accessed March 4, 2013] (interviewing *Modern Wo'Er*'s counsel, Mr GU Liaohai).

in writing that it had referred the matter to the relevant office at the NDRC, finding this one omission as the relevant administrative nonfeasance. On this sole finding, the appellate court sustained the lower court's opinion. Troublingly, the appellate opinion does not expressly re-order the Ministry of Finance to rule on Modern Wo'Er's complaint (although one hopes by sustaining the lower court ruling, a Ministry decision on the complaint should be the next step in the process). The appellate Court also ordered the Ministry to pay a measly ¥50 (approximately \$7.50) in court costs. At the time of this writing, the Ministry of Finance has yet to provide a written response to Modern Wo'Er's complaint.

#### 4. Not An Isolated Incident

The supplier's dilemma showcased in *Modern Wo'Er* is not an outlier. Frighteningly, it may be common. Other case adjudications reflect injustices resulting from ill-defined regulatory boundaries in Chinese procurement governance.<sup>29</sup> And project owners are not immune, as demonstrated by the case of *Television Broadcasting Bureau of Huaihua Municipality v Construction Bureau of Huaihua Municipality*.<sup>30</sup>

*Television Broadcasting* involved the construction of a public broadcasting facility by a local public broadcaster.<sup>31</sup> The primary supervisory department responsible for this procurement was the local construction bureau. Local rules governing the project provided specific bid challenge procedures as follows. First, 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 authorised to make formal contract award, allowing the project to proceed.<sup>32</sup> If a complaint is timely filed, then the construction department has thirty 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.<sup>33</sup>

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 as 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>34</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>35</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>36</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.

<sup>29</sup> Daniel Mitterhoff *Grappling with the Regulatory Environment For Chinese Public Procurement*, 3 International Government Contractor para.17 discussing the case of *Hebei Yanzhao Eng'g and Construction Management Company v The National Development and Reform Commission of Hebei Province*, Intermediate People's Court of Shijiazhuang Municipality, First Level Administrative Division Decision, No.11 (2005) available at [http://works.bepress.com/daniel\\_mitterhoff/5/](http://works.bepress.com/daniel_mitterhoff/5/) [Accessed March 20, 2013]. In *Hebei Yanzhao*, the Court upheld an administrative penalty of dubious legality against a commercial bidding intermediary. Relying on its compliance with the procurement opportunity advertising rules of the local municipal construction regulator, the intermediary was blind-sided by a fine assessed by the provincial office of the NDRC.

<sup>30</sup> Intermediate Court of Huaihua Municipality, Hunan Province, Administrative Division First Level Decision No.7 (2004) (on file with author).

<sup>31</sup> See above.

<sup>32</sup> See above.

<sup>33</sup> See above.

<sup>34</sup> See above. at p.7.

<sup>35</sup> See above. at p.8

<sup>36</sup> See above.

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>37</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>38</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>39</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 as 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 awarded damages to the plaintiff, sending the message that such administrative inefficiencies as manifested in the case would not be tolerated. Fortunately, the administratively induced delay suffered by the Plaintiff in *Television Broadcasting* lasted only a year, not the seven years delay and still going being suffered by Modern Wo'Er.

## 5. Analysis

### 5.1 China's Unresponsive Bid Challenge Systems: Is There A Legal Solution?

Bid challenge systems provide an important vehicle for holding government actors accountability for compliance with procurement rules and procurement outcomes.<sup>40</sup> When governments violate procurement norms, bid challenge systems also offer proper relief to aggrieved bidders.<sup>41</sup> Failure of their proper and intended operation actually undermines otherwise well written procurement law, as an unresponsive challenge system only encourages suppliers to opt out of the public procurement system, sapping it of the competition needed for the government to get best value for budgetary outlays. If suppliers feel cheated by the actual purchase process, only to later languish in an unresponsive bid challenge process, they will simply quit competing for contracts. Thus while *Modern Wo'Er* represents a tragicomedy for the immediate supplier, and an embarrassment to the Chinese government, its harm to the broader Chinese public procurement system should not be underestimated. The overall system's indifference to the impact of such a long-awaited non-decision on supplier trust in China's public procurement system bodes ill for the healthy development of China's public procurement regime.

A big question, one unanswerable in the limited confines of this Note, surrounds how to reign in rent-seeking administrative agents, who covet the administrative province of other agencies, but jealously guard their own. A good start might be for China's State Council to stop serving as an enabler, and abandon the practice of statutorily devising ill-defined and overlapping regulatory roles for those agencies claiming

<sup>37</sup> See above. at p.9.

<sup>38</sup> See above. at pp.8–9. The project owner also argued, albeit unsuccessfully, that the local DIC, as an instrumentality of the Chinese Communist Party, was not a government department with the status to hear complaints. See above. at pp.3 and 9.

<sup>39</sup> See above.

<sup>40</sup> Daniel Gordon Constructing a Bid Protest Process: The Choices That Every Procurement Challenge System Must Make, 35 Pub. Cont. L.J. 427, 430 (2006).

<sup>41</sup> See above.

supervisory powers over public purchasing, construction or otherwise. Such a change of practice, however, might be of limited effect, given the wide-ranging authority exercised by Chinese executive departments as compared to other political actors in China, even the State Council itself. Watching the Chinese Ministry of Finance struggle for regulatory supremacy over government procurement in the drafting process of the 2002 Government Procurement Law, yet later balk when it comes to properly exercising this administrative responsibility in the face of Modern Wo'Er's bid complaints, has been at once fascinating and dispiriting. Yet closer observers might well sympathise with the Ministry as it is clear it bears some reasonable fear of scrutinizing a purchase managed by the more powerful NDRC. (The NDRC is sometimes disparagingly referred to as the "Little State Council" by non-NDRC government officials). The Beijing Courts, particularly the Beijing High Court, seem to share this fear, as evidenced by its years of delay in handling an appeal of a relatively simple legal dispute. If and when the Ministry of Finance provides notice to the supplier in writing stating that it had referred the matter to the NDRC for consideration, then what? Will the NDRC rule on the complaint (which, via the earlier referral, it could have done all along)? Will Modern Wo'Er, already dejected by seven years delayed justice, be forced to re-start the process elsewhere? Will it even bother?

## 5.2 Resolving Conflicts of Law Chinese Style

Viewed narrowly, *Modern Wo'Er* is a simple legal dispute over which administrative supervisory department in China is legally responsible for handling a supplier's complaint on a particular public project. That determination in turn depends first on determining which law applies to the case, the 1999 Tender and Bidding Law or the 2002 Government Procurement Law. Unfortunately, Chinese courts are poorly situated to resolve such conflict of law issues.

### 5.2.1 Limited Power of Chinese Courts

A general principle is that Chinese courts only possess the power to apply, not interpret or review Chinese legislation.<sup>42</sup> Explicitly resolving a conflict of laws question can actually land a judge in deep trouble.<sup>43</sup> In practice, however, Chinese judges regularly, indirectly and with luck discreetly resolve conflict of laws problems by simply choosing to apply one law over another, simply ignoring the latter.<sup>44</sup> Quite neatly, this is exactly what the trial court did in *Modern Wo'Er*, finding that the purchase at issue in *Modern Wo'Er* was a goods procurement triggering application of the 2002 Government Procurement Law. Preferably, the trial court should have been more courageous, simultaneously explaining why the project at issue was not a "national large-scale construction project," (a finding which also falls safely in the realm of applying law to facts and not resolving broader tensions between China's two procurement laws). Considering the limited function of Chinese courts, however, the trial court's original interpretative boldness should be applauded.

The appellate court, in contrast, retreated from the issues of legislative/systemic conflict and, failing the interest of greater clarity, narrowly characterised the Ministry of Finance's administrative malfeasance as a failure to notify Modern Wo'Er in writing that its complaint and supporting documentation had been referred to the NDRC. As a result, the *Modern Wo'Er* litigation now barely resembles a case of public procurement law.

<sup>42</sup> James Zimmerman *China Law Deskbook: A Legal Guide for Foreign Invested Enterprises* 3rd edn (American Bar Association 2010) at pp.69–70.

<sup>43</sup> Jim Yardley "A Judge Tests China's Courts, Making History," *The New York Times*, November 28, 2005 available at [http://www.nytimes.com/2005/11/28/international/asia/28judge.html?pagewanted=all&\\_r=1](http://www.nytimes.com/2005/11/28/international/asia/28judge.html?pagewanted=all&_r=1) [Accessed March 4, 2013].

<sup>44</sup> Keith Hand "Understanding China's System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony," to be published in the spring 2013 issue of the *Columbia Journal of Asian Law*, available at <http://ssrn.com/abstract=2196074> [Accessed March 13, 2013].

## 5.2.2 Other Legal Principles Available to the Court

The Courts in *Modern Wo'Er* had other avenues to explore to resolve the issue of which agency was responsible to handle the relevant procurement complaint. As a general rule, when there are inconsistencies between laws, special provisions apply over general provisions and new provisions prevail over old provisions.<sup>45</sup> Arguably then, the provisions of the later 2002 Government Procurement Law should take precedence over the earlier 1999 Tender and Bidding Law, dispensing with the acrobatics of determining whether the project at issue was a “goods procurement” or a “national large- scale infrastructure project.” However, application of this principle gets tripped up by art. 4 of the 2002 Government Procurement Law which contemplates both laws by instructing that with respect to bid competitions for government procurement of construction, the tender and bidding law should apply. The “newer law beats older law” principal has greater traction when considering art.60 of the 2002 Government Procurement Law, which prohibits a supervisor of government procurement from engaging in purchasing activities. The Beijing Courts could have instructed the Ministry of Finance to rule on *Modern Wo'Er's* complaint on the fundamental principal that the purchaser (the NDRC) cannot act as supervisor of its own procurement activities. Such a ruling would better strike at the core problem, derived from Chinese agencies wanting broad regulatory portfolios over which they self-supervise and avoid external policing.<sup>46</sup>

## 5.2.3 Conflict Resolution By Other Political Actors

The *Modern Wo'Er* courts might also have been wiser to flip the conflicts of law dilemma back into China's legislative system, as the power to interpret law and resolve conflicts between and among laws rests with the Standing Committee of China's National People's Congress.<sup>47</sup> The Beijing Courts were free to refer the matter to the Supreme People's Court who in turn could have referred the matter for resolution by the Standing Committee of the National People's Congress.<sup>48</sup> Then again, if they were interested, the National People's Congress and/or its Standing Committee have the power to simply promulgate a new single public procurement law (hopefully above the fray of jostling administrative agents) finally merging the tender and bidding system with the government procurement system, so their responsiveness to a case-specific referral is in doubt. Moreover, evidence suggests that the Standing Committee of the National People's Congress rarely employs its interpretive powers.<sup>49</sup>

The State Council is also well-situated to resolve the conflicts issue actualized by *Modern Wo'Er*. While on a broader level, the case juxtaposes the 2002 Government Procurement Law and the 1999 Tender and Bidding Law, it more specifically pits the NDRC's *Measures for Handling Complaints Concerning Tender and Bidding for Engineering Construction Projects*<sup>50</sup> against the Ministry of Finance's *Measures for Handling Complaints of Government Procurement Suppliers*,<sup>51</sup> two departmental rules. The State Council is expressly authorised to resolve conflicts between rules emanating from different administrative departments.<sup>52</sup> Indeed the State Council, as progenitor of the concept of “large scale infrastructure projects,” supervision of which it entrusted to the NDRC,<sup>53</sup> is best poised to define this concept in the context of the *Modern Wo'Er* dispute. (Interestingly, *Modern Wo'Er's* counsel attributes the Ministry of Finance loss

<sup>45</sup> 2000 Law on Legislation of the People's Republic of China, art.83.

<sup>46</sup> Cha En Ze, *Polyarchical Legislation Propagates Conflicts of Departmentalism*, 8 Honesty Outlook 18–19 (2007) (in Chinese). Available with subscription at <http://www.cnki.net> [Accessed March 13, 2013].

<sup>47</sup> 2000 Law on Legislation of the People's Republic of China, arts 42, 85, 87 and 88(1).

<sup>48</sup> See above. 43. China's Supreme People's Court (SPC) also issues interpretations of law, remarkably without constitutional and legislative authority. See e.g. Finder, Susan, *The Supreme People's Court of the People's Republic of China*, 7 J. Chinese Law 145 (1993). So it is feasible that the SPC could have directed the Beijing Courts on which law to apply.

<sup>49</sup> See Keith Hand, fn.45 above at pp.44 and 51.

<sup>50</sup> See fn.16 above.

<sup>51</sup> See fn.17 above.

<sup>52</sup> Law on Legislation, art.86.

<sup>53</sup> *State Council 2000 Opinion*.

to the Ministry's failure to provide evidence to support its allegation that the project should be classed as a "national large-scale infrastructure" project).<sup>54</sup> Unfortunately, like the Standing Committee of the National People's Congress power to resolve conflicts of legislation, the State Council sparingly employs its power to resolve conflicts of department rules.<sup>55</sup> And anyway, the machinations in *Modern Wo'Er* originate from the State Council's countenance of ill-defined supervisory roles over public procurement, dynamics that the State Council seems ready to perpetuate rather than solve.<sup>56</sup>

## 6. Conclusion

Instead of law serving to rationally order China's public procurement administration, a perverted combination of rent-seeking and responsibility avoidance by Chinese government departments serves to create chaos in the application of Chinese public procurement law. On paper, Chinese public procurement law contains the necessary provisions to enliven China's bid challenge system for the purposes of properly airing, and resolving, grievances of disappointed suppliers. Moreover, against the timidity of and limitations imposed upon Chinese courts, China's Law on Legislation textually provides other mechanisms (legislative and administrative) for resolving systematic conflicts between China's uniquely bifurcated "tender and bidding" and "government procurement" regime. What is lacking is the political will at higher echelons of Chinese government to exercise powers to properly order public procurement management and constrain the turf battles and power plays among Chinese government departments that ultimately undermine functional procurement law. It is not just *Modern Wo'Er*, but all players in China's public procurement system, that wait for deliverance from the Chinese state.

<sup>54</sup> Xu Hao, fn.28 above.

<sup>55</sup> See Keith Hand, fn. 44 above at p.50.

<sup>56</sup> *Implementing Regulations*, fn.14 above.