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## **NEW YORK CITY'S PROCUREMENT SYSTEM: REVERSING THE CYCLE OF CORRUPTION AND REACTIONARY REFORM**

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# NEW YORK CITY'S PROCUREMENT SYSTEM: REVERSING THE CYCLE OF CORRUPTION AND REACTIONARY REFORM

## INTRODUCTION

In fiscal year 1997, New York City entered into approximately \$5.8 billion dollars worth of contracts.<sup>1</sup> The attendant problems of effectively managing a system the size of New York City are further complicated by the fact that the multiple goals of government contracting—efficiency, prevention of corruption, and fairness to the providers of goods and services—seem to be at odds with one another.<sup>2</sup> The government must be as efficient as possible to maximize taxpayer dollars.<sup>3</sup> The government must minimize the potential for corruption, and even the appearance of corruption, to ensure that taxpayers do not lose trust in the system.<sup>4</sup> Finally, the government must be fair to the potential providers of services to ensure that a pool of qualified, responsible bidders remain available.<sup>5</sup> Attaining these goals requires a difficult balance.<sup>6</sup>

Historically, New York City has not been up to the challenge.<sup>7</sup> This failure results, in large part, because a significant amount of contracting reform in New York City occurred as a reaction to scandal.<sup>8</sup> Consequently, multiple procedures have been adopted over the years to combat corruption. Unfortunately, these procedures delay the procurement process.<sup>9</sup>

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1. See Ross Sandler, *Top 100 Contracts for FY 1997 Equal 50 Percent of the Value of All City Contracts*, CITYLAW (Center for N.Y. City Law, N.Y.L. Sch., New York, N.Y.), Sept./Oct. 1997, at 97.

2. See Frank Anechiarico & James B. Jacobs, *Purging Corruption from Public Contracting: The 'Solutions' Are Now Part of the Problem*, 40 N.Y.L. SCH. L. REV. 143, 146 (1995).

3. See *id.* at 173.

4. See *id.* at 146.

5. See *id.*

6. See *id.* at 173.

7. See generally *A Ship Without a Captain: The Contracting Process in New York City*, in GOVERNMENT ETHICS REFORM FOR THE 1990S, at 461, 469-82 (Bruce A. Green ed., 1990).

8. See Anechiarico & Jacobs, *supra* note 2, at 145-50.

9. See *A Ship Without a Captain*, *supra* note 7, at 477.

The 1989 revision of the New York City Charter brought widespread change to the process of procuring City contracts,<sup>10</sup> guided largely by reaction to scandal.<sup>11</sup> However, the Charter Revision Commission's creation of the Procurement Policy Board, with its stated goal of providing continual improvement of the New York City procurement policy, has the potential to break the vicious cycle of corruption, reactionary reform, and inefficiency in procurement contracting.

Part I<sup>12</sup> of this Note outlines the City's preferred method of procurement (the competitive bidding process), describes how the procedures adopted to prevent corruption undermine the underlying goals of government contracting, and analyzes recent efforts to remedy some of the long-standing problems. Part II<sup>13</sup> outlines the non-competitive bid methods of procurement, describes how the reaction to corruption affected the procurement reform of the 1989 New York City Charter Revision, and analyzes subsequent efforts to remedy the long-standing problems. Part III<sup>14</sup> discusses section 326 of the New York City Charter and illustrates how reaction to corruption caused the City to adopt an inefficient procedure. Part IV<sup>15</sup> critiques this procedure, discusses recent reforms to the procedure by the Procurement Policy Board, and offers suggestions for further improvement.

## I. AN OUTLINE OF COMPETITIVE SEALED BIDDING

Competitive sealed bidding is the City's preferred method of procurement, because it is believed that competitive sealed bidding provides the best price, while at the same time, prevents corruption and

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10. The City of New York Procurement Policy Board Rules defines "Procurement" as:

Buying, purchasing, renting, leasing, or otherwise acquiring any goods, services, or construction. It also includes all functions that pertain to the obtaining of any good, service, or construction, including planning, description of requirements, solicitation and selection of sources, preparation and award of contract, and all phases of contract administration, including receipt and acceptance evaluation of performance and final payment.

CITY OF NEW YORK PROCUREMENT POLICY BOARD, CITY OF NEW YORK PROCUREMENT POLICY BOARD RULES § 1-07 (1997) [hereinafter PROCUREMENT POLICY BOARD RULES].

11. See Anechiarico & Jacobs, *supra* note 2, at 148-49.
12. See *infra* notes 16-45 and accompanying text.
13. See *infra* notes 46-85 and accompanying text.
14. See *infra* notes 86-99 and accompanying text.
15. See *infra* notes 100-112 and accompanying text.

ensures equal opportunities to those who submit bids.<sup>16</sup> The competitive sealed bidding system requires the agency seeking to procure goods or services to notify the public of its specifications and invite bids.<sup>17</sup> The bids submitted are reviewed, and the contract is awarded to the lowest responsible bidder.<sup>18</sup> Despite the City's preference for this system, it is not without its shortcomings.

Historically, the procedures New York City has adopted to combat corruption have caused the contracting process to take much more time than it does in the private sector.<sup>19</sup> There are various procedures in place to verify that a bidder is responsible.<sup>20</sup> Bidders must complete questionnaires, and their names must be run through the "Vendex" computer system,<sup>21</sup> which records data regarding any integrity-related problems of contractors.<sup>22</sup> The city comptroller, who registers contracts, can object to a contract if he or she believes "there is possible corruption in the letting of the contract or that the proposed contractor is involved in corrupt activity."<sup>23</sup>

The effect that these requirements have on minimizing corruption is impossible to determine.<sup>24</sup> However, one verifiable effect is that many qualified contractors do not bid on contracts with New York City because of the increased time, paperwork, and attendant cost of the vendor responsibility review process.<sup>25</sup> In many instances, this causes a lack of true competition. Some experts consider "five bids or three bids the bare

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16. Competitive sealed bidding was adopted in New York City in the 1870s in reaction to Tammany Hall corruption scandals. This foreshadowed the City's proclivity to reform the contracting process in response to a major scandal.

In 1862, William Marcy Tweed gained control of the Board of Supervisors. Due to "sweetheart deals," where contracts were steered to Tweed associates resulting in overinflated bills, the New York County courthouse construction wound up taking a decade to complete, costing taxpayers \$8 million. The original budget was \$250,000. The result was reform and the push for a competitive system of procurement that limited officials' discretion in the contracting process. *See Anechiarico & Jacobs, supra* note 2, at 145-46.

17. *See id.* at 146.

18. *See id.*

19. *See generally id.*; *A Ship Without a Captain, supra* note 7, at 477.

20. *See* PROCUREMENT POLICY BOARD RULES, *supra* note 10, § 5-02.

21. *See id.*

22. *See id.*

23. N.Y. CITY CHARTER ch. 13 § 328 (1989). The comptroller must deliver an objection to the mayor, who must respond in writing. The mayor may require registration of the contract if corrective action has been or will be taken, or if the mayor disagrees with the comptroller's objection. *See id.*

24. *See Anechiarico & Jacobs, supra* note 2, at 169.

25. *See A Ship Without a Captain, supra* note 7, at 469.

minimum necessary for adequate competition.”<sup>26</sup> Prior to the revision of the Charter in 1989, New York City fell below this “bare minimum” all too often.<sup>27</sup>

Furthermore, this system often does not provide New York City with the best price. The delay and oppressive processes discourage many contractors from pursuing contracts with New York City.<sup>28</sup> As a result, contractors know there will be little competition, and are therefore under much less pressure to keep their bids low.<sup>29</sup> Due to the small number of competitors, contractors quickly become aware of their competitors’ price structure.<sup>30</sup> A competitive process so easily undermined does not keep prices down.

The competitive sealed bidding system actually increases the potential for some forms of corruption.<sup>31</sup> The absence of significant competition makes bid rigging possible.<sup>32</sup> When only a small group of the same firms bid on certain types of contracts, it is easier for these firms to act collusively.<sup>33</sup> The system does not encourage the most qualified firms to submit bids but instead encourages firms who have adapted to the system and who have the knowledge to manipulate it.<sup>34</sup> These firms can easily work together to exploit the system.

Another shortcoming of the system is that it does not promote fairness to the provider of services.<sup>35</sup> The inordinate delays in the process and in receiving payment for services provided is unfair to the contractors. This unfairness is therefore reflected in the prices the City receives.<sup>36</sup> Despite the problems with the competitive sealed bidding system, it is still the preferred method of procurement in New York City.<sup>37</sup> When the New York City Charter was revised in 1989, the competitive sealed bidding system remained basically unchanged, while the non-competitive bid

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26. *Id.* at 469.

27. *See id.* at 469-72.

28. *See id.* at 473-74.

29. *See id.* at 475.

30. *See id.*

31. *See id.* at 481.

32. *See id.*

33. *See id.*

34. *See id.*

35. *See id.* at 473-74.

36. *See id.* at 473-75.

37. *See* Eric Lane, *The Sorrows of Seabury or How Not to Read a Statute*, CITYLAW (Center for N.Y. City Law, N.Y.L. Sch., New York, N.Y.), Oct. 1995, at 77; Edward N. Costikyan & Leslie U. Cornfeld, *NYC's New Procurement Structure: Birth of an Imperial Agency*, 204 N.Y. L.J. 1, 1 (1990).

methods of procurement—the focus of the most recent corruption scandals in New York—were revised dramatically.<sup>38</sup>

However, the New York City Charter Revision Commission, in creating the Procurement Policy Board, established the potential for continuous improvement in City procurement policy making. The Board's continuous focus on procurement may help break the cycle of reactionary policy making. For example, in an attempt to remedy the problem of late payments to vendors, the Procurement Policy Board, pursuant to New York City Charter section 332, promulgated PPB rule 6-07 which provided for strict procedures for prompt payment of vendors.<sup>39</sup> As a result, in fiscal year 1995, New York City paid 58% of invoices on time, and 30% were paid during the grace period.<sup>40</sup> In fiscal year 1996, 60% were paid on time, and 27% were paid during the grace period.<sup>41</sup> Section 332 of the City Charter also directs the Procurement Policy Board to report annually on prompt payment efforts.<sup>42</sup>

This type of effort has the potential to improve the system. If vendors are confident that they will be paid promptly, they will be more likely to bid on work with the City.<sup>43</sup> This effort seems to be working. Because many city agencies did not keep adequate records prior to the charter revision,<sup>44</sup> a detailed comparison of the levels of competition for contracts before and after the 1989 charter revision is not possible; however, the levels seem to have increased substantially in recent years.<sup>45</sup>

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38. See Costikyan & Cornfeld, *supra* note 37, at 1.

39. See PROCUREMENT POLICY BOARD RULES, *supra* note 10, § 6-07; see also N.Y. CITY CHARTER ch. 13 § 332 (1989); *City Contracts: Prompt Payment*, CITYLAW (Center for N.Y. City Law, N.Y.L. Sch., New York, N.Y.), Oct. 1995, at 80.

40. See *City Slashes 1996 Interest Payments: DOT Still Top Payer*, CITYLAW (Center for N.Y. City Law, N.Y.L. Sch., New York, N.Y.), Aug./Sept. 1996, at 86.

41. See *id.*

42. See *City Contracts: Prompt Payment*, *supra* note 39, at 80.

43. See *A Ship Without a Captain*, *supra* note 7, at 473.

44. It should be noted that the Procurement Policy Board has remedied this inadequate record keeping by requiring that the contracting agency report the number of responses from vendors for each contract to be registered. See PROCUREMENT POLICY BOARD RULES, *supra* note 10, § 5-07(e)(vii).

45. Compare STATISTICAL SUMMARY SUPPLEMENT TO THE COMPTROLLER'S COMPREHENSIVE ANNUAL CONTRACTS REPORT FOR FISCAL YEAR ENDING JUNE 1996, 17-18 (1997) [hereinafter STATISTICAL SUMMARY SUPPLEMENT] (providing statistics for the years 1993 to 1996 that indicate a range of 77% to 87% of City contracts awarded through competitive systems that received three or more responses), with *A Ship Without a Captain*, *supra* note 7, at 469-72 (describing the lack of competition for contracts with New York City prior to the revision of the Charter in 1989).

## II. AN OUTLINE OF NON-COMPETITIVE BID PROCUREMENT

In certain situations, delineated by the New York City Charter, the competitive system of procurement can be circumvented. The non-competitive methods are exceptions to the preferred competitive system in instances where it is perceived that the competitive system would not be feasible or cause a substantial benefit.<sup>46</sup> As with the competitive bidding process, scandal prompted reform of the non-competitive bid methods of contracting.<sup>47</sup>

For example, in 1986 the Parking Violations Bureau scandals made headlines.<sup>48</sup> The Parking Violations Bureau ("PVB") awarded contracts to companies with connections to PVB officials, then-Queens Borough President Donald Manes and Bronx Democratic leader Stanley Friedman, by using a "sole source" contracting method of procurement, a non-competitive method used when there is only one acceptable supplier for the goods or services sought.<sup>49</sup> Even when competitive bids were sought for a computer contract, behind the scenes, shareholders of Friedman's shell company, Citisource, helped write the contract specifications to give Friedman's firm an "enormous advantage."<sup>50</sup> When this was revealed, the deficiencies of the non-competitive system of procurement were spotlighted. The Charter Revision Commission's procurement provisions were guided largely in response to the PVB scandal.<sup>51</sup>

Prior to the revision of the New York City Charter in 1989, an agency that awarded a contract over \$10,000—\$15,000 for construction contracts that were not the product of competitive bidding was required to get the contract approved by the Board of Estimate.<sup>52</sup> This occurred at public meetings,<sup>53</sup> but the Board of Estimate's semi-monthly meetings contained hundreds of items on the agenda.<sup>54</sup> Furthermore, there was little time

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46. See N.Y. CITY CHARTER ch. 13 § 312 (1989); see also Anechiarico & Jacobs, *supra* note 2, at 149. This Note does not address the extent to which the current procurement provisions may conflict with state law requirements for the use of competitive sealed bids. See N.Y. GEN. MUN. LAW § 103 (McKinney 1986).

47. See Anechiarico & Jacobs, *supra* note 2, at 148-49.

48. See *id.* at 147-48.

49. See *id.* Sole source contracting is still used. See PROCUREMENT POLICY BOARD RULES, *supra* note 10, § 3-05.

50. See Anechiarico & Jacobs, *supra* note 2, at 148-49.

51. See *id.* at 149.

52. See Costikyan & Cornfeld, *supra* note 37, at 1.

53. See N.Y. STATE OFFICE OF THE COMPTROLLER, THE APPROVAL PROCESS FOR NON-COMPETITIVE CONTRACTS IN NEW YORK CITY, REP. A-2-87, at 6 (1986).

54. See *id.*

between the calendaring of a contract and the hearing,<sup>55</sup> and the members of the Board of Estimate—the mayor, who served as chairman, the City comptroller, the president of the City Council, and the presidents of each of the five boroughs—often sent representatives in their place to attend these meetings.<sup>56</sup> Finally, the Board of Estimate's involvement usually occurred too late in the process.<sup>57</sup> For the Board to decide not to approve a contract, it would have needed to disregard the administration's expectation of approval as well as the fact that funds were already expended in preparation for the contract.<sup>58</sup>

The volume of contracts under consideration, the time constraints, and the numerous responsibilities of the members of the Board, made serious review of contracts impossible.<sup>59</sup> Board of Estimate approval became a mere rubber stamp.<sup>60</sup> In its Final Report, the Charter Revision Commission stated that the Board of Estimate's approval process had very little impact on City policy, because it occurred at the end of the process and did not promote integrity as accountability. Accountability was disbursed to all eight members of the Board.<sup>61</sup> The 1989 New York Charter Revision Commission was ultimately charged with improving this system.

Around the time of the PVB scandals, residents of Brooklyn challenged the voting structure of the Board of Estimate.<sup>62</sup> The resultant decision from the U.S. Supreme Court, in *Board of Estimate v. Morris*, held that the voting structure violated the "one person-one vote" standard. The borough presidents each had a single vote even though each represented boroughs of different populations.<sup>63</sup>

Rather than reshuffling the relative voting power of the members of the Board, the Charter Revision Commission decided to eliminate the Board of Estimate altogether.<sup>64</sup> This decision had widespread ramifications. For example, there was the need to rework the non-competitive bid contract approval process.

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55. *See id.* at 7.

56. *See id.* at 6.

57. *See Lane, supra* note 37, at 76.

58. *See id.*

59. *See N.Y. STATE OFFICE OF THE COMPTROLLER, supra* note 53, at 7.

60. *See Lane, supra* note 37, at 76.

61. *See N.Y. CITY CHARTER REVISION COMM'N, FINAL REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION, JAN. 1989-NOV. 1989, at 10 (1990) [hereinafter FINAL REPORT]; see also Lane, supra* note 37, at 76.

62. *See Board of Estimate v. Morris*, 489 U.S. 688, 690 (1989).

63. *See id.* at 700-02.

64. *See John Horenstein & Stanley Trybulski, New York City's Charter Revision: The Political Aftermath*, 1 J.L. & POL'Y 113, 133 (1993).

The 1989 Charter Revisions ("new Charter") attempted to limit the use of non-competitive means of procurement.<sup>65</sup> However, like the old Charter, several exceptions to the competitive bid system were put in place.<sup>66</sup> Specifically, small purchases,<sup>67</sup> emergency procurements,<sup>68</sup> intergovernmental procurements,<sup>69</sup> and special case exceptions<sup>70</sup> were exempted from competitive sealed bidding.<sup>71</sup> The new Charter attempts to foster the most competitive method of procurement whenever possible.<sup>72</sup> Competitive sealed bidding remains the preferred method of procurement.<sup>73</sup> Under the new Charter, a procuring agency using special case exceptions to competitive sealed bidding must choose the next most competitive method under the circumstances, such as competitive sealed bids from pre-qualified vendors,<sup>74</sup> competitive sealed proposals,<sup>75</sup> or competitive sealed proposals from pre-qualified vendors.<sup>76</sup> The new Charter also attempts to foster accountability for avoiding competitive sealed bidding by delineating the particular circumstances authorizing an agency to invoke the special case exception.<sup>77</sup>

Critics of the new Charter believe that, in attempting to limit a procuring agency's opportunity to avoid the competitive sealed bidding process, the drafters may have actually made it easier for them to avoid it.<sup>78</sup> To that effect, it has been noted that the exceptions are broadly defined and

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65. See Lane, *supra* note 37, at 77.

66. See generally N.Y. CITY CHARTER ch. 13 (1989).

67. See *id.* § 314.

68. See *id.* § 325.

69. See *id.* § 316.

70. See *id.* § 312.

71. Under the old Charter, special case determinations were reviewed by the Board of Estimate, but now this decision is left to the agency's discretion. See Costikyan & Cornfeld, *supra* note 37, at 1.

72. See Lane, *supra* note 37, at 77.

73. See Costikyan & Cornfeld, *supra* note 37, at 2.

74. Competitive sealed bids from pre-qualified vendors differs from competitive sealed bidding in that the agency only solicits bids from a pre-determined list of providers of goods and services. See N.Y. CITY CHARTER ch. 13 § 318 (1989).

75. Competitive sealed proposals differ from competitive sealed bidding in that the provider of the good or service sought must submit a "detailed statement of the manner in which the proposer intends to perform" if awarded the contract. See PROCUREMENT POLICY BOARD RULES, *supra* note 10, § 3-03; see also N.Y. CITY CHARTER ch. 13 § 319 (1989).

76. Competitive sealed proposals from pre-qualified vendors allow the procuring agency to accept proposals from a pre-determined list of providers of goods and services. See N.Y. CITY CHARTER ch. 13 § 320 (1989); see also Costikyan & Cornfeld, *supra* note 37, at 7.

77. See N.Y. CITY CHARTER ch. 13 § 312 (1989); see also Costikyan & Cornfeld, *supra* note 37, at 6.

78. See Costikyan & Cornfeld, *supra* note 37, at 6.

may be abused by the agencies.<sup>79</sup> This criticism appears well-founded. In fiscal year 1996, only 41% of all contracts were awarded via competitive sealed bids<sup>80</sup>—the lowest percentage reached in five years.<sup>81</sup>

The procurement process's competing objectives of increasing efficiency and minimizing opportunity for corruption must be balanced when deciding how much discretion to grant City agencies in the area of procurement. Increasing decision-making discretion in the agencies themselves should speed up the contracting process.<sup>82</sup> However, agencies have historically abused this discretion.<sup>83</sup> To this end, there is no easy solution, as even seemingly straightforward rules are undermined.<sup>84</sup>

For example, procurement audits conducted by the comptroller's office in fiscal year 1996 uncovered abuse of the small purchase exception to competitive bidding. The Department of Corrections had artificially limited the dollar amount of purchases to remain within the small purchase threshold and thereby circumvented the competitive bidding process.<sup>85</sup> This artificial limitation is not necessarily proof of corruption in the sense of stealing government funds; rather, it may simply be a manifestation of the agency personnel's frustration with the competitive bidding system. Regardless of the reasons behind these actions, it demonstrates the relative ease with which the competitive bidding process can be circumvented.

### III. SECTION 326

Though the Commission found that the old procedure lacked benefit, a similar procedure was enacted in the revised Charter.<sup>86</sup> Section 326 of the New York City Charter is an example of a procedure adopted to prevent corruption or the appearance of corruption in the "post Board of

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79. *See id.* (commenting on the "New Charter's" broad special-case exception definitions).

80. *See* STATISTICAL SUMMARY SUPPLEMENT, *supra* note 45, at ii.

81. *See id.*

82. *See A Ship Without a Captain*, *supra* note 7, at 477-79.

83. *See supra* notes 16-18, 48-52 and accompanying text.

84. Despite the problems with granting broad discretion to City contracting officials, the Procurement Policy Board is attempting to grant further discretion. For example, the dollar amount of the small purchase limits has been raised in most cases to \$25,000 for goods and services and \$50,000 for construction contracts, up from \$10,000 and \$15,000 respectively. *See* PROCUREMENT POLICY BOARD RULES, *supra* note 10, § 3-08; *see also Purchases Less than \$2,500 Freed from Competition Requirements*, CITYLAW (Center for N.Y. City Law, N.Y.L. Sch., New York, N.Y.), Dec. 1995, at 111.

85. *See* ALAN G. HEVESI, REPORT TO THE MAYOR AND CITY COUNCIL ON CITY COMPTROLLER AUDIT OPERATIONS FISCAL YEAR 1996, at 6 (1997).

86. *See* FINAL REPORT, *supra* note 61, at 10.

Estimate" non-competitive bid procurement process. Section 326 provides that a procuring agency must hold a public hearing for all contracts over \$100,000 that are awarded by means other than competitive sealed bids or competitive sealed bids from prequalified vendors.<sup>87</sup>

The Revision Commission, in evaluating the public hearings process, was aware of the low likelihood of public involvement. Besides its acknowledgment that the old Board of Estimate process was not beneficial,<sup>88</sup> the Commission's discussion regarding the possibility of having the procuring agency hold a hearing substantiates the belief that a change in format would not increase the benefits. For example, then-Director of Contracts Joel Copperman stated the following:

[I]f you have public hearings on such contracts, I would suggest to you that no one would come. The public process, what goes on in the Board of Estimate is public in that there are a number of elected officials involved, but it doesn't involve the general public . . . .<sup>89</sup>

True to the predictions, section 326 public hearings have had a lack of public involvement. The Department of Environmental Protection held twenty-six public hearings on non-competitive bid contracts in fiscal year 1996.<sup>90</sup> The total dollar amount of contracts awarded was \$60,385,000.<sup>91</sup> No testimony was heard at any of the twenty-six public hearings.<sup>92</sup>

Similarly, the Department of Transportation held hearings on fifty-six contracts pursuant to section 326 in fiscal year 1997.<sup>93</sup> The total dollar amount of these contracts was \$165,700,000.<sup>94</sup> Testimony was received at

87. See N.Y. CITY CHARTER ch. 13 § 326 (1989). The Procurement Policy Board rules also exempt emergency contracts, contracts made on an accelerated basis due to price fluctuations in the markets, and contracts for which a hearing would disclose litigation strategy. See PROCUREMENT POLICY BOARD RULES, *supra* note 10, § 5-06 (delineating public hearing requirements).

88. See FINAL REPORT, *supra* note 61, at 10.

89. Legislative Hearing, Mar. 1, 1989 (statement of Joel Copperman).

90. See Letter from Debra Butlien, Professional Services Contract Liaison, City of New York Department of Environmental Protection, to Joseph A. Cosentino 1 (Nov. 7, 1997) (on file with the *New York Law School Law Review*).

91. See *id.*

92. See Letter from Paul Stanton, Agency Chief Contracting Officer, New York City Department of Transportation, to Joseph Cosentino 1 (Dec. 1997) (on file with the *New York Law School Law Review*).

93. See *id.*

94. See *id.*

nine of the hearings,<sup>95</sup> but this testimony produced no changes to the contracts at issue.<sup>96</sup>

Neither the Department of Environmental Protection nor the Department of Transportation keep records of the cost of holding section 326 hearings, but time is likely wasted and costs are certainly incurred.<sup>97</sup> Each hearing must be advertised in the *City Record* at least ten days prior to the hearing.<sup>98</sup> The agency head or deputy must be present for the hearing.<sup>99</sup> At a hearing, a script is read, no one usually testifies, and subsequently the hearing is closed. Section 326 was an attempt to avoid the appearance of corruption. In reality time and money are sacrificed without apparent benefit.

#### IV. IMPROVING SECTION 326

Normally, no one from the public comes to the scheduled hearings on procurement contracts. Therefore, these hearings produce no foreseeable benefit that would not be achieved by simply requesting written submissions from the public. Furthermore, the current Procurement Policy Board Rules do not allow an agency representative at a hearing to make any commitments to change a proposed contract.<sup>100</sup> The testimony is made for the record and the agency representative may ask questions of the witness. The agency is not bound by the public commentary but must take it into consideration.<sup>101</sup> A summary of the testimony and the agency's response must be kept in the contract file. The summary and contract file are public information.<sup>102</sup>

A better result that still includes the potential for public participation could be achieved through the agency's acceptance of written correspondence from the public.<sup>103</sup> Public hearings, at their best, provide a forum for public participation, but often, little value is added to the

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95. *See id.*

96. *See id.*

97. *See Public Hearing Not Required For Contract Renewals*, CITYLAW (Center for N.Y. City Law, N.Y.L. Sch., New York, N.Y.), Apr. 1995, at 37.

98. *See* PROCUREMENT POLICY BOARD RULES, *supra* note 10, § 5-06.

99. *See id.*

100. *See id.*

101. *See id.* (explaining testimony must be "considered" and that a written response from agency must set out how, if at all, the testimony affected the contract).

102. *See id.*

103. It should be noted that a referendum is required to do away with a Charter provision "requiring a public notice and hearing as a condition precedent to official action." N.Y. CITY CHARTER ch. 2 § 38 (1989).

process.<sup>104</sup> An issue that brings the public out is normally an emotional affair. The acceptance of written submissions from the public would still allow for participation in the process and could serve to spur more thoughtful input.<sup>105</sup>

The opportunity for the public to submit ideas in writing may spur additional participation. Currently, hearings are held at City Hall at 10:00 a.m. on weekdays. Working individuals wishing to supply information on a particular contract or contractor would have to take time from their work day to participate. This inconvenience likely contributes to the lack of participation.

If the opportunity for the public to speak, as opposed to write, remains in the non-competitive bid procurement process, some assurance should be made that the public will participate before a hearing is held. The public notice requirements could remain, but interested parties would have to acknowledge their desire to speak in advance of the hearings in lieu of submitting written commentary. As a result, fewer hearings would be held. However, the hearings will have guaranteed public involvement and pertinent testimony. If this method were utilized in fiscal year 1997, the Department of Environmental Protection and Department of Transportation would have saved the time and expense of holding hearings which produced no testimony on the combined seventy-three contracts.

The expansion of the public hearings requirement is not without its proponents. The New York State Commission on Government Integrity recommended consideration of public hearings "whenever public benefits or expenditures of a significant magnitude are being considered."<sup>106</sup> However, utilization of these requirements must add value to the process. This value is not evident with the section 326 hearings. What is particularly disingenuous about section 326 is that it has incorporated all that was ineffective about the old Board of Estimate procedure while eliminating the one feature that was arguably effective: the oversight provision. The hearings still take place at the end of the process and still foster very little public participation, but do not provide for any oversight outside of the contracting agency.<sup>107</sup> Thus, the Commission that denounced the Board of Estimate review process as ineffective has adopted a procedure that is even less effective.<sup>108</sup>

The important aspect of the public hearing is the opportunity for public participation. When the public does not wish to participate, conducting a

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104. See, e.g., PHIL K. HOWARD, *THE DEATH OF COMMON SENSE* 92-93 (1994).

105. See Legislative Hearing, Mar. 1, 1989 (statement of Lilliam Barrios-Paoli).

106. *A Ship Without a Captain*, *supra* note 7, at 338.

107. By the time a public hearing is held, the terms and contractor have been negotiated. See *PROCUREMENT POLICY BOARD RULES*, *supra* note 10, § 5-06.

108. See *FINAL REPORT*, *supra* note 61, at 10.

hearing spurred by fear of the appearance of corruption wastes the resources of the city residents. The argument can be made, however, that the threat of being exposed at a public hearing may be enough to prevent corruption.<sup>109</sup> Under the new Charter, as under the old, most contracts must be registered by the comptroller.<sup>110</sup> The comptroller may object to the contract on the basis of perceived corruption either on the part of the contractor or the procurement process.<sup>111</sup> With this measure already in place, it does not seem likely that hearings with no public attendance serve to prevent corruption. Instead, they prevent efficiency.

The Procurement Policy Board has recognized the inefficiency of holding a public hearing where a contract is simply being renewed. The Board subsequently changed the rule, and mandatory hearings are no longer "required when an agency exercises a renewal option where the original contract or prior renewal was subject to a public hearing."<sup>112</sup>

## V. CONCLUSION

In examining the efficiency of government agencies, the multiple objectives sought must be factored into the equation. As one commentator noted, "when we complain that contracts were awarded without competitive bidding or in a way that allowed bureaucrats to line their pockets we acknowledge that we care about many things . . . we care about contextual goals . . . ."<sup>113</sup> Certain benefits, such as corruption prevention, are not easily determinable.<sup>114</sup> It is impossible to determine how much corruption would have taken place absent a certain procedure.<sup>115</sup> However, superfluous and ineffective procedures must be revised.<sup>116</sup> Before the system of ineffective procedures is brought to light by a headline-making scandal, the Procurement Policy Board has the potential for thoughtful revision and elimination of ineffective procedures.

Commentators have suggested that small adjustments to the contracting process have contributed to the problem and that New York City's system is too big to be adjusted on a small scale.<sup>117</sup> However, this critique focuses

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109. See Costikyan & Cornfeld, *supra* note 37, at 1.

110. See N.Y. CITY CHARTER ch. 13 § 328 (1989).

111. See *id.*

112. Public Hearing Not Required for Contract Renewals, *supra* note 97, at 37; see also PROCUREMENT POLICY BOARD RULES, *supra* note 10, § 5-06.

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

114. See Anechiarico & Jacobs, *supra* note 2, at 169.

115. See *id.*

116. See *id.* at 144.

117. See *A Ship Without a Captain*, *supra* note 7, at 462.

on the addition of procedures which serve to paralyze the system over time. Constant analysis and streamlining is essential.<sup>118</sup> Every procedure must be questioned to determine what value is added to the process.<sup>119</sup> In this way, the system is improved through thoughtful changes and not reactionary damage control.

The Procurement Policy Board has successfully streamlined the process and "reduced the procurement rules by half."<sup>120</sup> However, whether the Board is truly committed to continue this positive trend will not be tested until the next headline-making contracting scandal hits New York City.

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118. See Anechiarico & Jacobs, *supra* note 2, at 144.

119. *See id.*

120. Gene Russianoff, *Charter Revision Revs Up*, CITYLAW (Center for N.Y. City Law, N.Y.L. Sch., New York, N.Y.), Jan./Feb. 1998, at 4.