

# Limits of Competition: Accountability in Government Contracting

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## I. INTRODUCTION

Government contracts with private providers for the supply of goods and services have grown in number and magnitude over the last several decades.<sup>1</sup> Elected officials and other policymakers choose to privatize government functions for a variety of reasons. Politicians may want to appear to decrease the size of government by reducing the number of directly employed workers.<sup>2</sup> Lawsuits challenging the quality of government services can motivate quick change,<sup>3</sup> or private firms might lobby for government business.<sup>4</sup> Some elected officials believe that private-sector provision of services always results in financial savings and better quality of service over public provision.<sup>5</sup> Although in some instances the government unit involved conducts a serious study of the costs and benefits

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1. With regard to state and local privatization efforts, see Donald G. Featherstun et al., *State and Local Privatization: An Evolving Process*, 30 PUB. CONT. L.J. 643, 644 (2001) ("Every facet of governmental function has been touched by privatization."). For a study of the United States's "shadow" federal government of workers under contract or grant, see PAUL C. LIGHT, *THE TRUE SIZE OF GOVERNMENT* 24-41 (1999).

2. LIGHT, *supra* note 1, at 48 (cataloguing small-government ideologies).

3. See, e.g., Luke Andrew Steven Demaree, Note, "*Tiny Little Shoes*": *The Privatization of Child Welfare Services in Kansas*, 69 UMKC L. REV. 643, 644 (2001) (describing how a Kansas lawsuit created pressure for rapid improvements in child welfare services).

4. JOHN D. DONAHUE, *THE PRIVATIZATION DECISION* 149 (1989) (arguing that firms lobby to privatize government functions in areas with low levels of competition and little monitoring); Jocelyn M. Johnston & Barbara S. Romzek, *Contracting and Accountability in State Medicaid Reform: Rhetoric, Theories, and Reality*, 59 PUB. ADMIN. REV. 383, 384, 389-90 (1999) (outlining how lobbying by nonprofits and the ideology of the Governor combined to create a consensus for privatizing Kansas Medicaid).

5. DONAHUE, *supra* note 4, at 137-38 (documenting that government contracting is motivated chiefly by lower costs and that quality of services is usually the least important motive); ELLIOTT D. SCLAR, *YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION* 30-43 (2000) (describing the ideology that led Governor Weld of Massachusetts to privatize highway construction without careful cost accounting).

of privatizing, most privatization decisions in the United States result from a variety of motives and do not include serious study.<sup>6</sup>

Regardless of the motivation for privatization, the public and the relevant constituency retain an interest in monitoring privatized activities. Traditional legal checks on the procedural regularity and substantive rationality of government functions often do not apply to privatized services. Private contractors do not necessarily need to comply with statutory constraints on government, and even the process of privatizing often does not require formal procedures or reviews.

In much of the literature on government contracts and in the views of many policymakers, these accountability concerns are not too troubling because competition for government contracts will provide the solution to these problems. Adherents to this model believe that the market for contracts will promote efficiency and that other methods of accountability are of minor importance, beyond legal enforcement of the contract terms. However, gaps in the existing analyses of government contracting compromise this theory. Studies of government contracting often fail to define accountability—and the structures that can promote or hinder accountability—with the depth necessary for analyzing the complex provision of government goods. Moreover, many of these analyses lack detailed empirical studies of the actual workings of contracting structures.

This Note analyzes the accountability structures that do and should exist in contracting for government services and argues that the dominant competition model is extremely limited. The Note does not directly address the wisdom of privatizing as compared to government provision of goods and services. The use of contractors to provide government services is now widespread. This Note does present a caution to decisionmakers who believe that privatization simplifies the functions of government. The failure of a true market that promotes the efficient achievement of government goals requires an involved set of alternate accountability mechanisms that government must structure and administer.

To support the claim of the limits of the competition model in government contracting, this Note uses the case of New York City's recent \$800 million in contracts for child welfare services.<sup>7</sup> New York City

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6. KEVIN LAVERY, SMART CONTRACTING FOR LOCAL GOVERNMENT SERVICES 57-62 (1999) (decrying the lack of studies of privatization in local government). "Privatization" may mean a variety of different policies including divestiture of government assets, deregulation, vouchers, tax reductions or user fees, quasi-private corporations, and contracting out. *See, e.g.*, Jack M. Beermann, *Privatization and Political Accountability*, 28 *FORDHAM URB. L.J.* 1507, 1519 (2001). This Note addresses accountability in one type of privatization—government contracts—and does not address the accountability concerns of other varieties of privatization.

7. *See* ALAN G. HEVESI, CITY OF NEW YORK OFFICE OF THE COMPTROLLER, THE CITY OF NEW YORK COMPREHENSIVE ANNUAL FINANCIAL REPORT OF THE COMPTROLLER 15 (2000). The author of this Note was employed by New York City's Administration for Children's Services from 1998 to 2000, during the time of the procurement described here.

contracts out 20% to 25% of its production of goods, services, and City infrastructure to private bidders.<sup>8</sup> In fiscal year 2000, the City spent \$9.9 billion on just under 7000 procurement contracts.<sup>9</sup> The City's child welfare agency, the Administration for Children's Services (ACS), awarded the largest amount of New York City contracts that year, with more than \$800 million in contracts awarded for child welfare services.<sup>10</sup>

This Note has four Parts. Part II sets up a framework for analyzing accountability in government contracts. This Part analyzes what scholars and practitioners, struggling to shape new ways to hold private service providers accountable, call "multiple" and "overlapping" checks on the regularity and rationality of decisions.<sup>11</sup> The Part presents a definition of accountability using public and constituent input to shape reasonable, timely, and fair decisions leading to reasonably effective service outcomes. It also outlines the competition model in which the market cabins agency and contractor discretion. This Part then reviews other potential sources of accountability including legal constraints, hierarchical requirements, professional norms, public and constituent participation, and political processes. The Part creates a working typology that exposes the redundancy of some of these structures and begins to discuss the ways these structures have worked in other studies, stopping short of drawing conclusions about the operation of such structures in a large, complicated procurement system.

After developing a framework for determining accountability, the Note uses the case of child welfare services in New York City to analyze the way these accountability structures do and should work in an actual procurement. Part III of this Note examines New York City's recent child welfare procurement and attempts to fit ACS's system into a competitive model. The procurement process at ACS involved an unusually high number of bidders for government contracting and an extraordinarily experienced and knowledgeable bidding community. Even with the presence of formal elements of competition exceeding that found in many other studies of government procurement, the "market" for most of the services solicited by the City remained closed to new competitors.

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8. See ALAN G. HEVESI, CITY OF NEW YORK OFFICE OF THE COMPTROLLER, THE CITY OF NEW YORK COMPREHENSIVE ANNUAL FINANCIAL REPORT OF THE COMPTROLLER, at iii (2001) (documenting total citywide revenues for the City of New York for fiscal years 1997-2001); HEVESI, *supra* note 7 (beginning with Contract History by Contract Amounts by Award Method, a chart documenting the amount spent on contracting by the City of New York for fiscal years 1996-2000).

9. HEVESI, *supra* note 7, at 4.

10. The agency awarded a variety of other contracts for goods and services that year. *Id.* at iii. This Note analyzes the agency's core child welfare service contracts.

11. Johnston & Romzek, *supra* note 4, at 387; see also Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, in RECRAFTING THE RULE OF LAW: THE LIMITS OF THE LEGAL ORDER 333, 335 (David Dyzenhaus ed., 1999) (arguing that private actors performing public functions exacerbate traditional administrative law problems of accountability, and discussing alternative accountability mechanisms).

The primary claim of this Note is a challenge to the dominant competition model of government contracting. However, this Note does not abandon the question of accountability in government contracts after making this pessimistic claim. After analyzing the limits of the competition model using a case that contains many of the formal elements of competition, Part III analyzes other potential sources of accountability in public contracting systems and argues for an integrated accountability system that does not depend on any one structure for system-wide accountability.

Part IV concludes this analysis by summarizing the challenges that the case of ACS poses to the competitive model of government contracting and by presenting, in a unified manner, the ideal framework of accountability structures argued for in this Note. The Note resists picking one structure of accountability as a cure-all. Such a simple conclusion would repeat the failure of the competition model, which purports to be a closed system without need for other structures of accountability.

Rather, this Note argues that an accountable public contracting system must rely on the interaction of multiple structures of accountability. An accountable system would promote professionalism among agency staff and among contractors, create structures for meaningful public input, and engineer measurable evaluations of contracts. Hierarchical and political structures of oversight are necessary in minimal amounts, and are often unavoidable, but would be streamlined and cabined in an ideal system of accountability. The precise implications for law and policy of the ideal framework of accountability proposed here depend on the context of the particular contracting system. The framework argued for in this Note, however, provides a background for structuring systems of accountability that do not depend solely on the dubious promise of competition in public contracts.

## II. FRAMEWORKS OF ACCOUNTABILITY

The dominant model of analyzing accountability in government contracts views competition as promoting system-wide results. These accounts may criticize contracting systems that have paid too little attention to competition, but most assume competition is necessary and possible. Beyond these dominant analyses, a variety of academic disciplines and public bodies have produced studies of government contracting that legal scholars may draw on to frame theories of accountability. Such accounts include management literature, statistical research on contract outcomes, administrative law essays, government review commissions, and statements from policymakers. These varied approaches generally do not provide an

overarching framework for analyzing government contracting, nor do they provide clear statements of contracting goals.

The difficulty of defining goals for government contracting is exacerbated by the complexity of any given government task beyond simple efficacy of service or product delivery. As James Q. Wilson explains, “[G]overnment has many valued outputs, including a reputation for integrity, the confidence of the people, and the support of important interest groups,” as well as service delivery.<sup>12</sup> The legal structures overseeing government tasks variously demand “openness, fairness, participation, consistency, rationality and impartiality” to name a few not-so-simple goals.<sup>13</sup> To further complicate the problem, Wilson notes, “[w]e cannot measure these things nor do we agree about their relative importance.”<sup>14</sup>

The literature also suffers from a lack of detailed application of these theories to government tasks. Lester Salamon suggests that “the nitty-gritty” of actual program implementation is the missing link in this analysis.<sup>15</sup> Jody Freeman exhorts scholars to provide “microanalysis of institutions” to understand and prescribe accountability structures for privatized government functions.<sup>16</sup> Such analyses are especially rare in the social or human services fields. Many scholars have focused their attention on relatively uncomplicated services such as trash collection or street paving instead of wading into the complicated goals and operational realities of human services.<sup>17</sup>

This Part reviews analyses of government contracting to create a framework for analyzing the accountability that does and should exist in government contracts. These analyses inform a working definition of such accountability. Because traditional administrative law regimes (for controlling public endeavors) and classic market structures (for controlling private enterprises) may not apply to contracted government services, some scholars of these arrangements have called for multiple and overlapping

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12. JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 317 (1989).

13. Freeman, *supra* note 11, at 335.

14. WILSON, *supra* note 12, at 318.

15. Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 *FORDHAM URB. L.J.* 1611, 1621 (2001).

16. Freeman, *supra* note 11, at 368 (citing Edward C. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 *HARV. L. REV.* 1393 (1996)).

17. DONAHUE, *supra* note 4, at 58. Of course, the effects of privatization depend closely on the particular good or service considered. Government contracts for the provision of goods or “simple” services such as park maintenance require less involved structures of accountability than government contracts for human or social services. Still, the general structures of accountability remain similar across different types of government contracts. This Note provides a detailed look at a human service and presents a framework for thinking of accountability in complicated service contracts that can be simplified for contexts involving the provision of less complicated services or goods.

accountability structures.<sup>18</sup> A working overall definition of accountability in the contracting context must leave room for these varied controls of government and contractor discretion. As used in this Note, a process of contracting out government services will be accountable to the public, to the agency's relevant constituency, and to the officials involved, if the formal and informal controls surrounding the contract and the contract-management process support the goals of:

- reasonable, timely decisions;
- reasonably effective service-delivery outcomes;
- a fair, noncorrupt process; and
- input from the public and relevant constituency into defining all such goals.

The formal and informal controls that seek to further this working definition of accountability can come from a variety of sources. These sources include the market, the legal regime, hierarchical decisionmaking structures, professional norms, avenues for public participation, and political processes and pressures. Overlaps exist between these types of accountability, but these basic categories allow an analysis of the different forces at work in the government-contracting process.

#### A. *Market Controls in the Competition Model*

Much of the literature that calls for privatization of public functions focuses on the importance of competition for efficient service delivery. In the standard market model, private firms provide services better than government because they must compete with each other for business, driving down prices and improving quality. Under this model, market accountability furthers the goals of all involved in the contracting system by promoting efficiency through competitive bidding and contract monitoring. This type of efficiency involves the ability to get the maximum and cheapest outputs from any inputs. Some infamous privatization efforts, like Governor Weld's near-disastrous privatization of Massachusetts highway construction, are based on little more than a general belief that markets always provide services better than government.<sup>19</sup>

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18. Freeman, *supra* note 11, at 335; Johnston & Romzek, *supra* note 4, at 387.

19. See SCLAR, *supra* note 5, at 28-46.

More scholarly approaches, though, also stress the importance of competition. John Donahue argues that the most important factor in choosing whether to privatize is the existence of competition. His other criteria for privatization are mostly “conditions that make real competition possible.”<sup>20</sup> For Donahue, a function is more likely to involve real competition and thus to be effectively privatized,

[t]he more precisely a task can be specified in advance and its performance evaluated after the fact, the more certainly contractors can be made to compete; the more readily disappointing contractors can be replaced (or otherwise penalized); and the more narrowly government cares about ends to the exclusion of means.<sup>21</sup>

Donahue explains that the most successful cases he has examined meet these criteria.<sup>22</sup>

Other scholars have also made competition central to their studies of privatization. For some government functions, scholars claim that five or even three bids can constitute a bare minimum of competition, rationalizing that bidders are scared off by paperwork requirements or complicated services.<sup>23</sup> In rare circumstances—generally when the private sector has provided a service in the past—large cities might receive more than a hundred bids.<sup>24</sup>

However, the number of bids alone cannot make a competitive market. For example, a recent look at privatization in welfare takes pages from Donahue’s book to analyze welfare-to-work contracts. This study concludes that competition rarely occurs because entrenched bidders become aware of each other’s price structures and cozy up to risk-averse government administrators.<sup>25</sup> Similarly, an essay on privatization of child welfare

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20. DONAHUE, *supra* note 4, at 80.

21. *Id.* at 79-80 (emphasis omitted).

22. *Id.* at 60-61 (summarizing this argument); *id.* at 104-30 (describing Pentagon contracts that generally involve fragmented competition and difficulties specifying contract terms); *id.* at 146 (providing a cautious endorsement of contracting for local service delivery when outcomes are specified in advance, the contract is subject to competition, and government monitors the contract throughout); *id.* at 174-78 (arguing against contracting out in the current prison system because the outputs of prisons are complex, plural, and hard to express); *id.* at 179-211 (claiming that the complicated values of the Job Training Partnership Act undermined contract enforcement).

23. LAVERY, *supra* note 6, at 150 (noting that New York City’s comptroller sees three bids as the minimum for competition but that “professional circles” look for three to five strong bids); Joseph A. Cosentino, Jr., Note, *New York City’s Procurement System: Reversing the Cycle of Corruption and Reactionary Reform*, 42 N.Y.L. SCH. L. REV. 1183, 1185-86 (1998).

24. Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295, 1313 (1999) (describing child welfare bids in large cities).

25. Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 596-600 (2001); see also SCLAR, *supra* note 5, at 69-84 (describing contract monopolies and contexts in which bidders know other bidders’ prices and government prefers to

services in Kansas outlines a service structure in which competition takes place only during the bidding process. In this account, Kansas nonprofits bid to provide care to certain geographic regions. After winning a contract, a provider then has a monopoly on all child welfare services in its region.<sup>26</sup>

A recent study of local service delivery contracts by British scholar Kevin Lavery found that only a few cities have made competition a top priority in contracting.<sup>27</sup> In most other cities, contract processes generally have some competition in the early stages of a relationship between government and the provider. In general, however, Lavery characterizes most service contracts between private providers and local government as “noncompetitive” and focuses on ways that management can increase competition.<sup>28</sup>

Government can try to promote some of the goals of competition by measuring outcomes of services in addition to overseeing input or process measures. Such measurement tries to address the classic principal-agent problem in which the principal lacks information about the agent’s activities. Almost all serious studies of privatization recognize the difficulty of contracting for services involving complicated goals and tasks.<sup>29</sup> For instance, Matthew Diller describes the problems of setting outcome targets in local welfare-to-work offices. Tracking meaningful and sustained employment is a complicated task, and Diller argues that workers can only respond to a limited number of incentives. Thus, the most visible and quantifiable outcomes become the most important. In welfare reform, this has mostly meant a focus on the reduction of caseloads to the exclusion of other, more complicated indicators and values.<sup>30</sup>

Columbia professor Elliott Sclar also focuses on the specific, and often complex, tasks that the government monitors in service delivery by private providers. Sclar thinks that contracting processes should have as much competition as possible, but he argues that with complex services and long-

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rely on known contractors); Johnston & Romzek, *supra* note 4, at 389-90 (examining Medicaid contracts in Kansas where the state considered only one contractor).

26. Demaree, *supra* note 3, at 646-47.

27. LAVERY, *supra* note 6, at 57-59 (describing the efforts of Indianapolis and Phoenix to promote competition between public and private bidders and among private bidders).

28. *Id.*

29. Gilman, *supra* note 25, at 596-600. A recent study of the potential cost savings of privatizing child welfare found little financial savings and emphasized the need to structure systems to monitor specific outcomes. See Press Release, Children’s Rights Inc., Ground-Breaking Study on Privatization of Child Welfare Services Shows Some Benefits but Rarely Greater Efficiency and No Cost Savings (Nov. 25, 2002), at <http://www.childrensrights.org/press/2002-1124.htm> (discussing a final report that has not yet been issued). For a rare dissenting view, see David R. Riemer, *Government as Administrator vs. Government as Purchaser: Do Rules or Markets Create Greater Accountability in Serving the Poor?*, 28 FORDHAM URB. L.J. 1715 (2001) (claiming that data from Milwaukee, Wisconsin, show that contracting out works best with complicated services involving complex values and tasks).

30. Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1183-86 (2000).



term service contracts, governments cannot easily access alternate providers.<sup>31</sup> He concludes that service contracts must carefully specify what is contracted, looking at both external and direct benefits.<sup>32</sup> Sclar agrees with Donahue and Diller that complicated services and monitoring may jeopardize privatization. For these students of privatization, empirical evidence of efficacious service delivery comes from service-delivery markets with some competition in the bidding stages coupled with well-specified and monitored outcomes that ensure proper incentives.

The standard competition model has particular limits as it applies to publicly financed goods. One ambiguity in the contracting literature's use of competition involves its narrow focus on what can be termed "x-efficiency."<sup>33</sup> Under this conception of efficiency, workers choose their level of production based on their own utilities, and the market finds the efficient level of production and pricing based on each participant's level of output. For relatively easy-to-specify government services, the contracting agency may want little beyond the cheapest cost for a known output with all workers acting at their "x-efficient" level. For more complicated government functions—such as most human services—the contracting agency may want to promote policy innovation as well as thrift. The working definition of accountability given above seeks to balance reasonable decisions, efficacy, timeliness, and fair process with public and constituent input into defining goals and policies. In government contracts, the contracting agency that relies solely on market controls and "x-efficiency" will have a difficult time ensuring adequate public or bidder input into defining goals and policies. In the "market" for publicly financed goods, clients and bidders do not make demands that directly affect prices. The government entity sets prices, in agreement with its contractors, and can do so without public participation. Although the government-contracting process can encourage innovation by evaluating proposals based on factors other than price, the dominant competition model does not recognize these possible alternate effects of competition.

In addition, the competition model's focus on outcomes misses the "lessons of virtually all public management research since the Progressive Era[]." <sup>34</sup> The distinction between government ends and processes is "both artificial and misleading . . . [because t]he how of government operation powerfully shapes the what."<sup>35</sup> A market for private goods may have the luxury of focusing on prices and quantities produced and not concerning

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31. SCLAR, *supra* note 5, at 13-14.

32. *Id.* at 44.

33. See Harvey Leibenstein, *Allocative Efficiency vs. "X-Efficiency,"* 56 AM. ECON. REV. 392 (1966).

34. Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 410 (1996).

35. *Id.* at 411 (emphasis omitted).

itself with process values. Government functions, however, involve complex goods that do not truly exist independently of fair process and public input. This Part next turns to the legal structures that attempt to channel both ends and means and the interaction between these ends and means.

### B. *Legal Oversight*

Legal structures for government contracting can come from legislative pronouncement, agency regulation, enforcement of contracts, and judicial review of each of these structures. Legal oversight generally seeks to promote the accountability goals of the contracting system as a whole. The statutory, regulatory, and contract requirements that make up legal oversight seek to make the contracting process accountable to executive officials, legislators, members of the public, bidders, and clients. In many ways, legal structures do not contribute independent forms of accountability but provide a formal background to enforce the accountability goals of the system as a whole and to allow the operation of other accountability structures.

Most states and large cities give some statutory structure to government contracting. These regimes generally focus on corruption in the contracting process and often say little about specific service delivery or ongoing management of contracts.<sup>36</sup> Moreover, in many cases, executive decisionmakers choose to privatize functions in a state or city that does not have developed contracting laws, and legislators must play catch-up to devise controls of such processes.

Regulatory controls also may not have developed into sophisticated oversight systems. For instance, local governments generally do not need to comply with federal or state administrative procedure acts.<sup>37</sup> In addition, current D.C. Circuit case law exempts federal contracting measures from notice-and-comment requirements.<sup>38</sup> Some localities have set up independent rulemaking bodies to create procurement regulations that vary from jurisdiction to jurisdiction.<sup>39</sup>

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36. See, e.g., LAVERY, *supra* note 6, at 138-59 (describing the New York City contracting regime); Diller, *supra* note 30, at 1198 (noting that state statutes on contracting generally focus on the integrity of the process and do not allow for public input).

37. Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 *FORDHAM URB. L.J.* 1559, 1569 (2001).

38. *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987) (deciding that a federal Request for Proposals and contract did not require the rulemaking processes of § 553 of the federal Administrative Procedure Act (APA)).

39. LAVERY, *supra* note 6, at 54. Classic formulations of bureaucracies focus on the rules-based nature of these organizations. See, e.g., MAX WEBER, *Bureaucracy*, in FROM MAX WEBER: *ESSAYS IN SOCIOLOGY* 196, 215-16, 228-31 (H.H. Gerth & C. Wright Mills eds. & trans., Oxford

Given the lack of traditional administrative law constraints on private providers of government services, advocates focus on the contracting process and the contract itself as a way to promote accountability. As Matthew Diller writes in the context of privatized welfare services, “[G]overnment contracting policies and procedures potentially serve as one of the principal vehicles for ensuring fair process and public participation.”<sup>40</sup> Unfortunately, the general contracting process is often closed and confidential. For example, the Model Procurement Code for State and Local Governments allows a review of contracts only at the request of a bidder, not at the request of the public.<sup>41</sup> Also, the National Association of State Procurement Officials recommends that governments keep bids and information related to those bids confidential until they award contracts.<sup>42</sup>

There are at least four stages of contract management that could use scrutiny and oversight. Barbara Bezdek, again in the welfare context, identifies these stages as “services planning, contract negotiation and writing, contract award, and contract monitoring and evaluation.”<sup>43</sup> Kevin Lavery’s surveys found that local governments generally do not routinize contract monitoring and conclude that “[t]he overwhelming impression [is] of the absence of formal contract management.”<sup>44</sup>

Judicial review of government contracting or contractors has rarely occurred, except in cases of corruption or cases involving contractor liability.<sup>45</sup> At the local level, procurement regimes may allow bidders to appeal certain agency decisions to administrative law judges or to specially

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Univ. Press 1946) (1922) (describing the necessary development of systems of rules in a bureaucracy and the tensions of such rules with democracy). Systems of government contracting, in general, have not yet developed complete systems of rules, as legislators struggle to keep up with this growing form of government delivery of goods and services. The development of more formal legal rules for governing these contracts is underway, but, as this Note claims, the hybrid and more flexible nature of privatization efforts promotes multiple types of accountability instead of pure rules-based systems.

40. Diller, *supra* note 30, at 1198.

41. *Id.* (citing MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS § 9-101 (1979)).

42. *Id.* at 1199.

43. Bezdek, *supra* note 37, at 1604. Some lawyers have adjusted their practice to encourage public input in developing contractor performance standards. See Louise G. Trubek, *Old Wine in New Bottles: Public Interest Lawyering in an Era of Privatization*, 28 FORDHAM URB. L.J. 1739, 1746-48 (2001); Richard Briffault et al., *Public Oversight of Public/Private Partnerships*, 28 FORDHAM URB. L.J. 1357, 1382 (2001) (reprinting comments made by Louise G. Trubek at a panel on public contracting).

44. LAVERY, *supra* note 6, at 71, 73.

45. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (refusing to extend *Bivens* actions to government contractors); *Richardson v. McKnight*, 521 U.S. 399 (1997) (allowing suits against private prison employees without the partial barrier of qualified immunity); *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1041-45 (D.C. Cir. 1987) (refusing to review a federal contracting process under the APA).

constituted boards.<sup>46</sup> Local laws, however, generally constrain such appeals to limited instances, such as bidder disqualification. Moreover, since regulating government contracts is a relatively recent phenomenon, the amount of established precedent to apply to current cases is necessarily limited.

Finally, judicial review of noncompliance with contract terms has been scarce. Such review is particularly scarce in the human services field because contracts often do not specify quantifiable outcomes or clear processes. Agencies generally can terminate contracts without using the legal system simply by halting payments. However, an agency will terminate a contract only as a last resort because termination would force the agency to find other ways of providing the good or service. Legal structures exist as a backdrop for other methods of promoting accountability and can help or hinder these methods.

### C. Hierarchical Controls

Agencies and executive oversight offices often establish informal policies and procedures that guide government contracting. These controls seek fairness, integrity, and reasonable contracting decisions. Hierarchical controls attempt to make contracting decisions accountable to executive officers (including top agency staff) who may lose their positions if abuses in the contracting process come to light. Such reviews ultimately affect the public or other constituencies by changing or stalling contract decisions, but hierarchical structures exist primarily to serve officials and government staff.

Hierarchical controls can exist at different levels of government. An agency may have numerous internal departments—such as the budget department, the procurement shop, the policy office, and programmatic developers—that each insist upon reviewing or managing contracts. The city or state may then have duplicative processes run by executive staff who oversee the same functional components. Organizations holding government contracts also may create such hierarchical processes within their own structure to more easily comply with the various requests of the government offices.<sup>47</sup> Students of government contracts have often found such controls to be overly “parallel and duplicative,” slowing down the procurement process without a concomitant improvement in meeting

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46. See, e.g., NEW YORK CITY R. & REGS. tit. 48, § 2-15 (1998 & Supp. 2002) (allowing suspended contractors to object to their suspension, and authorizing appeal to an administrative law judge); NEW YORK CITY R. & REGS. tit. 9, § 4-09 (2000 & Supp. 2002) (discussing general disputes arising out of contract administration). Title 9 of the New York City Rules and Regulations codifies the rules of the Procurement Policy Board (PPB).

47. Johnston & Romzek, *supra* note 4, at 388.

government goals.<sup>48</sup> These informal forms of oversight can become formal legal checks if the legislature chooses to mandate them or if the agency incorporates them into its contracts. In most complex contracting regimes, informal policies and procedures exist alongside legal requirements.

#### D. *Professional Accountability*

Professional accountability can constrain the decisionmaking of contractor or agency staff, though most literature focuses on the norms of contractors.<sup>49</sup> These contractors may have informal professional contacts with colleagues and volunteers, or they may face formal board and donor reviews that influence their decisions, scrutinize their service delivery, and guard against corruption. Public-choice theorists claim that entities seek only their own interests at the expense of the public and their clients.<sup>50</sup> Observers of nonprofits, however, often document norms of professionalism and trust that broaden the motivations of contractors.<sup>51</sup>

Some nonprofits supplement such norms with substantial expertise, depending on the length of time these organizations have provided a service or produced a good. The context of a particular government function will always influence professional accountability. For some functions, only the government has provided that particular good or service, but other functions have long had private-sector competitors.<sup>52</sup> Nonprofit actors also face scrutiny from the Internal Revenue Service and from government offices for misuse of charitable funds.<sup>53</sup>

In contrast to nonprofits, private companies do not necessarily have entrenched norms of professional, publicly oriented behavior.<sup>54</sup> Private companies do face scrutiny by shareholders, but this scrutiny is generally diffuse and shareholders do not necessarily have adequate information about a company's practices.<sup>55</sup> This Note focuses on contracts with nonprofits. Some of the analysis provided here will apply to private

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48. LAVERY, *supra* note 6, at 76-77.

49. Johnston & Romzek, *supra* note 4, at 388 (defining "political accountability" as involving nonprofit boards and customer input, and "professional accountability" as including norms of conduct in a particular field).

50. See Freeman, *supra* note 11, at 365.

51. *Id.* at 356-66 (nonprofits generally); Mangold, *supra* note 24, at 1317-18 (child welfare).

52. See SCLAR, *supra* note 5, at 83-84 (discussing the importance of understanding the contractor's context of past operations); Mangold, *supra* note 24, at 1301-02, 1308-09 (describing the history of private involvement in child welfare).

53. Mangold, *supra* note 24, at 1319-20.

54. *Id.* at 1317-19 (noting also that private companies with out-of-state headquarters are particularly removed from local service delivery, and offering local advisory boards as a partial fix).

55. *Id.* at 1317.

contractors, but such contractors have differently structured norms and face legal constraints not explored in this Note.

At the agency level, professional norms can constrain self-interested behavior. Management-focused theories of accountability stress staff training, and procurement review commissions have often called for greater expertise in agency staff.<sup>56</sup> Agency staff with a background in a particular field may also have professional colleagues with whom they share norms of behavior. Such informal scrutiny of agency decisionmakers and formal training can encourage reasonable policy decisions and discourage corruption.

#### E. *Public and Client Input*

Public and client input promotes transparency and openness and can inform the contracting agency's conception of the reasonableness of decisions and the effectiveness of outcomes. Traditional administrative law regimes require notice and comment for most rulemaking or require quasi-judicial procedures for more formal determinations. Although these structures do not necessarily apply to the contracting context, state and local governments may build public participation into their procurement frameworks. Some procurement structures require public notice and public hearings and allow for appeals of procurement decisions. These requirements may be substantive or merely pro forma, depending on the legal regime and the compliance of agency procedure with this regime.<sup>57</sup>

#### F. *Political Accountability*

In the sense used in this Note, the political process may encourage accountability through public and other stakeholder pressure in the form of elections or informal contacts.<sup>58</sup> At the executive level, the mayor (or governor) and appointed commissioners receive appeals from would-be contractors. These appeals may result in corrupt decisions, as decisionmakers throw contracts to their political benefactors.<sup>59</sup> Such appeals may also result in risk-averse policymaking if elected officials seek

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56. N.Y. STATE COMM'N ON GOV'T INTEGRITY, *A Ship Without a Captain: The Contracting Process in New York City*, in GOVERNMENT ETHICS REFORM FOR THE 1990S: THE COLLECTED REPORTS OF THE NY STATE COMMISSION ON GOVERNMENT INTEGRITY 460, 464-65 (Bruce A. Green ed., 1991); see also LAVERY, *supra* note 6, at 73.

57. See Bezdek, *supra* note 37, at 1560; see also *infra* Subsection III.C.3 (discussing New York City's minimalist legal requirements for public input in contracting).

58. Cf. Johnston & Romzek, *supra* note 4, at 388 (defining "political accountability" slightly differently).

59. See, e.g., LAVERY, *supra* note 6, at 139-41; N.Y. STATE COMM'N ON GOV'T INTEGRITY, *supra* note 56, at 480-82.

to guard against scandal or risky changes in government programs. In some cases, legislation charges an independent comptroller or reviewing body with oversight of executive functions. These officers and legislators may themselves face political pressure from the voting public or from the media.

Some studies of contracting regimes by international scholars focus on the downsides of governing by strong executive control. Such scholars prefer systems of professional managers appointed by local councils.<sup>60</sup> These critiques, however, often serve little practical purpose in the United States where many states and cities function with strong executive power. The country's sprawling and diverse metropolitan centers frequently present complicated problems that go beyond the control of a local board. Reform of the general structure of state and local balances of power is unlikely and, in any case, beyond the scope of this Note. As this case study will demonstrate, however, an executive-led political process has the potential to speed the contracting regime by executive decision, at agency request.<sup>61</sup> A variety of types of political contacts may exist in the process of awarding and monitoring government contracts as interest groups, the public, and agency staff bring pressure to bear on political actors in the contracting system.

### G. *Multiple and Overlapping Checks*

The increased reliance by government on private contractors requires new structures of accountability. Many students of government contracting believe that competition by itself can ensure accountability to everyone involved as long as government uses competitive methods and appropriately monitors its contracts. Competition can promote some efficiency, though the analyses reviewed above found limited numbers of bidders and bidder collusion. If competition fails to meet all the goals of the working definition of accountability given at the beginning of this Part, contracting systems need other review mechanisms.

Table 1 summarizes the purposes and processes of the accountability mechanisms described in this Part. Pairing other accountability structures with competition can, in theory, provide accountability should the market model fail.

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60. See LAVERY, *supra* note 6, at 15-24.

61. See *infra* notes 151-153 and accompanying text.

TABLE 1. FRAMEWORK OF ACCOUNTABILITY

Type of Accountability	For What?	With What Process?	To Whom?
Competition	Efficiency; innovation	Competitive bidding; ongoing monitoring	Everyone
Legal Oversight	Fair process; no corruption; transparency; reasonable decisions; effective outcomes	Statutory/regulatory reporting requirements; appeals; contract standards	Executive officers; legislators; public; bidders; clients
Hierarchical Controls	Fair process; no corruption; reasonable decisions	Government and agency review processes	Executive officers
Professional Accountability	No corruption; reasonable decisions; effective outcomes; fairness	Informal professional contacts; formal board or donor reviews; training	Colleagues; staff; volunteers; boards; donors
Public/Client Input	Transparency; openness; reasonable decisions; effective outcomes	Notice; hearings; appeals; media scrutiny	Public; clients
Political Accountability	No corruption; reasonable decisions; effective outcomes	Elections	Public
	Particular stakeholder interests	Informal contacts with public/stakeholders; formal mandated review	Special interests or public interest
	Efficiency; speed	Informal contacts with executive	Agency

Many of these structures overlap and provide duplicative ways of reaching goals. For instance, the freedom from corruption or the integrity of the contracting process may be promoted through hierarchical controls as well as by professional and political accountability. The effectiveness of each of these controls varies, however. As described in this Part, professional accountability exists in some contractor communities more than in others,



depending on the service background and expertise of the contractors. Moreover, controls such as government oversight offices operate in a short-term, targeted way, while controls such as elections operate only in the very long term and have diffuse impact on particular government practices.

This Part provides a framework for analyzing government-contracting processes. However, understanding the particularities of the ways in which various controls work in practice requires in-depth study of contracting regimes. Such “microanalysis” or look at the “nitty-gritty” of institutions requires work with actual, existing contract processes.<sup>62</sup> This Note next turns to a case study of contracting for child welfare services in New York City to analyze the nitty-gritty of accountability structures that do and should exist in this context.

### III. A CASE STUDY OF GOVERNMENT CONTRACTS: NEW YORK CITY CHILD WELFARE

The case of child welfare contracts in New York City demonstrates the limits of the dominant competition model of accountability. This case provides a particularly useful test because it involves an unusually large number of bidders—more than one hundred bids overall, whereas contract theorists hope for two or three—and a legal structure newly revised to attempt to promote competitive government contracting. Although conducting an elaborate and supposedly competitive bidding process, the Administration for Children’s Services awarded no contracts to new foster care providers and instead merely realigned the contracts of existing foster care providers. Moreover, ongoing monitoring of these contracts remains difficult. The case analyzed here demonstrates ways to enhance the competition model by promoting some of the effects of competition and by shoring up the competition model with other accountability structures.

This Part begins by briefly discussing the revisions to New York City’s contracting regime. The Part then outlines the basics of the Administration for Children’s Services’s ambitious \$800 million contract process. Finally, the Part analyzes this process in light of the framework proposed in this Note and develops a revised framework of accountability that integrates the structures and forces that impact government contracts. With levels of formal competition far beyond those found in most analyses of government contracts, this case nonetheless demonstrates the limits of the dominant competition model for government contracts and provides a basis for developing a typology of alternate structures of accountability.

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62. Freeman, *supra* note 11, at 368; Salamon, *supra* note 15, at 1621.

### A. *Recent Reform in New York City's Contracting Regime*

New York City's history of failed efforts to ensure accountability in its contracts has centered around efforts to reduce corruption and to promote competition. Most relevant to modern analysis of the City's procurement system is the Supreme Court's 1989 decision *Board of Estimate v. Morris*, which forced broad structural change in the City and a new Charter.<sup>63</sup> Before the Charter change, the Board of Estimate oversaw city contracts. This Board consisted of representatives sent by the Mayor, the Comptroller, the City Council Speaker, and the presidents of the five boroughs. The Board did not fall clearly in one branch of city government; consequently, the various members could disclaim responsibility for any given contract disaster and did not feel great personal pressure to reform the system.<sup>64</sup> The new Charter created a Procurement Policy Board (PPB) controlled by the executive branch.<sup>65</sup> This new Board authors procurement rules and meets continually to review and revise those rules.

Within this new legal regime, New York City has attempted to promote competition in its contracting process. The City has tried to reduce late payment of bills,<sup>66</sup> decrease the time frame of contracts,<sup>67</sup> encourage the measurement of performance indicators,<sup>68</sup> and streamline burdensome paper requirements by setting out common standards for basic procurement methods.<sup>69</sup> From the most recent reports available, fifty-five percent of procurements for which the City expected or hoped for multiple bids received more than two responses—of course, then, forty-five percent of supposedly competitive contracts received only one or two bids.<sup>70</sup> The City's Comptroller classifies three bids as the minimum for competition, although, as Kevin Lavery and others argue, three bids alone cannot guarantee competition.<sup>71</sup> To determine whether true competition exists in a contracting process requires more than this citywide perspective. The child welfare contract process analyzed here questions whether competition can exist in the reformed New York City system and whether the system has

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63. *See Bd. of Estimate v. Morris*, 489 U.S. 688 (1989).

64. N.Y. STATE COMM'N ON GOV'T INTEGRITY, *supra* note 56, at 466; Cosentino, *supra* note 23, at 1188-89. *But cf.* Edward N. Costikyan & Leslie U. Cornfeld, *NYC's New Procurement Structure: Birth of an Imperial Agency*, N.Y. L.J., Oct. 22, 1990, at 1 (lamenting the end of the Board of Estimate because of its review powers).

65. NEW YORK CITY CHARTER & ADMIN. CODE ANN. § 311(a) (N.Y. Legal Publ'g Corp. 1990).

66. POLICY PROCUREMENT BD., PROMPT PAYMENT REPORT / FISCAL YEAR 2001, at 4-6, at <http://www.nyc.gov/html/selltonyc/pdf/promptppayrpt2001.pdf>.

67. NEW YORK CITY R. & REGS. tit. 9, § 2-04(e)-(f) (2000 & Supp. 2002).

68. *Id.* § 4-01(a)-(d).

69. *Id.* § 2-05(a).

70. HEVESI, *supra* note 7, at 36.

71. *Id.*; LAVERY, *supra* note 6, at 149; *see also supra* notes 25-32 and accompanying text.

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created enough space for other accountability structures to assist where competition for government contracts fails.

#### B. *Child Welfare Contracts in New York City*

New York City's Administration for Children's Services contracted out more than \$800 million in child welfare services from 1999 to 2000, the largest amount of City contracts in fiscal year 2000.<sup>72</sup> This large procurement provides a useful case for testing competition in complex government contracts and for creating a comprehensive framework for accountability. As required by the 1989 Charter change, ACS used a competitive process to award child welfare service contracts for the first time in agency history. The context of this contract process is different from that of many of the contracts studied by analysts to date.<sup>73</sup> Instead of contracting out services that the City alone had provided in the past, the City tried to construct a competitive process for a system that for years had involved contracts with nonprofits.

The City of New York today cares for about 26,000 children in foster care and provides services to the families of thousands more children to try to prevent the placement of those children in care.<sup>74</sup> The vast majority of these children and families are African American or Latino and most live at or near the poverty line.<sup>75</sup> The history of child welfare services in New York City is often dismal, with children—especially children of color—languishing in foster care for years and moving from foster placement to foster placement in search of a permanent home. Rampant discrimination on the basis of race and religion has always existed in the City's child welfare system in part because the system began as an almost entirely privatized network of charitable organizations that could pick and choose the children each would serve. The City has long funded orphanages and provided relief to some poor families with children, but before widespread government funding of foster care services began in the last century, private organizations provided much of the child welfare services in the City.<sup>76</sup>

A reform in the mid-1990s gave the City some new leverage with its contractors. In November 1995, the highly publicized death from child abuse of six-year-old Elisa Izquierdo—a child known to the City's

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72. HEVESI, *supra* note 7, at 15.

73. See Mangold, *supra* note 24 (discussing the context of child welfare contracts).

74. NEW YORK CITY ADMIN. FOR CHILDREN'S SERVS., ACS UPDATE FOR OCTOBER 02 (2002) (on file with author). The most recent *ACS Update* is available at [http://www.nyc.gov/html/acs/pdf/monthly\\_update.pdf](http://www.nyc.gov/html/acs/pdf/monthly_update.pdf).

75. See Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. PUB. INT. L.J. 409 (1997).

76. NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE 197-99* (2001).

protective workers—put pressure on the mayor, Rudolph Giuliani, to reform the system. Mayor Giuliani responded in January 1996 by creating a new agency to oversee the City's child welfare services, the Administration for Children's Services.<sup>77</sup> ACS occupied a unique position in New York City's layers of bureaucracy. Before the creation of ACS, child welfare existed as a department within the sprawling Human Resources Administration. The director of child welfare in the City thus reported to the Commissioner of the Human Resources Administration, who reported to the Deputy Mayor in charge of the agency, who reported to the Mayor. Under the new structure, the Commissioner of ACS reported directly to the Mayor without any intervening layers of bureaucracy and participated in daily morning meetings with the mayor along with the Police and Fire Commissioners.

The revised City Charter required competitive bid processes for all large City contracts, and the new child welfare agency scrambled to comply. Under the Charter, the Mayor's Office of Contracts can approve the use of a Request for Proposals (RFP) that allows a contracting agency to weigh factors other than price in awarding bids.<sup>78</sup> ACS decided that awarding contracts for child welfare services based on price alone would make no sense, as providing good services depends on a variety of factors including staffing, training, facilities, budgeting, community contacts, and a background in the service.<sup>79</sup> The agency contracted for a range of services. These services included foster boarding home services, congregate (or group) care services, and preventive services to stabilize families and prevent the need for foster care. ACS wanted to enact a major policy change through these contracts, termed "neighborhood-based services." ACS planned to assign each contractor particular community districts to serve instead of allowing providers to serve children and families throughout the City.<sup>80</sup>

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77. NEW YORK CITY ADMIN. FOR CHILDREN'S SERVS., PROTECTING THE CHILDREN OF NEW YORK 3 (1996) [hereinafter 1996 REFORM PLAN], available at [http://www.nyc.gov/html/acs/pdf/reform\\_plan.pdf](http://www.nyc.gov/html/acs/pdf/reform_plan.pdf).

78. NEW YORK CITY CHARTER & ADMIN. CODE ANN. § 313 (N.Y. Legal Publ'g Corp. 1990); see also NEW YORK CITY R. & REGS. tit. 9, § 3-01(d) (2000 & Supp. 2002) (elaborating that such alternative methods of procurement may be needed if "specifications cannot be made sufficiently definite" to award based on price alone or if "judgment is required in evaluating competing proposals based on a "balancing of price, quantity, and other factors").

79. NEW YORK CITY ADMIN. FOR CHILDREN'S SERVS., REQUESTS FOR PROPOSALS FOR CHILD WELFARE SERVICES (1999) [hereinafter ACS, RFP].

80. 1996 REFORM PLAN, *supra* note 77, at 25. As ACS described its rationale, "Under the current system, the trauma of victimized children is multiplied many times over when they are sent to foster families far from their homes, their friends, their schools, and extended family." *Id.* ACS hoped this policy would lead to quicker, safer, permanent homes for foster children either with their birth families or with adoptive families and hoped to use the procurement system to begin to make these changes.

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ACS released its first RFP for service delivery in the borough of the Bronx in the summer of 1998. In the Bronx RFP, the agency received bids from 74 potential providers, about a tenth of which came from organizations that did not already have a contract with the agency. The agency could ultimately accommodate only 35 of the 74 bidding providers, all of which had current contracts with ACS.<sup>81</sup> ACS issued final award letters and the Comptroller registered the contracts by July 1999, about a year after the agency first released the Bronx RFP.

The agency conducted a procurement for the remaining four boroughs simultaneously. For the four-borough RFP, the agency received 234 proposals from 113 separate providers.<sup>82</sup> In this RFP, 28 potential providers who had never before contracted with ACS bid for contracts. Some of these new vendors did indeed receive new contracts from the City. Of these new vendors, only one received a tentative award for a foster care program. The new foster care provider received a tentative award for congregate care services (that is, group homes supervised by staff instead of foster boarding home placements with families). The rest of the new providers received awards for one or more preventive services programs. The agency registered all contracts by the summer of 2000.<sup>83</sup> The next Section analyzes these patterns of contracting and argues that, despite a few new awards of preventive service contracts, the “market” for child welfare services remained uncompetitive.

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81. Press Release, New York City Administration for Children’s Services, ACS To Award Child Welfare Contracts to 35 Neighborhood Providers in Bronx County (Feb. 22, 1999) [hereinafter ACS Press Release 2/22/99] (on file with author); *see also* Interview with Linda Gibbs, (former) Deputy Commissioner, ACS, in New York City, N.Y. (Mar. 3, 2002) (noting that only contractors who already contracted with the City received awards in the Bronx RFP).

82. Press Release, New York City Administration for Children’s Services, Mayor Giuliani Announces Plan To Award Child Welfare Contracts to 94 Providers Citywide for Neighborhood-Based Services System (Nov. 24, 1999) [hereinafter ACS Press Release 11/24/99] (on file with author).

83. Interview with Linda Gibbs, *supra* note 81. New York City’s child welfare agency contracted out for much of its foster care services, including group home services, as well as for much of its “preventive” services, which seek to keep families together. The agency does not, however, contract out its investigations of child abuse and neglect, and it retains small City-run foster care and preventive programs. Given this hybrid system of contracted and noncontracted services—a mixture common for most public agencies that use contracts—it is unrealistic to expect new contracts to correct all the failings of the child welfare system. Although the agency in this case contracts out \$800 million of core child welfare services, the total agency budget is more than twice that amount; it was more than \$2 billion for fiscal year 2000. *See* CITIZENS BUDGET COMM’N, NEW YORK CITY AND NEW YORK STATE FINANCES 2 (2000). This Note analyzes the accountability structures surrounding the contract system; it does not purport to offer fixes for general policy and implementation problems faced by public agencies.

*C. Lessons from Child Welfare in New York City*

New York City's child welfare contracting process had elements of formal competition beyond that found in most analyses of government contracting. The City received bids from more than a hundred providers and some new providers received awards for preventive services. This Section analyzes the experience of ACS in comparison with the dominant competition model. Even though more formal competition seemed to exist in ACS contracts than in many of the studies reviewed in Part II, this Section's in-depth look at the specifics of the contracting process reveals the failure of this "competition" to ensure accountability. The failure of the competition model does not, however, dash hopes of system-wide accountability. This Section examines methods of promoting partial competition and analyzes other structures for promoting accountability, namely, professional norms, public input, hierarchical control, and the political process. The Section describes an ideal typology of accountability structures to shore up the weaknesses of the competition model, emphasizing professionalism and reasonable, substantive public input while reducing burdensome hierarchical requirements and inequitable political contacts.

*1. Limited Competition*

Most scholars of public management and administrative law view competition as a central component of effective government service contracts. Some of these scholars, however, rightly challenge the assumption that any privatized service necessarily involves a real market with competition between providers. A lack of competition can manifest itself in many ways, including bidding processes with few bidders,<sup>84</sup> an award structure that gives one organization a monopoly over a particular geographic area,<sup>85</sup> and cozy contracting between well-organized bidders and a risk-averse government agency.<sup>86</sup>

The particular context of New York City's child welfare services makes competition seem possible. Nonprofit organizations have provided child welfare services in the City for over a hundred years, often without comparable government-provided services. The City gradually developed its own program to provide services to children and families and struggled to gain control over independent and often recalcitrant nonprofit

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84. *E.g.*, DONAHUE, *supra* note 4, at 104-06; LAVERY, *supra* note 6, at 150; SCLAR, *supra* note 5, at 13-14, 34-35.

85. *E.g.*, Demaree, *supra* note 3, at 646-47.

86. SCLAR, *supra* note 5, at 69-84; Gilman, *supra* note 25, at 596-600.

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providers.<sup>87</sup> The *Wilder v. Bernstein*<sup>88</sup> lawsuit challenging the placement of children on the basis of race and religion helped the City wrest some control over its contracts, culminating in grudging agreement by the contractors to include specific monitoring standards in each contract.<sup>89</sup> In addition, the City as a whole recently streamlined its procurement procedures hoping to encourage competition.<sup>90</sup>

Given this context of a reformed legal framework and a hard-fought struggle by the City to regain bargaining power over contracts, we might expect adequate competition to exist in the agency's procurement process. Although high numbers of bidders alone cannot make a competitive market, the child welfare system did have many more bidders than that found in most studies. Many of the studies reviewed in Part II of this Note struggled to find contracting processes with three bids. The City of New York itself generally has only half of its competitive contracts bid on by three or more bidders.<sup>91</sup> In contrast, ACS received 138 proposals from 74 separate providers in the Bronx (many providers bid on more than one type of service), and 234 proposals from 113 separate providers in the four-borough RFP.<sup>92</sup>

Despite the large number of bidders and the history of professional expertise of these bidders, no new contractor received a contract for foster boarding home services, the central and most costly service in ACS's child welfare system. Twenty-eight potential new providers bid for contracts in the four-borough RFP and fourteen of these providers received contracts (out of a total of ninety-four providers). However, all except one of these providers received new preventive services contracts that involve much less complicated services than foster care and that make up a small percentage of the agency's overall procurement. One new provider won a tentative congregate care contract, but as this service has always been underprovided, ACS had to accept nearly all local capacity offered.<sup>93</sup> A process cannot be deemed competitive if the contracting agency has to take all offers provided to it aside from offers that were obviously not responsive to the RFP. Further, the new congregate care contractor had other contracts with the City and so was not "new" to City procurement.

The procurement process did not succeed in forcing meaningful competition between bidders. No new bidders broke into the foster boarding home system to challenge existing service arrangements. Is it possible that the large number of bidders itself compromised competition

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87. See *supra* notes 76-80 and accompanying text.

88. See *Wilder v. Bernstein*, 49 F.3d 69 (2d Cir. 1995).

89. BERNSTEIN, *supra* note 76, at 44-49.

90. See *supra* notes 64-69 and accompanying text.

91. HEVESI, *supra* note 8, at 36.

92. ACS Press Release 11/24/99, *supra* note 82; ACS Press Release 2/22/99, *supra* note 81.

93. Interview with Linda Gibbs, *supra* note 81.

by preventing communication about price structures and services? A procurement for a human service such as child welfare is a complicated process that, in this case, took into account multiple factors, including the design of the program, community connections, and staffing, as well as price.<sup>94</sup> For simpler services or the provision of goods where price is a larger determining factor in a contract award, bidders may more easily signal their intentions. The literature on government contracts reviewed in Part II, however, found that such arrangements—with relatively fewer bidders for a good or simple service contract—often resulted in collusion between bidders and less efficient production of the good or service than the original government production.<sup>95</sup> Past studies of government contracts have documented problems with competition between limited numbers of bidders and have focused on increasing the numbers of bidders.<sup>96</sup> Given the findings of the case reviewed here, then, neither small numbers of bidders nor large numbers of bidders can assure competition in the context of government contracts.

In this case, the lack of competition at the bidding stage compromised the market model's hopes of easy accountability, although "competition" did promote policy innovations as bidders proposed innovative program structures. Policy innovations can improve the quality of services provided, but this type of "competitive" effect falls short of ensuring accountability for the system as a whole. ACS's contracting system needed methods of accountability to make up for this general failure, systems described in more detail in the next Subsections. Still, the City took actions to promote partial competition that can have beneficial effects. Methods to promote partial competition included forcing provider choice within a geographic area, planning for another potentially competitive process within a short time frame, and effectively monitoring and evaluating contractors. Each of these methods and their partial contributions to an accountable contracting system is discussed here in turn.

One flaw in many contracting structures that hope to rely on competition, as reviewed in Part II, is the assignment of only one contractor to each geographic area.<sup>97</sup> ACS did not replicate this mistake. ACS assigned at least two and sometimes as many as eleven service providers to each New York community district, depending on the size of the district and the amount of need in that district.<sup>98</sup> This assignment preserves some amount of client choice of providers and tries to keep a contractor from monopolizing

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94. ACS, RFP, *supra* note 79, app. A at 7-10.

95. *See supra* notes 25-26 and accompanying text.

96. *See supra* notes 23-24 and accompanying text.

97. Demaree, *supra* note 3, at 646-47.

98. NEW YORK CITY ADMIN. FOR CHILDREN'S SERVS., FOSTER CARE EVALUATION AND QUALITY IMPROVEMENT PROTOCOL 10 (2000) [hereinafter FC EQUIP]. This protocol is attached to the ACS contract as Schedule C.



all the government funding in that area. In each borough, the City also operates a public program as an alternative to the private providers. These public programs did not bid against private providers. Still, the existence of these foster care beds provides the City with some leeway in awarding contracts and allows it to choose more competitive offers. In addition, the City's experience with running its own child welfare programs helped it to understand ways to monitor contractors, as discussed later in this Subsection. Elliott Sclar and others have identified the time frames of government contracts as another area in which competition may flounder.<sup>99</sup> Long contracts with automatic renewals can compromise arm's-length transactions. In the past, ACS routinely renewed its contracts without a competitive process. Under the new Charter regime, agencies cannot set contracts for more than nine years and must review and renew the contracts every three years.<sup>100</sup> ACS wanted to set all its contracts for the maximum term because of the time involved in reprocurring contracts.<sup>101</sup> It is too early to tell whether at the rebid stage the agency will see numbers of bidders similar to this RFP, if some potential bidders will opt out, or if new bidders will succeed as they become more experienced with government processes. The change from an unlimited term to a maximum contract term of nine years, however, necessitates a continued attempt at competition.

The failure of competition as a complete model of accountability makes the actual replacement of poor performing providers and the close evaluation and monitoring of all providers crucial. Government can replicate some of the efficacious service delivery promoted by competition through measures of contract performance. In this case, the City decided to include performance standards in its new foster care contracts. These standards evaluate contractors in three areas: outcomes and indicators, quality of programs, and traditional process measures such as paperwork completion and staff training.<sup>102</sup> ACS's contracts state that the agency will use these evaluations to help decide contract extensions, determine which agencies will receive more clients, and decide which agencies should receive additional funding as an incentive for continued good performance.<sup>103</sup>

These goals seem well intentioned. The existing foster care system suffers from inflexible and poorly incentivized funding. Federal foster care

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99. See SCLAR, *supra* note 5, at 13-14; see also *supra* note 66 and accompanying text.

100. NEW YORK CITY R. & REGS. tit. 9, § 2-04(e)(3) (2000 & Supp. 2002). These time limits can only be exceeded in an "extraordinary case for compelling reasons." *Id.* § 2-04(e)(4).

101. For the agency's homemaking contracts—for in-home assistance to try to stabilize families—ACS abided by the decision of the Mayor's Office of Contracts that the Charter only allowed a six-year term because these services did not involve long-term client contacts. See *id.* § 2-04(f)(2).

102. FC EQUIP, *supra* note 98, at 1-2.

103. *Id.* at 9-14.

dollars (though not preventive services dollars) are uncapped. In addition, foster care providers receive per diem funding for each child, which incentivizes these providers against quickly finding permanent homes for these children in their care. ACS must counter these incentives to encourage good contract performance and has attempted to do so through contract monitoring.

Studies of government contracting often have either found contract evaluation and monitoring entirely lacking or have found that evaluation misplaced. For example, John Donahue criticized the federal Job Training Partnership Act (JTPA) for underspecifying its contractual goals and thus failing to achieve them. Congress intended the training programs contracted for under the JTPA to increase employment and lessen welfare dependency. However, because the contracts evaluated performance based on job-placement indicators, contractors could screen out clients that might lower the contractors' job-placement scores. The federal government could monitor these contracts for good job placement but could not ensure that employment had increased overall or that welfare dependency had decreased.<sup>104</sup>

ACS has developed a much more complicated evaluation system than that used in Donahue's JTPA example. This system is fairly involved, but because most of the competition-based theories outlined in Part II view contract monitoring as crucial for their analysis, an understanding of the agency's evaluation scheme is important for determining the competition effects that might exist in this contract situation. ACS bases fifty percent of each vendor's overall score on outcomes and indicators, twenty-five percent on quality measures, and twenty-five percent on process measures.<sup>105</sup> At first glance, this weighting seems to value outcomes more highly than quality or process indicators. The agency, however, uses these measures in a variety of ways.

For instance, to achieve more contracted *capacity*, a contractor must meet the agency's goals of neighborhood foster bed recruitment and score highly on the overall quality of service scales.<sup>106</sup> This capacity-management system does not require a good score on outcome measures. In contrast, the *fiscal reward* system seeks to incentivize finding a permanent (biological or adoptive) home for children, that is, it incentivizes good outcomes for children in care. For the fiscal reward, ACS creates a baseline for each vendor and rewards higher rates of discharge of foster children "without a corresponding increase in re-entries or inappropriate . . . transfers to other agencies."<sup>107</sup> The agency then checks this data against the nonprofit's

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104. See DONAHUE, *supra* note 4, at 179-214.

105. FC EQUIP, *supra* note 98, at 6-7.

106. *Id.* at 9-12.

107. *Id.* at 13.

overall score on the measured outcomes.<sup>108</sup> If the nonprofit has scored well, the agency provides the nonprofit with its “savings” from reducing days of foster care use. The nonprofit can spend these “savings” for preventive services approved by the agency, with the goal of generating even more reductions in the use of foster care.<sup>109</sup>

Much of the literature on government contracting recommends measuring performance instead of process because of the closer correlation between the goals sought by government and performance than between those goals and process indicators. Studies such as Matthew Diller’s also caution agencies against placing monitoring resources on an indicator that does not actually correlate with outcomes—such as a primary focus on reduction of welfare caseloads rather than a focus on job retention.<sup>110</sup> In the present case, ACS weights what it terms “indicators” more highly than outcomes (thirty points compared to twenty out of the total of fifty), which raises questions about the correlation between those indicators and good services for children and families. Table 2 illustrates the weighting of each indicator.

TABLE 2. ACS INDICATORS AND THEIR RESPECTIVE WEIGHTS<sup>111</sup>

Tool	Measure	Weighting
Indicators	Neighborhood-based services	12.5 points
	Case conferences	7.5 points
	Service plan reviews	7.5 points
	Movements in care	2.5 points
Total		30 points

Some studies have found relations between case contacts—conferences about a case or service-plan reviews in which staff, advocates, and parents review the child’s progress in care—and faster permanent homes for children.<sup>112</sup> To focus a large amount of points on such casework processes,

108. *Id.* at 35.

109. *See id.* at 13-14.

110. Diller, *supra* note 30, at 1183-86.

111. FC EQUIP, *supra* note 98, at 8.

112. NEW YORK CITY ADMIN. FOR CHILDREN’S SERVS., A RENEWED PLAN OF ACTION FOR THE ADMINISTRATION FOR CHILDREN’S SERVICES 67-82 (2001), at [http://www.nyc.gov/html/acs/html/whatwedo/reform\\_key.html](http://www.nyc.gov/html/acs/html/whatwedo/reform_key.html) (citing research by the Annie E. Casey Foundation); Elan Melamid, What Works? Integrating Multiple Data Sources and Policy Research Methods in Assessing Need and Evaluating Outcomes in Community-Based Child and Family Services Systems 89-116 (2001) (unpublished Ph.D. dissertation, RAND Graduate School), available at <http://www.rand.org/publications/RGSD/RGSD161/>.

the agency needs to have more certainty of the positive effects of these processes. Otherwise, these time-consuming case contacts could easily become the focus of contractor activity.

Some studies have also linked the neighborhood-based services indicator to faster permanency for children, though comparatively fewer studies have documented this effect because only a few U.S. jurisdictions have attempted this policy.<sup>113</sup> Donahue and Lavery rightly complain about the lack of studies of the impacts of privatization.<sup>114</sup> In this case, ACS could do little to research the impact of its new neighborhood-based services contracting regime. With the most points for any indicator, contractors will certainly focus their efforts on finding foster homes in their assigned community district. ACS may welcome this effect to hasten its neighborhood-based services policy change. If ACS had not linked such a large number of points to this indicator, contractors would likely have tried to conduct business as usual. Weighting this indicator highly is a necessary step for trying to change the system to a neighborhood-based one. However, whether neighborhood-based placements will succeed in affecting actual outcomes for children and families is an item of faith at this point.

Aside from the “indicators,” the actual outcome measures included in a contractor’s score seem to balance the goals of the foster care system. Table 3 illustrates the weighting of each outcome measure.

TABLE 3. ACS OUTCOMES AND THEIR RESPECTIVE WEIGHTS<sup>115</sup>

Tool	Measure	Weighting
Outcomes	Time to reunification	5 points
	Time to adoption	5 points
	Time to re-entry	5 points
	Independent living	5 points
Total		20 points

These measures address the range of outcomes available to children in care. These outcomes, however, are weighted less overall than the indicators shown in Table 2 (twenty points versus thirty points). If the Table 2 indicators of neighborhood-based services and casework contacts succeed

113. NEW YORK CITY ADMIN. FOR CHILDREN’S SERVS., *supra* note 112, at 5. The City of Cleveland and Los Angeles County have begun the adoption of such service alignments.

114. See DONAHUE, *supra* note 4, at 60-61; LAVERY, *supra* note 6, at 84-85.

115. FC EQUIP, *supra* note 98, at 8.

as a proxy for child well-being—which only more data can determine—these indicators have the advantage discussed by Donahue and others of being relatively easy to mandate, quantify, and track.<sup>116</sup> If these indicators do not succeed as such a proxy, ACS will be focusing contractors' attention on easy-to-track indicators that nevertheless track the wrong variables.

A complicating factor in the actual workings of ACS's contract evaluations is the existence of other monitoring activities that the agency does not include in the formal evaluation process. ACS's foster care contract notes that the agency will conduct "additional routine monitoring," including reports of incidents (such as abuse while in care or assaults on staff), case reviews, and site visits.<sup>117</sup> These additional monitoring efforts noted in the contract occur from different ACS offices (the contract cites six and leaves the reader to believe that other offices may conduct such routine monitoring as well).<sup>118</sup> The monitoring of nonprofit activities by more than six offices within ACS undoubtedly frustrates the effort to send clear signals about the priorities of the monitoring agency, further complicating the supposed promotion of competition.

This analysis of ACS contract monitoring does contrast sharply with Kevin Lavery's assertion that U.S. municipalities—and New York City in particular—conduct little or no monitoring of their contracts.<sup>119</sup> In fact, the opposite may be true but with equally pernicious effects. Contractors for child welfare services in New York City may face such an array of monitoring efforts by ACS that they become bogged down in trivial requests and cannot focus on overall outcomes for children and families. ACS has introduced outcome indicators into its contracts for the first time—a good step—but the lessons of theories of government contracting show that the agency needs to look at the total impact of its monitoring and reduce duplicative and trivial monitoring that may distract from the outcomes it seeks to promote.

In addition to this structural problem, one overall drawback to ACS's present evaluation of outcomes is that the agency only has been able to finalize outcomes for foster care services and not for preventive services. Currently, ACS informally monitors preventive service contracts (similar to the informal foster care monitoring that overlays the formal evaluation). The agency does not give contractors a formal score on their preventive services nor does the agency adjust contractor capacity or provide financial bonuses. Agency staff claim they are working to develop a formal

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116. DONAHUE, *supra* note 4, at 79-80, 174-211.

117. *See* FC EQUIP, *supra* note 98, at 8, 29.

118. *Id.* at 5-6.

119. *See* LAVERY, *supra* note 6, at 139, 148.

evaluation for preventive services.<sup>120</sup> Any such evaluation process will be hampered by the current state of statistical research, which has not yet determined how to quantify preventive outcomes.<sup>121</sup>

The case of preventive services is thus slightly different from foster care services as analyzed under the competition model. More potential providers bid on ACS's preventive contracts than for foster care, more contractors received awards than in foster care, and a number of new nonprofits actually received awards for preventive services.<sup>122</sup> However, if ACS does not find ways to evaluate and monitor these contractors using the clear and well-specified measures advocated by Donahue and Sclar, ensuring accountability in preventive services will require more extensive use of the other accountability structures discussed in the next Subsections.

For now, ACS has committed itself to taking action on its foster care contracts based on the outcomes it can measure. The agency released its first set of "report cards" for foster boarding homes in July 2001 and for congregate care facilities in September 2001.<sup>123</sup> A month later, the City decided to close its low-scoring Manhattan and Staten Island foster boarding home programs and to transfer the management of those homes to well-performing private agencies. The move sends a message to contractors to improve their performance. Eliminating the City-run program entirely, however, risks returning the City to days when it lacked programs on which to fall back in a crisis with contractors. Scholars like Lavery have found comparative success in public systems that have competition between public and private entities as well as among private entities.<sup>124</sup> The existence of a public alternative allowed ACS to reject some bidders it might otherwise have had to accept. Further, ACS used its knowledge from its in-house services to help shape its contract evaluations. Closing these services will let go expertise the agency needs to revise its unfinished evaluation processes. Although ACS should take the evaluation of its contracts seriously, the lessons of government contracting counsel the agency not to leave the business altogether.

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120. Interview with Benjamin Charvat, Associate Commissioner, ACS, in New York City, N.Y. (Feb. 21, 2002).

121. Melamid, *supra* note 112, at 137-38.

122. *See supra* text accompanying notes 87-89. Although a number of new preventive service providers received awards in the procurement reviewed here, the procurement occurred during the end of the economic boom that New York City experienced in the late 1990s and early 2000s. In a nonboom time, many of these providers may not have received awards as preventive services do not involve the direct care of children and thus face service cuts before cuts in foster care. As the City currently faces deep budget cuts, many of these preventive services awards may not last.

123. Nina Bernstein, *City Evaluates Providers at Group Homes*, N.Y. TIMES, Sept. 1, 2001, at B3; Nina Bernstein, *City Will Close Office Running Foster Program*, N.Y. TIMES, Aug. 29, 2001, at A1.

124. LAVERY, *supra* note 6, at 57-59 (discussing successful programs in Indianapolis and Phoenix).

The case of ACS demonstrates the limits of the competition model of government contracting. This case shows that even with numbers of experienced bidders far beyond the two or three expected by most models of contracting, barriers to a true market exist. ACS did succeed in bringing some new providers into its preventive service system—a system that will not see long-term competitive effects because of the lack of measurable outcome indicators—but its foster care system remained closed. Given the failure of competition at the bidding stage, the City's efforts to encourage ongoing competition will not ensure total system-wide accountability. Still, decisions such as breaking up service monopolies and shortening contract time frames will further some of the goals of competition. Evaluating outcomes remains a crucial way to monitor contract performance and to try to promote effective results for children and families. The agency, however, needs to calibrate these performance measures correctly and to streamline and rationalize the volume of contract monitoring that already occurs. Further, the agency should maintain publicly provided service options to ensure government bargaining power in the future and to inform its monitoring efforts. The limits to the competitive model shown here highlight the need for other—multiple and overlapping—accountability mechanisms. This Subsection has demonstrated ways to promote partial competition, but other structures are needed to develop a system that is wholly accountable to the stakeholders involved.

## 2. *Significant Professional Controls*

The case of ACS demonstrates the potential of strong professional controls to promote reasonable decisionmaking and outcomes in the absence of a true competitive market. Professional checks on discretion can exist both at the agency level and within contracted service providers. New York City began to address the problem of agency staffing by decentralizing procurement expertise so that each agency had its own Agency Chief Contracting Officer (ACCO). The City also established a training institute for procurement staff and a certification process for ACCOs and Deputy ACCOs.<sup>125</sup>

At ACS, these training initiatives shored up an already well-qualified staff. The Deputy Commissioner charged with implementing the RFP had worked with both the City's Office of Management and Budget and the City Council, and had herself drafted the chapter on procurement of the new Charter as a member of the Charter Revision Committee.<sup>126</sup> The ACCO had benefited from the City's new effort to train and certify

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125. *Id.* at 152-53.

126. Interview with Linda Gibbs, *supra* note 81.

procurement staff, had served as a Deputy ACCO and an ACCO in other City agencies, and had shepherded other procurements through the arduous labyrinth of the old Charter and City regulations.<sup>127</sup>

The professional experiences of ACS staff present generalizable lessons for other jurisdictions, but it is more challenging to ensure an engaged, professional vendor community. In the case of ACS, nonprofit organizations had provided child welfare services for years before receiving substantial government funding.<sup>128</sup> This community of providers built up expertise in the service area as well as political connections to executive and City Council members that served as informal checks on agency decisionmaking. New York City child welfare organizations answer to their boards and their staff, to outside funders that supplement City resources, and to government charitable oversight offices.

The engaged, experienced child welfare providers in New York City forced, or at least encouraged, numerous policy changes. City child welfare nonprofits agitated successfully for a trial RFP in the Bronx before the solicitation of bids for the other boroughs, and convinced ACS to modify the weighting of some of its outcome measures.<sup>129</sup> These providers also convinced the agency to alter certain RFP deadlines, haggled over awards and community district assignments, and brought service model innovations to the attention of agency staff.<sup>130</sup> Nonprofits actively participated in ACS's conferences, discussed below in Subsection C.3. These contractors also used their political connections to force agency change, discussed below in Subsection C.5.

This sort of professional accountability is extremely context-specific. In an ideal framework of accountability, agencies would benefit from professionalism among both agency staff and the contractor community. In fields that have such expertise, such as child welfare in New York City, agencies will see more professional norms and informal controls over bidder behavior than in fields lacking this background.

Moreover, ACS's experience with its professionally engaged nonprofit contractors again highlights the limits of the conventional market model of competition-based accountability. Even with an engaged, expert community of contractors, vigorous competition did not occur. The existence of a professional, experienced nonprofit community promoted a more nuanced sort of competition than that theorized by Donahue and others—this professionalism presented policy innovation that had real effects on ACS's

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127. Obviously, multiple issues of government staffing exist, including perverse incentives created by some civil service requirements. This Note does not try to suggest overall reforms of this process; it only recommends limited procurement-related training of staff to promote professionalism.

128. See BERNSTEIN, *supra* note 76, at 197-99.

129. Interview with Linda Gibbs, *supra* note 81.

130. *Id.*



decisions. This sort of innovative effect, though, cannot provide a complete model of accountability to all participants in the contracting system. Other checks on the reasonableness and fairness of decisions and the efficacy of outcomes still need to exist. Even with this engaged, professional community of nonprofits, the case of ACS shows the limits of relying on competition for system accountability.

### 3. *Public Input Despite the Legal Regime*

Given the failure of competition found in this case, public input would ideally work to encourage reasonable decisions and effective outcomes, as well as to increase the transparency of decisionmaking. In New York City, the legal regime requires only pro forma public participation. The current structure provides some avenues for input to actual bidders and less to clients and to the public at large. The Charter requires an internal agency presolicitation review of procurement options,<sup>131</sup> public notice of solicitations above small purchase limits,<sup>132</sup> and a public hearing before the contract award.<sup>133</sup> The legal requirements for each of these events are minimal, however. City rules also encourage the use of a preproposal conference to educate bidders about the agency's intentions.<sup>134</sup>

Despite the minimal requirements embedded in New York City's legal regime, ACS used its discretion to fashion some meaningful public input. To plan for the RFP, ACS used questionnaires and conducted a planning conference with advocates and service providers. New York City's legal regime does not mandate a presolicitation review with public input,<sup>135</sup> ACS's decision to involve the public came from its professional experience with procurement and from the insistence of the engaged nonprofit community. The public process served to educate both ACS and potential bidders about the procurement and caused at least one substantive change: the decision to release a RFP for one borough first before soliciting services for the remaining four boroughs.<sup>136</sup>

New York City's rules also encourage a conference before bids are returned; the rules recommend little more than a brief discussion with potential bidders.<sup>137</sup> The agency felt compelled by the complexity and

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131. NEW YORK CITY R. & REGS. tit. 9, § 2-02 (2000 & Supp. 2002).

132. NEW YORK CITY CHARTER & ADMIN. CODE ANN. § 325(3)(a) (N.Y. Legal Publ'g Corp. 1990) (applying this procedural requirement to contracts above small purchase limits).

133. *Id.* § 326; NEW YORK CITY R. & REGS. tit. 9, § 2-11 (applying this procedural requirement to contracts exceeding \$100,000).

134. NEW YORK CITY R. & REGS. tit. 9, § 3-03(f).

135. *Id.* § 2-02.

136. Interview with Linda Gibbs, *supra* note 81.

137. NEW YORK CITY R. & REGS. tit. 9, § 3-03(f) (citing § 3-02(h), which explains in more detail recommendations for the conference).

magnitude of the procurement to hold a two-day conference that resulted in substantive discussion and a written packet of questions and answers mailed to organizations that had picked up a copy of the RFP.<sup>138</sup> New York City's Charter has set up a workable framework for such conferences, maintaining the flexibility to allow a more substantive conference for complicated procurements. Agency procurement trainings can explain that these conferences inform the public and allow the agency to gain early bidder buy-in to agency policy—and early warning of ill-conceived policy. Professional expertise thus interacts with structures for public input. An ideal accountability framework would rely on professionalism to further the goals of public input at the early stages of contract planning.

To ensure agencies make effective use of these channels of public input, public notice is required. New York City's notice requirements fall short of a goal of ensuring public and constituent input. ACS advertised its upcoming procurement in a technical document called the *City Record* and mailed information to known child welfare advocates.<sup>139</sup> This strategy served to inform existing contractors of the solicitation, but the general public most likely does not inform itself about items in the detailed and crowded *City Record*. In the time since ACS has completed its RFP, the City of New York has developed a system for posting upcoming procurements on its website.<sup>140</sup> This use of technology increases the potential that organizations beyond existing contractors will learn about procurements. In addition, advertisements in general circulation periodicals would reach those without access to the Internet.

After the award of contracts, the public and relevant constituency retain an interest in providing input into the actual progress of those contracts. New York City's Charter mandates a "public hearing" after contract award but this hearing, as currently structured, provides no substantive accountability to the contract system. At both of ACS's hearings (one for the Bronx RFP and one for the four-borough RFP), no one presented testimony and agency staff left after reading a prepared script that listed contractors and dollars. The Charter Revision Commission itself expressed a belief that this sort of hearing would not result in meaningful participation.<sup>141</sup> In scattered evidence of hearings conducted by the Department of Transportation and the Department of Environmental Protection, the hearings garnered little or no testimony.<sup>142</sup> One student of New York City's procurement process has made revising this public

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138. Interview with Linda Gibbs, *supra* note 81.

139. *Id.*

140. See City of New York, Doing Business with New York City Agencies, at <http://www.nyc.gov/html/selltonyc/html/rfps.html> (last visited Feb. 27, 2003).

141. Cosentino, *supra* note 23, at 1192.

142. *Id.* at 1192-93.

hearing provision the center of his proposal to change City procurement.<sup>143</sup> His account notes that the hearing comes late in the process and does not provide an opportunity for meaningful public input. From the experience of ACS, this critique is correct. Earlier opportunities for public input promote transparency and reasonable decisionmaking. This reform, however, cannot exist in a vacuum without the other accountability structures described in this Note. In the absence of meaningful competition, no other single method can create a complete system of accountability.

Instead of a hearing after the initial award of contracts, public and constituent input has more value in supporting the ongoing evaluation and monitoring of those contracts. Scholars in this field have encouraged public-interest lawyers to work with their clients in giving feedback on government performance measures.<sup>144</sup> In the present case, ACS asked for provider input on its foster care outcomes. In earlier drafts of these measures, the agency had weighted “adoption” and “re-entry into care” more highly than “reunification.”<sup>145</sup> The City’s child welfare community responded that this would necessitate paying more attention to adoption than to sending children home to their birth parent or parents. ACS accepted the critique and changed the weighting of its outcome scores to better reflect the goals of the child welfare system.

Further, New York City’s legal regime requires some sort of interview of clients or staff as part of the evaluation process for human service contracts.<sup>146</sup> ACS complies with this requirement by including data from such interviews in its assessment of program quality.<sup>147</sup> The City’s rules do not require a particular weighting for client and staff input in evaluating contractors. Mandating such a weighting would place too much of a burden on agencies to precisely quantify difficult-to-measure client input. Relatively small procurements for easy-to-specify goods do not necessarily need this input. Public and client input, however, have particular value for complicated services for which an agency or a scholarly field has not reached a consensus on measuring outcomes.

The case reviewed here demonstrates the potential for substantive public input to provide a review of decisionmaking and to promote transparency. In the absence of formal competition in which bidders would provide their input through the process of a market, structures to collect alternate constituent input can promote some of the same goals of a competitive system. In an ideal framework of accountability for government contracts, structures to allow public input would function with

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143. *Id.* at 1193-95.

144. *See supra* note 43.

145. For final evaluation measures, see *supra* Table 3.

146. NEW YORK CITY R. & REGS. tit. 9, § 4-01(d) (2000 & Supp. 2002).

147. *See FC EQUIP, supra* note 98, at 8.

strong norms of professionalism to promote the meaningful use of such structures. In the absence of such professional norms, more formal rules-based structures would be needed to ensure sustained public input that is not merely pro forma.

#### 4. *Hierarchical Requirements*

Hierarchical requirements are often added to a procurement system as an attempt to counteract corruption and promote competition. In many cases, however, these requirements are unnecessarily duplicative and not usefully integrated into a framework of accountability. Layers of red tape and burdensome process have long plagued New York City workers and potential bidders alike.<sup>148</sup> The innovation of the Procurement Policy Board (PPB) in the 1989 Charter revision, a body that acts both to develop uniform procurement rules in the City and to continually review and revise these rules as a whole, creates the possibility for reform that goes beyond the piecemeal. The PPB must review its rules and make recommendations to revise them at least once a year.<sup>149</sup>

New York City's Charter revision reduced some redundant hierarchical controls, but many such controls exist not as legal rules but as mayoral policy. For any given City procurement, eight offices might oversee the process. Basic procurements go through the budget office, the mayor's operational staff, the contracts office, the investigation department, the finance department, and the Comptroller's office.<sup>150</sup> Some large procurements must meet equal opportunity tests through the business services office, and construction contracts go through a construction office.<sup>151</sup> In response to this outside review, agencies often construct their own structures mirroring City departments. City contractors also may construct similar offices to deal with agency requests.

ACS managed a reasonably quick procurement process in spite of these layers of oversight, mostly because agency staff learned from the Bronx experience. After a year-long RFP process for the Bronx, ACS completed its RFP for the remaining four boroughs in just under a year.<sup>152</sup> For the Bronx RFP, internal evaluation and scoring of the 138 Bronx proposals took about two months. ACS received 234 proposals for the remaining four boroughs but managed to score these proposals in a similar two month period. The main innovation that allowed ACS to push along this scoring

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148. See N.Y. STATE COMM'N ON GOV'T INTEGRITY, *supra* note 56, at 461.

149. NEW YORK CITY CHARTER & ADMIN. CODE ANN. § 311(c) (N.Y. Legal Publ'g Corp. 1990).

150. Interview with Linda Gibbs, *supra* note 81.

151. LAVERY, *supra* note 6, at 145.

152. See *supra* notes 82-83 and accompanying text.

process was the creation of staggered teams of readers.<sup>153</sup> ACS also learned to avoid some of the parallel and duplicative oversight structures that plague the City. For example, instead of waiting until the end of its award decisions to brief some of the many offices that oversee the agency, ACS staff briefed these offices as the process progressed.

Professional training and skilled, decentralized procurement staff can speed the procurement process through some burdensome hierarchical controls. This problem, however, has plagued City contracting for years and continues to hinder contract processes. The problem parallels ACS's internal challenge of streamlining and rationalizing agency offices that monitor contractors.<sup>154</sup> New York City created a sound mechanism for making ongoing reforms in the Procurement Policy Board. The City's use of informal hierarchical controls has had less success in meeting integrity goals without compromising other goals of the contracting system such as efficiency and effective outcomes for clients. The case of ACS demonstrates the importance of resisting the impulse to create layers of reports and reviews. It also suggests eliminating duplicative oversight in favor of one or two offices that oversee agencies, as well as one or two offices within agencies that oversee contractors. In an ideal typology of accountability structures, hierarchical requirements are kept flexible and minimal.

##### 5. *Strong Political Oversight and Access*

Political oversight theoretically could promote some of the goals that competition falsely promised, further particular interests of stakeholders, and diffusely encourage overall accountability through elections. In practice, the structures of political oversight that exist in New York City's contract process both hinder and help effective contracting. A strong executive can promote speed in the procurement process but political controls may cause unequal treatment of contractors.

As discussed in Part II, Kevin Lavery and others criticize the "mayor-council" model of management that exists in cities like New York under which management is politicized rather than professionalized.<sup>155</sup> In ACS's case, the Mayor certainly took an active role in the contract process. After approval from the relevant oversight agencies, the Mayor insisted on his

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153. The PPB mandates that a minimum of three qualified readers must read and provide a written evaluation for each proposal. NEW YORK CITY R. & REGS. tit. 9, § 3-03(g)(1) (2000 & Supp. 2002). The rules do not specify that the same readers need to read every proposal within a service type. The allowance of additional staff to read proposals may reduce the aggregate time spent reviewing proposals.

154. See *supra* notes 117-119 and accompanying text.

155. LAVERY, *supra* note 6, at 22-23, 83.

own briefings. At these meetings, the Mayor often reopened issues of policy discussed earlier with his many deputies. This type of duplicative managing can slow the contract process. On several occasions, though, the Commissioner's relationship with the Mayor allowed the agency to bypass layers of red tape and to secure the Mayor's assent without the approval of his underlings.

For example, a dispute with the Mayor's Office of Contracts (MOC) threatened to cause significant delays. After multiple lengthy and contentious meetings between the Deputy Commissioner and MOC, the agency Commissioner brought up the issue with the Mayor at their daily morning meeting, and the Mayor agreed to the agency's plan.<sup>156</sup> This sort of end run around political oversight cannot occur in many instances because most agencies report to the Mayor only through many other officials. For especially important, large, or complicated procurements, however, a direct reporting structure can ease the burden of such oversight.

Other political effects include lobbying and pressure exerted by contractors. Although lobbying allows input into the award process, some contractors enjoy disproportionate clout because of their political connections. In the case of ACS, certain nonprofits had provided services to children in the past but did not receive the increases in service capacity for which they had hoped. The process of negotiating awards allows for feedback from disappointed bidders and for contract adjustments, so long as these adjustments do not violate City procurement rules mandating awards in rank order based on the score of the bidder. However, some bidders did not feel content to rely on the formal legal channels of review. Such bidders wrote strongly worded letters to the agency and mobilized board members, funders, and community connections to contact mayoral and legislative staff. Predictably, ACS felt these political pressures and made adjustments to awards. Within the legal structures mandated by City procurement rules and specified by the solicitation itself, the agency could adjust the capacities of higher-scoring bidders by reducing the capacities of lower-scoring bidders.<sup>157</sup>

In situations such as these, the result for clients may be positive because of the quality of programs of higher-scoring contractors. However, this circumvention of the general process demonstrates the inequity among bidders as well as the vulnerability of a process that is not rules-based. Of course, a legal mandate of specific details such as the number of beds given to each contractor would hamper efficiency and policy innovation. Instead of encouraging detailed rules, this example points to the need to strengthen other methods of oversight. In this case, ACS could have slowed the

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156. Interview with Linda Gibbs, *supra* note 81.

157. ACS, RFP, *supra* note 79, at 17-18.

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process slightly to routinize contractor input in negotiations, ensuring that the agency seriously considered all contractor suggestions. Still, political pressures will always exist in the world of government decisionmaking.

In the case of ACS, two other incidents of political pressure, or possible political pressure, raise concerns about corruption. In one case, the Agency Chief Contracting Officer discovered that an ACS staff member who had participated in many of the award decisions had pursued a job with a contractor bidding for services.<sup>158</sup> Although this discussion did not technically break City procurement rules, which forbid only talk directly related to the RFP,<sup>159</sup> general City anticorruption rules limit the situations under which agency staff may take jobs with vendors receiving agency contracts.<sup>160</sup> The ACCO also had concerns for the appearance of impropriety and immediately removed this staff member from the award process (to the dismay of the remaining members who picked up his share of the work). This staff member ultimately did not go to work at the bidding agency, although several years later he would leave ACS to work for another prominent contractor.

The other incident of potential impropriety involved a new awardee of a preventive services contract. ACS staff discovered that the director of the organization winning the contract worked for an ACS preventive services program. The agency did not want to lose this organization headed by minority ethnic and minority religious individuals with strong links to their community. After consulting with the Mayor's Office of Contracts, ACS decided there was no evidence of wrongdoing as none of the staff involved in making awards knew the bidder—one of more than 7000 employees in the agency. ACS instructed the director to have her assistant director (who was not an ACS employee) conduct all dealings with ACS until the director could leave her job at the agency.<sup>161</sup>

Damage from incidents such as these was minimized by the overlapping effects of the accountability structures in the system. Certain of the often-burdensome hierarchical controls may promote reasonable decisionmaking because agency staff must explain themselves multiple times to multiple offices. Still, adding oversight layers and rules to weed out corruption creates a complicated system in which a savvy and corrupt manager can hide. Precautions and basic review structures within an agency work better to catch incidents of possible impropriety than do centralized layers of oversight.

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158. See Interview with Linda Gibbs, *supra* note 81.

159. See General City Boilerplate § 3.2 (Sept. 5, 2000) (on file with author). The City Boilerplate is the form contract used by ACS for its child welfare contracts.

160. NEW YORK CITY CHARTER & ADMIN. CODE ANN. § 2604(a)(1)(a), (b)(2) (N.Y. Legal Publ'g Corp. 1990).

161. See Interview with Linda Gibbs, *supra* note 81; Interview with Angeles Pai, (former) Special Assistant, ACS, in New York City, N.Y. (Feb. 24, 2003).

In the case of ACS, political connections worked in a variety of ways. The useful connection of the agency's Commissioner to the Mayor resulted in the circumvention of some of the burdensome process requirements identified earlier. In general, however, the pressures exerted by contractors on agency staff raise concerns of fairness. A traditional administrative law regime might require every contact between an agency and an awardee to be on the record with a formal agency reply.<sup>162</sup> One minor benefit of the new and unstructured nature of laws and regulations surrounding contracting for government services is that agencies are not required to recreate formal and burdensome process requirements. Agency staff can be trained to conduct a systematic review of contractor complaints and to develop a way to devise such a system without an inflexible legal mandate. Hierarchical controls will catch some instances of impropriety as agency staff explain and reexplain their award decisions. Some off-the-record pressures and corruption will inevitably exist in government procurement systems. An ideal framework of accountability relies on other accountability structures to further fairness and integrity and to check the pressures that must exist in a politicized, executive-led system.

#### 6. *Multiple and Overlapping Structures*

The case of child welfare contracts in New York City demonstrates the limits of relying on competition to ensure accountability in a public contracting system, but the case also allows for the development of an ideal typology of accountability structures. Public agencies can promote partial competition by making the bidding process as competitive as possible and by focusing on the monitoring and evaluation of contracts. These attempts at partial competition, in an ideal system, would be shored up by strong norms of professionalism and by meaningful public input. Hierarchical and political controls, in contrast, often involve duplicative, or worse, inequitable results. Minimal hierarchical oversight necessarily exists to constrain agency discretion and to review political deals, but layers of formalized administrative rules will compromise efficiency as well as create places for politically savvy actors to hide. The final Part of this Note formalizes the ideal typology created from the experience of child welfare procurement in New York City, comparing this typology to the basic framework constructed in Part II.

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162. See *supra* note 39.



#### IV. CONCLUSION

Government decisions to contract out for the provision of goods and services show no signs of slowing. This Note has theorized that government contracting regimes would be accountable to the public, to the agency's constituency, and to the officials involved, if formal and informal controls work to ensure input from these sources, as well as to facilitate reasonable and timely decisions, reasonably effective outcomes, and a fair process. Some have argued that market competition alone can serve these functions. Government decisionmakers certainly want to promote competition, but even a public "market" as comparatively robust as the child welfare market in New York City cannot ensure system-wide accountability.

The case of ACS demonstrates the limits of the competition model of government contracting. Even with numbers of bidders drastically exceeding the two or three applicants typical in most government contracting, and with a professional and experienced bidder community, barriers to a true market existed. This professional child welfare community did bring innovative policy ideas and service structures to the attention of government decisionmakers. In this sense, "competition" succeeded in the New York City market because the contracting process promoted new ways of thinking about services. Innovation alone, however, is not the only goal of an accountable contracting system under the definition used in this Note. In the ACS experience, the foster care market remained closed to new providers. The preventive service system gained new contractors, but the City has to date been unable to develop an evaluation system for tracking complex preventive service outcomes. Even the most committed academic proponents of the market model do not believe a system of government contracts will remain competitive without ongoing agency monitoring of performance outcomes. The ACS experience suggests particular strategies for attempting to promote some of the elusive goals of competition but demonstrates the need for other accountability mechanisms.

None of the other accountability structures reviewed in this Note purport to create a complete system of accountability. Properly tailored, these structures can work together to meet the goals of system accountability, but some of these structures overlap in ways that are unnecessarily redundant. To determine which structures are crucial and which duplicate the functions of other structures and hinder the process, this Note looked in detail at New York City's recent child welfare contracts. Table 4 demonstrates an ideal framework for government contracting, comparing the existing processes for each category of accountability with the revised processes proposed in this Note. The first two columns duplicate the columns in the typology given in Part II. The third column reflects the revisions argued for in this Note.

TABLE 4. REVISED FRAMEWORK OF ACCOUNTABILITY

Type of Accountability	For What?	Existing Process	Revised Process
Competition	Efficiency; innovation	Competitive bidding; ongoing monitoring	Bidding as competitive as possible; ongoing monitoring
Legal Oversight	Fair process; no corruption; transparency; reasonable decisions; effective outcomes	Statutory/regulatory reporting requirements; appeals; contract standards	Standard procurement forms; PPB-like body to conduct ongoing review of rules; enforced contract standards
Hierarchical Controls	Fair process; no corruption; reasonable decisions	Government and agency review processes	One (or at most two) offices overseeing agencies and one or two offices overseeing contractors
Professional Accountability	No corruption; reasonable decisions; effective outcomes; fairness	Informal professional contacts; formal board or donor reviews; training	Useful but hard to guarantee among contractors; agency staff training
Public/Client Input	Transparency; openness; reasonable decisions; effective outcomes	Notice; hearings; appeals; media scrutiny	Substantive requirement at planning stage including evaluation decisions; real notice; earlier hearings; ongoing input into monitoring and evaluation
Political Accountability	No corruption; reasonable decisions; effective outcomes	Elections	Not relevant except as check on long-term, widespread corruption
	Particular stakeholder interests	Informal contacts with public/stakeholders; formal mandated review	Inevitable in political system; hierarchical controls and internal agency training will check some harmful contacts
	Efficiency; speed	Informal contacts with executive	Useful mechanism for large systems, especially if hierarchical controls are not decreased

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None of these structures standing alone can create a simple, closed system that furthers all the goals of an accountable contracting system. The case study presented in this Note demonstrates a context of heightened professionalism and public input—a situation that can promote some of the effects of competition and alleviate the need for some of the harmful and duplicative hierarchical and political processes that may exist in a contracting system. Redundant structures can compromise goals of timeliness and frustrate reasonable decisionmaking as well as create the potential for hiding corruption. An accountable system involves streamlined hierarchical controls combined with a professional provider community, trained staff, and a self-revising legal regime that forces compliance with contract terms and mandates public and constituent input.

The application of these processes will vary based on the particular context in which a procurement takes place. For systems that cannot take advantage of an existing professional contractor community, formal structures to promote professionalism and public input would need to exist alongside careful development and monitoring of contract performance standards. For systems that fail to decrease duplicative hierarchical requirements, a more direct political reporting structure can reduce the time needed to receive the necessary approvals.

The ideal typology of accountability mechanisms constructed in this Note provides a framework to structure accountability in government contract systems. A well-structured accountability system will contain many of the formal and informal controls discussed here, depending on the particular context of the goods or services to be contracted. This Note suggests real and potentially pervasive limits to the popular competition model. Contracted systems need to look beyond this easy answer and encourage the “multiple” and “overlapping,” but not unduly duplicative, checks on discretion that can further the decisions, outcomes, and processes needed to provide a complicated government function.