

Improving Public Procurement Efficiency—Applying a Compliance Criterion

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Abstract:

One of the main issues that arises in the context of competitive public procurement is the treatment of a defective bid. Under current law, such bids will be rejected more often than not, and can be ignored without sanction only in exceptional cases—when the flaw is merely “formal”. The rationale behind this policy is that ignoring non-compliance with the solicitation demands is unfair; endangers integrity, violates equality, and in the long run jeopardizes the efficiency of the competitive procurement process. However, this policy is also very costly—often resulting in the loss of the best bid, an increase in bidders’ transaction costs and the creation of undesired incentives for procurement officials. This article suggests a simple and effective remedy for the problem: recognizing the ability of contracting authorities to establish a “compliance criterion” which allows a defective bid to remain in the competition after being corrected by the bidder, subject to a score reduction. The types of defects for which correction will be allowed and the amount of the reduction for each such defect would be pre-determined in the solicitation documents. Adoption of this proposal is expected to enhance the efficiency of the public procurement process, without endangering its other goals—integrity, fairness and equality.

1. Introduction

Many steps must be taken in connection with the submission of a bid in a competitive bidding process and a bidder is susceptible to a risk of error with regard to any one of them. In addition, the competitive bidding process is generally carried out under time pressure; it requires the gathering and presentation of a considerable amount of data; the competitive bidding process is highly regulated; and the bidders come from a variety of backgrounds—some of them are not fully aware of the significance of full compliance with the solicitation demands. In light of all this, it is little wonder that bids submitted for any particular competitive bidding process often fail to comply with all its requirements.¹

When a submitted bid violates one or more of the solicitation requirements, the contracting authority in charge of the competitive bidding process must decide how it should be handled. Should it be disqualified or ignored? Should the bidder be allowed to correct the violation? Contracting authorities are frequently required to decide on these questions, which are often difficult to resolve because of two interlocking issues: (1) the need to distinguish between a violation that by law must lead to disqualification, and one that does not; and (2) the significant loss that is often involved when the questionable bid is, from an economic perspective, the best bid that has been submitted. In such cases, US federal law² offers two polar

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¹ Steven W. Feldman, *Government Contracting Awards, Negotiation & Sealed Bidding*, (West, 2010) Vol.3, p.152 (“Given that bidders commonly prepare their bids under time constraints, bid mistakes are common.”).

² The discussion here relates to the federal law of the United States. All references to the “law”, the “current law”, the “current legal regime” and so forth, refer to that regime. However, the argument presented in this article may also be applicable to other legal regimes. See, for example, the discussion relating to European countries which are subject to EU directives on public procurement, at S. Arrowsmith, *The Law of Public and Utilities Procurement*, (3rd edn) (London: Sweet & Maxwell, 2014), pp.720-727, 814-829.

options: either the disqualification of the defective bid, or the acceptance of the bid with the violation having been either corrected or ignored, but without any sanction having been imposed on the infringing bidder. Federal law does not present any intermediate option—such as the correction of the defective bid, subject to the imposition of a sanction on the bidder. This article presents a proposal for a new practice based on this last option.

The main difficulty with the current law is that if a defective bid is also the best bid submitted, its rejection means a substantial loss for the public purse. The proposed practice offers a solution to this problem: allowing the contracting authority to include in the solicitation documents a list of “correctable defects”—defects which, if included in a bid, may be corrected by the infringing bidder. However, the bidder will be penalized by the loss of points, in an amount which is also predetermined in the solicitation documents. If a bidder chooses not to correct a correctable defect, the bid will be disqualified and the bid guarantee will be forfeited, as if the bid had been withdrawn.

Accordingly, in most cases, infringement of the solicitation demands will not lead to the rejection of the defective bid, but only to the loss of points at a predetermined rate. As a result, defective bids will be disqualified only in a minority of circumstances. It should be emphasized that the proposed practice does not purport to change any of the rationales on which the public procurement process is based—i.e., integrity, fairness, equality and the need for efficiency in the use of public funds. Neither will it grant procurement officials any wider discretion than that which is given to them today.

This article consists of five sections in addition to the first introductory section. The second section briefly describes the current federal law regarding a defective bid. The third section presents the proposed practice and its main characteristics while the fourth and fifth sections, respectively, examine the advantages and disadvantages presented by the proposed practice as compared to the current legal regime. The sixth section summarizes the ideas presented in this article.

2. The main principles of United States federal procurement law regarding defective bids

a. The conflicts arising from a defective bid and their treatment under current federal law

Generally speaking, the laws of government procurement seek to achieve three main objectives. The first is to prevent corruption and maintain integrity. The second is to provide an equal opportunity to all qualified suppliers to contract with the government. The third objective is to achieve economic efficiency by making optimal use of public funds.³ Ideally, each competitive bidding process will achieve all three goals. However, if the most economically worthwhile bid is also a defective one (in that it does not comply with one or more of the solicitation requirements),⁴ a major dilemma arises: if the defect is ignored, the principles of integrity, fairness and equality may be compromised. However, rejection of the defective bid will lead to a sub-optimal transaction.⁵ This conflict reflects a dilemma that contracting authorities often confront

³ Each of these goals arises from a complex background, a discussion of which is beyond the scope of this article. For a discussion of this issue, see O. Dekel, “The Legal Theory of Competitive Bidding for Government Contracts”, 37 *Pub. Cont. L. Rev.* (2008) 237. See also the Federal Acquisition Regulations (“FAR”) §1.102(b)(3) (“The Federal Acquisition System will [...] (3) Conduct business with integrity, fairness and openness;”) and FAR §1.602-2(b) (“Contracting officers shall [...] (b) Ensure that contractors receive impartial, fair, and equitable treatment.”). For a discussion on the objectives of government procurement regulations, both on the domestic and international levels, see P. Trepte, *Regulating Procurement — Understanding the Ends and Means of Public Procurement Regulation* (Oxford: Oxford University Press, 2004).

⁴ This is commonly referred to in the case law as “unresponsiveness”. See, for example, *Shoals American Industries, Inc. v United States*, 877 F2d 833, fn. 4 (CA11 1989).

⁵ The fact that an otherwise superior bid contains a defect does not mean that it is not the best bid submitted. An example of this would be a case in which the bid guarantee is for a slightly lower amount than is required in the solicitation document. For a broader discussion of the tension between the objectives of public procurement, see Dekel, “The Legal Theory of Competitive Bidding for Government Contracts”, 37 *Pub. Cont. L. Rev.* (2008) 237.

and which can also occasionally lead to legal proceedings. The following is a brief description of how public procurement law generally deals with this situation.⁶

b. The treatment of a defective bid under current law

The manner in which contracting authorities may approach faulty bids is highly regulated. However, the Federal Acquisition Regulations (“FAR”) offer only two polar alternatives for a contracting officer dealing with a defective bid. One is to disqualify the defective bid, while the other is to allow its correction without imposing any sanction on the non-compliant bidder. There is no option that offers a middle way.⁷ Thus, the regulations generally provide that bids which are “substantially” defective or non-responsive will be rejected, while bids with merely “formal” defects may be corrected or waived.⁸ The FAR also establish concrete legal rules for the treatment of specific types of infringements.

Thus, FAR § 14.404-2 sets out both the general rule regarding substantive or material deficiencies, and the particular types of defects that are deemed to be substantive. These include, inter alia, a stipulation of conditions regarding future changes to the contract,⁹ failure to meet the delivery schedule for supply,¹⁰ or a failure to furnish the bid guarantee in accordance with the solicitation requirements.¹¹ According to the courts, a bid that contains any of the listed defects must be rejected.¹² Additionally, FAR § 14.405 establishes the principle that formal deficiencies may be waived or corrected,¹³ and provides examples of when this principle may be applied. These include, inter alia, a submission of an insufficient number of copies of the bid,¹⁴ non-compliance with respect to the bidder’s signature,¹⁵ or “clerical mistakes” that contracting officers can correct themselves without the need for the bidder to indicate the manner of correction.¹⁶ The FAR also contain detailed provisions concerning the conditions under which a bidder is allowed to correct a “mistake”, and when and how such a correction may be made.¹⁷ Thus, the FAR regime clearly conforms to the above described pattern of binary decision making model for the treatment of defects. The polar alternatives approach to the treatment of defective bids is also reflected in the case law, with the courts

⁶For a comprehensive review of the federal law’s treatment of defective bids, see Feldman, *Government Contracting Awards, Negotiation & Sealed Bidding* (2010) 1, 87–167.

⁷As mentioned above, the discussion here relates to the US federal system. However, the argument concerning the fact that the law offers only a binary option for dealing with a defective bid is valid with regard to other legal regimes as well. See, for example, Arrowsmith, *The Law of Public and Utilities Procurement* (2014), regarding the EU and the UK regimes.

⁸FAR § 14.404-2(a) (“Any bid that fails to conform to the essential requirements of the invitation for bids shall be rejected.”). See, for example, Seawolf Constr. Corp., Comp. Gen. B-405730, 2011 U.S. Comp. Gen. LEXIS 287 (Dec 21, 2011).

⁹FAR § 14.405 (“The contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government.”). Similar rules exist in EU countries (Arrowsmith, *The Law of Public and Utilities Procurement* (2014), at pp.722–727).

⁹FAR § 14.404-2(d)(1).

¹⁰FAR § 14.404-2(e). See, for example, W.N. Hunter & Assocs., Comp. Gen. Dec. B-237168.2, March 27, 1990, 1990 CPD 334 (“Since the submission affected price, it constituted a substantive condition which could not be corrected under FAR § 14.404-2(e).”).

¹¹FAR § 14.404-2(j) and FAR § 28.101-4. See also *Professional Bldg. Concepts, Inc. v Central Falls Housing Authority*, 783 F. Supp. 1558, 1562-63 (D.R.I. 1992) (“Professional Building Concept’s failure to comply with the bid guarantee requirement is not an informality which could be waived by the authority.”), and the cases mentioned at Feldman, *Government Contracting Awards, Negotiation & Sealed Bidding* (2010), p.121, fn. 37.

¹² “[A] proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and a contract award based on such an unacceptable proposal violates the procurement statutes and regulations.” (*E.W. Bliss Co. v United States*, 77 F.3d 445, at p. 448 (Fed. Cir. 1996)). See also *Aluminum Co. of America*, 71 Comp. Gen. 245, 1992, 92-1 CPD 184. For a list of 41 common deficiencies requiring mandatory bid disqualification according to case law or regulation see Feldman, *Government Contracting Awards, Negotiation & Sealed Bidding* (2010), pp.110–130.

¹³ “Where a government contract is awarded under competitive bidding, deviations may be waived by the contracting officer provided they do not go to the substance of the bid or work an injustice to other bidders.” (*Toyo Menka Kaisha, Ltd. v United States*, 220 Ct. Cl. 210, 218, 597 F.2d 1371, 1376 (1976). Cited at *Croman Corp. v United States*, 31 Fed. Cl. 741, 747 (1994)).

¹⁴ FAR § 14.405(a). See also *International Shelter Systems, Inc.*, 71 Comp. Gen. 142, 1992, 92-1 CPD 38.

¹⁵ FAR § 14.405(c). See also *Stafford Grading & Paving Co., Inc.*, Comp. Gen., B-245907, January 14, 1992 CPD 66.

¹⁶ FAR § 14.407-2. “Both the mistake and the intended bid must be ‘ascertainable substantially from the invitation and the bid itself.’ FAR § 14.407-3(a).” (*BCPeabody Construction Services v United States*, 112 Fed. Cl. 502, 509 (2013)). See also FAR § 15.306(a); *Will H. Hall and Son, Inc. v United States*, 54 Fed. Cl. 436 (2002).

¹⁷ FAR § 14.407-3. For a list of 44 examples of “formal” deficiencies defined by court as those which should be waived or allowed to be corrected see Feldman, *Government Contracting Awards, Negotiation & Sealed Bidding* (2014), pp.138–151.

consistently requiring absolute fidelity to the solicitation rules in such scenarios, regardless of the cost to the public purse.¹⁸

3. The proposed practice — the inclusion of an evaluation criterion relating to the level of compliance with the solicitation requirements

a. The proposed practice in brief

Under the current legal regime, a contracting officer must disqualify any substantially defective bid and has discretion to allow the correction of any non-substantial defect, without imposing any sanction on the non-compliant bidder. The proposition outlined here would allow contracting authorities to include in the solicitation documents an evaluation criterion entitled “The Bidder’s Compliance with the Solicitation Requirements” (“the proposed criterion”). A bidder that is fully compliant with all the solicitation requirements will attain full scoring for this criterion. Conversely, if a bid contains an error which may be corrected according to the proposed criterion, the bidder will be allowed to correct the bid, but points will be deducted in the bid scoring. The amount to be deducted will be predetermined in accordance with the proposed criterion. The contracting officer will have neither any discretion as to whether to permit or prohibit the correction of a bid, nor any discretion regarding the amount to be deducted from the bid scoring if a correction is allowed.¹⁹ For example, assume that one item on the list of correctable defects is the “inclusion of a reservation regarding a contractual requirement,”²⁰ and the point percentage reduction listed for it is 15 per cent. Consequently, a bid that includes such a reservation may be corrected, but the bid will lose 15 per cent of the maximum scoring attainable for the compliance criterion. Under the current regime, the contracting officer is obligated to reject such a bid even if it is otherwise superior.²¹ The use of the proposed criterion would prevent this undesirable result and would allow the bidder to remain in the competition, although its’ scoring—and consequently its chances of winning—would be reduced. Where the differences among bidders are small in terms of quality or price, the scoring reduction will probably result in the loss of the competitive process. However, if the differences are large enough, a bid that violates a solicitation requirement may still win the competition despite the reduction in its’ scoring.

It should be emphasized that the proposed practice does not lessen the importance of the solicitation requirements and does not legitimize any deviation from them. As with the current regime, a violation of the requirements will be regarded as inappropriate and will generate a negative response. However, unlike the current law, which allows for only one kind of sanction to be imposed (i.e., rejection of the defective bid), the proposed practice matches the sanction to the severity of the defect, through a more proportionate approach which is pre-defined in the solicitation documents. Furthermore, in order to ensure that bidders do not violate the solicitation requirements intentionally, in order to preserve their options when faced with the costs and benefits of correcting bid defects, the proposed criterion will clarify that a failure to correct a defect will be equivalent to a withdrawal of the bid, and a sufficient ground for forfeiture of the bid guarantee.

¹⁸ “[...] maintaining confidence in the competitive system is of greater importance than the possible advantage to be gained by considering a late proposal in a single procurement.” (Silvics, Comp. Gen. B-225299, February 24, 1987 87-1 CPD 204); “[...] the public interest in strict adherence to federal competitive bidding procedures required by law outweighs any financial advantage that might accrue to the government in a particular case by a violation of those procedures.” (A & A Roofing Co., Inc., Comp. Gen., B-219645, Oct 25, 1985 85-2 CPD 463).

¹⁹ For a draft of the proposed criterion, see the Appendix.

²⁰ A “reservation” can take many forms. One example would be a note by the bidder indicating that the price being demanded does not relate to a particular part of the required work or service.

²¹ FAR §14.404-2(d) (“A bid shall be rejected when the bidder imposes conditions that would modify requirements of the invitation or limit the bidder’s liability to the Government, [...]”). See also, *Tel-Instrument Elec. Corp. v United States*, 56 Fed. Cl. 174 (2003), aff’d, 87 Fed. Appx. 752 (Fed. Cir. 2004).

b. The distinction between a correctable defect and a defect that should result in disqualification

The proposed practice does not suggest that all defects should be correctable. Two central criteria may be applied in this regard. First, a distinction should be made between a defect that can be corrected in only one manner, for which a correction should be allowed, and a defect which can be corrected in one of several ways, for which a correction should not be allowed. If correction of a defect is permitted where this can be achieved in more than one way, bidders in this situation gain room for manoeuvre by being allowed to choose to correct the defect in the manner that is most beneficial to them.²² Thus the bidder gains an unfair advantage over other bidders whose bids do not contain such a defect. Additionally, bidders who know that such a correction will be permitted might be encouraged to submit intentionally defective bids, despite the “cost” involved in their correction, whenever they consider that this cost is worth bearing.

Applying this criterion, we can point to several categories of defects the correction of which should be permitted. The first includes defects relating to issues that are not an element of the competition among the bidders, such as the lack of a signature, a defect concerning the bid guarantee,²³ a failure to attach an official document regarding the bidder’s business, the submission of a photocopy when the requirement is for an original document, the submission of a smaller number of copies than required, or a failure to pay for the solicitation documents when payment is required.

A second category of defects which, it is proposed, should be deemed to be correctable, are those that require the completion or correction of *evidence* confirming the accuracy of information already contained in the bid (such as proof of prior experience, number of workers, business turnover, etc.)—evidence that the bidder was required to supply as part of the bid. These may be corrected, provided that the missing proof relates only to the situation prior to the bid’s submission date. Other examples in this category would include the failure to supply an affidavit or other required confirmation (such as that of a lawyer or an accountant) certifying the accuracy of information specified in the bid, or the absence of a professional certificate.

A third category of corrections that should be allowed are defects requiring supplementation or correction of *objective information* relating to the bidder or to the bid (the goods, services or work that is the subject of the procurement process), provided that the information is unequivocal and relates to the bidder or the bid’s status prior to the date of submission. Thus, for example, the correction of information concerning the number or the type of the bidder’s employees, its business turnover, its ownership structure or its previous experience should be permitted, provided that the corrected information relates to the situation prior to the date of submission. Similarly, a bidder should be allowed to correct objective information relating to the characteristics of the product or service that is being offered through the competitive process.

A fourth category refers to defective bids that do not comply with the solicitation or the contract requirements, where correction of the defect cannot affect the bid scoring, and compliance can be achieved in only one way. Examples of this kind of defect include the following: a situation in which the bidders are required to commit to providing the relevant service 24 hours a day, and one bidder indicates that it would provide the required service for only 20 hours a day; a situation in which the bidders are required to insure themselves on certain terms and a bidder describes a deficient insurance policy; or a situation in which the bidders are asked to provide a three-year warranty for the product offered and a bidder offers a warranty for only two years. The correction of such defects is equivalent to the dropping of a stipulation or a reservation regarding any of the solicitation or contract requirements which should also be allowed.

²² This does not necessarily mean that the result is the submission of a better bid. A bidder can sometimes believe that the submitted bid was too good, in the sense that a bid of even lower quality could still win the competition.

²³ Provided that the guarantee is one that can be forfeited; an important feature of the proposed practice is that if a bidder fails to correct the bid, the bid will be disqualified and the bid guarantee will be forfeited.

As stated, these four categories share two rationales: first, the defects can be corrected in only one manner. Second, their correction cannot affect the bid scoring and therefore cannot affect competition. Accordingly, the bidder does not gain any advantage from being given the opportunity to correct its bid.

The flip side of the above is that bidders should not be allowed to make a correction that might be achieved in more than one way, and that gives them an unfair advantage. Therefore, permission to correct a bid price should not be granted even if the bidder claims that it reflects an error, unless both the error itself and the way in which it should be corrected are clear from the face of the bid. Equally, a bidder should not be permitted to correct a piece of information relating to the product or the service being offered, if there is more than one possible way to make the correction or if the correction may affect the competitive bidding outcome. For example, if the competitive bidding process is for the purchase of an IT system, a bidder should not be allowed to correct references to the amount of memory available, the speed or any other aspects of the computers being offered if there is more than one possible correction, or if a correction could impact on the bid scoring or give the bidder some other advantage over the other participants.

The second criterion that should be considered relates to the bidder's integrity and good faith. There is a temptation to allow only the correction of defects that come about through honest mistakes and which were made in good faith, as opposed to defects which reflect deliberate deviations from the solicitation requirements. However, such a rule would impose a complex evidentiary task upon the contracting authority—the need to determine whether a specific violation came about intentionally or unintentionally. The proposed practice avoids this evidentiary dilemma, on the assumption that it will provide an effective incentive for compliance with the solicitation requirements. Nevertheless, it is not suggested that intentions should be disregarded entirely. Correction would not be allowed if the defect is of a kind that clearly and manifestly indicates a lack of integrity or reliability, or if it appears to constitute criminal behaviour. Examples of this type of non-correctable defect include submission of a false document, an obvious attempt to deceive the contracting authority, or a blatant conspiracy among bidders aimed at preventing true competition. Such a provision is necessary because a process that allows such flaws to be corrected would be disturbing in itself, and might harm the public's faith in the public procurement process as a whole.

c. How to treat defects that cannot be corrected but which may be waived

Some defects cannot be corrected, but can only be waived. An example of this includes a situation in which the potential bidders are required to have five years of experience in the relevant field and one of the bidders has experience which falls two months short of that. Naturally, such a defect cannot be corrected. The same dilemma can also arise with respect to other requirements, such as the bidder's turnover, the number of its employees, the scope of its experience, and so forth. Under the current legal regime, the contracting officer must disqualify such a bid, even if the bidder's experience is actually sufficient for carrying out the contract and the bid is superior to the other submissions in all other respects. If this is the case, why not allow contracting entities to waive the defect while reducing the number of points awarded to that bid? In many cases, the drafter of the solicitation documents determines the requirements in an environment of incomplete information, and therefore cannot be expected to have full knowledge of what can reasonably be expected from the potential bidders with respect to those requirements. Furthermore, it is not only bidders who commit errors—the solicitation documents may also contain errors, and an optimal legal regime should take that possibility into consideration.

Nevertheless, the proposed practice would not allow the waiver of a violation of a solicitation requirement which by its nature cannot be corrected. The main reason for this is that in most procurement proceedings, if a potential bidder finds that it does not meet a solicitation requirement, the bidder may request an amendment of that requirement provided that the submission deadline has not passed.²⁴ The

²⁴ FAR § 52.214-6 ("Explanation to Prospective Bidders").

contracting officer can then make a determination as to whether the requested amendment is reasonable and serves the transaction’s objectives, and on that basis will decide either to reject the request or to accept it.²⁵ In addition, allowing such a waiver is equivalent to transforming the competitive bidding prerequisites into evaluation criteria, a step that should be taken explicitly and not as a part of the proposed criterion. In view of the foregoing, it is recommended that a defect which by its nature cannot be corrected, and is considered substantive under current law, should also lead to the bid’s disqualification under the proposed criterion.

d. Additional aspects of the proposed practice

The weight of the proposed criterion. The less weight the “compliance criterion” carries, the less the impact of a violation of a solicitation requirement on the competitive bidding results. If the proposed criterion is given too little weight, it may also reduce the incentive for bidders to comply with the solicitation requirements, and create an incentive for bidders to intentionally commit errors in order to reserve for themselves the opportunity of deciding at a later stage whether it is preferable to remain in the competition by complying, or whether to leave by failing to amend their bids. On the other hand, if the proposed criterion is given too much weight, the practical effect will be that any infringement of a solicitation requirement will lead to a significant reduction in the bid scoring, which will in turn lead to the defective bid losing the competition. In practice, this result is equivalent to the almost automatic disqualification of substantially defective bids under the current legal regime.

Thus, the weight to be accorded to the proposed criterion must be one that is high enough to motivate bidders to comply with the solicitation requirements, yet not so high as to cause almost any defect to result in the failure of a defective bid even if it is otherwise superior. The determination of an optimal balanced weight for this criterion is beyond the scope of this article, but it would seem that the higher the value of the transaction, the lower the weight of the proposed criterion should be, and vice versa.

The rule should also be applied to minor violations. The application of the proposed criterion to minor violations is important for three reasons. First, under the current law, a bidder knows that the submission of a bid with a “formal” defect will not be problematic, because the defect will most likely be waived or permission will be granted for it to be corrected. This existing rule discriminates against those bidders who approach the solicitation requirements seriously and are careful about ensuring their full compliance. Assume that two bids reach the competitive bidding final stage with identical scoring. The bid that fully complies with the solicitation requirements should clearly have an advantage over that which is characterized by a degree of negligence. Second, full compliance with the solicitation requirements is time-consuming and expensive. A lenient approach to “minor” deviations provides a negative incentive with regard to investing in full compliance. Third, knowing that minor defects can be corrected without being sanctioned may motivate bidders to intentionally include such defects in their bids, in order to preserve their option to decide later on whether or not to remain in the competition by either correcting their bids or not. This “escape route” has an economic value and it is therefore unfair to allow bidders to hold on to it without sanction. Accordingly, it is suggested that some kind of sanction, however minimal, should be imposed for each violation of a solicitation requirement, even where these are minor.

The proposed criterion should not be mandatory. The proposed criterion serves the contracting entity by reducing the risk of an inefficient transaction. It can therefore be expected that it will be adopted voluntarily in the procurement proceedings. However, the lower the expected value of the transaction, the less important it is to preserve transaction efficiency, and consequently, to implement the proposed criterion.

To conclude, given the proposed practice’s novelty and precedential character, the design outlined above is neither complete nor final. It may be assumed that if the proposed practice is adopted and

²⁵ See FAR §14.208.

implemented, its ultimate character, content and scope will be formulated in accordance with accumulated experience. Is the proposed practice compatible with the principles of public procurement? Does it create desirable incentives for bidders and public officials? Is it preferable to current law and practice? These questions will be discussed below.

4. The relationship between the proposed practice and the principles of public procurement and other policy considerations

As will be shown below, the attributes of the proposed practice not only conform to the principles of public procurement and to other policy considerations, they are actually preferable in this respect to those of the existing regime.

a. The proposed criterion increases efficiency

As has been noted, one of the main objectives of public procurement is economic efficiency. The adoption of the proposed practice clearly increases the efficiency of public procurement, by significantly reducing the risk of losing excellent bids as a result of defects that do not affect their overall quality. Although it does not eliminate that danger completely, it will definitely lower the risk of an inefficient transaction.

Moreover, the proposed criterion has the most impact in situations in which the current law causes the most severe harm. Thus, when the gap between the best (but defective) bid and the second best bid is small, disqualification of the defective bid is not particularly problematic. The situation is very different where the gap between the best (but defective) bid and the next best bid is substantial, because in such cases the loss of the defective bid means a significantly less efficient transaction. Thus, where the difference between the defective bid and the next best bid is small, the scoring reduction for the defective bid will often mean that the second best bid will become the winner—an outcome that will not be particularly troublesome, because of the similarity of the two bids. However, when the gap between the competing bids is substantial, the defective bid will often still be able to win the competitive bidding process despite losing points, an outcome that will prevent significant harm to economic efficiency.

Since all defects must be corrected and points are deducted for any defect, bidders will not gain any advantage from violating a solicitation requirement. Thus, the proposed criterion is also expected to preserve the incentive for bidders to comply with the solicitation requirements, and in that way to maintain efficiency in the long run as well.

b. The proposed criterion upholds integrity

As noted above, one of the main objectives of public procurement law is to ensure integrity in the public procurement process.²⁶ In order to determine whether or not the proposed criterion increases or reduces the risk of corrupt behaviour, two questions must be addressed. First, given that the risk of corruption is often linked to the degree of discretion which public officials are granted, it will be necessary to determine whether the proposed criterion increases that level of discretion. Second, it is necessary to determine whether the proposed criterion encourages manipulation by bidders. As will be explained below, the answer to both questions is in the negative.

As to the scope of the discretion given to procurement officials with respect to defective bids, not only does the proposed criterion not expand such discretion, it actually reduces it in two respects. First, there are fewer situations in which the contracting officer is required to distinguish between a “substantial” and

²⁶ “Rejection of irresponsible bids is necessary if the purposes of formal advertising are to be attained, that is, to give everyone an equal right to compete for Government business, to secure fair prices, and to prevent fraud.” (*Prestex, Inc. v United States*, 162 Ct. Cl. 620, 626 (1963), as cited at (*Toyo Menka Kaisha, Ltd. v United States*, 1377).

a “formal” flaw; second, the contracting officer does not retain any discretion in determining the treatment of a bid containing a correctable defect. Under the current legal regime, the contracting officer must categorize each violation of a solicitation requirement as being either “substantial” or “formal”, a classification that determines the fate of that bid. In many cases that classification is not obvious and necessitates the exercise of a wide degree of discretion.²⁷ In addition, the contracting officer must also exercise discretion in determining whether to reject a formally defective bid or to allow its correction.²⁸ According to the proposed practice, a defective bid’s fate will still turn on the contracting officer’s classification, but this classification is expected to be much easier and involves a significantly narrower degree of discretion.

Does the proposed criterion do more to encourage a manipulative violation of the solicitation instructions than the current law? It is to be recalled that under the proposed practice, any infringement of the solicitation requirements for which correction is permitted will also involve a sanction (a point deduction), which in turn can result in the loss of the competitive process. In view of this, it is difficult to see how the proposed practice could be understood as encouraging an intentional violation of solicitation requirements. In contrast, the current law allows the correction of certain defects without any sanction being imposed on the bidder. Thus, the current practice has the potential to motivate bidders to intentionally include “technical” defects in their bids, so that they can preserve the option of either staying in the competition or withdrawing from it, without being subject to any sanction.²⁹

In summary, the use of the proposed criterion would seem to reduce the degree of discretion exercised by contracting officers as compared to discretion exercised under the current legal regime, and to remove the incentive to include intentional violations of solicitation requirements. Adoption of the proposed criterion is not expected to increase the risk of unethical behaviour; in fact, it actually reduces that risk.

c. The proposed criterion upholds equality

The principle of equality is expressed in the public procurement mechanism both ex-ante and ex-post. Ex-ante—the mechanism offers an equal opportunity to any potential supplier to benefit from potential business with the government. Ex-post—the process ensures equal treatment by requiring the bid evaluators to examine all bids in accordance with the same criteria, which are predetermined in the solicitation documents.³⁰ Does the proposed practice maintain the principle of equality at least as well as the current law? Ex-ante—there are no apparent differences between the current and the proposed practices in terms of maintaining equality. They both operate under the same assumptions and criteria. However, ex-post, the proposed practice does more to assure equality than does the current law in at least three ways:

First, as explained above, under the current law, procurement officials enjoy more discretion than they would have within the framework of the proposed practice. This discretion naturally opens the door not only to corruption, but also to mere unequal treatment, both of bidders in a particular procurement process and of bidders across different transactions. Second, and in line with the above, while the current law

²⁷ See for example, *Centech Group, Inc. v United States*, 554 F.3d 1029, 1038 (Fed. Cir. 2009); *Electronic On-Ramp Inc. v. United States* 104 Fed. Cl. 151, 167 (2012); *Tel-Instrument Elec. Corp. v United States*, 56 Fed. Cl. 174 (2003) 177 (“Determination of whether a defect in a bid is material is committed to agency discretion”); *Camar Corp., Comp. Gen.*, B-248485, August 31, 1992, 92-2 CPD 140 (“A determination of whether a bidder’s product meets an IFB’s technical specifications is a matter primarily committed to the discretion of the contracting agency”). The exercise of discretion in determining how to deal with a non-compliant bid characterizes the EU and the UK legal regimes as well. See discussion at Arrowsmith, *The Law of Public and Utilities Procurement* (2014) at pp.816–822.

²⁸ See, for example, *Gulf Group, Inc. v United States*, 61 Fed. Cl. 338, 360 (2004); *BCPebody Construction Services v United States*, 112 Fed. Cl. 502, 509 (2013), p. 510, 511 (“For negotiated procurements, clarifications [of bids’ clerical mistakes] are to be obtained at the discretion of the contracting officer. [...] Undoubtedly, the language of FAR § 15.306(a)(2) is permissive, and a contracting officer has discretion in determining whether to seek clarification.”)

²⁹ See, for example, *Professional Bldg. Concepts, Inc. v. Central Falls Housing Authority*, 783 F. Supp. 1558, 1563 (D.R.I. 1992). (“Professional Building Concepts deliberately failed to comply with the terms of the invitation for bids, and at the time of bids opening, it was not obligated to perform the contract even though it was the low bidder.”)

³⁰ “Contracting officers are required to ensure that contractors receive impartial, fair, and equitable treatment. FAR § 1.602-2(b).” (*BCPebody Construction Services v United States*, 112 Fed. Cl. 502, 509 (2013), p.512); See also *Prestex, Inc. v United States*, 162 Ct. Cl. 620, 626 (1963).

allows for a deviation from the solicitation rules when a defect is “formal”, the proposed practice establishes a strict rule which is known and defined from the outset, and which is applied equally with respect to all bidders. This also reduces the risk of discriminatory treatment. Third, as noted above, according to current law, a correction will usually be allowed for a bid that contains a formal defect, but without any sanction. However, if the bidder does not correct the bid, it is disqualified. This practice can motivate bidders to include formal defects in their bids in order to preserve the option to decide, at a later stage, whether to remain in the competition or to leave it (by causing the bid to be disqualified), without any sanction being imposed. Needless to say, this option has an economic value that may give a bidder a valuable advantage over other competitors. Under the proposed practice, this unjust advantage is eliminated since both the correction of a defect and a decision not to correct it will lead to the imposition of a sanction.

In summary, both the current and the proposed practices provide equal treatment *ex-ante*. However, the proposed practice has an advantage over the existing regime with respect to assuring equality *ex-post*.

d. The proposed practice creates desirable incentives for contracting officers

As explained above, under the current regime, contracting officers will, in most cases, reject a defective bid. To the extent that the disqualified bid is the best bid submitted, the contracting entity then faces an undesirable result—the disqualification means that the most attractive bid will be unavailable, the government will lose the chance to contract with the best supplier, and the transaction that is effectuated will consequently be sub-optimal. This kind of outcome is expected to create two undesirable incentives among procurement officials.

First, the knowledge that there is a serious risk that the competitive bidding process will result in an inefficient outcome understandably leads to a belief that competitive bidding processes are not economically efficient,³¹ which is a disincentive for conducting them. Contracting authorities can avoid the need to conduct a competitive process in a variety of ways. For example, the contracting officer may rely on maximum utilization of exemption provisions in the procurement regulations, on an expansive interpretation of such provisions,³² or on making fullest use of any contractual option that allows for the extension or expansion of the existing contract without requiring the conducting of a new competitive bidding process. Since the proposed practice reduces the risk of a sub-optimal transaction, the expectation would be that procurement officials will have more faith in the competitive process and will thus be less motivated to avoid its use.

A second problem that arises when the general rule is that defective bids must be disqualified, is that bid evaluators have an incentive to undervalue the defects in such bids, and, sometimes, to completely disregard them. This difficulty can be related to the “confirmation bias”, which causes decision-makers to unconsciously overvalue information or evidence that supports a result that they prefer, and undervalue or even ignore evidence that contradicts such an outcome.³³ The confirmation bias may cause a subconscious reduction of the importance attributed to a defect, or it may lead to the classification of such a defect as being merely “formal”, so as to avoid the undesirable result, namely, the disqualification of the best bid

³¹ In 1996, as part of my PhD thesis, I conducted a survey among contracting authorities which are required by law to conduct competitive biddings when entering into a contract. The results support the claim that contracting officers perceive the competitive bidding mechanism as being inefficient. The survey was conducted among 67 individuals, with 85% of them expressing the view that the public procurement process fulfils the requirement that parties should be treated equally, and 79% believing that the public procurement process reduces the risk of corruption. However, only 49% responded that they regard the public competitive bidding as enabling contracting authorities to enter into contracts with optimal provisions.

³² See, for example, Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC; Minden Air Corp.; Comp. Gen. B-409356.2-6, 2014 U.S. Comp. Gen. LEXIS 84 (Mar. 31, 2014). (in which the U.S. Department of Agriculture abused a statutory exemption to the duty to purchase through competitive procedures in order to contract with a specific firefighter and airtanker supplier in the sum of \$496 million).

³³ For a comprehensive review of the psychological research regarding confirmation bias, see Raymond S. Nickerson, “Confirmation Bias: A Ubiquitous Phenomenon in Many Guises” 2 Rev. General Psychol. (1998) 175. See also Kary Edwards and Edwards E. Smith, “A Disconfirmation Bias in the Evaluation of Arguments” 71 J. Pers. Soc. Psychol. (1996) 5 (Showing that claims that are inconsistent with the original position taken by a decision-maker receive harsher criticism and are assessed as being weaker than claims that support the decision-maker’s original view).

submitted. Since the proposed practice is expected to prevent the disqualification of defective bids in many cases, it is also expected to reduce the incentive for contracting officers to ignore such defects.

e. The proposed practice is more proportionate

Any response to wrongful behaviour should be proportionate to the severity of the undesirable acts.³⁴ Under current law, a contracting authority must choose between two polar alternatives in deciding the fate of a defective bid—disqualification of the non-compliant bid or the correction or waiver of the violation, without the imposition of any sanction on the non-complaint bidder. The absence of any intermediate option means that in many situations that response may be either disproportionately harsh or disproportionately lenient. In contrast, the proposed practice takes the severity of the bidder’s violation into account and matches it with a proportionate response. The range of such responses can begin with a minimal reduction of the bid’s score where the violation is mild, and can reach the level of a significant reduction where there is a major defect. This matching process may even result in complete disqualification where a correction will give the bidder an unfair advantage over the other participants. This scale reflects the complexity of the situation and demonstrates the authority’s commitment to a proportionate response.

f. The proposed practice properly balances the interests of all the competitive bidding participants

The competitive bidding mechanism is a multi-party process. On one side stands the contracting entity, which initiates and conducts the competitive process and drafts its rules in order to achieve an efficient competition and an optimal transaction.³⁵ On the other side stand the bidders, who are all entitled to an equal opportunity to bid for the transaction. The question to be asked is: what should the response be when one or more of the competitive bidding participants violate the solicitation rules?

In these situations we should strive for an arrangement that takes into account the interests of all players—the general public (as represented by the contracting authority), the bidders who comply with the solicitation requirements, and the bidders who do not. This arrangement should give the interests of the above players the weight they deserve and represent a reasonable balancing of those interests. The optimal legal regime should therefore impose a deterrent sanction on non-compliant bidders and should also limit, to the extent possible, the harm done to parties who are acting in good faith—i.e., the bidders who do comply with the solicitation rules and the public as a whole. The current regime does not satisfy this standard. It does include a negative response to the non-compliant bidder, but this response, the removal of such bidder from the competition, is often unbalanced in two respects: first, it often reflects an overreaction to the act of non-compliance; and second, it fails to give the appropriate weight to the general public’s interest in an efficient transaction.

Conversely, the proposed practice also imposes a deterrent sanction on the non-compliant bidder (a deduction of points), but it also reflects the public’s interest in an efficient transaction by limiting the frequency of situations in which the best (but defective) bid will be removed from the competition. On the one hand, the non-compliant bidder is penalized, which deters potential bidders from committing

³⁴ The requirement of maintaining proportionality as between the severity of a crime and the sanction imposed is a basic principle of sentencing in all Western legal systems. See, for example, Richard S. Frase, “Comparative Perspectives on Sentencing Policy and Research” in *Sentencing and Sanctions in Western Countries*, M. Tonry & R. Frase eds., (Oxford: OUP, 2001), pp.259, 261; Leena Kurki, “International Standards for Sentencing and Punishment” in *Sentencing and Sanctions in Western Countries*, p. 331; Andrew Von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005). Naturally, the principle of proportionality should apply to any sanction, whether criminal or administrative.

³⁵ For a discussion of the use of game theory in auction design for the purpose of obtaining an optimal outcome, see, for example, Paul Milgrom, *Putting Auction Theory to Work* (Cambridge: Cambridge University Press, 2004); Paul Klemperer, “What Really Matters in Auction Design” 16 J. Econ. Perspective (2002) 169 (discussion of the main considerations which a competitive bidding designer must take into account in order to achieve an optimal outcome); Evan R. Kwerel & Gregory L. Rosston, “An Insider’s View of FCC Spectrum Auctions” 17 J. Regulatory Econ. (2000) 253 (detailed discussion of the considerations that guided the designers of competitive bids for the allocation of broadcasting licences in the United States).

future violations. However, at the same time, appropriate weight is attributed to the public interest in obtaining an efficient transaction, along with a proportionate reward for compliant bidders. And no less important, all this is achieved without detracting from long-term efficiency considerations and without increasing the risk of unethical behaviour.

5. Difficulties and weaknesses in the proposed practice

Of course, the proposed practice is not free of problems. For example, because of the difficulty in foreseeing all types of violations, it may be that certain violations will be deemed to be correctable while others, which are no more serious, will lead to disqualification simply because this outcome was not foreseen by the competitive bidding designer. Additionally, the assignment of the same score reduction to different kinds of violations may eventually lead to unbalanced outcomes. For example, a minor irregularity regarding a bid guarantee may lead to the same deduction in points that would be imposed for a more significant irregularity. (This will depend on the level of precision achieved in the drafting of the proposed criterion). Further, it could be argued that the proposed practice requires that complex calculations be made at the design stage, in order to adjust the weighting of the proposed criterion to the scope and nature of the competitive bidding being designed—a process which leaves much room for error.

These difficulties are real, to the extent that they indicate that the proposed practice is not perfect or free of any difficulties. However, the desirability of any regulatory scheme will not depend on how close it is to perfection; rather, it will be judged with respect to whether or not it is preferable to an alternative solution. If it is indeed preferable to the alternatives, it should be adopted. We have already discussed the ways in which the proposed practice is preferable to the current law; this point need not be reiterated.

An additional argument against the proposed practice is that it is likely to complicate and lengthen the procurement process in two ways. First, an extra section will be needed in the solicitation documents. Second, it will be necessary to relate to the proposed criterion during the bid's evaluation, and to allow non-compliant bidders to correct their bids, thereby complicating and lengthening the acquisition process. However, it may be assumed that in practice the adoption of the proposed criterion will actually save time and improve the efficiency of the procurement process. As to the drafting of the proposed criterion, its text will presumably be one that can be repeated in each solicitation, with only minor adjustments needed for each particular case; these are not expected to require a significant investment of time. Regarding the extra work involved in reviewing bids, the proposed criterion includes considerations and components that bid evaluators are required to examine in any case, so its use should not increase the complexity of their work. It is true that the correction of the bids by the bidders will probably take a few days, but the addition of such a short period of time is rarely problematic. Thus, it appears that the adoption of the proposed criterion is not expected to complicate the procurement process significantly.

6. Conclusions and recommendations

Clearly, the use of the proposed criterion does not fit into the current legal regime and its adoption will require legislative action. However, all that is required is a legislative provision authorizing contracting authorities to include in the solicitation documents provisions that allow for the correction of defective bids, and that stipulate that such corrections be subject to three conditions: first, the imposition of a sanction on the non-compliant bidder by reducing the bid's scoring by a constant pre-determined amount; second, that a failure to correct a correctable defective bid will lead to forfeiture of the bid guarantee; and third, that the only defects which may be corrected will be those for which such correction will not potentially result in an unfair advantage to the correcting bidder. An authorisation such as this will allow contracting authorities to include in solicitations a compliance criterion, such as the one proposed here, without violating the law. As a result, contracting authorities will no longer need to reject the best submitted bid

when it is not in full compliance with the solicitation requirements, thus leading to overall savings for the public purse. These advantages will be obtained without harming integrity, fairness and equality—the other important goals of public procurement.

Appendix — A Schematic Draft of the Proposed Compliance Criterion

a. General

1. The compliance criterion will be worth 25 %³⁶ of the maximum score that the bid may be awarded. A bid that fully complies with the solicitation requirements will be awarded the full number of available points for this criterion.
2. A bid that includes one or more of the violations specified in the left-hand column of table below may be corrected, subject to a deduction of points as set out in the right-hand column of the table.
3. A bidder that does not correct its bid will be deemed to have withdrawn its bid, leading to a forfeiture of its bid guarantee, subject to the bidder first being granted a hearing.
4. The weighting specified in the right-hand column of the table reflects the deduction of points that will be imposed with respect to this criterion. Thus, for example, 10% means a reduction of 10% of the maximum score that can be allocated with respect to this criterion (a reduction of 2.5% of the bid’s overall score).
5. If a bid contains more than one violation of the same kind, each violation will be considered separately and points will be deducted accordingly. For example, if a bid contains two reservations regarding the solicitation or the contractual requirements, and each reservation is given a weighting of 15%, the point deduction for that bid will be 30% of the points that can be allocated with respect to this criterion—this being 7.5% of the bid’s overall maximum score.
6. In any event, the points to be deducted from a bid for non-compliance with the solicitation requirements will not exceed the maximum weighting for this criterion (25%).
7. The provisions of the current legal regime will apply to a bid containing a defect that is not included in any of the categories listed below.

b. Violations that can be corrected, and their relative weighting

	Type of violation	Rate of reduction, as a percentage of the bid’s maximum score for this criterion
<i>1. A defect unrelated to the subject of the competition such as:</i>		
1.1	A missing signature (even if the requirement is for a number of signatures); failure to submit a required document; the submission of a copy where an original document is required; the submission of fewer than the required number of copies.	5%
1.2	A defect in or failure to supply an affidavit concerning a subject unrelated to the competition - e.g., an affidavit regarding compliance with labour laws or IP laws.	10%
1.3	The submission of a bid guarantee which is not fully or exactly compliant with the solicitation requirements, provided that the guarantee can be forfeited, and that its value is not less than 75% of the amount required in the solicitation.	15%

³⁶ As noted above, the greater the financial value of the expected transaction, the lower the weighting to be given to this criterion, and vice versa.

	Type of violation	Rate of reduction, as a percentage of the bid's maximum score for this criterion
<i>2. Failure to include documentary proof as required by the solicitation documents, provided that this relates to the situation prior to the date of submission</i>		
Examples include: the failure to supply an affidavit or other required confirmation (such as confirmation from a lawyer or an accountant) regarding the accuracy of information specified in the bid (such as prior experience, number of employees, financial turnover, etc); omitting a required certificate, provided that the certificate was issued prior to the submission date.		10%
<i>3. Absence of objective information regarding the bidder or the bid (the goods, services or work being offered), provided that the information relates to the status of the bidder or the bid prior to the date of submission</i>		
Examples include: inaccurate or incomplete information regarding the number or qualities of the bidder's employees, the bidder's turnover, the structure of its ownership, its experience etc., provided that the information relates to the bidder's status prior to the date of submission.		10%
<i>4. An indication that the bid (the goods, services or work that is being offered) does not comply with a solicitation or a contractual requirement, provided that such correction will not affect the bid scoring, and that the correction can only be made in one way</i>		
4.1	Examples include: a commitment to provide goods or services not in full compliance with the contractual requirements; a deficient insurance policy or warranty.	10%
4.2	Stipulation or reservation which contradicts a solicitation or a contractual requirement.	10%
<i>5. Additional categories that can be corrected</i>		
5.1	A typographical, clerical or accounting error, characterized as one which is obvious on the face of the bid, for which the manner of correction can be understood from the bid itself or from objective external evidence which is not under the bidder's control, and consequently there is no need for the bidder to indicate the manner of correction.	5%
5.2	Clarification of vagueness in the bid, when it can be achieved without changing the content of the bid or giving the bidder any room for manoeuvre, and does not result from deficient drafting of the solicitation (a clarification that is required as a result of the vague drafting of the solicitation should not be penalised).	10%

c. Without detracting from the generality of section a.7, the following defects should not be corrected or waived and a bid which contains such a defect must be disqualified:

- 1) A failure to comply with a prerequisite that cannot be corrected (for example, a bidder having less experience than required, a smaller financial turnover than required, fewer employees than required, a professional classification lower than that required, etc.).
- 2) Late submission of a bid.
- 3) An accumulation of five or more of the defects listed in the above table.
- 4) Failure to submit a guarantee where the solicitation documents require its submission, or the submission of a guarantee that cannot be forfeited in time for bid evaluation, or the submission of a guarantee which is for an amount that is less than 75% of that required by the solicitation documents.
- 5) Cost shifting which the bidder cannot justify on the basis of solid economic reasons. Disqualification to be subject to a hearing.
- 6) The submission of false information in a bid when the bid itself indicates that such information was submitted with the knowledge that it was false. Disqualification to be subject to a hearing.

- 7) Circumstances that clearly indicate dishonesty or an attempt to deceive the contracting authority or the other participants. Disqualification to be subject to a hearing.
- 8) Submission of a false affidavit, even if submitted in good faith.
- 9) A deficiency or an error which cannot be corrected based on information within the bid itself, and which can be corrected in more than one way, in situations in which the bidder can gain an advantage from correcting the deficiency or error.