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Broken Buying: Adversarial Legalism and (In)Efficiency in Procurement Law

ABSTRACT. The United States has a government-capacity crisis: it struggles to get things done with speed and at low cost. Government's incapacity has prompted a public reassessment of the country's core institutions and processes. Most relevant legal scholarship discusses problems at the federal level, but this Note is part of a growing trend that shifts the spotlight onto state and local governments. Procurement laws—and more specifically, competitive-bidding laws—that determine how and to whom government contracts are awarded are central to the state- and local-capacity crisis. By tracing the history of the country's competitive-bidding laws, this Note reveals how the broad vision of administrative discretion embodied in the laws at the country's Founding has drifted into the narrow vision that prevails today. This Note argues that two forces are primarily responsible for the drift: adversarial legalism (i.e., complex, formal rules enforceable via litigation meant to check government discretion) and cost-based efficiency (i.e., requirements that government justify its actions in quantifiable, cost-cutting terms). In order to reinvigorate government capacity, both forces must be rolled back through statutory reforms enhancing administrative discretion. In a political moment defined by public frustration about government dysfunction, this Note offers a novel approach to unstick the government's gears.

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INTRODUCTION

Ranking atop the world's most traffic-congested cities,[1] San Francisco has experienced years of growth in demand on its transportation infrastructure without a corresponding increase in capacity.[2] The 1.7-mile Central Subway project, first proposed in 1993, was supposed to provide some relief.[3] Instead, the city stumbled through years of delays and racked up hundreds of millions of dollars in cost overruns.[4] From the outset, the city government could not avoid a highly specialized and high-cost construction process. Located entirely inside the city center of San Francisco, the subway was designed to link the surface-level Third Street Line with the SoMa, Downtown, and Chinatown business districts.[5] Three of the four new stations would be 40 to 120 feet below grade, meaning that a network of tunnels had to be built beneath the city.[6] The preliminary design and environmental permitting requirements, too, would be onerous.[7] But the project fell further behind schedule even after final permits were secured in 2008.[8] By the time contractors completed the Central Subway project in 2022, the project had exceeded initial budget projections by an eye-popping $375 million and dragged on more than three years longer than expected.[9]

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1. Adam Brinklow, *San Francisco Is Fourth Most Congested City in the World, Says Study*, CURBED S.F. (Feb. 20, 2017, 12:06 PM PST), https://sf.curbed.com/2017/2/20/14671660/sf-fourth-worst-traffic-inrix [https://perma.cc/QC6B-YPFS].

2. *See San Francisco Transportation Plan 2040*, S.F. CNTY. TRANSP. AUTH. 16 (Dec. 17, 2013), https://www.sfcta.org/sites/default/files/2019-04/SFTP_final_report.pdf [https://perma.cc/8NJD-DSNH]; Chava Kronenberg, Kaitlyn Connors, Jay Liao & Melissa Whitehouse, *Safe, Reliable and Affordable Transportation: Mayor's Transportation Task Force 2030*, CITY & CNTY. OF S.F. 20-28 (Nov. 25, 2013), https://www.sfmta.com/sites/default/files/reports-and-documents/2017/10/taskforce_annualreport2030v9_1113.pdf [https://perma.cc/5SQ3-TTX9].

3. Ethan N. Elkind, Katie Segal, Ted Lamm & Michael Maroulis, *Getting Back on Track: Policy Solutions to Improve California Rail Transit Projects*, U.C. BERKELEY INST. OF TRANSP. STUD. 49-50 (Jan. 2022), https://escholarship.org/content/qt3xq7q69t/qt3xq7q69t.pdf [https://perma.cc/B3K2-74DF].

4. *Id.* at 53.

5. *Id.* at 49.

6. *Id.*

7. *See id.* at 51 (describing a multiyear, multistep process for obtaining final permits to begin construction).

8. *Id.*

9. Alex Mullaney, *San Francisco Opens Central Subway 4 Years Late and $375M Over Budget*, S.F. STANDARD (Nov. 17, 2022, 6:00 AM), https://sfstandard.com/2022/11/17/san-francisco-central-subway-375-million-over-budget-union-square-chinatown [https://perma.cc/KK6H-E9Y2]. Final costs were almost triple the costs of comparable international projects, and the

Despite the Central Subway's many setbacks, political leaders hailed the project a success. House Representative Nancy Pelosi celebrated the new subway track as "a crucial artery in San Francisco, connecting families to a booming corridor in the heart of the city" and "a strong step forward for justice, making it easier for parents to get to work, children to get to school and small businesses to attract more customers."[10] Then-San Francisco Mayor London Breed called it "a transformative project . . . and a critical bridge to connect our neighborhoods and bring people together."[11] But the reality of the subway's construction tells a more complicated story.

Delays and cost overruns were not just a matter of mismanagement or bad luck. A study commissioned by the State of California found that they could be traced to a systemic issue: San Francisco's statutory obligation to select the lowest-priced bidder, commonly known as low-bid, or lowest-bidder, procurement.[12] The low-bid selection method is one way government can conduct public procurement, which is its process for acquiring the goods and services it needs to keep society running. Subways are one form of public procurement, but government procures so much more—schoolhouse desks, computers, medical equipment, buildings, submarines, and vaccine research. Although thought to ensure fairness and cost savings,[13] the low-bid method of procurement sometimes produces the opposite effect. Recent research suggests the method can contribute to delays, hidden costs, bid-rigging, and poor results in infrastructure projects nationwide.[14]

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duration of construction was around triple the duration of comparable projects abroad. Elkind et al., *supra* note 3, at 51.

10. *SFMTA T-Third Opens in New Central Subway*, Mass Transit (Jan. 9, 2023), https://www.masstransitmag.com/rail/press-release/21291851/san-francisco-municipal-transportation-agency-sfmta-sfmta-t-third-opens-in-new-central-subway [https://perma.cc/6Q8T-FKV4].

11. *Id.*

12. Cal. Pub. Cont. Code § 20103.8 (West 2025); S.F., Cal., Admin. Code art. 1, §§ 6.6, 6.20 (2024); Elkind et al., *supra* note 3, at 52 (describing how a "mismatch between the project's low-bid contracting . . . and complex, high-cost station excavation and systems . . . result[ed] in an arrangement ripe for delays and additional costs").

13. *See, e.g.*, *Highway Policy-Procurement*, Am. Rd. & Transp. Builders Ass'n, https://www.artba.org/advocacy/policy-positions/highway-policy/procurement [https://perma.cc/P2AE-7YMQ].

14. *See, e.g.*, Eric Goldwyn, Alon Levy, Elif Ensari & Marco Chitti, *Transit Costs Project: Executive Summary*, N.Y.U. Marron Inst. of Urb. Mgmt. 21-26 (2017), https://transitcosts.com/wp-content/uploads/TCP_Executive_Summary.pdf [https://perma.cc/P5J3-4KZG] (cataloging procurement problems, including low-bid procurement, that add to the costs of infrastructure construction in the United States); Greg Hadley, *USSF's Top Buyer to Industry: Stop Low-Bidding Now*, Air & Space Forces Mag. (Feb. 23, 2024), https://www.

The Central Subway project is no isolated government-procurement catastrophe. Similar problems plague government attempts to spend money all over the country, caused in part by similar legal obligations to select the cheapest bidder.[15] These problems contribute to what academics and political commentators refer to as the "crisis of state capacity."[16] The crisis affects nearly all government operations—from building subways to providing clean water and public housing.[17] The solution has often been to throw money at the problem. For instance, the Biden Administration allocated more than $1.8 trillion in new infrastructure spending.[18] But the greater expenditure was accompanied by marginal changes in *how* that money was spent, and it failed to alter the widespread perception that government cannot get things done. The perception of government incapacity may have, at least in part, fueled the "red" wave in the 2024 U.S. presidential election.[19] In one telling, an electorate frustrated by government inefficiency

airandspaceforces.com/space-acquisition-czar-industry-low-bidding [https://perma.cc/RS6K-QYZU] ("The Space Force's acquisition boss . . . argu[ed] . . . that underbidding eventually forces the Space Force to 'rob our future to pay for the past.'"); *infra* notes 113-119 and accompanying text.

15. The California High-Speed Rail, a multibillion-dollar project meant to connect cities across California, has been beset with significant delays and has run shockingly over budget, partly because it followed low-bid procurement. *See* Ralph Vartabedian, *A 'Low-Cost' Plan for California Bullet Train Brings $800 Million in Overruns, Big Delays*, L.A. Times (Feb. 22, 2021, 5:00 AM PT), https://www.latimes.com/california/story/2021-02-22/california-bullet-train-dragados-design-changes [https://perma.cc/P2AY-KBTQ]. Similar delays occur around the country. *See, e.g.*, Ed. Bd., *Lowest Bid Isn't Always the Best Value—Look at Mount Rose*, York Dispatch (Feb. 3, 2022, 1:28 PM ET), https://www.yorkdispatch.com/story/opinion/editorials/2022/02/03/lowest-bid-isnt-always-best-value-look-mount-rose/9240606002 [https://perma.cc/CG7N-F7JS]; Wendy L. Pfaffenbach, *'Slow' Laws, the Big Dig Delay Court Construction*, Mass. Laws. Wkly. (Mar. 6, 2000), https://masslawyersweekly.com/2000/03/06/slow-laws-the-big-dig-delay-court-construction [https://perma.cc/AT28-LMN8].

16. *See* David Schleicher & Nicholas Bagley, *The* State *Capacity Crisis*, 66 B.C. L. Rev. 2301, 2306 (2025).

17. *See generally* Ezra Klein & Derek Thompson, Abundance (2025) (arguing that outdated rules and regulations have undercut the government's capacity to build infrastructure, housing, and clean energy); Marc J. Dunkelman, Why Nothing Works: Who Killed Progress—and How We Bring It Back (2025) (describing how progressive distrust of centralized authority has weakened public capacity to execute large-scale projects).

18. *See Record U.S. Infrastructure Spending Is Colliding with Higher Construction Costs and Other Hurdles*, S&P Glob. (May 14, 2024, 1:25 PM EDT), https://www.spglobal.com/ratings/en/regulatory/article/240514-record-u-s-infrastructure-spending-is-colliding-with-higher-construction-costs-and-other-hurdles-s13104338 [https://perma.cc/63RC-N4HN].

19. *See* Noah Smith, *Blue States Don't Build. Red States Do*, Substack (Mar. 25, 2025), https://www.noahpinion.blog/p/blue-states-dont-build-red-states [https://perma.cc/7RLA-HD4X] ("Degrowth discredits progressive policies at the national level, helping people like Donald Trump win the presidency and Congress.").

was looking for a candidate with a solution.[20] And Donald Trump, with his newfangled Department of Government Efficiency, promised to "conduct[] a complete financial and performance audit of the entire federal government" to eliminate "fraud and improper payments" that arguably created the inefficiencies.[21] But despite the political rhetoric, what is needed to correct government efficiency may be something different altogether: a reform of how the nation's public-procurement laws are drafted, interpreted, and applied, particularly at the state and local level.

Most contributors studying the government-capacity crisis—and to be sure, politicians themselves—focus on problems at the federal level.[22] Upon taking office, the Trump Administration launched a federal-employee firing spree that purported to eliminate government bloat.[23] Soon after, it announced plans to overhaul the federal government's public-procurement guidebooks—the Federal Acquisition Regulation (FAR) and other agency supplements—to "create the

20. Although I did not encounter studies linking perceptions of government inefficiency to electoral outcomes, the high prevalence of these views among the American population indicates it almost certainly played a meaningful role. *See Americans' Views of Government's Role: Persistent Divisions and Areas of Agreement*, Pew Rsch. Ctr. (June 24, 2024), https://www.pewresearch.org/politics/2024/06/24/governments-scope-efficiency-and-role-in-regulating-business/#views-on-the-efficiency-of-government [https://perma.cc/7554-4VWX] (reporting that fifty-six percent of Americans found government to be "almost always wasteful and inefficient" in 2024).

21. Helen Coster & Gram Slattery, *Trump Says He Will Tap Musk to Lead Government Efficiency Commission If Elected*, Reuters (Sep. 6, 2024, 3:51 AM EDT), https://www.reuters.com/world/us/trump-adopt-musks-proposal-government-efficiency-commission-wsj-reports-2024-09-05 [https://perma.cc/M2MN-8UTN]. On Inauguration Day, President Trump acted on his campaign promise to create the Department of Government Efficiency (DOGE). *See* Establishing and Implementing the President's "Department of Government Efficiency," Exec. Order No. 14,158, 90 Fed. Reg. 8441, 8441 (Jan. 20, 2025); Implementing the President's "Department of Government Efficiency" Workforce Optimization Initiative, Exec. Order No. 14,120, 90 Fed. Reg. 9669, 9669-70 (Feb. 11, 2025). The legality of DOGE's work is another matter, and it has been challenged on numerous grounds for overstepping statutory and constitutional bounds. *See, e.g.*, Does 1-26 v. Musk, 771 F. Supp. 3d 637, 661-78 (D. Md. 2025).

22. *See* Schleicher & Bagley, *supra* note 16, at 2305-06. For examples of this focus on the government-capacity crisis at the federal level, see Brink Lindsey, *State Capacity: What Is It, How We Lost It, and How to Get It Back*, Niskanen Ctr. 2-6 (Nov. 2021), https://www.niskanencenter.org/wp-content/uploads/2021/11/brinkpaper.pdf [https://perma.cc/SD5D-AH6N]; Richard H. Pildes, *The Neglected Value of Effective Government*, 2023 U. Chi. Legal F. 185, 187-88; and K. Sabeel Rahman, *Building the Government We Need: A Framework for Democratic State Capacity*, Roosevelt Inst. 12-13 (June 6, 2024), https://rooseveltinstitute.org/wp-content/uploads/2024/05/RI_Building-the-Government-We-Need_Report_062024.pdf [https://perma.cc/4UPV-W29B].

23. *See* Elena Shao & Ashley Wu, *The Federal Work Force Cuts So Far, Agency by Agency*, N.Y. Times (May 12, 2025), https://www.nytimes.com/interactive/2025/03/28/us/politics/trump-doge-federal-job-cuts.html [https://perma.cc/ZH36-H7GU].

most agile, effective, and efficient procurement system possible."[24] The Administration's stated plan for FAR reform is to slim down the more than "2,000 pages of regulations" by eliminating provisions not required by statute.[25] It is fair to question whether trimming down the FAR will solve the biggest problems with public procurement today. But even if such trimming could, the FAR assists only federal agencies in achieving procurement objectives. Problems at the state and local level would be left untouched.[26]

The irony of a federal-government-centric approach is that arguably the most significant government inefficiency problems exist at the state and local level. In fact, the federal government itself directly allocates only part of discretionary federal funds and issues substantial grants to states and local governments.[27] Most procurement spending ($1.3 trillion of the nation's total $2 trillion) is assigned by state and local governments.[28] For the most part, state and local law determine how that money goes out the door. David Schleicher and other scholars have long called for greater attention to state and local governments for their significant, often underappreciated roles in government

24. Restoring Common Sense to Federal Procurement, Exec. Order No. 14,275, 90 Fed. Reg. 16447, 16447 (Apr. 15, 2025).

25. *See id.*

26. *See* Christopher Yukins, *The Revolutionary FAR Overhaul: A First Step*, PUB. PROCUREMENT INT'L (May 3, 2025), https://publicprocurementinternational.com/2025/05/03/the-revolutionary-far-overhaul-a-first-step [https://perma.cc/V52G-SMEA] (noting that FAR is an "'operating manual' for the federal procurement community").

27. *See* Moraa Ogendi & David Wessel, *What Is Discretionary Spending in the Federal Budget?*, BROOKINGS INST. (July 11, 2023), https://www.brookings.edu/articles/what-is-discretionary-spending-in-the-federal-budget [https://perma.cc/5T88-7GBQ].

28. Brian J. Baldus & Lindle Hatton, *U.S. Chief Procurement Officers' Perspectives on Public Procurement*, 26 J. PURCHASING & SUPPLY MGMT. art. no. 100538, at 1 (2020).

capacity.[29] Despite their significance, state and local law has been sidelined in conversations about public procurement.[30]

Another problem is that there is little consensus about how or why U.S. public-procurement law contributes to government incapacity. Scholarship is divided on the question of how much discretion to leave procurement officers. Some scholars champion discretion-curtailing laws as foundational to the democratic procurement process, but others contend that discretion-enhancing laws are necessary for successful procurement outcomes.[31] Economic research indicates that stricter laws in high-income countries like the United States may worsen procurement outcomes.[32] But that research has not translated into specific proposals for reform to procurement law. As Ezra Klein and Derek Thompson put it in their recent hit book, *Abundance*, "What is . . . missing . . . is a clearly articulated vision of the future and how it differs from the present."[33] This Note takes on that task.

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29. *See* David Schleicher, *Federalism and State Democracy*, 95 Tex. L. Rev. 763, 763 (2017); Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 Colum. L. Rev. 215, 220 (2000) ("[M]ost governing in America—including almost everything that really matters to people in their daily lives—is still done by state officials."); Daniel J. Hopkins, The Increasingly United States: How and Why American Political Behavior Nationalized 4-7 (2018); Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 Yale L.J. 954, 975-78 (2019); Zachary Liscow, Will Nober & Cailin Slattery, *Procurement and Infrastructure Costs* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31705, 2023), https://www.nber.org/system/files/working_papers/w31705/w31705.pdf [https://perma.cc/3TMQ-F9EW]; Lisa R. Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 Harv. L. & Pol'y Rev. 15, 140 (2018). More recently, the *Yale Law Journal* dedicated a special issue to state and local governance in part because "[d]espite its underrepresentation in discourse, [it] touches the lives of every individual in this country." *See* Dena Shata, *Introduction to the Special Issue on State and Local Governance*, 133 Yale L.J. 2521, 2521 (2024).

30. *See* Schleicher & Bagley, *supra* note 16, at 2305-06.

31. Scholars like Christopher R. Yukins argue that the United States's complex regulations for procurement "reinfor[ce] democratic structures" by making rules clearer for bidders. *See* Christopher R. Yukins, *The U.S. Federal Procurement System: An Introduction*, 2017 Procurement L.J. 69, 75. On the other hand, Steven Kelman suggests that "procurement officials should be encouraged to use more discretionary standards." *See* Jerry Mashaw, *The Fear of Discretion in Government Procurement*, 8 Yale J. on Regul. 511, 515 (1991) (reviewing Steven Kelman, Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance (1990)).

32. *See* Erica Bosio, Simeon Djankov, Edward Glaeser & Andrei Shleifer, *Public Procurement in Law and Practice*, 112 Am. Econ. Rev. 1091, 1093 (2022) (finding that "[c]onstraints on bureaucratic freedom . . . harm [procurement] outcomes when [public-sector capacity] is high," as in the United States). *See generally* Liscow et al., *supra* note 29 (finding that procurement cost is driven by both (1) the capacity of the Department of Transportation procuring a project and (2) the lack of competition in the market for government construction contracts).

33. Klein & Thompson, *supra* note 17, at 15.

I argue the government-capacity crisis, at least in procurement law, is the result of two forces: adversarial legalism and cost-based notions of efficiency. Adversarial legalism, a term proposed by Robert A. Kagan, refers to the distinctively American system of party- and lawyer-dominated legal contestation.[34] Complex formal rules operate within the system to channel action.[35] Litigation, or its mere threat, exerts an additional and constant influence that further concerts behavior. This structure pressures administrators to comply with strict interpretations of laws, even when doing so produces suboptimal results or may not be demanded by the laws themselves. For example, administrators may feel pressure to award procurement contracts to the cheapest bidder even when laws permit awards to a higher-priced best-value bidder. The second factor, a commitment to a cost-based version of efficiency, affects how judges and lawyers read legal rules and administrators make decisions.[36] Courts may sometimes demand administrators justify their actions in terms of cost savings, regardless of whether the laws they are executing were written to emphasize cost considerations. This application may frustrate the purpose of the underlying statutes, such as when an emphasis on cost cutting fosters corruption, impedes quality, or, ironically, leads to higher costs in the long run. Emphasis on cost removes nuanced decisions from the hands of those who have the greatest comparative competence to make them (e.g., procurement officers). The system also has a baked-in bias for readily quantifiable cost savings while neglecting benefits that are harder to quantify and that therefore may be more difficult to defend in court.

Government capacity cannot exist without well-defined guardrails on adversarial legalism and cost-based efficiency. Both factors result from limited statutory reservations for administrative discretion. Strict textualist modes of interpretations combined with widespread fears that government discretion will invite corruption and inefficiency, compound the restrictiveness of the statutes. Specific statutory reforms, especially at the state and local level, must clarify that measured administrative discretion is an intentional feature—not a bug—of good governance. One place to start is replacing the lowest-bidder language in competitive-bidding statutes, which often operates as one of the strictest checks on procurement officials' decision-making. Doing so will unlock the opportunity

34. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE UNIQUELY AMERICAN WAY OF LAW 3 (2d ed. 2019).

35. *Id.*

36. *Cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340 (1990) (explaining the law-and-economics—that is, the efficiency-minded—support for textualist modes of interpretation that "emphasiz[e] the statutory words chosen by the legislature, rather than (what seem to be) more abstract and judicially malleable interpretive sources").

for the government's enormous procurement capacity to exert a greater active influence on public life.

This Note begins with an overview of how procurement law operates in practice. Part I introduces the core debate that has shaped the field: how much discretion the law should reserve for procurement administrators in the solicitation and award of public contracts. The Part then weighs in on this debate, arguing that administrative discretion has become too narrow and should be broadened in scope. I detail the problems limited discretion creates to reveal why state and local government procurement law needs urgent reform.

Part II traces the historical roots of public-procurement law. The Part starts with the nation's first competitive-bidding laws, which set foundational standards for transparency and accountability in public procurement. It recounts how these laws originated during the American Revolution and traces their diffusion throughout state and local governments in the decades that followed. Rather than emphasizing bid amount alone, government administrators and courts understood the laws to require decision-making in the public interest.

Part III identifies how government-procurement law has evolved into its current form. It traces key cases in New York state courts that signify a nationwide evolution in procurement law. The evolved interpretation and application of public-procurement law, I argue, is part of a more general process of legal drift—the gradual change in how laws are interpreted and applied over time. The Part proposes that public procurement today is characterized by an entrenchment in adversarial legalism and a misguided commitment to efficiency—which often turns out to be inefficiency in practice.

Part IV recommends how policymakers and judges might expand government capacity through the law. The Part proposes (1) reinterpreting public-procurement laws in accordance with their original intent; (2) broadening statutory authorization for the exercise of government discretion; (3) narrowing the availability of judicial review of government procurement decisions; and (4) tailoring judicial remedies to foster the procurement process, not stall it. Each of these proposals can be accomplished across every level of government. But state and local governments, as the primary disbursers of procurement funds, must drive this change. The most important starting point is the American Bar Association's (ABA) Model Procurement Code,[37] which is currently undergoing the most sweeping revision since its adoption in 1979.

Many American public-procurement projects, especially for major public works, come at a high cost, take a long time to complete, and perform poorly in the long run.[38] A different approach is needed to make government work again.

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37. *See* MODEL PROCUREMENT CODE FOR STATE & LOC. GOV'TS (A.B.A. 2000).

38. *See* Goldwyn et al., *supra* note 14, at 7-9; Liscow et al., *supra* note 29, at 2.

This pivot requires returning to the original conception of the competitive procurement system—one that empowers all levels of government, but especially state and local governments, to act in the public interest.

I. THE GOVERNMENT-CAPACITY CRISIS: A PROCUREMENT PROBLEM

This Part introduces the basics of public procurement in the United States, including the foundational competitive-bidding system and its variants. I argue that the features of the procurement system are the outcomes of normative decisions that have important ramifications for government capacity. The primary debate concerns how much discretion to extend to procurement administrators, with one camp arguing that high levels of administrative discretion risk corrupting government contracting and another suggesting that discretion is a necessary component of a well-functioning system. This Part's survey of the latest engineering and economic research signals that strict restrictions on discretion have resulted in some of the very consequences the competitive-bidding system was originally designed to prevent: collusion, fraud, and inefficiency. This finding calls for a return to broader administrative discretion and the original conception of the competitive-procurement system.

A. A Primer on the Public-Procurement Process

Public procurement is the process by which the government solicits and awards contracts to acquire the public goods and services that keep communities running. In the United States, thousands of specialized administrators execute this process under a byzantine web of laws and regulations that span all levels of government.[39] Federal procurement procedures spill across nearly 2,000 pages of the FAR and thousands more pages of agency-specific supplements.[40] The FAR and its supplements govern every detail of federal procurement contracts, down to the 12-point font size used on project proposals.[41] States have adopted their own acquisition regulations which, while perhaps shorter than the FAR, are similarly detailed.[42] Local governments, too, award contracts under detailed

39. *See* Yukins, *supra* note 31, at 69, 73-74.

40. FAR 1-53 (2025).

41. *Id.* 2452.215-70.

42. *See generally* DANIELLE M. CONWAY, STATE AND LOCAL GOVERNMENT PROCUREMENT 1-30 (2012) (providing a high-level overview of state and local procurement).

rules passed by counties or municipalities, many of which date back to the nineteenth century.[43]

Viewing the public-procurement system through the lens of a principal-agent framework illuminates its functioning.[44] In this view, the principal (e.g., taxpayers, the executive branch, or Congress) delegates authority to an agent (e.g., a procurement official or agency) who solicits bids, awards contracts, and oversees execution. At each stage of this process, laws and regulations align agent action with the principal's goals. Yet the checks are imperfect and tradeoffs are embedded in the system's structure.[45] Compliance with the vast body of procurement law consumes administrative, judicial, and private resources. Conflicts of interest may also arise, leading agents to deviate from the principal's intent. Such tradeoffs (i.e., between control and flexibility, oversight and efficiency) are fundamentally political choices that determine how and at what cost the government delivers goods and services and who benefits from the public spending.

The primary method for directing procuring-agent activity has historically been open and competitive bidding.[46] Several features distinguish competitive procurement. For one, a core feature of competitive procurement is that contracts must be advertised publicly and open to any qualified contractor.[47] Each bid must be evaluated according to the same standards as every other bid.[48] And

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43. *See generally id.* (noting the history of local-government contracts).

44. *See generally* Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 PUB. CONT. L.J. 63 (2010) (advocating for assessing a public-procurement system through the principal-agent framework used frequently in economics and other social sciences).

45. *See* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 1, 7 (2002); Daniel I. Gordon, *Constructing a Bid Protest Process: The Choices that Every Procurement Challenge System Must Make*, 35 PUB. CONT. L.J. 427, 430-32 (2006) ("Any protest system serves multiple purposes, and there is inevitably conflict among them. These competing goals, like the competing objectives or 'desiderata' of a procurement system overall, lead to trade-offs, since one or more goals can be met only at the expense of others.").

46. 1 JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 5 (3d ed. 2012). *But see* Christopher L. Atkinson, Clifford McCue & Eric Pier, *Full and Open Competition in Public Procurement: A Noble Lie*, 17 INT'L J. PROCUREMENT MGMT. 204, 204 (2023) ("[C]ompetitive contracting by the US federal government is more an ideal than actual practice.").

47. *See* CONWAY, *supra* note 42, at 41-45 (describing the central requirement for competition in state and local public procurement); JOHN CIBINIC, JR., RALPH C. NASH JR., CHRISTOPHER R. YUKINS & NATHANIEL E. CASTELLANO, FORMATION OF GOVERNMENT CONTRACTS 3-16 to -19 (5th ed. 2023) (describing the concept of "[f]ull and [o]pen [c]ompetition" at the federal level).

48. *See* CONWAY, *supra* note 42, at 177-80 (describing bidder-evaluation methods in state and local procurement); CIBINIC ET AL., *supra* note 47, at 5-6, 5-74 to -76 (describing the centrality of evaluating bidders according to consistent standards in public-procurement law).

the government must select the bid that best fulfills the stated project objectives without undue preference or favor, sometimes based on bid price alone.[49] When the government deviates from the mandated process, disappointed bidders who did not receive the contract may file a bid protest to challenge the award.[50] At the federal level, protests are heard by the Government Accountability Office (GAO) or the Court of Federal Claims;[51] at the state and local levels, state courts or administrative bodies play a similar role.[52] Across the board, protests pause the procurement process until their merits are resolved. While some protests, like Amazon and Microsoft's battle over a multibillion-dollar National Security Administration cloud-computing contract, receive national attention, thousands more unfold quietly, delaying projects and tying up billions in public funds.[53]

A common misconception is that competitive procurement exists to ensure the government pays the lowest price for its acquisitions. By pitting bidders against one another and enforcing rules through protests, the system intuitively seems designed to drive down costs. But cost reduction was never the model's primary objective.[54] Its origins instead lie in preventing favoritism, fraud, and abuse by government administrators or private contractors, in addition to ensuring the government pays a fair price.[55] A number of state courts around the

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49. *See* CONWAY, *supra* note 42, at 177-80 ("Generally, the evaluation of bid price is the primary—if not only—factor considered in determining a procurement award."); CIBINIC ET AL., *supra* note 47, at 5-74 to -75 (providing the standard federal procedures and considerations for bidder evaluation).

50. *See* Gordon, *supra* note 45, at 428-29.

51. *See* FAR 1352.233-71(a) (2025).

52. *See* CONWAY, *supra* note 42, at 201-22.

53. Aaron Gregg, *NSA Quietly Awards $10 Billion Cloud Contract to Amazon, Drawing Protest from Microsoft*, WASH. POST (Aug. 11, 2021), https://www.washingtonpost.com/business/2021/08/11/amazon-nsa-contract [https://perma.cc/7V8T-Q9QG]; *see also* Sandra Erwin, *Space Development Agency Restores L3Harris, SpaceX Contracts Following Protest*, SPACE NEWS (Jan. 7, 2021), https://spacenews.com/spacex-and-l3harris-win-again-space-development-agency-contracts-to-build-missile-warning-satellites [https://perma.cc/7JYP-KA7C] (reporting awards of $149 million and $193.5 million contracts to SpaceX and L3Harris, respectively, to build missile-detection satellites); U.S. GOV'T ACCOUNTABILITY OFF., GAO-25-108652, BID PROTESTS: KEY FEATURES AND TRENDS 1 (2025) (showing that the Government Accountability Office had received between 1,658 and 2,789 bid protests every year between 2015 and 2024).

54. *See* HENRY A. COHEN, PUBLIC CONSTRUCTION CONTRACTS AND THE LAW 1 (1961).

55. *See id.* ("The double objective of competitive bidding is to stimulate competition and to prevent favoritism and fraud when contracts are awarded."). As a case in point, Section 100 of the California Public Contract Code defines the purpose of competitive-bidding requirements as:

> (a) To clarify the law with respect to competitive bidding requirements.

country have underscored that the competitive-bidding system exists to maintain integrity in government contracting and stimulate market competition, objectives deemed more important than saving money.[56]

Yet the competitive-procurement framework has undergone a gradual drift away from its original purpose, sometimes contributing to the very inefficiencies and corruption it was built to prevent.[57] The most consequential distortion

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> (b) To ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds.
> (c) To provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices.
> (d) To eliminate favoritism, fraud, and corruption in the awarding of public contracts.

CAL. PUB. CONT. CODE § 100 (West 2025).

56. *See, e.g.*, Konica Bus. Machs. U.S.A., Inc. v. Regents of Univ. of Calif., 253 Cal. Rptr. 591, 595 (Ct. App. 1988) ("Because of the potential for abuse arising from deviations from strict adherence to [competitive-bidding] standards . . . the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance with bidding requirements will be set aside. This preventative approach is applied even where it is certain there was in fact no corruption or adverse effect upon the bidding process, and the deviations would save the entity money." (citations omitted)); Township of Hillside v. Sternin, 136 A.2d 265, 270 (N.J. 1957) ("In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way."); Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931) (appearing to affirm the appellant's argument that "the object and purpose of competitive bidding statutes is to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the county at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the county, by affording an opportunity for an exact comparison of bids").

57. Legal drift, to my knowledge, has not before been identified in procurement law, though it has been analyzed in a variety of other settings. *See, e.g.*, RICHARD L. KAGAN, LAWSUITS AND LITIGANTS IN CASTILE, 1500-1700, at xxii-xxiii (1981) (observing the shift from a litigation-centric judicial system to one with a lesser role for the courts); STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 1 (2012) ("Like continental drift, legal drift happens over centuries and millennia, often without a single cataclysm or public recognition of the shift."). Laura Nader provides a foundational understanding of "legal drift," which follows a related usage in linguistics:

> The concept of drift draws attention to the unconscious selection of specific complaining and disputing mechanisms by individuals participating in legal procedures. The consequence of their selection is the accumulation of certain disputing or complaining processes in a particular evolutionary direction. These unconsciously generated cumulative movements may be considered as separate from and yet equally as important as any consciously created ones that might be attributed to legal engineering or legal development schemes.

centers on the "lowest-bidder" requirement, which Congress first codified for certain types of contracts during the early nineteenth century.[58] This requirement was envisioned as a check that would prevent government from entering contracts not representing the best deal for the price.[59] Similar bidding stipulations spread to the states soon after. New York, for instance, adopted low-bid requirements in 1847.[60] By the turn of the twentieth century, states and localities around the country had adopted some version of the laws.[61] Terms such as "responsible" and "responsive" were also appended to the low-bid requirement to help ensure a minimum quality.[62] Courts originally interpreted the low-bid laws to permit, or even mandate, administrators to select bidders on factors besides bid amount (e.g., product quality, capability, or contractor responsibility).[63] Doing so helped the government enter projects worth their cost. But the focus has since shifted closer to price alone.[64]

Today, most states and local governments still have some version of the lowest-bidder requirement.[65] Although the federal government possesses broad

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Laura Nader, *From Disputing to Complaining*, *in* TOWARD A GENERAL THEORY OF SOCIAL CONTROL: FUNDAMENTALS 71, 71-72 (Donald Black ed., 1984).

58. *See, e.g.*, Act of May 18, 1842, ch. 29, § 15, 5 Stat. 475; H.R. 47, 13th Cong. § 1 (1815); *see also* 1 NAGLE, *supra* note 46, at 5 (discussing Congress's preference for the "lowest bidder" system in the early days of the country). Note that the terms "low bid" and "lowest bidder" are used interchangeably in legal practice and scholarship and this Note.

59. For a general overview of the low-bid concept, see CONWAY, *supra* note 42, at 177-80; CIBINIC ET AL., *supra* note 47, at 5-74 to -75; and Sidney Scott, III, Keith R. Molenaar, Douglas D. Gransberg & Nancy C. Smith, *NCHRP Report 561: Best-Value Procurement Methods for Highway Construction Projects*, TRANSP. RSCH. BD. 7 (2006), https://www.colorado.edu/tcm/sites/default/files/attached-files/nchrp_rpt_561_0.pdf [https://perma.cc/U6RS-WEBM].

60. *See* Act of May 12, 1847, ch. 278, 1847 N.Y. Laws 314; *see also* Bennett Liebman, *What Are You Going to Do About It? Ethics and Corruption Issues in the New York State Constitution*, ALB. L. SCH. 11-14 (Apr. 2017), https://www.albanylaw.edu/sites/default/files/centers/government-law-center/about/publications/Documents/Liebman-Ethics-in-NY-Const-5.1.pdf [https://perma.cc/4ZKJ-63WV] (discussing the development of the New York low-bid requirement).

61. *See* 10 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 29:72 (3d ed. 1950) (cataloging low-bid requirements).

62. *See* CIBINIC ET AL., *supra* note 47, at 4-5 to -33 (providing an authoritative description of how "responsible" functions in the lowest-bidder context).

63. *See* COHEN, *supra* note 54, at 80 ("The meaning of the term is not confined to the lowest bidder whose pecuniary ability is the best, but rather to the bidder who is most likely with regard to skill, judgment, and integrity as well as sufficient financial resources, to do faithful, conscientious work and promptly fulfill the contract according to its letter and spirit.").

64. *See* Douglas D. Gransberg, *Does Low Bid Award Facilitate Wrongdoing? US Implications of Quebec's Charbonneau Commission Report*, 12 J. LEGAL AFFS. & DISP. RESOL. ENG'G & CONSTR. art no. 03719004, at 2 (2019).

65. *See, e.g.*, *infra* note 181 and accompanying text.

exemptions from the low-bid requirement,[66] in 2023 it disbursed more than $1.1 trillion to state and local governments, which are bound by their own laws.[67] That means, for the more than $4 trillion in annual funds spent by state and local governments,[68] most contracts are awarded to the lowest bidder. Bids may be distinguishable by their quality, risk level, or some other feature, but so long as they comply with the criteria in the project solicitation, low-bid laws are read to require selection of the lowest-cost bidder. The only perceived alternative if the government deems the lowest-cost bidder inadequate is to toss out all the bids and restart the process anew. This strict process forces governments to draft project specifications with excruciating detail before publishing a bid solicitation: a formidable, if not unachievable, task.

The downsides to this approach are easy to see. Take car shopping as an example. You, a buyer, might have a brand, model, year, and color already in mind. The criteria provide a useful starting point. But you will want to do more investigation before signing on the dotted line. You might ask about the car's accident history, service records, or design features. Imagine instead that you can only tell the dealer your initial criteria and must accept whichever car is offered at the lowest price. How would you know whether you were buying a lemon or bypassing better options? You would not. The same goes for many kinds of public procurement, endeavors far more complicated than car shopping.

In response to the strict low-bid model's downsides, a few state and local governments have begun a push for express statutory language that authorizes bidder-selection criteria beyond price.[69] For simplicity, I refer to these

66. *See* U.S. Gov't Accountability Off., GAO-14-584, Defense Contracting: Factors DOD Considers When Choosing Best Value Processes Are Consistent with Guidance for Selected Acquisitions 9 (2014).

67. *See How Much Funding Do State and Local Governments Receive from Federal Government?*, Peter G. Peterson Found. (Apr. 11, 2024), https://www.pgpf.org/blog/2024/04/how-much-funding-do-state-and-local-governments-receive-from-the-federal-government [https://perma.cc/WZ4Z-XD3A]. Although a large portion of the $1.1 trillion in federal funds was allocated toward health expenditures, which made up a far greater percentage of grants than infrastructure, those contracts too must be awarded according to state procurement rules. *See* Moira Forbes & Sean Dunbar, *Understanding Medicaid Managed Care Procurement Practices Across States*, Medicaid & CHIP Payment & Access Comm'n 17 (Apr. 8, 2022), https://www.macpac.gov/wp-content/uploads/2022/04/Understanding-Medicaid-Managed-Care-Procurement.pdf [https://perma.cc/7PRA-3Y5Y] (noting that states "take different approaches to how they conduct [health] procurements").

68. *State and Local Government Current Expenditures*, Fed. Rsrv. Bank St. Louis (Sep. 25, 2025), https://fred.stlouisfed.org/series/SLEXPND [https://perma.cc/AXA7-DTHW].

69. *See* Paul S. Chinowsky & Gordon A. Kingsley, An Analysis of Issues Pertaining to Qualifications-Based Selection 37 (2009) ("[P]rojects incorporating the [Qualification-Based Selection] procurement method outperform the national average in traditional

procurement modes under the umbrella of "best-value." Some of these laws mandate that procuring agents award contracts to the bidder deemed "most advantageous" to the state.[70] Others authorize government to award contracts to bidders who fail to comply with procedural requirements if acceptance is in the "best interest of the [public]."[71] It is notable that these bidding methods do not operate much differently from how the low-bid methods were applied in the nineteenth and early twentieth centuries.[72] The new provisions rewind legal drift by expressly authorizing administrators to evaluate factors like structural integrity, disruption to the public, construction timelines, and contractor qualifications. Extensive research since the early 2000s demonstrates that, compared to strict low-bid procurement, best-value bidding delivers improved outcomes.[73] Among the benefits are higher predictability, shorter timelines, lower costs, smaller long-term maintenance expenses, better quality, and improved labor conditions.[74]

Some government initiatives have gone a step further and envision the procurement process as fulfilling economic- and social-development goals.[75] I refer to these initiatives as best-value-*plus* systems. They emerged in the twentieth century in response to deindustrialization and to channel project funds directly into local communities. The policies expanded government's role in job creation,

measures and exhibit positive results in emerging areas."); *Understanding the Public Construction Bidding Process*, LEAGUE OF CAL. CITIES 15-17 (July 12, 2011), https://www.cacities.org/getattachment/ce501b8d-ff7e-4fcf-a093-96accb7b0857/locc-webinar-public-bidding-process-paper.aspx [https://perma.cc/F77L-8RCK]; *cf. Best Practices Best Value Selections*, ASSOCIATED GEN. CONTRACTORS OF AM. 5 (2008), https://www.agc.org/sites/default/files/Project%20Delivery%20-%20Best%20Value%20Selection.pdf [https://perma.cc/RE92-MNX5] (recommending best practices for securing value using evaluation based on criteria other than price).

70. *E.g.*, GA. CODE ANN. § 50-5-67(a)(6) (2025).

71. *E.g.*, HAW. REV. STAT. ANN. § 103D-302 (LexisNexis 2025).

72. *See infra* Part II.

73. *See infra* notes 112-119 and accompanying text.

74. *Id.*

75. *See* Scott Cummings & Madeline Janis, *Reclaiming the Progressive Potential of Local Procurement*, LPE BLOG (Jan. 10, 2024), https://lpeproject.org/blog/reclaiming-the-progressive-potential-of-local-procurement [https://perma.cc/YBT5-UWBS]; Brett Theodos, Sophie McManus & Tomi Rajninger, *Removing Barriers to Participation in Local and State Government Procurement and Contracting for Entrepreneurs of Color*, URB. INST. 1-3 (May 2024), https://www.urban.org/sites/default/files/2024-04/Removing%20Barriers%20to%20Participation%20in%20Local%20and%20State%20Government%20Procurement%20and%20Contracting%20for%20Entrepreneurs%20of%20Color.pdf [https://perma.cc/R3JU-XG67].

redressing historical inequalities and accomplishing a variety of other objectives.[76]

Without uniform guideposts, thousands of separate state and local governments may struggle to reform their outdated laws in an expedient or uniform fashion. Indeed, recent state and local government procurement-law reform efforts have progressed gradually. The much-needed reform of the ABA Model Procurement Code currently underway presents a valuable opportunity to correct many lingering problems in state and local public procurement.[77] The latest version of the ABA Model Procurement Code was released in 2000, but it is embedded with the very problems that limit state and local capacity.[78] A uniform Code that adequately addresses these issues could speed reforms and discourage courts from reading expansive grants of discretion as demanding selection of the lowest bidder.

B. The Debate: What's Wrong with Public Procurement?

Public-procurement law determines nearly every aspect of public-good and service acquisition. But despite public-procurement law's importance, there is persistent disagreement over its fundamental purpose. This disagreement is preoccupied with how much administrative discretion is too much. One side, the procedural-clarity camp, argues that stricter procurement rules will reinforce democracy; the other argues that discretionary standards will improve project

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76. *See* Scott L. Cummings & Madeline Janis, *Preemption by Procurement*, 70 UCLA L. Rev. 392, 399 (2023) (discussing the 1980s trend of destabilized cities relying on procurement, among other policies, "as a way to regenerate opportunities that would put unemployed local residents, often people of color, back to work"); Hugh Baran, Note, *In* Croson*'s Wake: Affirmative Action, Local Hiring, and the Ongoing Struggle to Diversify America's Building & Construction Trades*, 39 Berkeley J. Emp. & Lab. L. 299, 303-04 (2018) (discussing the evolution of local hiring in relation to efforts to diversify construction unions); Theodos et al., *supra* note 75, at 1-3, 12 (discussing the potential of procurement methods to address racial inequality within the construction industry and small-business enterprises); Air Transp. Ass'n of Am. v. City & County of San Francisco, 266 F.3d 1064, 1068 (9th Cir. 2001) (upholding an ordinance that prohibited the awarding of contracts to contractors that discriminate in their provision of benefits between married employees and employees with domestic partners).

77. *2020 Survey of State Procurement Practices: Executive Summary*, Nat'l Ass'n of State Procurement Offs. 3 (2023), https://levin-center.org/wp-content/uploads/2023/01/2020-Survey-of-State-Procurement-Practices.pdf [https://perma.cc/2WA7-G33K] (finding that, of the surveyed jurisdictions, 63% partially adopted the Code, 3% reported full adoption, and 34% reported no adoption).

78. Model Procurement Code for State & Loc. Gov'ts (A.B.A. 2000). *See generally* F. Trowbridge vom Baur, *A Personal History of the Model Procurement Code*, 25 Pub. Cont. L.J. 149 (1996) (providing a history of the Model Procurement Code).

performance.[79] Contrary to the conventional wisdom, administrative discretion can simultaneously operate as protection from fraud and a tool for government to realize its democratic vision. Indeed, recent research suggests that limited discretion may facilitate potential fraud in the system and bear some responsibility for the government's current capacity crisis.[80] This research indicates that reclaiming government capacity may depend on returning some discretion to the administrators charged with executing public procurement—and enshrining discretion as a necessary and valuable component of the procurement process.

1. Clarity Versus Discretion

The primary debate in public-procurement law centers on how much discretion to reserve for the administrators who run the procurement system. The first side of the debate, and to this point the most influential, conceives of procurement laws as bulwarks that protect the procedural clarity, and thus the democratic integrity, of the procurement system. A limited role for administrative discretion is, according to this view, necessary to maintain the predictable application of rules and prevent fraud. In stark contrast, the other side of the debate argues that the procurement system's highest objective should be to enhance government capacity, which often means empowering administrators to exercise reasonable judgment in necessarily nuanced tasks. This camp

79. A third side to the debate suggests low administrator capacity is the problem. *See* Shelley Roberts Econom, *Confronting the Looming Crisis in the Federal Acquisition Workforce*, 35 PUB. CONT. L.J. 171, 172-74 (2006) (arguing that "cuts to the acquisition workforce have proven too severe," bringing "increased risk of significant downstream costs and threaten[ing] successful contract performance"); Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?*, 33 PUB. CONT. L.J. 263, 265-66 (2004) (identifying a critical lack of "sufficient qualified acquisition and contract management professionals" in the government, which will only encumber efforts to outsource contracts). Employment and human-capital shortages across the procurement system have worsened over the past few decades, even as government duties have only expanded in scale and complexity. *See* Econom, *supra*, at 189-90; *see also* Sheryl Gay Stolberg & Christina Jewett, *10,000 Federal Health Workers to Be Laid Off*, N.Y. TIMES (Mar. 27, 2025), https://www.nytimes.com/2025/03/27/us/politics/health-department-job-layoffs-rfk-jr.html [https://perma.cc/5JW4-Q9B6] (reporting on cuts of procurement officials across the Department of Health and Human Services). A shortage of qualified procurement experts presents a serious threat to the government's ability to enter smart contracts and defend against corruption—risks too significant to ignore. But while the relative capacity of the procurement workforce is inextricably linked to how well administrators exercise their discretion, I treat workforce capacity as a background condition that bears on this Note's central focus on how the laws should be written.

80. *See* Gransberg, *supra* note 64, at 1.

champions discretion as a core component that allows government to get the most bang for its buck and accomplish multifaceted social and economic goals.[81]

The field remains divided. Proponents of procedural clarity have so far had the greatest influence, driving a hyperproceduralized version of public procurement.[82] At base, this camp is motivated by a clear-eyed concern that most people are opportunists—not corrupt by nature but willing to engage in illegal behavior if the opportunity arises.[83] Opportunism poses distinct risks in the public-procurement context, where multiple bidders are vying for just one lucrative contract. That scarcity triggers a risk that "illicit price competition in the form of bribery may undermine the goals of the program."[84]

If the world is full of opportunists, the institutional environment is a large determinant of the risk of corruption.[85] According to the procedural-clarity camp, the possibility of corruption might then be defined, at least in simplified terms, by the following formula: $C = M + D - A$, where corruption (C) equals monopoly power (M) plus discretion (D) and minus accountability (A).[86] Of these variables, discretion is by far the most manipulable. Fear of opportunism might therefore counsel in favor limited discretion to smother opportunism before it even has a chance to emerge.[87] But limited discretion comes with

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81. For an early and particularly clear example of the debate over whether procurement statutes should be drafted to "reduce opportunities for graft and collusion" or instead should be tailored so that "the purchaser . . . [receives] the best value for the money expended," see Addison A. Mueller, *The Protection of the Public Interests in Public Contracts*, 56 YALE L.J. 755, 755-56 (1947), which reviews HERMAN G. JAMES, THE PROTECTION OF THE PUBLIC INTERESTS IN PUBLIC CONTRACTS (1946).

82. *See, e.g.*, Amanda Sin, Note, *Our Brothers' Keepers, Reforming Intergovernmental Service Agreements in Immigration Detention*, 52 PUB. CONT. L.J. 705, 710, 723-34 (2023) (outlining problems with immigration detention due to the lack of oversight over private contractors). In fact, entire handbooks are devoted to limiting corruption in public procurement. *See, e.g.*, ROUTLEDGE HANDBOOK OF PUBLIC PROCUREMENT COMPETITION (Sope Williams & Jessica Tillipman eds., 2024).

83. *See, e.g.*, SUSAN ROSE-ACKERMAN & BONNIE J. PALIFKA, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 52 (2d ed. 2016); Susan Rose-Ackerman, *Governance and Corruption*, *in* GLOBAL CRISES, GLOBAL SOLUTIONS 301, 301 (Bjørn Lomborg ed., 2004) (expressing concerns where "private willingness-to-pay trump[s] public goals").

84. ROSE-ACKERMAN & PALIFKA, *supra* note 83, at 61.

85. *Id.* at 52.

86. ROBERT KLITGAARD, RONALD MACLEAN-ABAROA & H. LINDSEY PARRIS, CORRUPT CITIES: A PRACTICAL GUIDE TO CURE AND PREVENTION 26-27 (2000).

87. *See id.* at 26 ("Corruption loves multiple and complex regulations with ample and uncheckable official discretion."); Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 629 (2001) ("Just as prosperity can breed complacency, reduced oversight in an era of increased government employee discretion should cause alarm.").

tradeoffs. Its potential merits, including allowing administrators to navigate complexity and unpredictability according to their reasonable judgment, are sacrificed for a mechanistic system that may struggle with nuance.[88] It may also permit actors capable of navigating that system to manipulate the rigid laws for their own gain.

The procedural-clarity camp has chosen to accept the tradeoffs and prioritize walling off discretionary risks with legal red tape.[89] A central feature of its project are the competitive-procurement laws — those which are designed to ensure contract awards are made according to an open and fair process. Some of these laws limit procuring agents' *decisions*, such as requiring they award contracts to the lowest-priced bidder.[90] Most limits, however, are *procedural*, including bars on pre-bid communications, nonnegotiable deadlines, exclusion of subjective evaluation criteria, price-based negotiations, or sealed-bid selection.[91] Although both categories of laws, the decisional and procedural constraints, contribute to an unduly brittle system, the decisional constraints are perhaps the most restrictive because they can require administrators to enter less-than-ideal projects even when better alternatives are available.

Proponents of procedural clarity have also pressed for strict bidder-driven checks on government discretion, including the bid protest.[92] Bid protests incentivize disgruntled private participants to sue the government for any deviation from the competitive-procurement process. Various additional enforcement mechanisms complement the bid protest, including criminal sanctions, ethics codes, corporate compliance, debarment, and oversight by civil society and the legislative branch.[93] Such strict enforcement measures demand that

88. Mechanistic laws reduce discretion, but that can be for a good cause. *See* HERBERT KAUFMAN, RED TAPE: ITS ORIGINS, USES, AND ABUSES 4 (1977) ("One person's 'red tape' may be another's treasured procedural safeguard.").

89. *See generally id.* (analyzing the cultural and ideological roots of red tape in the federal government).

90. *See* Steven Kelman, *Remaking Federal Procurement*, 31 PUB. CONT. L.J. 581, 583 (2002).

91. *See id.*; FAR 14.1, 207 (2025).

92. *See* Gordon, *supra* note 45, at 430-32 (describing the goals of a protest system). What makes the bid protest so powerful is that it constrains administrators' willingness to deviate from the strictest interpretation of the law even when doing so might technically be possible or in the public's best interest. *See, e.g.*, Daniel I. Gordon, *Bid Protests: The Costs Are Real, but the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489, 506 (2013) ("Contracting Officers have told the author that they are acting to avoid bid protests when they decide that a contract should be awarded to the lowest-priced, technically acceptable (LPTA) proposal, rather than to allow for a tradeoff."). Additional later-stage protection against corrupt procurement practices by a contractor comes from litigation brought under the False Claims Act, 31 U.S.C. §§ 3729-3733 (2024).

93. *See* Yukins, *supra* note 31, at 89-92.

administrators hew closely to the letter of the competitive-bidding laws, but they also threaten to amplify the tradeoffs that come along with limited administrative discretion.

To be sure, the harmful consequences of too much administrative discretion do sometimes appear in practice. A recent note, for instance, explores the concern that discretion facilitates contractors' or political patrons' capture of procurement in the government's immigration-detention system.[94] The note reveals how intergovernmental service agreements exempt state and local government contractors from the FAR and incentivize U.S. Immigration and Customs Enforcement to shirk its oversight responsibilities over state subcontractors. At the same time, a growing interest from state and local governments in immigration enforcement, combined with a contracting system rife with kickbacks, strips good-government incentives from contracting officials. The result is routine underprovision of contracted-for bedspace and services in immigration-detention facilities.

But limited discretion is not the only option for protecting the procurement system's integrity. Another camp exists, one that favors discretion and emphasizes the demerits of too much red tape. Steven Kelman has been a leading figure in this camp since the 1990 publication of his seminal book *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance*.[95] Kelman observed that rigid procurement laws limited procurement agents' opportunities to engage prospective contractors, select those most competent, or negotiate once bids were received.[96] A "rule-bound system" guaranteed a minimal level of government performance, but it simultaneously deterred agents from achieving anything beyond the bare minimum.[97] The result: the government purchased overpriced, outdated, and sometimes inoperable systems that failed to meet its needs.

Reforms to increase discretion followed Kelman's assessment. As the director of President Clinton's Office of Federal Procurement Policy, Kelman

94. *See generally* Sin, *supra* note 82 (discussing issues in immigration detention arising from excessive discretion provided to private contractors).

95. *See* Steven Kelman, Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance (1990).

96. Similar limitations on procuring-agent discretion, as Kelman saw it, would be unlikely in the country's largest corporations. *Id.* at 28 (noting that those writing about business organizations "stress the need for an environment where initiative and achievement are encouraged").

97. Kelman, *supra* note 90, at 597-98; *see also* Henry Mintzberg, The Structuring of Organizations: A Synthesis of the Research 346 (1979) ("An organization cannot put blinders on its personnel and then expect peripheral vision.").

implemented reforms at the federal level.[98] Years later, the National Commission on the State and Local Public Service, colloquially called the Winter Commission, studied state and local government performance to identify performance limitations.[99] After countless surveys and interviews with public administrators, the Winter Commission found that "[b]y far the greatest impediment to fast, sensible government contracting and procurement practices is the multiple layers of approval through which requisitions must pass."[100] By the early 2000s, much of the Winter Commission's reform agenda had been adopted around the country, leading to tangible improvements in government processes.[101] But problems from limited procurement discretion have persisted.

Many of the strictest limitations on procuring-agent discretion, such as the low-bid requirement or related constraints, are still intact today, especially at the state and local level.[102] The result of that limited discretion is — as Kelman and the Winter Commission anticipated — government inefficiency and incapacity. Preeminent procurement-law scholar James F. Nagle recently quoted a medical supplier who stated that his business did not even consider public contracting because it is just "[t]oo much trouble" — a not uncommon sentiment traceable to the rigid requirements associated with entering and executing government

98. *Cf.* Schooner, *supra* note 87, at 629 (taking issue with Kelman's prodiscretion reforms, which he implemented as President Clinton's "procurement czar").

99. *See* Nat'l Comm'n on State & Loc. Pub. Serv., *Hard Truths/Tough Choices: An Agenda for State and Local Reform*, Nelson A. Rockefeller Inst. of Gov't, at vii-viii (1993), https://rockinst.org/wp-content/uploads/2018/07/Hard-Truths-Tough-Choices.pdf [https://perma.cc/3U4X-8SFK]. The report aspired to "strengthen[] executive leadership, reduc[e] the rules and regulations that tie public managers' hands, and chang[e] governments' organizational culture to create a more flexible, dynamic, and entrepreneurial approach to government management." Matthew Potoski, *State and Local Government Procurement and the Winter Commission*, 68 Pub. Admin. Rev. S58, S58 (2008) (summarizing the Winter Commission's report and the rate and effects of adoption of its reform proposals).

100. Nat'l Comm'n on State & Loc. Pub. Serv., *supra* note 99, at 34. The report quoted the City of Philadelphia's former Director of Finance, who lamented:

> We treat buying a police car and buying psychiatric services for children in almost the same way . . . . We treat a $1 million bid the same way as we treat a $5,000 bid . . . . That is a system, much like the civil service system, that we have been trying to overhaul for a hundred years . . . .

Id.

101. Potoski, *supra* note 99, at S58.

102. The Niskanen Center has found that when procurement reforms do occur, they are incremental and leave the core of the restrictive system intact. Alon Levy, *So You Want to Do an Infrastructure Package*, Niskanen Ctr. 13 (Mar. 2021), https://www.niskanencenter.org/wp-content/uploads/2021/03/levy-infastructure.pdf [https://perma.cc/A4MT-MN3K] ("American agencies in contrast use lowest-bid procurement, and in the few cases when they don't, such as in California, the technical score is only 30%, so the differences in price dominate the overall decision.").

contracts.[103] Recent studies report the many consequences of limited discretion in procurement.[104]

While limited discretion is linked to procurement inefficiency and incapacity, an even more worrisome problem is that limited discretion may undermine the system's competitive integrity. So limitations on discretion may defeat the objectives that motivate the procedural-clarity camp to impose them in the first place. As discussed in Section I.A, a growing body of evidence suggests this is a very real possibility.[105] The growing body of evidence provides a clearer view of the tradeoffs inherent to variations in administrative discretion in the procurement system. It suggests that the de facto approach of the procedural-clarity camp may overlook some of these tensions.

Critiques from fields like administrative law and public permitting also raise concerns about insufficient discretion.[106] But there are signs that the culture may

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103. 2 NAGLE, *supra* note 46, at 202; *accord id.* at 158 (describing also the risk of bid protests, which had "encrusted itself like a barnacle onto the contracting process"). Comparable restrictions on administrative discretion do not exist in Europe, where procurement outcomes are much better. *See generally* Sanja Bogojević, Xavier Groussot & Jörgen Hettne, *The 'Age of Discretion': Understanding the Scope and Limits of Discretion in EU Public Procurement Law*, *in* DISCRETION IN EU PUBLIC PROCUREMENT LAW 3 (Sanja Bogojević, Xavier Groussot & Jörgen Hettne eds., 2019) (identifying the scope and exercise of discretion in EU procurement law); *Contracting Techniques*, U.S. DEP'T TRANSP. (Nov. 7, 2014), https://international.fhwa.dot.gov/contractadmin/03.cfm [https://perma.cc/8WLZ-PBQN] ("The most notable difference between European and U.S. procurement methods is that best value . . . is used in virtually all types of procurements.").

104. *See, e.g.*, Joshua B. Fix, *Saving Other Transaction Agreements from Bid Protest Review: How to Keep OTs as Innovative and Flexible Tools for Research and Development*, 53 PUB. CONT. L.J. 737, 739-43, 761-62 (2024) (describing the efficiency threat posed by Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167 (2022), which subjected the Department of Defense's other transaction authority to bid protests).

105. *See* Gransberg, *supra* note 64, at 1; *infra* Section I.B.2.

106. *See* Zachary Liscow, *Getting Infrastructure Built: The Law and Economics of Permitting*, 39 J. ECON. PERSPS. 151, 154 (2025) ("So, while an agency may have discretion on paper in conducting a NEPA assessment, judicial review can substantially limit that discretion in practice."). *See generally* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019) (arguing that an overemphasis on agency procedure may hinder good governance); JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990) (examining issues of insufficient agency discretion in automobile regulation). Portions of this literature identify a culture that restrains discretion. Jerry Mashaw, for instance, argues that while insufficient government discretion manifests as the urgent crisis of government, the bigger problem is the American culture of mistrust in government. *See, e.g.*, Mashaw, *supra* note 31, at 514. That culture may even become ingrained in the unconscious decision-making processes of administrators themselves. *See* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS, at ix (1983) (describing the inner workings of bureaucratic decision-making, including administrative law judges' perceptions that challenges with the Social Security disability program were due to poor case management at the state-agency level).

be shifting, particularly as the government's inefficiencies elicit increased worry from both sides of the aisle.[107] What has followed is a nascent movement for increased government discretion.

2. *The View from the Ground Floor*

Both sides of the debate over discretion in the procurement process have sound justifications. But recent research suggests that greater discretion, especially at the state and local level, could solve certain government inefficiency problems without eliminating vital protections from opportunism and corruption. Infrastructure procurement, a centerpiece in the crisis of state capacity, offers a useful case in point.

The United States lags many of its peers in infrastructure. Despite boasting the world's largest and most advanced economy, the United States ranks thirteenth globally in infrastructure quality.[108] In 2021, the American Society of Civil Engineers (ASCE) awarded American infrastructure a grade of C-.[109] Compared

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107. *See, e.g.*, Katie Linderman, *Most Americans Think the Government Is Inefficient—but Few Support DOGE, Poll Finds*, MIA. HERALD (Jan. 30, 2025), https://www.miamiherald.com/news/nation-world/national/article299448859.html [https://perma.cc/8EVY-N3QJ]; William Melhado, *California Dept. of Finance Wants $20 Million to Reduce Government Inefficiency*, SACRAMENTO BEE (May 28, 2025), https://www.sacbee.com/news/politics-government/the-state-worker/article307294121.html [https://perma.cc/RBJ2-8LDX]; Hannah Falcon, *Inspired by Federal Efforts, Missouri Lawmakers Look Into Potential Government Waste*, KY3 (Feb. 10, 2025, 6:29 PM EST), https://www.ky3.com/2025/02/10/inspired-by-federal-efforts-missouri-lawmakers-look-into-potential-government-waste [https://perma.cc/K9KL-AQ2M]; Joe Pearlman, Opinion, *Jeff Jackson Takes a Stand for Government Inefficiency*, CAROLINA J. (Feb. 18, 2025), https://www.carolinajournal.com/opinion/jeff-jackson-takes-a-stand-for-government-inefficiency [https://perma.cc/YG3D-QTW5]; Betsy Klein & Kate Sullivan, *Biden Signs Infrastructure Bill Into Law at Rare Bipartisan Gathering*, CNN (Nov. 15, 2021, 5:54 PM EST), https://www.cnn.com/2021/11/15/politics/biden-signing-ceremony-infrastructure-bill-white-house/index.html [https://perma.cc/T96T-SGLP]; *cf. DOGE-Curious Dems Dwindle After Early Musk Moves*, PUNCHBOWL NEWS (Feb. 5, 2025), https://punchbowl.news/article/washington/doge-democrats-fall-off-after-musk-moves [https://perma.cc/CL7E-9TP6] (highlighting some of the discord between the Republican and Democratic approaches to improving government efficiency).

108. *See* Klaus Schwab, *The Global Competitiveness Report: 2019*, WORLD ECON. F. 582-83 (2019), https://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf [https://perma.cc/NU8M-PYP5]; *Modernizing U.S. Infrastructure: The Bipartisan Infrastructure Law*, WHITE HOUSE (Nov. 15, 2021), https://www.whitehouse.gov/cea/written-materials/2021/11/15/the-time-is-now-to-modernize-u-s-infrastructure [https://perma.cc/44Z9-27G5].

109. *2021 Report Card for America's Infrastructure*, AM. SOC'Y CIV. ENG'RS 2 (2021), https://2021.infrastructurereportcard.org [https://perma.cc/7484-A2NA].

to other countries, the United States regularly spends multiple times as much to complete comparable projects.[110] This is a procurement problem.

No doubt the complexity of modern procurement contributes to its current challenges.[111] Constructing a subway in San Francisco two-and-a-half centuries ago might have been a much simpler task. Today, however, several key factors have complicated procurement. Cities now have much higher levels of density; projects often require specialized and expensive construction equipment; the number of contractor and subcontractor relationships has increased; and a dense thicket of building codes and permitting requirements has developed. Given this complexity, it is unsurprising that which contractor the government selects can make or break a project.

Especially for the most complex projects, procurement methods conferring broader administrative discretion (e.g., best-value procurement[112]) achieve better outcomes compared with alternatives that constrain discretion (e.g., low-bid procurement).[113] A survey of 187 countries found that more stringent procurement regulation only improved outcomes in countries with low public-sector capacity.[114] In contrast, greater discretion is associated with improved outcomes including lower schedule and cost growth,[115] shorter timelines,[116] lower costs,[117]

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110. *See* Goldwyn et al., *supra* note 14, at 9, 13.

111. *See id. passim*.

112. *See Modernising Local Government: Improving Local Services Through Best Value*, Dep't of the Env't, Transp. & the Regions 13 (1998), https://upload.wikimedia.org/wikipedia/commons/9/9d/Modernising_Local_Government_-_Improving_Local_Services_Through_Best_Value_%281998%29.pdf [https://perma.cc/885M-GU8J] (describing how to incorporate local authorities' discretion when assessing best value); Bosio et al., *supra* note 32, at 1091.

113. *See* Bosio et al., *supra* note 32, at 1091.

114. *Id.*

115. Projects procured with the low-bid method have been found to result in 5.6 and 7.35% higher schedule and cost growth, respectively, than those procured using a best-value method. Marwa A. El Wardani, *Comparing Procurement Methods for Design-Build Projects*, Comp. Integrated Rsch. Program 76 (May 2004), https://www.engr.psu.edu/ae/cic/publications/TechReports/TR_046_ElWardani_2004_DB_Proc_Methods.pdf [https://perma.cc/L9L6-PVWF]; *see also* Dai Tran, Keith R. Molenaar & Douglas D. Gransberg, *Implementing Best-Value Procurement for Design-Bid-Build Highway Projects*, 2573 Transp. Rsch. Rec.: J. Transp. Rsch. Bd. 26, 32 (2016) (identifying how best-value bidding reduced "risk, change orders, and cost overruns").

116. Marwa A. El Wardani, John I. Messner & Michael J. Horman, *Comparing Procurement Methods for Design-Build Projects*, 132 J. Constr. Eng'g & Mgmt. 230, 232-35 (2006).

117. *Id.* at 234-35; *see also* Douglas D. Gransberg, Ali Touran & Eric Scheepbouwer, *Qualification-Based Selection of Consultants and Contractors: Breaking the Lowest Tender Price Culture*, 7 Procs. Int'l Structural Eng'g & Constr. art. no. PRO-02, at 1 (2020) ("The paper's primary contribution is to demonstrate the value for money to the client when changing focus from lowest tendering cost to contractor qualifications and past performance.").

and higher quality.[118] These disparities are most significant for high-complexity projects.[119]

Although worse government performance via the low-bid procurement method should be enough to give any reader pause, more alarming is the possibility that restrictive methods like low-bid procurement facilitate corruption. It may seem counterintuitive that a mandate that government select the cheapest bidder could facilitate corruption. To be sure, the predominant argument against the best-value bidding alternative, which preferences administrative discretion, is that it may open the door to collusion with bidders who exploit administrative discretion.[120] But a recent study published by ASCE revealed the possibility that this conventional logic has it backwards.[121] Building upon the Charbonneau Commission's groundbreaking investigation into collusion linked to low-bidder selection within Quebec's construction industry,[122] the ASCE study emphasized that the increased legibility of the low-bid method makes it easier for contractors to rig bids in U.S. procurement systems.[123]

Contractors looking to game the method's simplicity can follow a couple approaches to boost their profits above competitive levels. The first option is to rely on a government agency's online publication of its pre-bid cost estimate, the amount for which the agency is authorized to award a contract, to identify the highest possible bid price that the government would be willing to accept and submit a bid just below that level. Coordination with other bidders to maximize

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118. *See, e.g.*, Magdy Abdelrahman, Tarek Zayed & Ahmed Elyamany, *Best-Value Model Based on Project Specific Characteristics*, 134 J. CONSTR. ENG'G & MGMT. 179, 179 (2008); Jubair Ahmed, Nasir G. Gharaibeh & Ivan D. Damnjanovic, *Best-Value Bid Selection Methods for Performance-Based Roadway Maintenance Contracts*, 2292 TRANSP. RSCH. REC.: J. TRANSP. RSCH. BD. 12, 16-18 (2012) (discussing the benefits of best-value bidding for the entire lifespan of highway projects).

119. Ahmed et al., *supra* note 118, at 63-64; *see also* Gransberg et al., *supra* note 117, at 1 ("It is difficult to justify not awarding a contract to the lowest tender offer in the public sector because to do so interjects an element of subjectivity, which in turn makes the procurement vulnerable to accusations of favoritism and even corruption.").

120. Gransberg, *supra* note 64, at 2.

121. *Id.* at 1.

122. *See id.* at 2 (quoting the Charbonneau Commission report as stating how "the legislation, regulation and consistency of practices [of the LB process] of a number of public authorities, [have] over the years, facilitated collusion strategies").

123. *Id.* at 2. The drawbacks to a highly legible low-bid model are akin to the more general critiques James C. Scott lodges against legal legibility. *See* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 6 (1998). Scott's central concern is that "[d]esigned or planned social order" will "ignore[] essential features of any real, functioning social order." *Id.* In place of high legibility, he "make[s] the case for the indispensable role of practical knowledge, informal processes, and improvisation in the face of unpredictability." *Id.*

the price government pays would of course make this method more profitable. A second option is to underbid the contract. Under this approach, the contractor would simply reduce their profit margin to an infeasibly low level when submitting a bid in order to guarantee they win the contract.[124] Once the contractor is awarded the contract and shovels hit the ground, they possess crucial leverage to exploit their newfound contractual rights and recover a higher overall cost by filing for change orders.[125]

There is good reason to suspect that low-bid methods provide fertile grounds for the first option—industry collusion.[126] In many major project solicitations, just a few contractors submit bids. That is partly because so few are qualified to perform the technical work required for modern infrastructure projects. A notable downside to this reality, however, is that the smaller pool lowers the transaction costs of coordination. If the existing handful of bidders, all known to one another, conspire to boost prices, they need only ensure no party to the arrangement submits a bid below an agreed-upon amount calculated to fall within the agency's pre-bid cost estimate.[127] It can also be difficult to detect collusion in the bidding process when it does occur. For instance, one problem baked into many studies that attempt to track down bidder collusion is that they frequently rely on agencies' own historical bid tabulations.[128] But if those tabulations are dragged upwards by prior bid rigging, then the detection risks classifying collusive behavior as otherwise ordinary. Such shortcomings exacerbate the dearth of research into collusive bidding behavior in the United States.[129]

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124. Gransberg, *supra* note 64, at 1; *Charbonneau Commission Follow-up: Ethics Lessons for Quebec and Elsewhere*, Diane Girard Ethics 36 (Apr. 2016), https://web.archive.org/web/20240809110951/https://epac-apec.ca/wp-content/uploads/2014/11/charbonneau-webinar-april-2016-final.pdf [https://perma.cc/WRA6-E9WZ] ("Collusion is made easy when selection criteria are easy to predict, e.g., when 'lowest compliant bidder' is the criterion for construction contracts.").

125. Gransberg, *supra* note 64, at 1.

126. *See* Darrell W. Harp, *Historical Background—Low Bid Concept*, Transp. Rsch. Bd. 43 (1991), https://onlinepubs.trb.org/Onlinepubs/trcircular/386/386-010.pdf [https://perma.cc/9WAT-VTBL]; Lemlem Asaye, Muhammad Ali Moriyani, Chau Le & Tuyen Le, *Detecting Red-Flag Bidding Patterns in Low-Bid Procurement for Highway Projects with Pattern Mining*, 40 J. Mgmt. Eng'g art. no. 04023060, at 1 (2023). *But see* Gransberg, *supra* note 64, at 4 ("The research literature was almost devoid of reference to wrongdoing.").

127. *See* Asaye et al., *supra* note 126, at 1-2. Although coordination may very well be a possibility, it is not even a prerequisite for bidders to game the pre-bid estimates, which are often publicly advertised and make it possible for bidders to submit higher bids than might otherwise be necessary. *Id.*

128. *See* Gransberg, *supra* note 64, at 4; Asaye et al., *supra* note 126, at 2.

129. *See* Gransberg, *supra* note 64, at 4.

Like bid rigging, underbidding contracts, especially those procured through the low-bid method, may also exist in practice as much as it does in theory. Take the Central Subway project as an example. The successful bidder had faced scrutiny many times for underbidding California state contracts only to file for change orders that upped the public's costs once projects got underway.[130] Since 2000, that same contractor had completed eleven projects in the Bay Area for $765 million more than anticipated, a forty percent increase above initial bid amounts.[131] While this behavior may be scrutinized in the high-profile cases, it likely goes unnoticed in many smaller projects. State and local governments may lack the resources or interest to challenge the practice — that is, if they even know it is ongoing.[132] Prosecution may also yield little benefit for the government administrator who issued and awarded a contract, as calling more attention to the concern might only expose them to public scrutiny.

Beyond possibly limiting fraud in procurement, greater discretion stands to improve procurement in a variety of other ways as well: discretion can improve performance, bidder competition, innovation, and quality across social and economic dimensions.

First, greater discretion allows government to prioritize contractor performance and innovation. For instance, the low-bid method may lead to the selection of contractors that offer the lowest price but subpar quality.[133] Best-value methods, which can place an onus on bidders to demonstrate the unique contributions they bring to a project, can enhance innovation in construction practice.[134] Sometimes bidders selected for submitting the lowest bid and highest project quality may still rack up long-term costs associated with lower performance and postconstruction maintenance that can outweigh any initial

130. *See* Nicholas Umashev, *The Horrible History of State Contract Awards*, CAL. POL'Y CTR. (July 20, 2017), https://californiapolicycenter.org/horrible-history-state-contract-awards [https://perma.cc/D26N-N8BY]; Vartabedian, *supra* note 15.

131. Zusha Elinson, *Low Bid on Subway Station Could Cost SF*, SFGATE (Aug. 10, 2012, 11:24 PM), https://www.sfgate.com/bayarea/article/Low-bid-on-subway-station-could-cost-SF-3780385.php [https://perma.cc/MVY6-CL3Z].

132. *Id.* (describing the massive legal fees spent on bid-protest litigation).

133. Scott et al., *supra* note 59, at 1; *see* Phuong H.D. Nguyen, Brian C. Lines & Dai Q. Tran, *Best-Value Procurement in Design-Bid-Build Construction Projects: Empirical Analysis of Selection Outcomes*, 144 J. CONSTR. ENG'G & MGMT. art. no. 04018093, at 2, 7 (2018).

134. *See* Nigel D. Caldwell, Jens K. Roehrich & Andrew C. Davies, *Procuring Complex Performance in Construction: London Heathrow Terminal 5 and a Private Finance Initiative Hospital*, 15 J. PURCHASING & SUPPLY MGMT. 178, 178 (2009); Karen Manley, *Implementation of Innovation by Manufacturers Subcontracting to Construction Projects*, 15 ENG'G CONSTR. & ARCHITECTURAL MGMT. 230, 235 (2008) (linking the choice of procurement system to innovation in construction).

savings.[135] Discretion to select the contractor poised to provide the government with the highest project value can provide a powerful safeguard against such long-term risks.[136]

Second, greater discretion could expand government's role in economic and public life. Many of the country's procurement projects dating back to at least the late nineteenth century have included requirements or incentives for contractors to purchase local materials,[137] and since at least the twentieth century to hire locally.[138] These policies empowered many state and local governments to be seen providing tangible benefits to constituents. Government has also effectively deployed existing discretionary procurement authority to address historical inequities that prevented disadvantaged groups from accessing well-paying employment opportunities.[139] It adopted selection criteria to push labor standards upwards, establish wage floors above state and local minimums, require employer-provided healthcare and partner benefits, and award contracts to less-advantaged business owners.[140] Some state and local governments have also

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135. Life-cycle maintenance costs are notoriously difficult to predict, but for projects like highway construction, maintenance can account for around half of the annual infrastructure funding. Scott et al., *supra* note 59, at 11; Peyman Babashamsi, Nur Izzi Md Yusoff, Halil Ceylan, Nor Ghani Md Nor & Hashem Salarzadeh Jenatabadi, *Evaluation of Pavement Life Cycle Cost Analysis: Review and Analysis*, 9 INT'L J. PAVEMENT RSCH. & TECH. 241, 242 (2016).

136. Scott et al., *supra* note 59, at 11.

137. *See* COHEN, *supra* note 54, at 15-16.

138. *See* Cummings & Janis, *supra* note 76, at 399.

139. *See generally* Baran, *supra* note 76 (discussing the evolution of local hiring in relation to efforts to diversify construction unions); Theodos et al., *supra* note 75 (discussing how public procurement can address racial inequality within construction and contracting industries).

140. *See, e.g.*, COHEN, *supra* note 54, at 15-20; Air Transp. Ass'n of Am. v. City & County of San Francisco, 266 F.3d 1064, 1068-69 (9th Cir. 2001); S.D. Meyers, Inc. v. City & County of San Francisco, 253 F.3d 461, 465 (9th Cir. 2001); TEX. GOV'T CODE ANN. §§ 2161.001-.253 (West 2025) (providing for contracting with "historically underutilized businesses"); Establishing a Minimum Wage for Contractors, Exec. Order No. 13,658, 79 Fed. Reg. 9851, 9851 (Feb. 12, 2014) (specifying a higher minimum wage for employees hired by contractors completing certain government contracts). By excluding these requirements, a strict low-bid method might not incentivize companies to improve working conditions. Research indicates low-bid requirements can lead to lower safety measures, wages, benefits, and training. *See* Sadi A. Assaf & Sadiq Al-Hejji, *Causes of Delay in Large Construction Projects*, 24 INT'L J. PROJECT MGMT. 349, 352-53 (2006); Molly M. Scott & Hailey D'Elia, *Incentivizing Job Quality in Government Procurement: Current Models and Questions to Be Answered*, URB. INST. 1-3 (Aug. 2023), https://www.urban.org/sites/default/files/2023-09/Incentivizing%20Job%20Quality%20in%20Government%20Procurement.pdf [https://perma.cc/22UP-ME7H]; *State and Local Government Procurement*, SERV. EMPS. INT'L UNION OR. STATE COUNCIL (Sep. 15, 2022), https://seiu-oregon.org/2022/09/15/state-and-local-government-procurement [https://perma.cc/ET9Y-GXRT]; Nguyen et al., *supra* note 133, at 7 (identifying higher safety standards for projects procured with a best-value compared to a low-bid method).

adopted environmental protection and sustainability as a priority.[141] But poor contractor selection imposes a greater disruption on communities during the construction process and over the lifecycle of completed projects.[142]

This is not to say that greater discretion is not accompanied by some drawbacks; it most certainly is. Implementing a best-value system demands, for instance, greater administrator expertise,[143] more robust checks to prevent corruption,[144] and a higher effort to execute. Also, contracting for relatively interchangeable products (e.g., bulk commodities such as sand or gravel) may work best with a rather straightforward approach like low-bid procurement. But whether a project is suited for low-bid or best-value procurement is a choice that should be available to the procurement officer. Mandated adherence to the low-bid standard, by contrast, will continue to create needless delays and higher costs, all the while limiting state capacity.

What is most striking about the persistence of low-bid procurement, especially when better-performing alternatives exist, is that selection of the cheapest bidder is often not even mandated by the laws themselves.[145] The lowest-bidder

141. *See* Keith R. Molenaar, Nathaniel Sobin & Eric I. Antillón, *A Synthesis of Best-Value Procurement Practices for Sustainable Design-Build Projects in the Public Sector*, 5 J. GREEN BLDG. 148, 148, 156 (2010); Keith R. Molenaar et al., *Sustainable, High Performance Projects and Project Delivery Methods: A State-of-Practice Report*, CHARLES PANKOW FOUND. & DESIGN-BUILD INST. AM. 19 (Sep. 1, 2009), https://www.researchgate.net/publication/327976573_Sustainable_High_Performance_Projects_and_Project_Delivery_Methods_A_State-of-Practice_Report [https://perma.cc/X8TE-AUVS] (describing how approximately sixty-three percent of LEED-certified public buildings were constructed with a best-value or similar method in the early 2000s). *See generally* Peter Calthorpe, THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM (1993) (describing a need to turn toward more sustainable development).

142. *See, e.g.*, *Bullet Train Bidder Had Cost Overruns*, SAN DIEGO UNION-TRIB. (Sep. 5, 2016, 12:04 AM PST), https://www.sandiegouniontribune.com/2013/04/15/bullet-train-bidder-had-overruns [https://perma.cc/9JNT-4D5T]; Kim Slowey, *Tutor Perini Denies Fault in Central Subway Project Delays*, CONSTR. DIVE (Apr. 16, 2019), https://www.constructiondive.com/news/tutor-perini-denies-fault-in-central-subway-project-delays/552699 [https://perma.cc/5GRL-X3WC].

143. *See* Douglas D. Gransberg & Jennifer S. Shane, *Defining Best Value for Construction Manager-General Contractor Projects: The CMGC Learning Curve*, 31 J. MGMT. ENG'G art. no. 04014060, at 1-2 (2015) (discussing the "learning curve" for state agencies adopting best-value bidding).

144. *See* Chaimae Naci, Ghada M. Gad, Christofer Harper & Mohammed S. Hashem M. Mehany, *Best-Value Procurement in Transportation: Lessons Learned from Bid Protest Challenges*, 17 J. LEGAL AFFS. & DISP. RESOL. ENG'G & CONSTR. art. no. 04525034, at 1 (2025) (describing fairness risks associated with best-value bidding without appropriate guardrails).

145. *See infra* Section II.C; *see also* COHEN, *supra* note 54, at 80 (describing how the lowest-bidder requirement was not meant to limit consideration to price); Gransberg, *supra* note 64, at 4 ("The use of [best-value] awards in lieu of [low-bid] awards is not a legal issue. It is more appropriately characterized as a political issue.").

laws that today govern state and local procurement around the country were instead envisioned originally as a robust check on corruption that, critically, gave government the capacity it needed to shape communities and the economy.

II. THE ORIGINS OF PUBLIC-PROCUREMENT LAW IN AMERICA

This Part resurfaces the history of government procurement since the country's Founding to reveal how the application of competitive-bidding laws today is a long way from where it began. The Part explores the federal government's earliest adoption of competitive-bidding requirements and traces how the nation's leaders quickly realized that selecting based on price alone was a bad idea. In fact, low-bid requirements often jeopardized national security by compelling the military to purchase shoddy or constantly delayed supplies. By contrast, giving the government discretion to select contractors that best served the public interest helped develop crucial foundations for the early nation, including across the stagecoach and weapons industries. Lastly, the Part covers how courts and governments, federal and local, have long recognized exceptions to even rigid lowest-responsible-bidder requirements, affirming a broad view of government procurement.

A. The Wartime Foundations of Public-Procurement Law

In 1776, the first task of the United States's newly created independent government was to build a militia. Many aspects of sustaining the American militia, particularly the need for a steady supply of food, clothing, and weapons, demanded a robust public-procurement system.[146] Public procurement has evolved dramatically since the American Revolution, but its origins during the war set the stage for the competitive-bidding system that exists today. From the start, this system resembled best-value procurement more than it did low-bid procurement.

The American militia initially relied on the colonies for production of wartime supplies.[147] Without a mechanism for central coordination, however, production lagged.[148] It did not take long before the militia's generals turned to public procurement to sustain the war effort. At the time, public procurement methods were relatively unsystematized and beset by theft and fraud.[149] Contracts were often awarded despite "unbounded, unaudited discretion [that]

146. 1 NAGLE, *supra* note 46, *passim*.

147. *Id.* at 12-19.

148. *Id.* at 13-14.

149. *Id.* at 15-17.

fostered acts far beyond propriety and legality even by the standards of the day."[150] Recognizing the importance of coordination, the Continental Congress created a Commissary-General of Stores and Provisions and a Quartermaster-General in 1775.[151] These officials managed food procurement and supply transport but lacked significant production authority, relying mostly on merchants to meet military needs. Rampant profiteering also burdened the officials' work.[152] Merchants charged exorbitant commissions and refused to sell at lower prices.[153] By 1780, the inability to procure sufficient supplies left the American war effort in disarray, and the Continental Congress returned procurement responsibilities to the thirteen colonies, which decentralized an already inefficient and undersupplied system.[154]

The Continental Congress appointed Robert Morris as the first Superintendent of Finance on February 20, 1781, to address these challenges.[155] Morris's task was to reform procurement processes and address profiteering in government contracting,[156] for which he envisioned a system modeled on the European practice of sealed, competitive bidding.[157] Although he often advocated for a low-bid requirement on paper,[158] his standard approximated best-value procurement in practice. Morris thought that the government should select the

150. *Id.* at 14-17, 20-21.

151. JOHN W. BARRIGER, LEGISLATIVE HISTORY OF THE SUBSISTENCE DEPARTMENT OF THE UNITED STATES ARMY FROM JUNE 16, 1775, TO AUGUST 15, 1876, at 1 (Wash., Gov't Printing Off., 2d ed. 1877).

152. 1 NAGLE, *supra* note 46, at 33-34.

153. *Id.* at 32-34.

154. *Id.*

155. 19 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 176, 180 (Gaillard Hunt ed., 1912).

156. 1 NAGLE, *supra* note 46, at 34-35. Many of Robert Morris's reforms were under consideration in Congress while he implemented them. *Id.* at 36. His vision for broad government discretion in procurement was evident from the first contracts he issued as superintendent of finance. These contracts were to supply food for troops awaiting battle in Pennsylvania. JAMES F. NAGLE, FEDERAL PROCUREMENT REGULATIONS: POLICY, PRACTICE AND PROCEDURES 13-18 (1987) (drawing from the five-volume ROBERT MORRIS, THE PAPERS OF ROBERT MORRIS, 1781-1784 (E. James Ferguson ed., 1973)). He received six bids and selected the firm of Wager and Serrell because it offered "[t]erms the most reasonable as to Price and equally convenieint [sic] as to Time." *Id.* at 15. For food production in Lancaster, Morris agreed to contract with Henry Dering since his terms were "the most beneficial for the public." *Id.*

157. 1 NAGLE, *supra* note 46, at 35-36.

158. *See id.* at 36; James K. Perrin, Jr., "Knavish Charges, Numerous Contractors, and a Devouring Monster": The Supply of the U.S. Army and Its Impact upon Economic Policy, 1775-1815, at 128-30 (2016) (Ph.D. dissertation, Ohio State University), https://etd.ohiolink.edu/acprod/odb_etd/ws/send_file/send?accession=osu1462407701& [https://perma.cc/E9PJ-3N4B].

bidder whose proposal would be most beneficial to the public, even if it did not arrive at the lowest cost. Evidently, cost was but one among many factors, including reliability, timeliness, and payment terms, which Morris considered relevant to procurement decision-making.[159] In other words, Morris prioritized identifying and selecting whichever contractor offered the best value, and he refused to limit the government's discretion to make that evaluation.

Morris's initial attempt at formal public procurement via competitive bidding set the precedent for contracting throughout the rest of the war.[160] The system at first improved the militia's supply problems, but familiar problems soon emerged. Contractors would deliver spoiled or adulterated products to the militia and sometimes made soldiers trek miles from camp to collect supplies.[161] And even in the competitive-bidding system, contractors, including those whom Morris knew personally, sometimes failed to fulfill their obligations.[162] Despite these issues, Morris's principles of competitive bidding and best-value contracting left a lasting legacy, one that persisted into the early days of the new U.S. government.

The first step in formalizing Morris's competitive-bidding groundwork for public procurement was the Act of February 20, 1792, which established the office of the Postmaster General.[163] The Act instituted strict requirements that government publicly post and competitively bid contracts for collecting and delivering the mail.[164] Section 3 of the Act granted the Postmaster General discretion to choose contractors and "provide for carrying the mail of the United States" at rates "as he . . . shall think proper," and that would most effectively defray the department's expenses.[165] This authority approximated the powers granted to the Postmaster General by the Continental Congress.[166] That position

159. NAGLE, *supra* note 156, at 15-16. Morris also emphasized the importance of accounting for the bidder's responsibility, noting that that contracts should be awarded to "men of substance and talents." *Id.* at 16.

160. 1 NAGLE, *supra* note 46, at 37. Despite Morris's work to implement a procurement system, his own practices were no less corrupt than those of typical merchants contracting with the government at the time. From his seat in Congress, he often awarded contracts to his own company. *Id.* at 35.

161. *Id.* at 38.

162. *Id.*

163. Act of Feb. 20, 1792, ch. 7, § 3, 1 Stat. 232, 234.

164. *Id.* § 6, 1 Stat. at 234.

165. *Id.* §§ 2-3, 1 Stat. at 233-24.

166. *Compare* 1 NAGLE, *supra* note 46, at 42 (reporting the Continental Congress's resolution "[t]hat the postmaster general make enquiry, and report the best terms upon which contracts may be entered into, for the transportation of the several Mails, in the stage carriages on the

had been tasked with securing not just the lowest price but also "the *best* terms upon which contracts may be entered into[] for the transportation of . . . Mail[]."[167] Although procurement authority under the Act was linked to bid price, it also anticipated that the Postmaster General would consider a broader set of factors when exercising the position's discretion.[168]

The extension of broad procurement authority to the Postmaster General had a powerful effect on the nation's budding economy. In particular, the discretion helped accelerate growth in the burgeoning stagecoach industry.[169] Rather than being forced to select the cheapest bidders, which were almost always horseback carriers, the Postmaster General could award contracts to stagecoach operators who ensured more reliable, high-capacity mail transportation.[170] While stagecoaches often had higher up-front costs, they eventually became instrumental in overcoming the limitations of horseback delivery, offering greater speed and efficiency to connect the nation.[171]

Over the next few centuries, public-procurement statutes more often included mandates that government select contracts representing the "lowest cost" (or some variant of the phrase). But administrators applied the requirement in a way that permitted consideration of factors beyond price.[172] The flexibility helped spur additional groundbreaking innovations, such as the adoption of

different roads, where such stage carriers are or may be established"), *with* Act of Feb. 20, 1792, § 3, 1 Stat. at 234 ("And he shall provide for carrying the mail of the United States, by stage carriages or horses, as he may judge most expedient; and as often as he, having regard to the productiveness thereof, as well as other circumstances, shall think proper, and defray the expense thereof . . . ."). *See generally* Oliver W. Holmes, *Shall Stagecoaches Carry the Mail?—A Debate of the Confederation Period*, 20 WM. & MARY Q. 555 (1963) (describing the evolution and debates over the Post Office's reliance on stagecoaches to carry the mail during the Founding Period).

167. 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 489 (John C. Fitzpatrick ed., 1933) (emphasis added).

168. Act of Feb. 20, 1792, § 3, 1 Stat. at 234.

169. *See* Richard B. Kielbowicz, *Postal Enterprise: Post Office Innovations with Congressional Constraints, 1789-1970*, POSTAL RATE COMM'N 7 (May 30, 2000), https://www.prc.gov/sites/default/files/papers/enterprise_0.pdf [https://perma.cc/MFC6-9VJP].

170. *See* 1 NAGLE, *supra* note 46, at 44-45 (describing the flexibility that Congress granted to the early postmasters general, including leeway to contract with stagecoaches for the carrying of the mail as long as the price for doing so "would not exceed by more than one-third the price of the existing contract for mail transport on horseback").

171. *See id.* at 42-45. Historian Richard B. Kielbowicz notes that the contracts awarded to stagecoach operators under the Act helped fuel additional private investment in stagecoach roads and infrastructure, which catalyzed the industry's growth. Kielbowicz, *supra* note 169, at 7. As routes expanded, stagecoaches became indispensable to the mail system, and their development dovetailed with the nation's transportation improvements more broadly. *Id.* at 6-9.

172. *See, e.g.*, 2 NAGLE, *supra* note 46, at 99-100.

interchangeable parts in manufacturing—now a hallmark of American industrial innovation.[173] Samuel Colt's revolver was one example of how government facilitated interchangeability through public procurement.[174] In awarding weapons-manufacturing contracts to Colt, the government considered the cost of his revolver but also weighed the weapon's functionality and technological superiority.[175] The federal backing for Colt's innovative manufacturing approach gave him vital early funding that helped refine his manufacturing techniques so that he could eventually introduce even greater efficiency and reliability to domestic manufacturing.[176]

While often endorsing what is appropriately described as best-value procurement in practice, the government did not formally authorize best-value bidding government-wide until the Federal Property and Administrative Services Act of 1949.[177] The Act established that contract "award[s] shall be made . . . to that responsible bidder whose bid . . . will be the most advantageous to the Government, price and other factors considered."[178] This modification was later bolstered by the Federal Acquisition Streamlining Act of 1994,[179] which introduced race- and gender-conscious procurement policies.[180] Although it took more than a century to formally embrace the best-value requirement in the federal government, the standard existed all along in the system's regular functioning. The evolution of federal procurement practices from the early years of the Republic reveals a consistent effort to balance efficiency, fairness, and public benefit. This focus on achieving the best value, rather than simply the lowest price, gave the government capacity to foster the long-term growth of the nation's infrastructure and industrial base.

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173. *See* William D. Adler, Engineering Expansion: The U.S. Army and Economic Development, 1787-1860, at 64-65 (2021). Historian Lindsay Schakenbach Regele has argued that the federal government's procurement capacity—and by extension its ability to fuel domestic industry—drove many early national innovations, including interchangeability in manufacturing. Lindsay Schakenbach Regele, Manufacturing Advantage: War, the State, and the Origins of American Industry, 1776-1848, at 4, 73-74 (2019).

174. *See* 1 Nagle, *supra* note 46, at 126-27.

175. *See id.*

176. *Id.* In addition to improving manufacturing processes in the United States, government contracting with Samuel Colt signaled a much-needed improvement to the military's capacity. *Id.* Weapons contracting before the Civil War was often shoddy, and during the Civil War, government-supplied "bayonets were often so frail that they bent like lead and many broke off during bayonet drill[s]," while the carbines were more likely to "shoot[] off [the firer's] own thumbs" than hit their target. *Id.* at 141-42.

177. Federal Property and Administrative Services Act of 1949, ch. 288, § 304, 63 Stat. 377, 395.

178. *Id.*

179. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243.

180. *See id.* §§ 7102-7204, 108 Stat. at 3367-69.

B. Procurement Law in State and Local Government

The evolution of competitive bidding at the state and local levels closely mirrored developments in federal procurement law. Like the federal system, state and local procurement law aimed to combat corruption and ensure contracts were awarded in the public interest through competitive bidding. The laws enacted to address these issues, which often required that contracts be awarded to the "lowest responsible bidder," remain on the books today.[181] Like the founders of the federal government's procurement system, however, the lawmakers who passed these laws never intended to prevent administrators from exercising their discretion to get the best value from their contracts. Courts embedded that broad intention in their interpretation of competitive-bidding laws. In doing so, they affirmed that the exercise of procuring administrative discretion was a fundamental feature of sound public-procurement practice—a vision that, over the course of the law's drift, has since been whittled away.

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181. *See, e.g.*, ALA. CODE § 41-16-50(a) (2024) (providing that public-works contracts "shall be made . . . to the lowest responsible and responsive bidder"); CAL. PUB. CONT. CODE § 10311(d) (West 2024) (describing that for the acquisition of goods and services by a state agency, "the department may in its sound discretion either award the contract to the lowest responsible bidder meeting specifications who remains willing to accept the award or else reject all bids"); GA. CODE ANN. § 36-10-2.1 (2022) (providing that for counties with populations of 800,000 or more, "contracts for building or repairing any courthouse or other public building, jail, bridge, causeway, or other public works or public property shall be let to the lowest responsible bidder"); WASH. REV. CODE § 39.04.010(2) (2022) (defining "Award" as "the formal decision . . . notifying a responsible bidder with the lowest responsive bid of . . . acceptance of the bid"). A number of statutes maintain the "lowest responsible bidder" language but have appended express authority for agencies to account for other criteria besides price. *See, e.g.*, N.C. GEN. STAT. § 143-129(b) (2023) (requiring for larger purchases that "the board or governing body shall award the contract to the lowest responsible bidder or bidders, taking into consideration quality, performance and the time specified in the proposals for the performance of the contract"). Others provide for selection of contracts based on the low-bid requirement but permit best-value authority as an alternative that may be available if the agency offers sufficient justification. *See, e.g.*, DEL. CODE ANN. tit. 29, § 6962 (2024) (permitting the contracting agency to "award any public works contract . . . to the lowest responsive and responsible bidder, unless the agency elects to award on the basis of best value," in which case it must make "a written determination of the award describing the reason or reasons why such award better serves the interest of the agency"). Another option is to dispel a presumption for low-bid by permitting best-value selection alongside low-bid selection without any required justification. *See, e.g.*, MINN. STAT. § 16C.28 (2023) (permitting agencies to award bids to either (1) "the lowest responsible bidder, taking into consideration conformity with the specifications, terms of delivery, the purpose for which the contract is intended, the status and capability of the vendor or contractor, other considerations imposed in the call for bids, and, where appropriate, principles of life-cycle costing" or (2) "the vendor or contractor offering the best value, taking into account the specifications of the request for proposals, the price and performance criteria").

New York's 1847 canal law is often cited as among the first state laws to impose competitive-bidding requirements.[182] Because it was an early mover, New York provided a model for other states to build upon, making the state's early bidding laws particularly interesting. The law—a ballot measure passed by the legislature and voters before being codified in the state constitution—required that "[a]ll contracts for work or materials on any canal shall be made with the persons who shall offer to do or provide the same at the lowest price."[183] This provision aimed to address rampant corruption in New York's canal-construction industry, where contracts were frequently awarded based on patronage or bribery.[184] To mitigate the ability of contractors to exploit the government's bidding system, the legislature and voters introduced a safeguard that permitted the state to cancel contracts imposing unforeseen or oppressive costs.[185]

The competitive-bidding framework that developed in New York over the next several years continued to target rampant corruption in canal construction.[186] A New York State Assembly committee investigating canal construction at the time uncovered "a system of frauds and abuse of confidence such as seldom comes to life."[187] Despite the fraud and corruption that foregrounded the adoption of clear lowest-bidder language in New York law, courts interpreting the statutes were quick to recognize that it was "practically impossible to literally enforce" the strict requirements.[188] For example, bidders who submitted impractically low bids were often required to withdraw those submissions, and bidders themselves even refused to enter contracts awarded at noncompetitive prices.[189] Courts affirmed the discretion of state officers to apply somewhat subjective evaluation criteria, such as quality and capability, to assess bidders within the

182. *See, e.g.*, Harp, *supra* note 126, at 43; Liebman, *supra* note 60, at 11-14.

183. *See* Liebman, *supra* note 60, at 12-13 (quoting N.Y. CONST. of 1846 art. VII, § 3 (1854)); *New York Contract Bidding for Canal Projects Amendment (February 1854)*, BALLOTPEDIA, https://ballotpedia.org/New_York_Contract_Bidding_for_Canal_Projects_Amendment_%28February_1854%29 [https://perma.cc/9365-R5PS].

184. Liebman, *supra* note 60, at 11-14.

185. *Id.* at 13 (citing N.Y. CONST. of 1846 art. VII, § 3 (1854)).

186. *See id.* at 11-14. The competitive-bidding laws also began to encompass contracts outside of canal construction as well. *See, e.g.*, Brady v. Mayor of New York, 20 N.Y. 312, 315 (1859) (discussing the common council's commitment to regulate rock-excavation contracts); People *ex rel.* Smith v. Flagg, 17 N.Y. 584, 587 (1858) (targeting map-making contracts).

187. *Outrageous Corruption—The Canal Frauds—Astounding Disclosures*, N.Y. HERALD, Feb. 21, 1847, at 2.

188. *In re* Hilton Bridge Constr. Co., 43 N.Y.S. 99, 109-10 (App. Div. 1897) (Herrick, J., dissenting) (citing People *ex rel.* Frost v. Fay, 3 Lans. 398, 401 (N.Y. App. Div. 1871)).

189. *Id.*

competitive system.[190] Only after the government established objective criteria were officers bound to exercise their discretion more rigidly.[191] And even then, courts extended leeway for administrators to apply their well-reasoned discretion to award contracts to not just the cheapest-priced bidder.[192]

Over the following years, more states began to include similar language mandating competitive bidding in their state constitutions or statutes.[193] And by the early twentieth century, almost every state had passed some form of the provisions.[194] States intended these laws to cut down on fraud and compel officers

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190. *See, e.g.*, Smith v. City of New York, 10 N.Y. 504, 508 n.1 (1853) ("The term 'lowest bidder' is not to be construed literally; in determining who is the lowest bidder, the quality and utility of the thing offered, and its adaptability to the purpose for which it is required, are to be considered."); Cleveland Fire Alarm Co. v. Metro. Fire Comm'rs, 5 Abb. Pr. (n.s.) 49, 55-56 (N.Y. Sup. Ct. 1869).

191. *See, e.g.*, *In re* Anderson, 17 N.E. 209, 210 (N.Y. 1888); *In re Hilton Bridge*, 43 N.Y.S. at 102.

192. *See, e.g.*, People *ex rel.* Bullard v. Contracting Bd., 33 N.Y. 382, 382 (1865) ("[T]he [lowest-bidder] law had committed to the judgment of the contracting board the decision of the question as to what bids were most advantageous to the State; and that the legislature had given them full authority, whenever in their opinion proposals made were excessive and disadvantageous to the State, to decline them."); People *ex rel.* George E. Mathews & Co. v. City of Buffalo, 25 N.Y.S. 50, 54 (App. Div. 1893) ("The courts have been, and should be, quite liberal in reviewing the acts of contracting boards in this regard; and, where it is apparent that the bid was deceptive, unbalanced, fraudulent, collusive, or disadvantageous, the board ought to reject the bid; and where the bidder is the highest instead of the lowest, and the lowest has been rejected, because of irregularity, the board may reject all, and the court in the exercise of its discretion will not interfere by mandamus."); *Fay*, 3 Lans. at 401 ("The Constitution declares that all contracts for work or materials on any canal shall be made with the person who shall offer to do and provide the same at the lowest price . . . . It is evident that this is a declaration of a broad and general principle. . . . There must be reposed in some officers of the State a discretion on this subject; and they must apply this constitutional provision in its spirit, not in its letter."). Although throughout the mid-nineteenth century, contracting for New York's canal construction was deeply corrupt, *see* Liebman, *supra* note 60, at 11-14, the addition of a requirement that certain canal contracts be awarded to the cheapest-priced bidder "[u]nfortunately . . . resulted only in new schemes [of corruption and fraud]. By offering to do major parts of a project at a very low rate while demanding exorbitant prices for minor ones, a contractor could present an 'unbalanced' but winning bid." Liebman, *supra* note 60, at 13 (citing Thomas J. Archdeacon, *The Erie Canal Ring, Samuel J. Tilden, and the Democratic Party*, 59 N.Y. HIST. 408, 411 (1978)). Rather than stripping administrators of discretion, it ultimately required "massive investigative action undertaken against the canal commissioners by the executive [to] put a halt to corruption." Liebman, *supra* note 60, at 14.

193. *See, e.g.*, H.B. 186, 58th Gen. Assemb., 1st Sess., 1868 Laws of Ohio 59-63; An Act to Regulate Contracts on Behalf of the State, in Relation to Erection and Buildings, *reprinted in* THE STATUTES OF CALIFORNIA PASSED AT THE 21ST SESSION OF THE LEGISLATURE, 1875-6, at 427-33 (Sacramento, State Printing Off. 1876); Harp, *supra* note 126, at 43.

194. *See* CONSULT JAMES, THE PROTECTION OF PUBLIC INTERESTS IN PUBLIC CONTRACTS 13-14, 23 (1946).

to make full and fair use of public funds.[195] But those original intentions still envisioned substantial discretion for procuring agents to make their best, reasoned judgments.[196] The leading treatise on public contracts at the time embraced administrative discretion as "[t]he positive advantage" of the "'lowest responsible bidder' formula."[197]

Competitive bidding spread to local governments when they, too, gained greater autonomy over their charters and expanded administrative capacities following the Progressive Era reforms of the late nineteenth century.[198] With the growth of public-infrastructure projects, local governments increasingly needed formal procurement processes to ensure accountability and fiscal responsibility.

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195. *See* Harp, *supra* note 126, at 43.

196. *See, e.g.*, West v. City of Oakland, 159 P. 202, 204 (Cal. Dist. Ct. App. 1916) (holding that without "direct averments and proof of fraud," the city council's "discretionary power as to which is the lowest responsible bidder . . . will not be interfered with by the courts"); Williams v. City of Topeka, 118 P. 864, 866-67 (Kan. 1911) ("The determination of . . . who is the lowest responsible bidder does not rest in the exercise of an arbitrary and unlimited discretion, but upon a bona fide judgment, based upon facts tending to support the determination . . . . The city authorities are required to act fairly and honestly, upon reasonable information, but when they have so acted their decision cannot be overthrown by the court."); Clapton v. Taylor, 49 Mo. App. 117, 124 (Ct. App. 1892) ("It ought hardly to be supposed that a law requiring municipal authorities to let a contract to the lowest bidder means absolutely that the contract shall be given to the lowest bidder without regard to his fitness, responsibility or capacity to perform the work . . . . Such matters [as fraud or attacks on the bona fide conduct of government officials] should be made to appear, in order to overturn the contract."); Findley v. City of Pittsburgh, 82 Pa. 351, 353 (1876) ("[T]he Act of Assembly imposed upon the city authorities[']duties, in awarding the contract in controversy, which were not merely ministerial, but deliberative and discretionary, and that as a consequence the writ of mandamus would not lie to compel them to award the contract to N. Snyder & Co., who were the lowest bidders; having, perhaps indiscreetly, but not corruptly, proceeded to the performance of the duty with which they were charged by the statute, the matter was put beyond our reach.").

197. James, *supra* note 194, at 23 (noting that while the government "is not free to disregard entirely the lowest bidder . . . abuse of discretion or fraud or arbitrary action must be shown if the award is to be questioned").

198. *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 10, 15 (1990) (citing Ernest S. Griffith, A History of American City Government: The Progressive Years and Their Aftermath, 1900-1920, at 34-99 (1974)); *Principles of Home Rule for the 21st Century*, Nat'l League of Cities 9-13 (2020), https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf [https://perma.cc/CRT5-DTS5] (charting the expanded authority of local governments in the late nineteenth century).

Starting in the late nineteenth century, Philadelphia,[199] Nashville,[200] and other cities around the country adopted ordinances and city charters that mirrored state competitive-bidding laws. These laws were passed to curtail favoritism in awarding contracts and to ensure cost-effective use of public funds.[201] Some state courts even limited bidders' standing for challenging a contract award to where "corruption or favoritism . . . influenced the conduct of the bidding officials."[202]

In a notable case from 1931, *Wester v. Balote*, the Florida Supreme Court summarized the jurisprudence governing public procurement in states and localities around the country.[203] It defined the purpose of the laws as follows:

> [T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the county at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government].[204]

Nowhere in the court's analysis did it suggest that procurement laws mandated selecting the lowest bidder.[205] Instead, the laws were designed to ensure a full and fair return on public funds, free from fraud or favoritism.[206] Courts routinely affirmed government discretion to reject all bids, select bidders who did not submit the lowest proposal, or even award contracts to parties who had not

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199. *See* Ordinances and Joint Resolutions of the City of Philadelphia: From January 1st to December 31st, 1874, at 126-27 (Phila., King & Baird Printers 1874); Act of May 23, 1889, No. 247, art. IV, § 6, 1889 Pa. Laws 277, 283.

200. *See* Ordinances of the City of Nashville, to Which Are Prefixed the State Laws Chartering and Relating to the City 115 (Nash., Marshall & Bruce 1881).

201. *See, e.g.*, Lawrence Brunoli, Inc. v. Branford, 722 A.2d 271, 274 (Conn. 1999).

202. *Id.* at 273.

203. 138 So. 721, 724 (Fla. 1931).

204. *Id.* at 723-24.

205. *Id.* at 724. The court acknowledged that lowest-bidder requirements benefited public economy and taxpayer interests, *id.*, but declined to state that these requirements were necessitated "where no abuse of power, fraud, corruption, or unfair dealing is proved." *Id.* at 727.

206. 1 Nat'l Coop. Highway Rsch. Program, *Selected Studies in Transportation Law*, Transp. Rsch. Bd. 4 (2004), https://crp.trb.org/selected-studies-law/wp-content/uploads/sites/20/2019/11/SSTLv1.pdf [https://perma.cc/2K4X-LVS2] ("Even though avoidance of favoritism and fraud is important, it is not the most important purpose of public bidding rules. The primary objective has always been to obtain a full and fair return for an expenditure of public funds.").

initially bid.[207] Judicial intervention was then mostly limited to instances where administrators exercised discretion arbitrarily or capriciously.[208]

C. Ad Hoc Exceptions to a Strict Low-Bid Requirement

A limited set of exceptions to competitive- and low-bid procurement requirements have functioned during at least the late nineteenth century and have since stood the test of time.[209] Courts permitted these exceptions even where procurement laws required the government to contract with the lowest bidder determined through a competitive-bidding process. When state and local governments took on larger roles shaping communities through social policy in the early twentieth century, they introduced certain best-value-plus preferences, which widened the traditional bounds of competitive bidding. Historian Henry A. Cohen divides the set of exceptions to competitive-bidding and low-bid procurement into two categories: first, where publicly posting a contract is not desirable, and second, where emergency conditions require circumventing the competitive process.[210] The former category is broad, encompassing government land purchases and cases that involve specialized professional services or a unique product.[211] Both exceptions illustrate how procurement rules once adapted to help the government accomplish complex tasks.

Courts applying these exceptions interpreted competitive-bidding laws to empower administrators to get the best value through the procurement process. Take, for example, the exception from low-bid procurement when contracting for specialized and professional services. This exception applies to government contracting with professional-service providers such as engineers, lawyers, physicians, architects, and accountants.[212] It arose from the recognition that the quality of such services often varied with price, even for accomplishing a single

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207. Paul A. Mancino, *Rights of the Unsuccessful Low Bidder on Government Contracts*, 15 CASE W. RSRV. L. REV. 208, 209 (1963).

208. *See, e.g.*, *id.* at 211 nn. 27 & 30-31 (listing cases); State *ex rel.* United Dist. Heating Inc. v. State Off. Bldg. Comm'n, 179 N.E. 138, 139 (Ohio 1931); Adolphus v. Baskin, 116 So. 225, 226 (Fla. 1928) (voidinga a contract for the unreasonable exercise of discretionary power); Seysler v. Mowery, 160 P. 262, 264 (Idaho 1916) (finding an insufficient basis for an award to not the lowest bidder); Armitage v. Mayor of Newark, 90 A. 1035, 1037 (N.J. 1914) (voiding a contract for failing to publicly announce changed terms); Kratz v. City of Allentown, 155 A. 116, 117 (Pa. 1931) (voiding a contract for an inadequate investigation of the low bid).

209. *See, e.g.*, *infra* note 216 and accompanying text.

210. COHEN, *supra* note 54, at 4.

211. *Id.*

212. *Id.*

stated objective.[213] A 1921 Texas case, *Hunter v. Whiteaker*, commented on the exception in detail. There, the court focused on a town's decision not to hold competitive bids for an engineering contract required by statute to be bid competitively.[214] The court resoundingly dismissed the plaintiff's argument that the government should have undergone a competitive-bidding selection process:

> To hold that the act would require that the services of a man belonging to a profession such as that of the law, of medicine, of teaching, civil engineering, or architecture should be obtained by a county only through competitive bidding would give a ridiculous meaning to the act, and require an absurdity . . . . Such a test would probably be the best that could be conceived for obtaining the services of the least competent man, and would be most disastrous to the material interests of a county.[215]

Most, if not all, states have similar exemptions for procurement of professional services.[216] These exemptions were created despite statutory language mandating competitive bidding and lowest-bidder procurement.

The emergency exemption also shows that procurement rules were not meant to impose excessive procedural hurdles, especially when swift government action is needed.[217] Because emergency determinations are so context specific, courts have broad discretion to determine what qualifies as an emergency exempt from competitive bidding.[218] For example, a court in California found that emergency conditions existed when a city government contracted to clean up a

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213. *Id.* at 5.

214. 230 S.W. 1096, 1097 (Tex. Civ. App. 1921); *see also* Douglas D. Gransberg, Sanjaya Senadheera, Jason Valerius & Mustaque Rumi, *Best Practices in Design-Build Contracting for Highway Projects in Texas*, TEX. TECH UNIV. C-6, C-7 (Apr. 30, 1997), https://www.depts.ttu.edu/techmrtweb/documents/reports/complete_reports/3916-1R_tech.pdf [https://perma.cc/7KCD-KW34] (listing related exceptions for the provision of architectural services and construction-planning consultant services).

215. *Hunter*, 230 S.W. at 1098.

216. *See* COHEN, *supra* note 54, at 4-6; *see also, e.g.*, Van Baman v. Gallagher, 37 A. 832, 832 (Pa. 1897) (finding that local-government commissioners did not need to allocate a monument-construction project through competitive bidding); Mackenzie v. State, 81 N.E. 638, 639-40 (Ohio 1907) (finding the same for a courthouse construction); Horgan & Slattery v. City of New York, 100 N.Y.S. 68, 71 (App. Div. 1906) (finding the same for an armory-building project); Braaten v. Olson, 148 N.W. 829, 830-31 (N.D. 1914) (finding the same for hiring semi-professional services like accountants); *In re* Bd. of Cnty. Comm'rs, 177 N.W. 1013, 1015 (Minn. 1920) (finding the same for employment contracts for "personal service[s] of an agent"); Franklin v. Horton, 116 A. 176, 178 (N.J. 1922) (finding the same for an engineering contract for an electric light-distributing system); Rollins v. City of Salem, 146 N.E. 795, 796 (Mass. 1925) (finding the same for an engineering contract for a school building).

217. *See* COHEN, *supra* note 54, at 6.

218. *Id.*

bathing beach polluted by the dredging of a harbor channel.[219] A Washington court, however, denied an exception for construction of a new bridge to ease traffic after a sudden explosion in the local population.[220] Some local statutes authorize exemptions when a city officially declares the presence of an emergency, precluding any judicial review of the action.[221]

For over a century, some state and local governments have broadened the scope of the exceptions by incorporating best-value-plus considerations into the contracting process.[222] These added requirements signify the role a flexible procurement system can have in empowering government in modern society. For instance, the federal government has historically preferred that certain products be produced with American materials and by American contractors.[223] Two federal defense appropriations acts—the Naval Service Appropriations Act of 1866[224] and the Army Appropriation Act of 1876[225]—both mandated reliance on American materials, labor, and products for public-improvement contracts. Often these preferences were imposed to protect the country's important security or commercial interests. Best-value-plus preferences have also seen a resurgence with the "Buy American" policies of the Trump and Biden Administrations.[226]

Despite their deep roots, best-value-plus preferences have proven somewhat difficult to implement. The Department of Justice's Office of Legal Counsel (OLC) has, since at least 1986, interpreted best-value-plus criteria as "unduly" limiting the bidding pool and thereby thwarting open competition in procurement.[227] This means that best-value-plus preferences, such as preferences for labor conditions or sustainable production methods, may not attach to government contracts that otherwise must be competitively bid. Like federal agencies,

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219. L.A. Dredging Co. v. City of Long Beach, 291 P. 839, 842-43 (Cal. 1930).

220. Green v. Okanogan County, 111 P. 226, 229 (Wash. 1910).

221. *See, e.g.*, Sheehan v. City of New York, 75 N.Y.S. 802, 803-04 (Sup. Ct. 1902).

222. COHEN, *supra* note 54, at 15-17.

223. *See* 1 NAGLE, *supra* note 46, at 160, 165-66.

224. Naval Service Appropriations Act of 1866, ch. 74, § 7, 13 Stat. 462, 467.

225. Army Appropriation Act of 1876, ch. 133, § 2, 18 Stat. 452, 455.

226. *See, e.g.*, *The Buy American, Hire American President*, WHITE HOUSE OFF. OF TRADE & MFG. POL'Y 4-5 (2020), https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/10/Donald-J-Trump-Buy-American-Hire-American-President.pdf [https://perma.cc/S2UX-AY87] (describing the Trump Administration's best-value-plus policies implemented for contracts connected to the manufacturing industry).

227. *See* Memorandum Op. for the Acting Gen. Couns., Dep't of Transp., 37 Op. O.L.C. 33, 33-36 (2013); Memorandum Op. for the Gen. Couns., Dep't of Transp., 10 Op. O.L.C. 101, 103 (1986). *But see* Cummings & Janis, *supra* note 76, at 397-400 (presenting a convincing rebuttal of the Office of Legal Council's interpretation by identifying how state and local governments have long conducted best-value-plus procurement).

state and local governments disbursing federal funds follow the OLC's interpretation, meaning they may not be able to put local best-value-plus preferences into practice.[228]

Similarly, prospective bidders have advanced successful dormant Commerce Clause challenges to bidder-selection preferences for local contractors or workers. Courts in some of these cases have found the bidding restrictions to be unconstitutional forms of discrimination against out-of-state nonresidents.[229] But courts have occasionally upheld the local selection criteria because a government has a reasonable and constitutional basis for expressing its sincere interests in choosing a certain type of material[230] or preferencing local taxpayers.[231] Other common preferences, such as for minority- or female-owned contractors or for contractors who employ unionized workers, have also been permitted.[232]

The ad hoc exceptions from low-bid procurement and adoption of best-value-plus preferences, far from undermining competitive-bidding principles, affirm that flexibility is an integral part of the government's ability to get the best value. These adaptations reveal a deliberate effort to balance efficiency with broader social, economic, and security objectives. Courts, in permitting the adaptations, have implicitly endorsed government discretion in the procurement process. But the longstanding exceptions to low-bid procurement have provided little protection against a gradual erosion of administrative discretion. Strict interpretations of lowest-bidder laws have since replaced the original expansive readings that reserved room for the exercise of administrators' judgment. As discussed in Section I.B, strict interpretations have also resulted in a system that is more expensive, less efficient, and more susceptible to fraud and corruption—outcomes the original broad readings of competitive-bidding laws were meant to prevent.

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228. Cummings & Janis, *supra* note 76, at 394-96.

229. *See, e.g.*, People *ex rel.* Treat v. Coler, 59 N.E. 776, 776 (N.Y. 1901); People v. Buffalo Fish Co., 58 N.E. 34, 36-37 (N.Y. 1900).

230. Allen v. Labsap, 87 S.W. 926, 928 (Mo. 1905).

231. *See, e.g.*, Air Transp. Ass'n of Am. v. City & County of San Francisco, 266 F.3d 1064, 1078-79 (9th Cir. 2001); S.D. Myers, Inc. v. City & County of San Francisco, 253 F.3d 461, 471-72 (9th Cir. 2001); Heim v. McCall, 239 U.S. 175, 189-90 (1915); State *ex rel.* Collins v. Senatobia Blank Book & Stationery Co., 76 So. 258, 260-61 (Miss. 1917).

232. *See, e.g.*, Taylor v. Ryan, 3 N.Y.S.2d 684, 684-85 (App. Div. 1938); Burland Printing Co. v. LaGuardia, 9 N.Y.S.2d 616, 617-18 (Sup. Ct. 1938).

III. THE DRIFT FROM PUBLIC-PROCUREMENT LAW'S ORIGINAL INTENT

The state and local public-procurement process is today like an old road, littered with procedural bumps and potholes that weaken administrative discretion and lessen government capacity.[233] This scenario is the result not of legislative intent but rather a phenomenon known as legal drift: the gradual change in application and interpretation of legal rules over time.[234] Judges, lawyers, administrators, and policymakers all contribute to this process. Over time, subtly shifting interpretive lenses have culminated in a significant change to the law's function. In procurement law, legal drift is most visible on the state and local level, where it has been shaped by two forces: adversarial legalism and a strict efficiency logic. Both forces limit discretion and worsen the government-capacity constraints already imposed by permitting,[235] zoning,[236] citizen voice,[237] and fiscal capacity.[238] Reforms targeted at combating adversarial legalism and efficiency logics have percolated, but most have been unsuccessful and piecemeal. This Part traces procurement law's drift through New York's state courts and reveals how both hang-ups have reshaped judicial decision-making. It also examines the Central Subway project as evidence of how these problems manifest on the ground.

A. Adversarial Legalism

The American public-procurement crisis is explained in part by adversarial legalism, a uniquely American way of law. Robert A. Kagan defines this mode of governance as "policymaking, policy implementation, and dispute resolution by means of party-and-lawyer-dominated legal contestation."[239] The term

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233. For examples of restrictions on administrative discretion in transportation-sector procurement, see Scott et al., *supra* note 59, at S-1, which identifies that "[t]he majority of public sector highway construction contracts are awarded strictly on a low-bid basis"; and Gransberg, *supra* note 64, at 2, which finds that the transportation sector still awards the majority of its contracts to the "lowest responsive and responsible bidder" despite "mounting empirical evidence supporting [best-value] awards" in the industry.

234. *See supra* note 57 and accompanying text.

235. *See* Liscow, *supra* note 106, at 153.

236. *See* KLEIN & THOMPSON, *supra* note 17, at 34-45; Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 PEPP. L. REV. 719, 722 (2023).

237. *See* Lindsey, *supra* note 22, at 6; Schleicher & Bagley, *supra* note 16, at 39.

238. *See* DAVID SCHLEICHER, IN A BAD STATE: RESPONDING TO STATE AND LOCAL BUDGET CRISES 17 (2023).

239. KAGAN, *supra* note 34, at 3.

contrasts U.S. adjudication with other adjudication models. Western Europe, for instance, depends on a bureaucratic administration whereby experts—not judges or lawyers—exercise discretion in decision-making.[240] The United States, by contrast, depends on formalistic and complex legal rules that mandate strict compliance with procedural requirements.[241] This litigious culture is self-perpetuating.[242] Moreover, lawyers', and arguably the public's, deep-seated mistrust of government and devotion to individualism have only further entrenched its influence.[243]

Adversarial legalism has been a defining feature of American democracy since the country's Founding, although its influence has arguably expanded with time.[244] The United States, as described by Seymour Martin Lipset, "began and continues as the most anti-statist, legalistic, and rights-oriented nation."[245] The features of adversarial legalism became more prevalent in the 1960s with deepening mistrust in government and centralized authority.[246] Around that same time, lawmakers began legislating prescriptive statutes and regulations, which reflected a desire to impose tighter control over agency action.[247] They also expanded judicial review.[248] Courts, in turn, adopted an aggressive approach, subjecting government decisions to a "more searching and demanding" review.[249] Over time, these influences shaped the hallmarks of adversarial legalism:

(1) more complex legal rules;
(2) more formal, adversarial procedures for resolving political and scientific disputes;
(3) slower, more costly forms of legal contestation;
(4) stronger, more punitive legal sanctions;

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240. *See* Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. Pol'y Analysis & Mgmt. 369, 374, 391 (1991).

241. *Id.* at 372.

242. *See* Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 Law & Soc. Inquiry 1, 6-7 (1994).

243. *See* Bagley, *supra* note 106, at 353 & n.34, 381, 397 n.335.

244. *See* Kagan, *supra* note 34, at 17-18; *see also* Marc Galanter, *Law Abounding: Legislation Around the North Atlantic*, 55 Mod. L. Rev. 1, 2-11 (1992) (describing the expansion of legal action in the United States).

245. Seymour Martin Lipset, American Exceptionalism: A Double-Edged Sword 20 (1996).

246. Kagan, *supra* note 34, at 59; *see also* Dunkelman, *supra* note 17, at 14 (describing how mistrust has influenced government since the 1960s).

247. Kagan, *supra* note 34, at 217.

248. *Id.*

249. *Id.* at 59.

(5) more frequent judicial review of and intervention into administrative decisions; and
(6) more political controversy about (and more frequent change of) legal rules and institutions.[250]

Each of the above characteristics shapes American legal practice today. Taken together, these characteristics provide a framework for evaluating whether adversarial legalism advances fairness and accountability or instead entangles government in unnecessary legal conflict.

Adversarial legalism is not a normative theory; it describes the way that things are. In fact, Kagan characterizes adversarial legalism as Janus-faced—seen in both positive and negative lights.[251] Sometimes adversarial legalism gives greater voice to individuals looking to advance their individual rights, combat inequality, or guard against government intrusion.[252] But it also has significant drawbacks. Owen M. Fiss once noted concern that the legal system's adversarial nature, rich with its complexity and proceduralism, can sometimes obscure actual decision-making.[253]

In practice, adversarial legalism can prevent people from achieving the very aims that brought them to the legal system in the first place. The United States now lags behind other nations—at least in terms of government capacity—that have adopted different modes of law.[254] Scholars, including Zachary Liscow, have recently pointed to adversarial legalism as an explanation for the nation's permitting problems.[255] The same logic applies to public procurement. Administrators become so bound up in red tape and litigation—often triggered by

250. *Id.* at 8.

251. *Id.* at 37-40.

252. *See, e.g.*, Charles R. Epp, Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State 13-15 (2009).

253. Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1086 (1984) ("There is, of course, sometimes a value to avoidance, not just to the judge, who is thereby relieved of the need to make or enforce a hard decision, but also to society, which sometimes thrives by masking its basic contradictions.").

254. *See supra* notes 103-104 and accompanying text.

255. *See* Liscow, *supra* note 235, at 152-53; *see also* Robert A. Kagan, *The Dredging Dilemma: Economic Development and Environmental Protection in Oakland Harbor*, 19 Coastal Mgmt. 313, 317 (1991) (describing adversarial legalism in environmental permitting); Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 Tex. Int'l L.J. 449, 449 (2005) (referencing the effects of adversarial legalism on international arbitration); Edward L. Rubin, *Discretion and Its Discontents*, 72 Chi.-Kent L. Rev. 1299, 1299-1300 (1997) (comparing conceptions and implications of administrative discretion in the American Federal Reserve system and the German Bundesbank, the latter of which operates under a statute and two regulations that are slimmed down to 110 pages and implemented by highly specialized administrators).

formal protests from losing bidders — that they struggle to procure projects serving the public interest.

On a macro level, adversarial legalism helps explain procurement law's drift since the 1960s as it gradually transformed from a tool envisioned to empower government to a constraining force. This drift manifests in several respects: (1) courts interpret procurement laws more narrowly; (2) strict statutory language and judicial interpretations make litigation easy to initiate but difficult to defend against; (3) reforms grant administrators only marginal increases in discretion; and (4) the fragmented structure of procurement authority across local, state, and federal governments continues to stifle reform.

First, courts have interpreted procurement laws, and particularly the lowest-bidder requirement, in an increasingly strict manner. This shift reflects the rise of strict textualism, which is itself defined by many of the same forces that characterize adversarial legalism, such as a formal application of the "plain meaning of the statute" rather than a more flexible, purpose-oriented application.[256] In the nineteenth century, lowest-bidder laws were understood to require the selection of the contractor that best served the public interest. Courts feared that selecting the lowest-priced bid without regard to quality would be "impossible" or lead to "disaster[]."[257] But interpretations of the lowest-bidder laws have gradually drifted so that courts now focus on bid price alone and mandate strict compliance with procedural requirements. In some jurisdictions, courts now understand lowest-bidder laws to require procuring agencies to spell out all evaluation criteria in the initial bid solicitation, even if certain factors only become relevant after the process is underway.[258] This hyperproceduralism leaves administrators vulnerable to technical constraints and delays.

The evolution of New York procurement law illustrates this legal drift. In the 1800s, the state enacted its first competitive-bidding laws to combat corruption in public contracting for the construction of the state's canal system.[259] These laws mandated selection of the lowest bidder, but the state government interpreted this requirement loosely. Courts found that awarding public contracts

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256. *See* Eskridge & Frickey, *supra* note 36, at 340 (describing that among the justifications for textualism is a desire to restrain "more abstract and judicially malleable interpretive sources").

257. People *ex rel.* Frost v. Fay, 3 Lans. 398, 401 (N.Y. Sup. Ct. 1871) ("To [award the contract to the lowest bidder] *literally* might often be impossible."); People *ex rel.* Smith v. Flagg, 5 Abb. Pr. 232, 236 (N.Y. Sup. Ct. 1857) ("But in avocations strictly professional, which require for their successful pursuits a learned education, no specifications or supervision can prevent the disasters and losses which would result from the employment of ignorant or unskillful persons, who might happen to be the lowest bidders.").

258. *See, e.g.*, Acme Bus Corp. v. Orange County, 68 N.E.3d 671, 675-76 (N.Y. 2016); Foley Bros., Inc. v. Marshall, 123 N.W.2d 387, 390 (Minn. 1963).

259. *See* Liebman, *supra* note 60, at 11-14.

"requires the exercise on [the administrator's] part of judgment and discretion."[260] In fact, it was thought to be "practically impossible to literally enforce . . . that provision of the Constitution which provides that all contracts for work or materials upon the canals shall be made with the person who shall offer to do it for the lowest price."[261] Courts were most concerned about applying procurement laws in a way that would assist government in achieving the "best interest of the [public]."[262] The New York Court of Appeals went so far as to say that the validity of a contract "does not depend upon [the administrator's] accuracy, but upon an honest effort to be accurate."[263] Across all these cases, the focus was on preserving administrative discretion while guarding against impropriety and promoting competition among bidders.

But the original broad reading of lowest-bidder laws has gradually disappeared. Around the mid-twentieth century, state courts began opposing government attempts to consider selection factors beyond bid price. Then, the public was contending with greater government influence, spurred by President Roosevelt's New Deal programs.[264] The "astronomical" growth in the amount of public funds committed to public contracts made some courts feel it was "a matter of grave public concern that there be absolute honesty in the procuring of a public contract."[265] Without any change in the statutory language, these courts refashioned competitive-bidding laws "to effectively *deter* the unscrupulous practice of fraudulent and collusive bidding on public contracts."[266] Deference to administrative discretion flew out the window.

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260. Erving v. Mayor of New York, 29 N.E. 1101, 1103 (N.Y. 1892); *see also* Cleveland Fire Alarm Co. v. Metro. Fire Comm'rs, 7 Abb. Pr. (n.s.) 49, 55 (N.Y. Sup. Ct. 1869) ("Even where a statute declares that contracts shall be given to the 'lowest bidder,' it cannot be held that these words should be construed literally, and accepted as an absolute restriction.").

261. People *ex rel.* Hilton Bridge Constr. Co., 43 N.Y.S. 99, 109-10 (App. Div. 1897) (citing *Fay*, 3 Lans. at 401).

262. Walsh v. Mayor of New York, 20 N.E. 825, 826 (N.Y. 1889).

263. Reilly v. Mayor of New York, 18 N.E. 623, 625 (N.Y. 1888).

264. *See* Jered Contracting Corp. v. N.Y.C. Transit Auth., 239 N.E.2d 197, 200-01 (N.Y. 1968) (noting the "expansion of government services on all levels").

265. *See, e.g.*, *id.* at 201. The swelling size of government around this time no doubt shaped the path of the law more generally. *See* Charles Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964) ("One of the most important developments in the United States during the past decade has been the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale.").

266. *See, e.g.*, *Jered Contracting Corp.*, 239 N.E.2d at 200-01 (emphasis added); Hillside v. Sternin, 136 A.2d 265, 270 (N.J. 1957) ("In this field it is better to leave the door tightly closed than to

The next several decades brought more limitations on government discretion for the stated purpose of deterring a corrupt and bloated government.[267] In 1986, the New York Court of Appeals relied on a deterrence rationale to reject the City of Rochester's requirement that apprenticeship training programs be a prerequisite for bidding on public-works contracts.[268] The court found that "the predominate purpose of the State Legislature was the protection of the public fisc by requiring competitive bidding."[269] What the court meant by protection of the public fisc was, in substance, little different from preventing corruption and bloat, since preventing unnecessary expense and guarding against self-dealing both serve the same end. This introduced another concern to the court's reasoning: cost cutting.

This focus on cost cutting was new. But courts stuck to it. In 1998, the New York Court of Appeals struck down New York City's joint-bidding agreement for construction and public-utility-interference work during construction.[270] The joint-bidding agreement was supposed to resolve the city's problems from contract segmentation and thereby eliminate "lengthy delays . . . and inflated costs," some of which could be passed on to consumers through higher utility prices.[271] The purpose of the joint-bidding arrangement was not in dispute, but

permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way."); Griswold v. Ramsey County, 65 N.W.2d 647, 652 (Minn. 1954) ("A fundamental purpose of competitive bidding is to deprive or limit the discretion of contract making officials in the areas which are susceptible to such abuses as fraud, favoritism, improvidence, and extravagance. Any competitive bidding procedure which defeats this fundamental purpose, even though it be set forth in the initial proposal to all bidders, invalidates the construction contract although subsequent events establish, as in the instant case, that no actual fraud was present."); City of Inglewood-L.A. Cnty. Civic Ctr. Auth. v. Sup. Ct., 500 P.2d 601, 604 (Cal. 1972) (rejecting the government's otherwise good-faith attempt to procure management-contractor services with similar procedures as engineer or architect services because "[t]o hold otherwise as a broad principle would open the door to possible favoritism, fraud or corruption in the letting of other public construction contracts"); Konica Bus. Machs. U.S.A., Inc. v. Regents of Univ. of Cal., 253 Cal. Rptr. 591, 595 (Ct. App. 1988) ("Because of the potential for abuse arising from deviations from strict adherence to [competitive-bidding] standards . . . the letting of public contracts universally receives close judicial scrutiny . . . .").

267. Although some judges in this period were willing to protect government discretion, they were deviations from a much stronger current moving in the opposite direction. For an example of a decision accommodating some government discretion, see *Exley v. Village of Endicott*, 415 N.E.2d 913, 915 (N.Y. 1980), which suggested that whether competitive-bidding laws had been violated should be judged according to "the total character of the arrangement."

268. *See* Associated Builders & Contractors, Inc. v. City of Rochester, 492 N.E.2d 781, 782-83 (N.Y. 1986).

269. *Id.*

270. Diamond Asphalt Corp. v. Sander, 700 N.E.2d 1203, 1215 (N.Y. 1998).

271. *Id.* at 1205.

the court nevertheless interpreted competitive-bidding laws to prohibit it.[272] The court's majority was concerned that the city's portion of the successful joint bid might not be the lowest bid for that portion of the contract when viewed alone.[273] By narrowing the circumstances where government might make a discretionary decision for the public's benefit, the decision further proceduralized public procurement. It did not matter if the hyperproceduralized process resulted in delay, costs, and burdens for the government,[274] not to mention an increased risk of fraud.[275]

Today, New York courts interpreting competitive-bidding laws read them just as strictly. This is evident from the Town of Southeast's struggle to procure refuse-removal services.[276] To begin the solicitation process, the local government issued a detailed public proposal that included minimum equipment and work requirements.[277] When the town inspected each of the bidders, it found that the second-lowest bidder's "operations, cleanliness, professionalism and process are head-and-shoulders superior to that of [the lowest bidder]."[278] In the administrators' judgment, the second-lowest bidder "would be most capable of providing for the needs of the residents of the Town of Southeast."[279] But because the government had not listed the qualitative criteria in the original bidding proposal, the court tossed out the town's award. If the government wanted to consider more qualitative requirements, it needed "to reject all the bids submitted and begin the process anew."[280]

This decision hampered government capacity, as the dissent pointed out:

> Only by exercising its sound business judgment on the question whether a bidder is financially and technically responsible can a municipal agency

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273. *Id.* at 1205, 1210–11.

273. *Id.* at 1205.

274. *See id.* at 1216 (Kaye, C.J., dissenting).

275. The dissent quite clearly describes how the disjointed bidding process "compelled [New York City] to extend completion dates in order to accommodate the utility interference work, adding cost and public inconvenience." *Id.* The "superior bargaining position" held by the contractors successful under the disjointed-bidding framework allowed those contractors to "goug[e] the companies for the necessary utility work," forcing the companies to "pass[] on [the higher costs] to their customers." *Id.*

276. *See* AAA Carting & Rubbish Removal, Inc. v. Town of Southeast, 951 N.E.2d 57, 58 (N.Y. 2011).

277. *Id.*

278. *Id.* at 59 (quoting the councilmembers' report to the Town Board concerning a visit to the second-lowest bidder's facilities).

279. *Id.* (quoting a councilmember's affidavit in response to the lowest bidder's petition for the Town of Southeast to set aside the award to the second-lowest bidder).

280. *Id.* at 62; *see also* Acme Bus. Corp. v. Orange County, 68 N.E.3d 671, 676 (N.Y. 2016) ("Awards may be overturned even without evidence of actual impropriety.").

> ensure that the best work consistent with a low price is obtained—as opposed to merely adequate work that costs less in the short term, but may cost public money in the future. The dispositive question is always whether it is in the public interest to disapprove a low bid; competitive bidding statutes exist to benefit the public, not contractors.[281]

And even when government tries to consider broader qualitative factors, it is not uncommon for courts to strike down those attempts for deviating from a strict, cost-focused reading of the competitive-bidding laws.[282]

Second, strict statutory language, coupled with even stricter judicial interpretation, makes procurement litigation easy to initiate and difficult to defend against. Administrators, fearing legal challenges, are incentivized to create a paper trail that reveals the cost-connectedness of their procurement decisions.[283] Even still, they may hire independent experts to justify their inclusion of specific criteria in the bid process.[284] Administrators also hesitate to exercise their discretion, out of fear that doing so might trigger lawsuits.[285] For instance, a bidder

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281. *AAA Carting*, 951 N.E.2d at 62-63 (Pigott, J., dissenting).

282. *See, e.g.*, Council of New York v. Bloomberg, 846 N.E.2d 433, 439 (N.Y. 2006) (striking down added employment requirements to procurement contracting because it would not "make the City's contracts cheaper or their performance more efficient"). The Court reached this conclusion despite the New York State Comptroller's testimony that the added requirements have "the potential to save significant resources for both the city and the state of New York." *Id.* at 445 (Rosenblatt, J., dissenting) (quoting the comptroller's testimony). For additional instances of courts reading lowest-bidder requirements to prohibit consideration of certain nonprice factors, see, for example, *City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court*, 500 P.2d 601, 604-07 (Cal. 1972); and *Rochester City Lines, Co. v. City of Rochester*, 868 N.W. 655, 664-65 (Minn. 2015). In other cases, governments considering qualitative or subjective criteria lost at the trial-court level and had to appeal to a higher court to validate an award not to the lowest bidder. *See, e.g.*, F.S.D. Indus., Inc. v. Bd. of Educ., 399 A.2d 1021, 1022-23 (N.J. 1979) (per curiam); Blue Cross & Blue Shield of R.I. v. Najarian, 865 A.2d 1074, 1077-79 (R.I. 2005); State *ex rel.* E.D.S. Fed. Corp. v. Ginsberg, 259 S.E.2d 618, 626 (W. Va. 1979).

283. *See, e.g.*, Standing Comm. on Lab., *Responsible Bidding on Public Work: Improving New York's Lowest Responsible Bidder Law*, N.Y. STATE SENATE 8 (Jan. 2010), https://www.nysenate.gov/sites/default/files/LRB.report.%20publication_0.pdf [https://perma.cc/4BYN-H9HY]; *PS&E Preparation Manual*, TEX. DEP'T OF TRANSP. 8-3 (Oct. 2024), https://www.txdot.gov/content/dam/txdotoms/des/pse/pse.pdf [https://perma.cc/8FUC-M57L].

284. *See, e.g.*, Empire State Chapter v. County of Onondaga, No. 99-490, 1999 WL 297696, at *3 (N.Y. Sup. Ct. Mar. 16, 1999).

285. This conclusion was confirmed through conversations with state officials who visited the class Law of Infrastructure: Why Is Building in the U.S. So Expensive and Slow? (Yale Law School, Fall 2024) and is supported by economic research, even in countries that have lower levels of adversarial legal practice. *See* Decio Coviello, Luigi Moretti, Giancarlo Spagnolo & Paola Valbonesi, *Court Efficiency and Procurement Performance*, 120 SCANDINAVIAN J. ECON. 826, 856

may propose an innovative approach that minimizes public disruption during construction. If the innovation was not listed in the bid solicitation, selecting the bidder based on its innovation risks lawsuits that can force administrators to restart the procurement process. And while administrators can theoretically re-bid the project, re-bidding can take months if not years, delaying time-sensitive projects.[286]

These practical consequences have played out in New York. In 1986, the New York Court of Appeals struck down the City of Rochester's attempt to include a project labor agreement (PLA) detailing a minimum level of employment practices in public contracts.[287] A decade later, the Court of Appeals prohibited the Dormitory Authority of New York from introducing a PLA into pre-bid specifications for a construction contract.[288] While the majority noted record evidence that PLAs could reduce delays and improve project delivery, it called for the government to show "something more" when introducing a PLA to "justify the significant restrictions imposed by PLAs."[289] The court desired a greater connection between the bid requirements and cost savings. As the court reasoned, "Glaringly absent from this record is [the Dormitory Authority's] contemporaneous projection of cost savings as a result of a PLA or any unique feature of the project which necessitated a PLA, an exceptional specification in all events."[290]

Following these cases, New York state and local governments continued proposing PLAs that they expected to promote cost savings. But their proposals were routinely struck down.[291] In some rare cases, government has prevailed by meeting a heightened showing that the criteria at issue could lead to cost savings. In one such case, the City of Onondaga undertook more than six months of study with an independent consultant and referred the proposal to the state legislature's Public Works Committee before adding the PLA as a requirement to the

(2018) (arguing that in Italian provinces, where courts are less adversarial, some public buyers do not enforce penalties for late deliveries to avoid litigation).

286. One study found that oversight of contracting-agent operations increased delays by 6.1 to 13.8% and overruns by 1.4 to 1.6%. Eduard Calvo, Ruomeng Cui & Juan Camilo Serpa, *Oversight and Efficiency in Public Projects: A Regression Discontinuity Analysis*, 65 MGMT. SCI. 5651, 5652 (2019).

287. Associated Builders & Contractors, Inc. v. City of Rochester, 492 N.E.2d 781, 782-83 (N.Y. 1986).

288. N.Y. State Chapter, Inc. v. N.Y. State Thruway Auth., 666 N.E.2d 185, 193-94 (N.Y. 1996).

289. *Id.* The dissenting opinion went a step further to say that project labor agreements (PLAs) by their very nature "inflate[]" bid amounts. *Id.* at 198 (Smith, J., dissenting). Indeed, the dissent argued that the issue of whether public works projects could require PLAs should be left "properly within the province of the Legislature," rather than decided by the courts. *Id.* at 203.

290. *Id.* at 193 (majority opinion).

291. *See* Empire State Chapter v. County of Onondaga, No. 99-490, 1999 WL 297696, at *2, *5 (N.Y. Sup. Ct. Mar. 16, 1999).

solicitation.[292] The city found that the PLA could result in $11 million in projected cost savings—just as they originally predicted.[293]

Third, even when government has attempted to expand administrative discretion, it has done so cautiously. States and local governments that authorize discretion-friendly procurement methods, such as "best-value" procurement, often impose strict limits on their use. They may restrict which criteria may be considered or the scenarios in which they apply.[294] New York City, for instance, authorized best-value bidding in 2013 but withheld that authorization from some categories of procurement, such as public works.[295] Courts have also maintained that best-value selection criteria must be quantifiable, limiting how broadly government can exercise discretion.[296] Absent from most decisions is any recognition that excessive legal oversight impairs government effectiveness.[297]

When jurisdictions have expanded best-value authorization, they have done so slowly and incrementally. New York's first best-value authorization, a 1996 amendment to the state labor law, permitted state and local officials to require contractors and subcontractors to participate in registered apprenticeship programs.[298] Since then, jurisdictions across the state have adopted prequalification requirements to improve construction quality, reduce delays, limit on-the-job injuries, and lower costs.[299] A decade and a half later, the state legislature again broadened the authorization, allowing certain state agencies, including the Metropolitan Transportation Authority and the New York State Department of Transportation, to engage in best-value contracting.[300] The authorization permitted these agencies to evaluate bids based on factors beyond cost, including contractor experience, innovation, and project-specific approaches. Still, the

292. *Id.* at *3.

293. *Id.*

294. *See* MODEL PROCUREMENT CODE FOR STATE & LOC. GOV'TS 26-29 (A.B.A. 2000).

295. *See* Amendments to Chapter 3, Title 9 of the Rules of the City of N.Y. (Apr. 8, 2013).

296. *See* Brayman Constr. Corp. v. Pa. Dep't of Transp., 30 A.3d 560, 567 (Pa. Commw. Ct. 2011) ("For all these reasons, the design-build best-value method used by PennDot is illegal because it permits subjective evaluation of construction contractors rather than utilizing criteria that are objectively measurable."); Rochester City Lines, Co. v. City of Rochester, 846 N.W.2d 444, 454 (Minn. Ct. App. 2014).

297. *See generally* Calvo et al., *supra* note 286 (studying excessive judicial oversight's harm on government efficiency).

298. N.Y. LAB. LAW § 816-b (McKinney 2025).

299. Rochester, N.Y., Ordinance 2003-347 (Oct. 21, 2003); Rochester, N.Y., Ordinance 2009-76 (Mar. 18, 2009).

300. Act of Jan. 27, 2012, ch. 608, §§ 1-3, 2011 N.Y. Laws 1571, 1571-73 (codified as amended at N.Y. GEN. MUN. LAW § 103).

agencies were not given unbridled discretion to go beyond the state-imposed sphere of permissible considerations.

When funds originate from the federal or state government, local governments are often still required to seek independent authorization to exercise broader procurement discretion.[301] So even after a state expressly authorizes best-value bidding, local governments may remain limited in their ability to move beyond low-bid procurement. For example, New York City was not authorized to use best-value bidding for certain procurement contracts until 2013, two years after the passage of New York's statewide best-value bidding authorization.[302] To compound the delay in the expansion of best-value authority, the city's 2013 authorization applied to purchase orders but not construction contracting.[303] It took until 2024 for the city to expand the authorization to major infrastructure projects.[304]

New York's slow and ongoing battle to recapture government capacity in the procurement process is reflected in similar, often less successful, battles in other states. So far, around a dozen states have passed explicit best-value authorizations.[305] But these authorizations come with caveats, resulting in laws that do not deviate much from low-bid requirements. For instance, Virginia passed best-value authorizations "when procuring goods and nonprofessional services, but not construction or professional services."[306] Arkansas requires contracts to be awarded to the low bidder in the absence of a "[c]omplete justification" for

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301. *See* N.Y. State Comptroller Op. 91-6 (Mar. 19, 1991), https://www.osc.ny.gov/legal-opinions/opinion-91-6 [https://perma.cc/4H6X-F47D] ("The doctrine of State preemption, however, represents a fundamental limitation on home rule powers. Where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with State law, whether or not the terms of the local law actually conflict with the State statute.").

302. *See Statement of Basis and Purpose of Proposed Rule*, N.Y.C. 1 (2013) [hereinafter *Statement of Basis*], https://www.nyc.gov/assets/mocs/downloads/Regulations/PPB/BestValueCSP.pdf [https://perma.cc/8CXN-BD8X]; Act of Jan. 27, 2012, §§ 1, 3, 4, 6-10, 2011 N.Y. Laws at 1571-74.

303. *Statement of Basis*, *supra* note 302, at 1-2.

304. N.Y.C., N.Y., Charter § 312 (2024); Samar Khurshid, *Promising Projects Faster and Cheaper, Adams Administration Pursues Capital Construction Reforms*, Gotham Gazette (Feb. 14, 2023), https://www.gothamgazette.com/city/11807-nyc-capital-construction-reforms-mayor-adams [https://perma.cc/ENA2-EJNR].

305. In 2010, eleven states had some form of best-value bidding laws. Standing Comm. on Lab., *supra* note 283, at 23 & n.47. These laws, however, have not resulted in an embrace of the system because of the need to pass a separate best-value-bidding authorization on the local level as well. *See* Gransberg, *supra* note 64, at 3; Sandra Tan, *County Looks to Shift Policy on Spending to 'Best Value*,*'* Buff. News, Oct. 14, 2024, at B8.

306. Va. Code. Ann. § 2.2-4300(C) (2024).

selecting another bidder.[307] In California, the state procurement code allows the state Department of General Services to negotiate terms with the chosen contractor "when it is in the best interests of the state," but otherwise requires that the contractor be selected through low-bid procurement.[308]

Minnesota stands out as an example of best-value bidding's success, albeit with limitations.[309] Like most other states that permit best-value bidding, Minnesota allows it alongside low-bid procurement (i.e., selection based on bid price alone), which remains the predominant bidder-selection method used across the state.[310] But when contracts are awarded through best-value procurement, officials can consider factors such as a contractor's performance record, customer satisfaction, on-budget and on-time performance, cost overruns, technical capabilities, and other qualifications.[311] Minnesota's authorization makes explicit that the best-value selection criteria "are not limited to" those listed in the statute.[312] The law thus grants administrators latitude in fashioning bidding criteria to best meet the public's needs. Already, this best-value system has improved public-procurement outcomes. It received the most acclaim for helping the state respond to emergencies like the I-35 bridge collapse in 2007, which the state government followed with a rapid and cost-effective rebuild.[313]

But even Minnesota's best-value program fails to deploy the full scope of procurement capacity available.[314] For one, state and local governments still face

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307. ARK. CODE ANN. § 19-11-234(c)(2) (2024).

308. CAL. PUB. CONT. CODE § 6611(b) (West 2024).

309. *See* Trevor L. Brown, Sergio Fernandez & Alexander C. Heckman, *States Buying Smarter: Lessons in Purchasing and Contracting from Minnesota and Virginia*, PEW CTR. ON THE STATES 21-23, 25 (May 2010), https://www.pew.org/~/media/legacy/uploadedfiles/pcs_assets/2010/statesbuyingsmarterfullreportpdf.pdf [https://perma.cc/W29V-UBGE].

310. MINN. STAT. § 16C.28 subdiv. 3 (2024); *see also Competitive Bidding Requirements in Cities*, LEAGUE OF MINN. CITIES 1 (Aug. 6, 2018), https://www2.minneapolismn.gov/media/content-assets/www2-documents/departments/Competitive-Bidding-Requirements.pdf [https://perma.cc/YJ73-PRV8] (discussing how competitive bidding under the uniform municipal law "[t]ypically . . . involves the solicitation of sealed bids and the award of the contract to the 'lowest responsible bidder'").

311. MINN. STAT. § 16C.28 subdiv. 1b (2024).

312. *Id.*

313. *See* Kate Vitasek, *Maryland Should Learn from Minnesota's Success with I-35 Bridge Rebuild*, FORBES (Mar. 29, 2024, 1:27 PM), https://www.forbes.com/sites/katevitasek/2024/03/29/maryland-should-learn-from-minnesotas-success-with-i-35-bridge-rebuild [https://perma.cc/4BBP-9WPN].

314. *See* Dean B. Thomson, Mark Becker & Jeffrey Wieland, *A Critique of Best Value Contracting in Minnesota*, 34 WM. MITCHELL L. REV. 25, 55-71 (2007) (discussing the limitations of Minnesota's best-value bidding system).

litigation from unsuccessful bidders challenging procurement awards.[315] These challenges, while unavoidable in the American system of law, are incentivized by courts willing to check government discretion when it deviates from rigid conceptions of the competitive-bidding process.[316] Minnesota courts maintain that "[a] central reason for competitive bidding is to eliminate an official's discretion on matters open to fraud, favoritism, folly and extravagance."[317] Notably, Minnesota's best-value statutes give the state a choice between selecting "(1) the lowest responsible bidder . . . or (2) the vendor or contractor offering the best value."[318] When precise or exact specifications for making the bidder selection is available, courts may demand that the government engage in low-bid selection.[319] The problem with this interpretation is that government discretion is tied up with a judicial determination about whether the bidder-selection criteria are specifiable. Sometimes it may be difficult to pin down whether selection factors such as quality, suitability, or adaptability require exact specifications or can be left up to the government's reasonable determination. By placing the ultimate resolution in the court's hands alone, the decision leaves open the possibility that the court will mandate low-bidder selection even when the government, in good faith, thinks the criteria that matter are not subject to specification. Such checks may limit the effectiveness of government procurement.

Fourth, the U.S. intergovernmental legal framework complicates procurement-reform efforts. Suppose a state grants its agencies broader procurement discretion. That reform applies to state projects, but local governments, which often have deeper knowledge of community needs, may still be bound by outdated procurement laws. By and large, local governments are required to comply with state restrictions and cannot independently expand their procurement

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315. *See, e.g.*, Sayer v. Minn. Dep't of Transp., 769 N.W.2d 305, 307 (Minn. Ct. App. 2009) (affirming the district court's denial of an injunction over a claim that the winning bidder submitted a nonresponsive proposal); Nordic Underwater Servs., Inc. v. City of Proctor, No. 69DU-CV-23-990, 2024 WL 4345263, at *2 (Minn. Ct. App. Sep. 23, 2024) (affirming the district court's issue of a temporary injunction for the city's contract award to the second-lowest bidder); Anoka Cnty. Rec., LLC v. Anoka Cnty. Bd. of Comm'rs, No. 02-CV-14-3083, 2015 WL 5089266, at *1 (Minn. Ct. App. Aug. 31, 2015) (rejecting an appellant's challenge to an award to the second-lowest bidder).

316. *See, e.g.*, Rochon Corp. v. City of Saint Paul, 814 N.W.2d 365, 369 (Minn. Ct. App. 2012) ("[A] competitive bidding contract is void even 'without any showing of actual fraud or an intent to commit fraud, if a procedure has been followed which emasculates the safeguards of competitive bidding.'" (quoting Griswold v. Ramsey County, 65 N.W.2d 647, 652 (Minn. 1954))).

317. *See, e.g.*, Rochester City Lines, Co. v. City of Rochester, 846 N.W.2d 444, 454 (Minn. Ct. App. 2014) (quoting *Rochon Corp.*, 814 N.W.2d at 368).

318. MINN. STAT. § 16C.28, subdiv. 1(a) (2024).

319. *See* Otter Tail Power Co. v. Village of Elbow Lake, 49 N.W.2d 197, 201 (Minn. 1951); Thomson et al., *supra* note 314, at 33 (discussing *Otter Tail*).

authority.[320] Once they have state authority, localities must amend their own charters or codes.[321] An amendment will often require a ballot measure, which can delay reform by a year or more, even without local opposition. Divisions between state and local authority, conceived as a check on centralized authority, here instead check government efficiency.

In addition to New York City, other localities in the state, such as Binghamton, have followed the state government's lead in expanding legal authorization for best-value bidding.[322] But they have often done so only after overcoming skepticism about best-value bidding's resistance to corruption and opposition from across the aisle.[323] Meanwhile, localities like Syracuse, Erie County, the Town of West Seneca, and Olean, will remain bound to low-bidder policies until a local authorization is passed.[324] The incremental rollout of procurement-law reforms underscores persistent institutional inertia and legal hurdles, even in states actively engaged in pursuing such reforms. The system also creates legal inconsistencies that make the procurement process and legal

320. Local governments within states that require low-cost bidding may be permitted to adopt best-value bidding methods if, for example, the city is a charter city exempt from the state code. *See, e.g.*, J.T. Wimsatt Contracting Co. v. City of San Diego, No. D059276, 2012 WL 934475, at *2 (Cal. Ct. App. Mar. 20, 2012) (permitting San Diego, a charter city, to adopt best-value bidding despite the state's low-bid requirements).

321. *See generally Principles of Home Rule for the 21st Century*, *supra* note 198, at 7-13 (introducing the concept of the home-rule doctrine, which delineates the authority of local governments to act without, or upon, separate state-granted authority, and discussing state-by-state variations in its form).

322. *See* Roy Santa Croce, *New Binghamton Law Cracking Down on Bad Contractors*, WIVT (Aug. 12, 2024, 5:39 PM EDT), https://www.binghamtonhomepage.com/news/top-stories/new-binghamton-law-cracking-down-on-bad-contractors [https://perma.cc/G6AL-5BC9].

323. *See, e.g.*, Tan, *supra* note 305, at B8. The irony with the reluctance to adopt best-value bidding due to corruption in Erie County is that reformers themselves appear to be motivated to stop ongoing exploitation of the government. The *Buffalo News* detailed how an "acute shortage of rock salt in the winter" had resulted in the city being bound to the low bidder, "even when the supplier, in this case American Rock Salt, is unable to meet the demand." *Id.*

324. *See How to Bid on Contracts*, SYRACUSE N.Y., https://www.syr.gov/Departments/Purchase/Bid-Information [https://perma.cc/74SN-84L3] ("We give the job to a responsible bidder who offers the lowest price."); ERIE COUNTY, N.Y., LOC. L. 2-2021 (Feb. 23, 2021); TOWN OF WEST SENECA, N.Y., CODE OF LOCAL LAWS ch. 30, art. 1, §§ 30-1, 30-2 (2023); CITY OF OLEAN, N.Y., CODE OF LOCAL LAWS ch. LL4.5, art. 1 (2015) (providing the city's lowest-bidder requirement, despite the misleading title "Best Value for Public Works Contracts"); *see also* Tan, *supra* note 305, at B8 (explaining that although municipalities in Erie County have passed best-value authorizations, Erie County must pass its own authorization to adopt the practice for county-government contracts).

environment even more complicated, particularly when localities fail to adopt the full range of best-value authority available.[325]

Adversarial legalism entangles every aspect of the procurement process. In theory, it functions as a check on public-procurement fraud and corruption. But, in practice, strict interpretations can fuel greater fraud and worse outcomes. It complicates the government's effort to accomplish already complex public-procurement tasks that demand discretion. And it limits government capacity to shape economic development or communities more broadly. Policymakers and judges, in their pursuit of strict legal compliance, sometimes overlook how the system itself fuels delays, inefficiencies, and excessive costs. If procurement law is to serve its intended purpose, adversarial legalism's role must be reconsidered.[326]

B. Efficiency

A commitment to efficiency, the touchstone of law and economics, is the second defining constraint on government's procurement capacity—and, paradoxically, government's own efficiency. Many theories of efficiency exist. Kaldor-Hicks (K-H) efficiency, often equated with cost-benefit analysis, is most relevant in the procurement context.[327] Its object is to identify and select the action that maximizes individual willingness to pay, thereby maximizing the size of the public-welfare pie. In theory, K-H efficiency is attractive because it provides an observable metric for choosing among alternatives.[328] That benefit, however, depends on the measurability of the relevant welfare effects. In the procurement context, welfare is often measured by bid price alone, which may not be the best proxy for welfare. The theory and its applications have already been critiqued at

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325. *See, e.g.*, BINGHAMTON, N.Y., CODE OF ORDINANCES ch. 18, art. III, § 18-25(D) (2005) (authorizing local government to assess a bidder's track record of performance but providing little authority to consider the long-term value of a bidder's proposal).

326. For examples of the inertia against procurement reform, see Gransberg et al., *supra* note 214, at 9; *Highway Policy—Procurement*, AM. ROAD & TRANSP. BUILDERS ASS'N, https://www.artba.org/advocacy/policy-positions/highway-policy/procurement [https://perma.cc/ERS2-D74D]; and Tan, *supra* note 305, at B8, which describes the departure from a low-bid requirement as "a controversial shift, even though this 'best value' standard has been allowed by New York State since 2012, and has been used by many other local governments and many states." *But see* Kenneth T. Sullivan & Yan Guo, *Contractor Cash Flow and Profitability Analysis Between Best Value and Low Bid*, 51 COST ENG'G 16, 16 (2009) (providing evidence that best-value procurement systems are more efficient, more profitable to contractors, and less risky).

327. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 13 (7th ed. 2007).

328. Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1658 (2018) ("The desirability of K-H efficiency is based in part on the notion that it is relatively observable.").

length elsewhere, so I will not belabor them.[329] Rather, I build from and apply these critiques to describe problems with public-procurement incapacity.

K-H efficiency is not an original feature of procurement law, but it instead emerged through the gradual process of legal drift. Over time, courts have reinterpreted competitive-bidding requirements to embody K-H efficiency considerations, specifically cost-cutting objectives.[330] Much like with adversarial legalism, these outcomes are the byproduct of mistrust in government and an individualistic ethos or free-market ideals. The gradual reinterpretation of competitive-bidding laws toward a narrow focus on K-H efficiency has serious consequences for government procurement outcomes.

I argue that the exclusive focus on efficiency prevents government from procuring efficiency-maximizing projects. That is because K-H efficiency forces administrators and courts to rely on quantifiable selection criteria, which excludes less quantifiable criteria from bidder assessment.[331] Ethan Bueno de Mesquita makes a similar critique of benefit-cost analysis in *The Perils of Quantification*.[332] I expand on this critique and apply it to explain government incapacity.

In practice, the procurement system rarely measures welfare in the manner K-H contemplates. Instead, welfare is often collapsed almost entirely into bid price, which is why selection of the lowest-priced bidder may be presumed to be an "efficient" outcome. The simplicity of relying on price makes this model appealing, but it rests on a flawed assumption: that each bidder will deliver a functionally equivalent project outcome for their proposed price. In reality, price can be a weak, or even inverse, proxy for project costs and, by extension, public welfare. Procurement, especially for major public works, is inherently complex.

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329. *See, e.g.*, ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 190-216 (1993); Mariana Mazzucato, *The Entrepreneurial State*, SOUNDINGS, Winter 2011, at 131, 131-32; Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1562-81 (2002). By way of a brief overview, the conventional critiques of Kaldor-Hicks (K-H) efficiency center for the most part on its disregard for distributional consequences. *See* Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 200 (1980); Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 243 (1999). *See generally* Liscow, *supra* note 328 (describing the distributional debates over efficiency). How these critiques play out in practice has been studied in detail, including in Scott L. Cummings and Madeline Janis's recent article studying best-value-plus procurement. *See* Cummings & Janis, *supra* note 76, at 425-57.

330. *See infra* notes 336-344 and accompanying text.

331. *See, e.g.*, Cass R. Sunstein, *Cost-Benefit Analysis and the Environment*, 115 ETHICS 351, 369-70 (2005); Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENV'T L. REV. 1, 3-4 (2017).

332. *See* Ethan Bueno de Mesquita, *The Perils of Quantification*, BOS. REV. (Mar. 26, 2019), https://www.bostonreview.net/forum_response/ethan-bueno-de-mesquita-perils-quantification [https://perma.cc/SMD2-NMX6]; *see also* Ackerman & Heinzerling, *supra* note 329, at 1578-81 (describing some of the limitations and pitfalls of quantification).

Haphazard construction or a shoddy piece of infrastructure can disrupt public life, including by causing future delays or inconveniences. Assessing the nuanced benefits and costs of bidders' proposals is therefore a tall order. Government must rely on heuristics since not everything is quantifiable, and in many contexts, price provides at best an imperfect guide.

The problems with using bid price as a proxy are especially apparent in project risk assessment. As referenced in Section I.B, engineering and economics literature reveals that awarding contracts based on price alone, rather than best value, results in more variable project outcomes.[333] Cost-focused selection can sacrifice long-term reliability and quality.[334] It also creates moral hazard. Bidders are incentivized to submit unrealistically low-cost proposals to secure an award, anticipating they will receive cost adjustments later. This inherent information asymmetry, where contractors know the ins and outs of project feasibility while administrators do not, places the government at a stark disadvantage.

A procurement model that revolves around bid price can incentivize bidders to cut costs by any means available. This includes hiring less-qualified workers, purchasing less-durable materials, or adopting riskier designs. The literature finds that such quality-impairing measures are common when bidder selection is based on price alone.[335]

Further, courts may not be the best fora for making detailed determinations about whether a project is efficiency-maximizing. Courts may lack the competence to make judgment calls about the relative value of bids. Given the inherent difficulty in quantifying the best bid, courts may be prone to overemphasize readily measurable factors (e.g., total cost) while underemphasizing important but less quantifiable features (e.g., risk, quality, or function). In contrast, administrators are better positioned to identify benefits that defy easy quantification. They have intimate involvement with prior procurement efforts, which can give them a leg up in grasping the technical and institutional challenges related to bid evaluation. Administrators may also possess greater insight into a locality's longer-term plans and their more regular interfacing with elected officials may make them accountable for project performance.

When courts impose efficiency mandates on the bidding process, they deter administrators from exercising their comparative, "boots-on-the-ground" competence. Recall *AAA Carting & Rubbish Removal, Inc. v. Town of Southeast*, where the local government discovered that the second-lowest bidder provided superior cleanliness, professionalism, and equipment performance.[336] The court

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333. *See supra* notes 112-119 and accompanying text.

334. *See* Scott et al., *supra* note 59, at 1.

335. *See supra* note 133 and accompanying text.

336. 951 N.E.2d 57, 58-59 (N.Y. 2011).

barred the government from considering these factors because they became apparent after bids were submitted. It also noted that these factors were "subjective," raising corruption concerns.[337] Although factors like cleanliness and professionalism likely matter for government's legitimacy, they may be disregarded under a rigid efficiency framework. Other beneficial non-cost-related considerations are dismissed by courts, or by procuring administrators who suspect they will not be approved.

Similarly, in *New York State Chapter, Inc. v. New York State Thruway Authority*, New York public authorities attempted to include PLAs in their bidder specification to create potential cost savings and broader improvements to project outcomes.[338] After years of protracted litigation and associated project delays, the New York Court of Appeals permitted one of the two projects.[339] But it denied the second because it found the public authority did not provide sufficient justification that the PLA would assist in achieving the best work at the "lowest possible cost."[340] To be sure, the public authority provided evidence that the PLA would improve project results. The lower court had already found that the relevant government agency

> considered the size and complexity of the project, the need to expedite the construction process and minimize disruptions and delays, the potential for labor unrest, and the need to establish a source of an adequate supply of labor in an area where a number of other sizeable construction projects had been proposed.[341]

But the Court of Appeals determined that the record did not meet its standard of "more than a rational basis," which the court applied because the PLA was "clearly different from typical pre-bid specifications in [its] comprehensive scope."[342]

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337. *Id.* at 61-62. The court determined that if the town board wanted to include additional qualitative criteria, "the proper remedy is not to reject the lowest responsible bid, but to reject all the bids submitted and begin the process anew, incorporating whatever reasonable and nonrestrictive requirements it wishes to consider into the bid solicitation." *Id.*

338. 666 N.E.2d 185, 191-93 (N.Y. 1996).

339. *Id.* at 191.

340. *Id.* at 189-90, 193-94. While the court noted that New York's competitive-bidding statutes served two underlying purposes, "obtaining the best work at the lowest possible price" and deterring corruption, its reasoning for striking down the project focused largely on the authority's "[g]laringly absent . . . projection of cost savings" or unique features necessitating a PLA. *Id.* at 190, 193.

341. Gen. Bldg. Contractors of N.Y. State, Inc. v. Dormitory Auth., 620 N.Y.S.2d 859, 860 (App. Div. 1994).

342. *N.Y. State Thruway Auth.*, 666 N.E.2d at 190.

The *New York State Thruway Authority* court clarified that its decision "neither rubber-stamp[ed] nor reject[ed] PLAs wholesale."[343] But ever since, the standard used in the case has compelled administrators to conduct substantial due diligence to avoid protracted litigation delays. For instance, in *Empire State Chapter of Associated Builders & Contractors, Inc. v. County of Onondaga*, the county government retained a professional consulting firm to commission extensive studies and underwent several sessions of legislative review to meet the burden.[344] Ironically, efficiency-rooted mandates contribute to bureaucratic inefficiency. Administrators, in an effort to demonstrate a connection between selection criteria and lower costs, generate redundant paperwork to substantiate conclusions they already know to be true. Similar bid specifications that lack a clear connection to saving the government money may be rejected out of hand, even though they confer cost savings on the government.[345]

Courts' overemphasis on observable, up-front cost reductions is problematic not just because of the poor incentives it creates but also because it is a flawed method for achieving cost savings. Sometimes cost savings are obvious: a specification might require contractors to purchase $25 hammers rather than $50 hammers. But a specification that requires cheaper hammers may not translate into cost savings unless the hammers are structurally equivalent to the more expensive version. If the $25 hammers are less durable and require the contractor to purchase twice as many to complete the job, any purported cost savings disappear. Likewise, a PLA may result in greater observable costs from higher wages. Yet these higher up-front costs may be more than offset by backend savings from fewer mistakes or work stoppages — tradeoffs the procurement administrators are likely best equipped to make.

Long-term project costs are also difficult to account for with a model built around K-H efficiency.[346] Procurement decisions often require tradeoffs between near- and long-term benefits and costs. Administrators may make tradeoffs

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343. *Id.* at 194. The dissent in the case would have gone much further and prohibited the judiciary or executive from requiring the use of PLAs altogether. *Id.* at 199, 203 (Smith, J., dissenting).

344. *See* No. 99-490, 1999 WL 297696, at *1 (N.Y. Sup. Ct. Mar. 16, 1999).

345. *See, e.g.*, Ian Ayres & Peter Cramton, *Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition*, 48 Stan. L. Rev. 761, 800-01 (1996); Wash. State Office of the Att'y Gen., AGO 1993 No. 19, Authority of a University to Impose a Bidding Prequalification Requirement That Contractors Must Have an Apprenticeship Program (Dec. 15, 1993), https://www.atg.wa.gov/ago-opinions/authority-university-impose-bidding-prequalification-requirement-contractors-must-have [https://perma.cc/5EVJ-H6GG].

346. *See, e.g.*, Lisa Heinzerling, *Discounting Our Future*, 34 Land & Water L. Rev. 39, 39-41 (1999); Susan Rose-Ackerman, *The Limits of Cost/Benefit Analysis When Disasters Loom*, 7 Glob. Pol'y 56, 56-57 (2016); *see also* Lisa Heinzerling, *Discounting Life*, 108 Yale L.J. 1911, 1914 (1999) (referencing the inherent difficulties involved in valuing future lives as dollars).

between cost and long-term performance based on public input, procurement experience, or their reasonable judgment. But courts may be particularly ill-equipped to determine whether the administrators made a rational tradeoff when exercising their discretion.[347] Judicial intervention, rather than reinforcing efficiency, can introduce inefficiency by constraining the government's ability to account for complex, forward-looking considerations that do not fit neatly into conventional cost-benefit models.

The effect of K-H efficiency on procurement practice reflects how efficiency considerations can distort administrator judgment and decision-making, sometimes for the worse. Courts today are often the final arbiters of whether administrators made an "efficient" decision. But the judiciary can limit government efficiency if it prevents administrators from considering factors that ultimately will improve project outcomes. And efficiency logics can extend beyond courts and lodge themselves in government functioning, as risk-averse administrators embrace them to avoid liability and agencies race toward the lowest bidder.

C. Adversarial Legalism and Efficiency in Action

The challenges adversarial legalism and efficiency pose to public procurement exist throughout the United States. In California, the Central Subway Project provides a case in point. Introduced at the start of this Note, the Central Subway was meant to extend the San Francisco Municipal Railway Metro light-rail system by 1.7 miles through downtown San Francisco.[348] After kickoff in 2009, the project did not open for service until 2022. In total, the project ran over the projected timeline by three years and the anticipated budget by $313 million.[349] A California-funded research study, *Getting Back on Track: Policy Solutions to Improve California Rail Transit Projects*, identified a key culprit: California's public-procurement system.[350] This Section discusses how adversarial legalism and efficiency contributed to the project's failures and how a better outcome could have been possible.

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347. *See, e.g.*, Hungerford & Terry, Inc. v. Suffolk Cnty. Water Auth., 785 N.Y.S.2d 506, 508 (Sup. Ct. 2004) (reversing a lower court's determination that the selected bidder's use of a filtration system not specified in the solicitation was material and necessary to meet performance standards, even though that had contradicted the government's unrefuted findings and would result in selection of a bidder $40,000 more expensive); Diamond Asphalt Corp. v. Sander, 700 N.E.2d 1203, 1206, 1210-11 (N.Y. 1998) (striking down a joint-bidding arrangement in part because the court determined that one segment of the project did not meet bidding requirements, even though the bid in the aggregate amounted to the lowest bid).

348. Elkind et al., *supra* note 3, at 49.

349. *Id.* at 49, 53-54.

350. *Id.* at 26.

To start, adversarial legalism incentivized the city to make decisions for the sake of dodging litigation risk and not for the betterment of the project. For instance, the city decided to use a single, large-scale design-build contract for station and systems work, as opposed to separate contracts for the four underground stations.[351] The single contract reflected a desire for procedural streamlining, as a segmented process would open the city to more potential missteps and legal challenges from dissatisfied bidders. But when delays and overruns occurred, the City of San Francisco found itself locked into a "'too big to fail' arrangement."[352] Each issue threatened the entire interdependent project, rather than one segmented piece. The structure also "significantly reduced the agency's leverage in negotiation," meaning that when things did go wrong, it had little wiggle room to strike a good deal.[353]

Before the project started, San Francisco had been no stranger to bid-protest litigation. Nor were other cities around California. In fact, a 2013 industry report counseled businesses bidding on California procurement projects to "[p]rotest early and often."[354] Doing so helped to ensure companies would not miss their chance at a meritorious protest. Whether the protest might harm the public welfare by imposing further delays was beside the point.

Many such protests occur regularly. For instance, a 2016 protestor contested an award for the construction of the Golden Gate Bridge's suicide-prevention nets, threatening to delay the nets' rollout for a year or more due to alleged defects in the successful contractor's bid.[355] The fear of a possible bid protest may cause administrators to shy away from the best decision in favor of the safest decision.

Efficiency logics compound the dynamics of adversarial legalism. California state law, for the most part, mandates lowest-bidder selection.[356] San Francisco's municipal laws do as well, and they even prevent the government from "split[ting] or divid[ing]" a public work contract "into two or more Contracts

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351. *Id.* at 53.

352. *Id.*

353. *Id.*

354. Steve Simas, *Problems to Avoid in Department of General Services Procurements*, Simas & Assocs. Ltd. (2013), https://simasgovlaw.com/problems-to-avoid-in-department-of-general-services-procurements [https://perma.cc/UF2V-M2AC].

355. Joe Fitzgerald Rodriguez, *Bid Protest Could Delay Golden Gate Bridge Suicide Net*, S.F. Exam'r (Dec. 15, 2016), https://www.sfexaminer.com/news/bid-protest-could-delay-golden-gate-bridge-suicide-net/article_606562fe-a965-5c20-b211-ce35a954f624.html [https://perma.cc/8JVJ-753G] (documenting a bidder's argument that the other bidder failed "to secure a qualified Systems Control Vendor, an engineer, a structural steel erector, and failed to furnish its bid with its safety history").

356. Cal. Pub. Cont. Code §§ 10126, 20103.8 (West 2024).

for the purpose of evading" the lowest bidder requirement.[357] As already discussed, this model places costs front and center for project selection. But the *Getting Back on Track* study found the low-cost model was "not the best fit for a project of such high cost and in such a complex, dense environment, particularly for the stations work."[358] It incentivized bidders to submit proposals they knew were more prone to delay and cost overruns and opened the door to intentional underbids supplemented with later change orders.

The focus on cost also makes the system vulnerable to underbidding. Journalists have, for instance, raised concerns about the Central Subway contractor's troubled history of underbidding.[359] Of eleven government contracts completed by the company between 2000 and 2012, it overran projected costs by $765 million, a forty-percent increase above original bid amounts.[360] San Francisco had already spent over $10 million in litigation fees fighting the contractor for overruns in its construction of the city's international airport terminal, only to settle for paltry sums that barely covered the legal bills.[361] In 2024, the same contractor announced it would pursue "a short-term hiatus" in bidding due to its $14 billion in project backlogs.[362] Time and again, this system works out in the contractor's favor. As a Los Angeles County attorney put it, successful low bidders "have had very good success with intimidating public agencies with litigation."[363]

Designed to deter corruption and cut costs, the bidding laws accomplished neither. A nonadversarial framework could have enabled the city to select contractors for quality and value, and not just to protect the process from challenge. Likewise, loosening the grip of K-H efficiency could have freed decision-makers to weigh value considerations, ranging from project resilience to risk mitigation or long-term operational success—without fear of triggering a legal challenge for straying from the lowest-bidder rule. Making that possible requires legislators, judges, and the public to reassess how we want our procurement laws to empower government.

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357. S.F., Cal., Admin. Code §§ 6.6, 6.20 (2024).

358. Elkind et al., *supra* note 3, at 53.

359. *See, e.g.*, Elinson, *supra* note 131; Umashev, *supra* note 130.

360. Elinson, *supra* note 131.

361. *Id.*

362. Joe Bousquin, *With $14B in Backlog, Tutor Perini Will Pursue Fewer Bids*, Constr. Dive (Nov. 12, 2024), https://www.constructiondive.com/news/tutor-perini-pause-bidding-megaprojects-earnings/732347 [https://perma.cc/4LR9-KY8R].

363. Elinson, *supra* note 131.

IV. RECLAIMING GOVERNMENT'S PROCUREMENT CAPACITY

Public-procurement laws, drafted over two centuries ago, were conceived as tools to check government impropriety and stimulate bidder competition. They reserved significant space for administrative discretion. But starting in the 1960s, rising mistrust in government and a commitment to individualist and free-market ideals put the brakes on government capacity. Now, an ineffective public-procurement process has left government capacity stuck in a rut. A renewed faith in government is necessary to reverse the legal drift, and that renewal must be accompanied by revised statutes and judicial interpretations.

In procurement law, the following reforms provide a start: (1) reinterpreting lowest-bidder laws to align with their historical best-value interpretation; (2) passing legislation that provides administrators sufficiently wide latitude to exercise reasonable judgment in selecting best-value bidders; (3) tailoring judicial-review standards to minimize unintended externalities on administrator decision-making; and (4) recalibrating judicial remedies to enhance procurement effectiveness, and not just to deter fraud.

A. Reinterpreting Competitive-Bidding Laws

The first reform possibility is for government to restore broad best-value procurement discretion by advancing sweeping challenges in the courts, rather than changing laws. Some state and local governments have, with varying success, already attempted to pack best-value considerations, such as past contractor performance, into the requirement that government choose a "responsible" bidder at the lowest cost.[364] But this reform option is complicated. Courts have been reluctant to permit government to pack so much into "responsible" because it can render the bidding system opaque.[365] Courts generally allow administrators to evaluate contractor qualifications for "responsibility," but not to use the term to assess the relative merits of proposals. And of course this option is not available to the many governments that have no "responsible" requirement in their procurement statutes.

Alternatively, courts could reinterpret lowest-bidder requirements as empowering the government to enter contracts that offer the best value for the public. A best-value interpretation is consistent with how the laws were first intended and applied: their focus was on preventing impropriety in the award of contracts and getting the best value for the public's money.[366] And building

364. *See* Standing Comm. on Lab., *supra* note 283, *passim*.

365. *Id.* at 16-17.

366. *See supra* Part II.

evidence of bid-rigging facilitated by low-bid procurement indicates that the laws are failing to even accomplish their original purpose.[367] The simplicity of the low-bid system allows contractors to secure projects by offering a bid lower than what they need to perform the contract and later boosting prices through change orders, which add unexpected charges and tack time onto projects. Some of the largest contractors rely on this strategy as a central component to their business model.[368] These findings weigh in favor of a broad reinterpretation.

Statutory reinterpretation is also consistent with the exceptions to competitive-bidding requirements long approved by courts, including emergency and professional-service carve-outs.[369] Public procurement for multimillion-dollar infrastructure projects today is more complex and requires consideration of far more factors than contracting for professional services, many of which are already exempt from competitive-bidding requirements. Governments ought to rely on these exceptions when defending their use of best-value bidding.

At least one court has affirmed that more-than-a-century-old state and local lowest-bidder statutes were intended to encompass best-value considerations. The Rhode Island Supreme Court ruled in *H.V. Collins Co. v. Tarro* that an award of a public-school construction contract to the third-lowest bidder was permissible.[370] Best-value procurement was permitted even though both the state code and the town charter explicitly mandated competitive bidding and an award to the lowest responsive bidder.[371] In compliance with the codes, Rhode Island officials set forth eight criteria in the request for proposals.[372] The criteria included past experience completing similar projects, record of timely project completion, prior quality of performance for the Town of Barrington, professional background of the construction team, accuracy of recent cost estimates, and community relations.[373] Because the school committee arrived at a decision "after evaluating each of the bids on the basis of objective, measurable criteria, all of which were published in the RFP," the town's award was permissible.[374]

The Rhode Island Supreme Court took a step in the right direction, but the *H.V. Collins* decision has not produced a wave of reinterpretations of lowest-

367. *See* Gransberg, *supra* note 64, at 1.

368. *See* Umashev, *supra* note 130.

369. *See supra* Section II.C.

370. 696 A.2d 298, 305 (R.I. 1997). *See generally* Lori A. Miller, *1997 Survey of Rhode Island Law: Cases: Public Contracts*, 3 ROGER WILLIAMS U. L. REV. 547, 547-51 (1998) (discussing the history of *H.V. Collins Co*).

371. 45 R.I. GEN. LAWS § 45-55-5 (1956); BARRINGTON, R.I., TOWN CHARTER § 16-2-9 (2025).

372. *H.V. Collins*, 696 A.2d at 301.

373. *Id.* at 301-02.

374. *Id.* at 305.

bidder laws across the country. Still, it provides a model for such reconsideration. Other courts could return to the original intent of procurement law by granting administrators broader discretion to craft bid solicitations and select proposals. Doing so would combat adversarial legalism in the procurement system by cutting down on the ability of disgruntled contractors to hamper government discretion and represent a step away from the misguided commitment to efficiency.

B. Broadening Government Discretion

Discretion is vital for effective government procurement, and procurement laws should protect it. The current largest obstacle to administrative discretion is that the procurement laws either expressly limit discretion or are vulnerable to strict interpretations, which courts have tended to embrace. These problems extend to the 2000 Model Procurement Code, which, for instance, limits "special procurement" forms, including best-value procurement, to "very limited circumstances, where deviations from the strict requirements of the Code are necessary to protect the interest of the [State]."[375] It otherwise requires that administrators default to lowest-bidder selection.[376]

To see how such requirements produce strict interpretations, take the common requirement that projects be awarded to the "lowest bidder." The modifier "lowest" is ambiguous: it might require that administrator decision-making be tied tightly to tangible metrics, such as bid price and observable costs, or that an award go to the bidder offering the best deal for the lowest cost, as determined by the administrator's reasonable judgment. Courts guided by a strict version of textualism or law-and-economics-inspired modes of interpretation may be inclined to impose rigid, measurable standards that curtail discretion,[377] potentially manipulating government behavior into compliance with a strict standard that falls short in the face of complexity and nuance.

Even if a judicial prejudice against government discretion in procurement persists, lawmakers can hedge against narrow statutory interpretations by enshrining discretion as integral to the competitive-bidding laws. First, the laws might scrap the "lowest" terminology altogether. Second, they might articulate an arbitrary-and-capricious-like standard along the lines of the following: the

375. Model Procurement Code for State & Loc. Gov'ts 30 cmt. 1 (A.B.A. 2000).

376. *Id.* at 25.

377. *Compare* Council of New York v. Bloomberg, 846 N.E.2d 433, 439, 445 (N.Y. 2006) (limiting a procurement award because it did not "make the City's contracts cheaper or their performance more efficient"), *with* Citiwide News, Inc. v. N.Y.C. Transit Auth., 467 N.E.2d 241, 244 (N.Y. 1984) (looking at the "total character of the arrangement" (quoting Exley v. Village of Endicott, 415 N.E.2d 913, 915 (N.Y. 1980))).

government must award the contract to the bidder that represents the best value to the public; if the award is made to a bidder who did not receive the highest objective score under the pre-bid solicitation, the decision must be accompanied by a written justification supported by a reasonable basis. Third, legislatures might specify when late-emerging post-bid evidence may inform government decision-making and prescribe a process for taking such evidence into account. Fourth, statutes might include interpretive guidance — perhaps in a preamble — clarifying that such laws are to be interpreted to empower administrators to exercise informed discretion in the pursuit of soliciting, awarding, and managing government contracts, provided that such discretion is exercised with transparency, fairness, and integrity.[378]

Regardless of the specific language adopted, the experiences of jurisdictions that have attempted to rebut the presumption of limited government discretion offer valuable lessons. For example, some procurement laws permit additional considerations beyond price but restrict those factors to a defined list.[379] This type of reform can be problematic. If a consideration arises that is not part of the predefined set, such as a bid's environmental impact or its long-term quality or performance, then the government may not be permitted, or very well may be reluctant, to factor it into its decision-making. A simple solution is to eliminate wording that could be read as limiting the considerations that may factor into a government's decision. While recommended factors like those contained in Minnesota's bidding statute can be helpful,[380] open-ended considerations provide greater flexibility for the government to meet its goals.

Of course, it is possible that expanded discretion could foster corruption or naked government preferences for reasons that do not benefit the public. But the current system may already be vulnerable to similar forms of fraud and collusion specifically due to restricted discretion.[381] Rather than attempting to curb corruption by tying administrators in knots with strict competitive-bidding procedures, the procurement system might be better served by imposing independent audits of procuring-agency operations,[382] maintaining strict standards for

378. For the textualists in the room, I note, of course, that "[w]hile such provisions as a preamble or purpose clause can clarify an ambiguous text, they cannot expand [an unambiguous statutory provision] beyond its permissible meaning." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 35 (2012).

379. *See, e.g.*, Binghamton, N.Y., Code of Ordinances ch. 18, art. III, § 18-25(D) (2005).

380. *See* Minn. Stat. § 16C.28 (2024).

381. *See supra* notes 80, 126-129 and accompanying text.

382. *See 2022 Survey of State Procurement Practices Report*, Nat'l Ass'n of State Procurement Offs. 25 (2022), https://cdn.naspo.org/RI/2022SurveyofStateProcurementPracticesReport.pdf [https://perma.cc/4K2W-8QQB] (finding that just thirty-one of forty-three responding

ethical breaches,[383] and providing robust training programs to equip administrators with the capacity to execute sophisticated procurement projects.[384]

Legislatures updating procurement laws might also consider specifying in black-and-white terms that procurement decisions are not confined to efficiency or cost-savings considerations. Even if laws are drafted to be open-ended, as in Minnesota's case, courts may still impose their own interpretations of efficiency or cost savings. By clarifying that courts should not be constrained by efficiency norms, legislatures could make a critical push toward overcoming their ingrained influence. This legislative change will also help to realign the incentives that prompt administrators to spend more time and money preparing for litigation than procuring the project.

Importantly, these reforms should be consolidated within the new version of the ABA Model Procurement Code for State and Local Governments. Two versions of the Code have already been implemented: the first in 1979 and the second in 2000.[385] A National Association of State Procurement Officials' survey from 2018 found that of the responding forty-eight state jurisdictions, "[s]ixty percent . . . indicated that they have adopted the provisions of the [2000] Model Code partially or in its entirety."[386] This widespread adoption makes the Code a North Star that can guide and unify state and local procurement-law reforms. But the 2000 Code suffers from the maladies of adversarial legalism and efficiency. For instance, the Code prohibits administrators from selecting a contract

states provide their central procurement offices with independent authority to audit purchases made at the state, agency, and decision level).

383. *See generally* Melchior Powell, *Corruption in the United States: A Systems View of Ethics Management*, *in* Corruption in a Global Context: Restoring Public Trust, Integrity, and Accountability (Melchior Powell, Dina Wafa & Tim A. Mau eds., 2020) (discussing ethics and oversight of procurement administrators at all levels of government in the United States); Nathaniel E. Castellano, *Suspensions, Debarments, and Sanctions*, 45 Pub. Cont. L.J. 403 (2016) (discussing debarment systems for preserving contractor integrity enforced by the United States and World Bank).

384. Jessica Tillipman & Steven L. Schooner, *Institutional Amnesia and the Neglect of the Federal Acquisition Workforce*, 67 Gov't Contractor art. no. 182, at 7-8 (2025) ("Although a serious, sustained, and strategic effort to recruit and develop acquisition talent would likely yield the greatest improvements in procurement outcomes, no such initiative appears forthcoming."); Rebecca Montano-Smith, *The Case of the Missing Worker*, Nat'l Ass'n State Procurement Offs. (June 27, 2023), https://www.naspo.org/news/the-case-of-the-missing-worker [https://perma.cc/36AQ-23SH] ("At the [2023] National Governors Association Winter Meeting in Washington, D.C., one topic was raised in every single session and panel: worker shortage.").

385. *See* Model Procurement Code for State & Loc. Gov'ts (A.B.A. 1979); Model Procurement Code for State & Loc. Gov'ts (A.B.A. 2000).

386. *2018 Survey of State Procurement Practices*, Nat'l Ass'n of State Procurement Offs. 2 (2018), https://cdn.naspo.org/RI/2018-UPDATED-Survey-Report_10-5-18.pdf [https://perma.cc/3EA9-HLD2].

with a higher quality or lower risk level "unless that bidder also has the bid price evaluated lowest in accordance with the objective criteria set forth in the Invitation for Bids."[387] Nor does the Code "permit discussions or negotiations with bidders after receipt and opening of bids."[388] Revised model language and commentary could leave more room for procuring officials to make judgment calls or revisions where they have a justifiable, but not easily measurable, basis.

The objectives of expanding administrative discretion in procurement are twofold: first, to reduce the government's frivolous liability exposure, and second, to empower administrators to select proposals that best serve the public's interest. Greater discretion, however, must also be coupled with checks to limit the risk of government corruption. Any reforms can still require administrators to list out selection criteria in the bid solicitation and publicize its basis for the award. Bid protests can also remain as a less potent but still robust tool to check government excess through the natural inclinations of disgruntled bidders. But administrators empowered in the face of these checks on their actions will be better able to exercise their good judgment and competence.

C. Tailoring Judicial Review

Judicial review should provide a workable framework for administrators to make sound assessments about whether action is committed to their discretion or might expose them to legal liability. A tailored framework would allow procurement laws to concert decision-making in an intended direction. Derived from the business-judgment rule, which controls business executive decision-making, a "government-judgment rule" could strike the right balance of enabling litigation for abuses of discretion and safeguarding good-faith administrative decisions from excessive legal exposure.

The adversarial features of the American procurement system no doubt present a formidable obstacle to procurement administrators.[389] The prospect of judicial review of a procurement award, for instance, influences administrator decision-making about the scope of factors to consider. It may shape whether they look beyond the safe harbor of lowest-priced bidder selection or consider less-quantifiable bidding requirements. Once exposed to judicial review, the government risks the reversal of an award or punitive injunctions that mandate a bidding redo. Both risks tax administrators' constrained resources and extend project timelines—undesirable outcomes for the public and its fisc. Administrators

387. Model Procurement Code for State & Loc. Gov'ts 23-24 (A.B.A. 2000).

388. *Id.*

389. *See, e.g.*, Standing Comm. on Lab., *supra* note 283, at 2-3, 8-10 (outlining the way in which litigation from disgruntled or disqualified bidders can stymie the procurement process).

must also undergo excessive document and research production to develop a defensible record for the court's review, even when the document-gathering may not be necessary or relevant to the decision made. A stringent standard of review may also force the government to prioritize procedural compliance over substantive decision-making.

Policymakers and judges should start mitigating these problems by limiting unnecessary interference in procurement decisions by disgruntled bidders. In other bodies of law, including administrative and corporate-governance law, the availability and level of judicial review varies widely and is often tied to the complexity of the decision-making.[390] Procurement law should be no exception. I propose a government-judgment rule that mandates rational-basis review for government procurement decisions, absent evidence of impropriety, gross negligence, actions contrary to the public interest, or conduct warranting heightened constitutional scrutiny.

The business-judgment rule provides a useful analogy.[391] In corporate law, courts typically refrain from intervening in corporate affairs so long as corporate officers acted in good faith, with honesty, and on an informed basis. The business-judgment rule is predicated on several key principles. It recognizes that corporate officers and directors have superior expertise and an informational advantage in making business decisions. Businesses must take risks to grow and innovate, and courts should avoid second-guessing commercial decisions that fall within the scope of reasonable judgment. Directors and officers are also presumed to be profit-motivated, so they should be incentivized to make decisions in a corporation's best interest. Moreover, business decisions are commercial, not legal, and should be assessed primarily by those with direct knowledge of the enterprise.

A similar standard of judicial review for government procurement is justified for related reasons. For one, government administrators are better equipped than courts to make judgment calls on procurement awards. They are more familiar with the ins and outs of project procurement. They have a better grasp on how the project fits into the larger framework of public works and services or long-term economic or cultural development plans. Administrators are also more responsive than courts to the needs and concerns of the electorate. The

390. *See generally* Emily Hancox & Sonja Heitzer, *It's a Complex World. Can Courts Help? Judicial Review and Complexity in Germany, the EU and the US*, 14 CAMBRIDGE INT'L L.J. 123 (2025) (discussing the availability of judicial review in areas of law in the United States, Germany, and the European Union).

391. *See* Kamin v. Am. Express Co., 383 N.Y.S.2d 807, 812-14 (Sup. Ct. 1976) ("The directors' room rather than the courtroom is the appropriate forum for thrashing out purely business questions which will have an impact on profits, market prices, competitive situations, or tax advantages. . . . More than imprudence or mistaken judgment must be shown.").

procurement process regularly involves public hearings and feedback and consultation with elected officials. These influences—not the more limited judgment of a dissatisfied bidder—deserve to play the predominant role in the procurement process.

A more deferential review standard does not eliminate the availability of checks on unlawful government action and would not be unprecedented. The line of exceptions to low-bid requirements already carved out by courts themselves provides an existing basis to narrow the scope of judicial review.[392] Although not identical to the profit influence presumed to motivate business leaders, the public's check on government discretion through the ballot box provides a similar disciplining effect on government discretion.[393] A state could also supplement the rollback in judicial review with a less formal dispute-oversight mechanism, like a state or local ombudsman. The ombudsman could resolve bid disputes much as GAO did when it first took on the bid-protest role: perhaps without GAO's trial-like process, but with the continued objective of serving as a backstop.[394]

Under this approach, courts would also reserve discretion to root out bad faith or negligence without relying on clunky, strict textualist interpretations of competitive-bidding laws. Importantly, the government must still adhere to the competitive-bidding requirements: it must publicly post the bid solicitation, open it to all responsible bidders, provide clear criteria for assessment, and select the project that best advances the public interest. A government-judgment rule would reserve discretion for the court not just in cases of impropriety or gross negligence but also where government action does not advance the public's interest. If a government administrator selects a bidder without any reasonable public-interest-connected justification, courts could intervene, even without any suspicion of impropriety. But in contrast, if an agency provides a rational basis for selecting a non-lowest-priced bidder—such as prioritizing long-term project viability over short-term lower costs—and no evidence of impropriety or negligence exists, courts should defer to that judgment.

This framework checks excesses without letting the legal process override sound judgment, offering a needed restraint on adversarial legalism. And while not tailored to remove narrow efficiency considerations, it would, by extension,

392. *See supra* Section II.C.

393. *See generally* B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801 (1991) (describing the responsiveness of government to political and democratic forces, including by nonelected and bureaucratic decision-makers).

394. *See* KELMAN, *supra* note 95, at 23-24 (describing the rise of "trial-like" procedures at the Government Accountability Office).

reduce the pressure on administrators to justify their decisions with easily quantifiable metrics when less quantifiable metrics are also important.

D. Recalibrating Judicial Remedies

The punishment should fit the crime. So too in procurement should the judicial remedy fit the infraction. Judicial remedies align behavior with the law, or rather, disincentivize unintended behavior. The flip side of course is that overly stringent judicial remedies can hamstring government capacity. This happens when courts compel government to redo the bidding process if procurement procedures are not strictly followed, such as when a bid solicitation does not list all relevant criteria.[395] Courts justify strict remedies as vital for protecting the integrity of the bidding process, where corruption is often presumed to be difficult to unearth.[396] The harsh injunctions are powerful deterrents against misconduct but can also go overboard, compounding delays, distorting administrator decision-making, and ultimately contributing to inefficient outcomes.

Courts' statutory authorizations to enjoin and restart the procurement process were originally intended for situations where it would be in "the public interest so to do."[397] Courts have further emphasized that this power "may not be exercised arbitrarily or for the purpose of thwarting the public benefit intended to be served by the competitive process."[398] To enhance government capacity, courts might revive such conceptions of judicial remedies. A more tailored approach would consider the burden of restarting the procurement process, which can add years onto government timelines. In large public-works projects, rigid

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395. *See, e.g.*, AAA Carting & Rubbish Removal, Inc. v. Town of Southeast, 951 N.E.2d 57, 62 (N.Y. 2011) (holding that the town acted "capriciously" in its bidding process and therefore undoing the town's selection of a bidder); Schram Constr., Inc. v. Regents of Univ. of Cal., 114 Cal. Rptr. 3d 680, 683, 694 (Ct. App. 2010) (finding the university "failed to 'adopt and publish procedures and required criteria that ensure that all selections are conducted in a fair and impartial manner'" (quoting Cal. Pub. Cont. Code § 10506.4(c) (2010))); Ritchie Paving, Inc. v. City of Deerfield, 67 P.3d 843, 850 (Kan. 2003) (granting a monetary award to an unsuccessful lowest bidder as a deterrent against government impropriety).

396. *See* Jered Contracting Corp. v. N.Y.C. Transit Auth., 239 N.E.2d 197, 200-01 (N.Y. 1968).

397. Conduit & Found. Corp. v. Metro. Transp. Auth., 485 N.E.2d 1005, 1008 (N.Y. 1985) (quoting N.Y. Pub. Auth. Law § 1209 (Consol. 1984)); *see also* Pace Co. v. Resor, 453 F.2d 890, 891 (6th Cir. 1971) (per curiam) (ordering vacatur of an injunction because the public welfare would be materially affected); Atlas Mach. & Iron Works, Inc. v. Sec'y of the Air Force, 429 F. Supp. 11, 13 (D.D.C. 1977) (denying an unsuccessful bidder's motion for a preliminary injunction because of the public interest in "expeditious completion" of the project).

398. *Conduit & Found. Corp.*, 485 N.E.2d at 1008; *see also* Carruci v. Dulan, 261 N.Y.S.2d 677, 678-79 (App. Div. 1965) (emphasizing the impermissibility of arbitrarily rejecting a bid).

re-bid requirements can also incentivize administrators to make decisions to avoid liability rather than for the good of the project.

Lawmakers should also establish clear guidelines that define when a bidding process should be redone. To prevent minor procedural missteps from thwarting government capacity, lawmakers may limit the judiciary's ability to enjoin contract awards. One option is to require that courts permit the government to proceed with a challenged award if a re-bid would likely have a negligible impact on the outcome. For instance, if a relevant factor emerged after bids were submitted but would not have materially changed how bidders formulated their proposals, requiring a full re-bid would serve little purpose. Alternatively, lawmakers could permit an expedited review process where existing bidders submit revised proposals reflecting an updated solicitation within a shortened timeframe. This approach would help maintain competition while minimizing unnecessary delays and costs.

These reforms to judicial remedies ought to be incorporated into the revised version of the ABA's Model State and Local Procurement Code. Section 9-202 of the current Code establishes judicial remedies in the event of violations in the solicitation or proposed award.[399] It provides just two options: a court may either cancel the award, effectively restarting the process, or revise the award to comply with the law. Section 9-203, which addresses remedies after an award, gives a court some flexibility in ratifying and affirming awards absent bad faith by the administrator, but still leaves room for the court to terminate the contract.[400] Both sections reserve some flexibility for courts to extend administrators' leeway, but courts do not often exercise it.[401] Revisions to the sections' text or commentary could provide more express guidance encouraging courts to apply remedies in ways that facilitate government capacity.

More tailored judicial remedies would be a significant step toward reducing the harmful effects of adversarial legalism. For one, they would prevent protesting bidders from exploiting the adversarial system to threaten government and the public with harsh consequences for minor procedural missteps. Narrower remedies would also provide administrators with clearer rules of the road as they execute the procurement process. Clarity and proportionality regarding potential missteps would help administrators make rational decisions about bidder evaluation. Taken together, these remedies would make the entire procurement process faster and less expensive for the public.

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399. Model Procurement Code for State & Loc. Gov'ts 70 (A.B.A. 2000).

400. *Id.* at 70-71.

401. *See supra* notes 256-258 and accompanying text.

CONCLUSION

The United States has a government-capacity problem. Yes, it exists in the federal government. But the crux of the problem is with state and local governments. These governments determine how trillions of public funds are spent each year. The history of state and local procurement law dates to the country's Founding, when it played a foundational role fostering economic and social development. Early competitive-bidding laws were drafted to prevent government impropriety and to encourage competition among bidders. Today, that vision has fallen by the wayside. Far from securing the lowest price, today's procurement laws saddle governments with higher costs and worse outcomes. Examples like the Central Subway project exist nationwide, straining communities and delegitimating government.

I propose that the government-capacity crisis in procurement law boils down to two overarching problems: the entrenchment of adversarial legalism and an overemphasis on a cost-based conception of efficiency. These forces took hold in the mid-twentieth century with rising individualism and mistrust in government. Still informed by the same ideals, reform proposals often suggest procedural requirements that limit when and how administrators exercise discretion. These constraints expose a procurement system broken not by government inefficiency or incapacity, but by design.

Government is not inherently incapable. It has, throughout its history, exercised discretion to tackle complex, large-scale projects that spur global economic and social development. And government can do so again—if given the capacity.