THE LEGAL THEORY OF COMPETITIVE BIDDING FOR GOVERNMENT CONTRACTS

Omer Dekel

I. INTRODUCTION

Each year, federal, state, and local governments carry out tens of millions of procurement transactions thought to total hundreds of billions of dollars.[1] Many of these contracts are awarded on a competitive basis, with a

1. In 2004, according to the *Federal Procurement Report FY 2004*, the Federal Government alone contracted over 10 million transactions totaling more than $340 billion. FED. PROCUREMENT

Dr. Omer Dekel (omerdekel@012.net.il) is a senior lecturer at Ramat-Gan College of Law in Ramat Gan, Israel, where he specializes in procurement law.

government authority being required to select the best of several competing offers. Each year, the courts are asked to decide the fate of thousands of public tenders[2] and of tens of thousands of offerors. Auction theory, which deals with, *inter alia*, the subject of public tenders, has given rise to ample economic literature and research, mostly within the context of game theory.[3] It is therefore surprising that so little legal literature has been written as yet regarding the theory of the public tender.[4]

The purpose of this article is twofold: first, to define and describe the objectives that the public tender mechanism is meant to serve and, second, to consider the proper hierarchy to be applied to the various public tender objectives, whenever they are in conflict. As basic as these issues are to the public tender mechanism, they have never been discussed or explored from an academic perspective.[5] Despite the theoretical nature of the discussion, it has considerable practical value for three main reasons.

First, as shall be shown below, an important characteristic of the public tender objectives is that they are often in conflict with each other. For this

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Data Ctr., U.S. Gen. Servs. Admin., Federal Procurement Report FY 2004 § I, at 9 (2004), *available at* http://www.fpdsng.com/downloads/FPR_Reports/fpr_section_I_federal_views.pdf. In addition, an estimated $750 billion in transactions are carried out annually by state and local governments. John B. Miller, The ABA Model Procurement Code Revision Project, http://web.mit.edu/civenv/idr/JBMWebPages/miller6.html#ABAMPCText (last visited Oct. 7, 2007).

2. The term "public tender" signifies any competitively based government procurement mechanism or method (for carrying out acquisitions or sales) that is subject to binding, rigid, and known rules. This includes contracting mechanisms such as an invitation for bids (IFB), a request for proposals (RFP), a request for quotation (RFQ), competitive negotiations, and public auctions and excludes any noncompetitive contracting procedures such as open negotiation. This term is commonly used in British and Canadian law, as well as in the legal systems of various other countries. Despite the fact that it is not commonly used in legal parlance in the United States, no other term appears to be better suited to cover all the various competitive contracting procedures carried out by Government.

3. *See*, *e.g.*, literature described *infra* note 24.

4. This is as opposed to practical literature, which itself is not abundant. *See*, *generally*, John Cibinic & Ralph C. Nash, Formation of Government Contracts (3d ed. 1998); John Cibinic & Ralph C. Nash, Administration of Government Contracts (3d ed. 1995); John Cibinic & Ralph C. Nash, Competitive Negotiation: The Source Selection Process (1993); John Cibinic & Ralph C. Nash, Federal Procurement Law (1st ed. 1966); Steven W. Feldman, Government Contract Awards: Negotiation & Sealed Bidding (2005); W. Noel Keyes, Government Contracts Under the Federal Acquisition Regulation (2d ed. 1996). Others also have found this lack of material to be surprising. *See*, *e.g.*, Robert C. Marshal et al., *The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest*, 20 Hofstra L. Rev. 1, 3 (1991) ("Despite the enormous significance of Government Procurement of goods and services in the American economy, public contract law has received relatively little attention from law and economics scholars." (footnotes omitted)).

5. One finds scant reference to the objectives of the government procurement system in general (as distinct from the purposes of the public tender, which constitutes one of the procurement mechanisms), but even the existing discussions of the issue fail to address the circumstances in which a conflict arises between the system's various objectives. *See*, *e.g.*, J. W. Whelan & E. C. Pearson, *Underlying Values in Government Contracts*, 10 J. PUB. L. 298 (1961); Steven L. Schooner, *Desiderata: Objective for a System of Government Contract Law*, 11 Pub. Procurement L. Rev. 103 (2002); Florian Neumayr, *Value for Money v. Equal Treatment: The Relationship Between the Seemingly Overriding National Rationale for Regulating Public Procurement and the Fundamental E.C. Principle of Equal Treatment*, 11 Pub. Procurement L. Rev. 215 (2002); Peter Trepte, Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation (2004).

tension to be properly resolved, it is essential to identify it and understand the preferred hierarchy among the public tender objectives. Thus, for example, when the best offer submitted in response to a solicitation is flawed (due to, say, a slightly late submission, missing signatures, a faulty bid bond, failure to enclose a requisite document, etc.), the contracting officer (CO) must decide whether to reject the offer because of the flaw despite it being the best offer or to overlook or correct the flaw. This dilemma, which is the most common issue arising in connection with public tenders, reflects a conflict between two public tender objectives: to uphold the equality principle (implemented through the CO's fulfillment of the duty to treat offerors equally) and to achieve economic efficiency (the fulfillment of the Government's duty to make the most efficient use of public funds). If the equality principle is deemed to be more important than contracting efficiency, the flawed offer should be rejected, even if the transaction's efficiency will suffer. However, if contracting efficiency is the more important value, the flaw should be overlooked or allowed to be rectified, even at the cost of violating the equality principle by holding different offerors to different standards. Understanding the objectives of the public tender mechanism and their relative importance is thus the key to finding an appropriate solution for this common dilemma.

Second, the various procurement laws are comprised of thousands of rules covering tens of thousands of particular circumstances.[6] However, there are still innumerable circumstances that are not regulated by these rules but that nevertheless require resolution.[7] When faced with any of these unregulated circumstances, a CO should attempt to reach a decision that reflects both the need to achieve the public tender mechanism's various objectives as well as the appropriate hierarchy among them.

Third, there are many situations in which the relevant procurement law expressly grants the CO broad discretion in the exercise of his or her power.[8]

6. The regulations governing federal contracting (Federal Acquisition Regulation (FAR), *available at* http://acquisition.gov/far/loadmainre.html) consist of 53 parts and 296 subparts, printed on more than 1,900 pages. This figure does not include the regulations supplemented by many agencies such as the Defense Federal Acquisition Regulations Supplement (DFARS), *available at* http://www.acq.osd.mil/dpap/dars/dfars/index.htm, which alone covers some 1,800 more pages.

7. For example, even though the regulations address a scenario in which a change occurs in the terms of a government contract awarded by a public tender, FAR 43, they fail to indicate when such a change is or is not to be accepted as legitimate. Similarly, while the regulations address a situation in which the lowest bid is considerably lower than the contract's value as estimated by the procuring entity, FAR 14.404-2(f), they do not establish how the procuring entity is to proceed in such a situation.

8. Thus, for example, *see* FAR 6.101, which confers broad discretion on the contracting officer in choosing the mechanism through which offers will be solicited. The choice of the solicitation mechanism is made pursuant to a flexible criterion, according to which the contracting officer selects the procedure "best suited to the circumstances of the contract action and consistent with the need to fulfill the Government's requirements efficiently." FAR 6.101.

Similarly, different kinds of public tender confer broad discretion on the contracting officer in awarding the contract and in selecting the proposal that offers the Government the "best value" without necessarily being the least expensive one. "Best value means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response

Whenever vested with such discretion, the CO should exercise it in such a way as to best achieve the public tender objectives. To do this, the CO must possess an in-depth understanding of the public tender objectives and of the appropriate hierarchy among them. Such an understanding, as previously noted, is particularly important when these objectives conflict with each other, in which case the CO must decide which of them ought to be preferred under the circumstances. It should be noted that in such a situation (unlike those encountered in many other public policy areas), it is generally impossible to arrive at a balance between the different objectives. More often than not, the CO must decide which value to prefer under the circumstances, at the cost of altogether sacrificing the other value.

It is safe to say that almost any dilemma arising in connection with a public tender process represents a conflict between at least two of the public tender objectives. Consequently, an understanding of the public tender objectives and of the relationship between them is critical for resolving many of the practical issues and dilemmas that arise in this field. Again, considering the centrality of this article's subject matter to the general subject of government procurement, it is surprising that this discussion has never been taken up.

The first part of this article defines and outlines the three objectives that the public tender mechanism is meant to achieve. The second part of the article discusses the preferred hierarchy to be applied between the public tender objectives, addressing the courts' treatment of this issue as well as the expressed and unexpressed rationales underlying the courts' approach. Finally, the third part of the article proposes an alternative model, to be called the "disqualification presumption."

The public tender mechanism is meant to serve three objectives: (1) to ensure integrity in the awarding of contracts and to prevent contracting tainted with favoritism, conflicts of interest, or corruption; (2) to allow Government to engage in economically efficient contracting; and (3) to provide an equal opportunity to all members of society to compete for the economic advantage inherent in contracting with the Government.[9] These objectives are reviewed in the following section.

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to the requirement." FAR 2.101(b)(2) (italics removed). In this context, the Court of Appeals for the Federal Circuit has ruled that where "the contract was to be awarded based on 'best value,' the contracting officer [has] even greater discretion than if the contract were to have been awarded on the basis of cost alone." Galen Med. Assocs., Inc. v. United States, 369 F.3d 1324, 1330 (Fed. Cir. 2004) (citation omitted). *See also* Idea Int'l Inc. v. United States, 74 Fed. Cl. 129, 140 (2006) (acknowledging that the "evaluation and award decision in a best value procurement is an area of wide agency discretion").

9. In a 1940 decision, the Tenth Circuit stated as follows: "The purpose of these statutes and regulations is to give all persons equal right to compete for Government Contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition." United States v. Brookridge Farm, Inc., 111 F.2d 461, 463 (10th Cir. 1940). It is interesting to note that this concise and incisive formulation has been cited only rarely in subsequent decisions. *See* Steven Kelman, Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance 11 (1990).

II. OBJECTIVES OF PUBLIC TENDERS

A. *Preserving Integrity; Preventing Corruption, Favoritism, and the Appearance Thereof*

Whenever a government officer is called upon to make decisions of significant economic import, she may find herself facing a conflict between the interest of the organization she represents and her own personal interest.[10] One of the objectives of the public tender mechanism is to reduce the possibility of favoritism and corruption playing a part in this decision-making process and to maintain integrity in the Government's transactions with private players. This objective also may be defined as the minimization of the "principal agent problem,"[11] which arises when an official is given authority to contract on behalf of the Government.

Contracting that is tainted by favoritism raises difficulties on a number of levels.[12] First, it poses a moral problem, as a violation of the public's faith in the Government and in its representatives. It also creates a social problem because a society in which economic survival depends on acquaintance with or the bribery of decision makers is, by definition, a "corrupt" one[13] and is therefore incapable of instilling values of fairness, honesty, volunteerism, and the need to contribute to the community. Worse still, corruption is economically inefficient since favoritism in contracting usually leads to economically suboptimal decisions and adverse economic effects on the economy and the public. Although these inefficiency effects are generally disclosed almost immediately, the more severe consequences—i.e., the negative effects on the Government's credibility and on the public's faith in appointed government officials—will manifest themselves only in the long term. A situation in which the public's representative faces conflict between his or her own interest and that of the general public that he or she

10. The conflict can be "moderate" or "extreme." As an example, a "moderate" conflict would be presented by the need to decide whether to prolong an existing contract rather than go through a new public tender, in order to avoid the work involved in conducting the new public tender. An "extreme" conflict would be presented by the need to decide whether to select the best offer submitted in the framework of a public tender or the offer submitted by an offeror willing to pay the highest bribe.

11. The "principal-agent problem," as originally formulated by Stephen Ross, is predicated on the existence of four cumulative conditions: (1) the agent's (officer's) action will have an impact on the economic situation of the principal (the administrative agency); (2) the agent may have private information relevant to the performance of the transaction unbeknown to the principal; (3) the agent can take decisions and actions that the principal cannot fully control; and (4) the agent can make decisions and carry out actions that will affect her own financial state. *See* Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, 63 Am. Econ. Rev. 134, 134–38 (1973).

12. Susan Rose-Ackerman, Corruption: A Study in Political Economy 1–4 (1978).

13. For a definition of "corruption," *see* Leslie Palmier, *Bureaucratic Corruption and Its Remedies*, *in* Corruption 207 (Michael Clarke ed., 1983); *see also* Rose-Ackerman, *supra* note 12, at 7.

is supposed to represent is one aspect of the principal-agent problem[14] and often a result of corruption.[15]

In light of the above, it would be hard to dispute that one of the goals of the public tender mechanism is to preserve integrity by minimizing the principal-agent problem that has the potential to arise in government transactions.[16] As the following discussion indicates, this is in fact the primary goal of the public tender mechanism.

Contracting that involves the appearance of partiality will include any transaction that has not in fact been tainted by corruption but that was entered into with a party seemingly related to the authority's representative, either personally (i.e., a relative or friend) or through business or political ties (i.e., a business partner or political supporter). Put differently, the appearance of partiality exists when a given transaction, because of its circumstances, would seem to be the kind of transaction that could have been tainted by partiality (potential partiality), even though no such taint actually exists.

These transactions, then, do not present any real material difficulty, as they do not involve actual corruption. Nevertheless, they present an evidentiary difficulty that arises from the fact that the public will not necessarily be fully aware of the actual (and honest) considerations that had guided the CO in awarding the contract. Theoretically, had it been possible to ascertain the actual considerations behind a contract award decision in such a situation and to make sure that these considerations were purely meritorious and devoid of any irrelevant element, any suspicion of favoritism would have disappeared. Consequently, the need to eliminate concerns about the appearance of partiality should not be viewed as an independent and separate objective of the public tender mechanism, but as one that is secondary to the main objective of preventing actual corruption or partiality in contracting.

B. *Guaranteeing Economically Efficient Contracting*

The Government holds public assets and funds in trust. Its trustee status translates into a duty to make the most efficient use of these assets and funds, which is why one objective of the public tender mechanism is to guarantee

14. For other aspects of the principal-agent problem, *see*, *generally*, Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, 51 Econometrica 7 (1983); Ian Jewitt, *Justifying the First-Order Approach to Principal-Agent Problems*, 56 Econometrica 1177 (1988); Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 J.L. & Econ. 103 (1990); William P. Rogerson, *The First-Order Approach to Principal-Agent Problems*, 53 Econometrica 1357 (1985).

15. *See*, *generally*, Susan Rose-Ackerman, Corruption and Government: Causes, Consequences, and Reform (1999); Rose-Ackerman, *supra* note 12, at 7; Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. Econ. Literature 1320, 1321 (1997); Paolo Mauro, *Corruption and Growth*, 110 The Q.J. Econ. 681 (1995); John J. Wallis, The Concept of Systematic Corruption in American Political and Economic History (Nat'l Bureau of Econ. Research, Working Paper No. 10952, 2004), *available at* http://www.nber.org/papers/w10952.

16. *See* Kelman, *supra* note 9, at 11; Trepte, *supra* note 5, at 70–111.

economically efficient contracting. The duty to make efficient use of public assets and funds applies to Government in all circumstances, but it is especially important in the context of the Government's business contracting activity, regarding which its transactions are, naturally, measured by regular business standards relating to economic efficiency. In other words, government activity in areas such as education, welfare, health, or security is measured by a broad set of public policy criteria, of which the economic criterion is only one, but not necessarily the foremost. On the other hand, the public has higher expectations that the Government's commercial activity, which is essentially parallel to the free-market activity of any other market actor, will be characterized by economic efficiency. This justifies the attribution of considerable importance to the economic efficiency of the Government's acquisition mechanism.

1. Different Criteria of Economic Efficiency

Having established that the public tender mechanism is intended to achieve, *inter alia*, economic efficiency, it is worth recalling that such efficiency is a complex concept and that economically efficient contracting therefore may be defined in different ways.[17] There are two major economic criteria for evaluating government contracting. One is the achievement of maximum utility for the issuer of the public tender, reflected in a contract with the offeror who submitted the best offer. The second is the achievement of maximum utility for the economy as a whole, reflected in a contract with the most efficient offeror (even if its offer is not the best one submitted). These two criteria usually coincide fully, but market failures are also possible, in which case different criteria for determining efficiency might yield different results, as explained below. Given the risk of a market failure occurring, the Government must decide which criterion it prefers or it should design the public tender mechanism in such a way as to minimize the risk of market failure.[18] What, then, are the possible criteria for efficient contracting?

- *Contracting with the offeror with the best offer*: A transaction may be defined as optimally efficient if it produces maximum utility for the Government itself. Thus, the optimal sale of an asset by the Government (e.g., mineral mining rights or rights to use transmission frequencies) is the one that will fetch the highest possible price; the optimal acquisition of goods or

17. Various definitions of efficiency are provided in Douglas G. Baird et al., Game Theory and the Law 311 (1994); Richard A. Posner, Economic Analysis of Law 13 (4th ed. 1992); Frank H. Stephen, The Economics of the Law 41–42 (1988); Jules L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 Cal. L. Rev. 221, 226 (1980).

18. For example, using the auction mechanism instead of the public tender mechanism might reduce the likelihood of market failure and could, therefore, facilitate more efficient contracting in certain cases. *See, e.g.*, R. Preston McAfee & John McMillan, *Auctions and Bidding*, 25 J. Econ. Literature 699, 708 (1987).

services (e.g., road construction, cleaning services, offices supplies, etc.) will be the one involving the lowest possible price payable for them.[19] This approach to economic efficiency is generally intuitive and is in keeping with game theory perspective.

- *Contracting with the most efficient offeror*: On the other hand, the conventional economic measurement of a business transaction's efficiency is its expected utility for the economy as a whole, as opposed to the utility that one side or the other might derive from it.[20] Thus, from an economic standpoint, an optimal transaction means one that is carried out with the most efficient offeror under the circumstances. According to this criterion, an optimal sales transaction will allocate the good to the offeror who stands to maximize its utility; an optimal acquisition will consist of the purchase of the good from the offeror for whom it is least vital; and when acquiring services, the optimal transaction will be concluded with the offeror capable of providing the service most efficiently. Under this economic approach, such optimal contracting will provide the economy with the maximum aggregate well being. As previously noted, the emphasis here is on overall efficiency, even if such efficiency is not necessarily reflected in the cost of the transaction or the bid amount.

In reality, this measure of economic efficiency is usually impossible to apply, for how can the most efficient offeror be identified in a given set of circumstances? Usually, the only way to make such a determination is to assume that the most efficient offeror is the one willing to pay the highest amount for the good or the one willing to supply the required goods or services at the lowest price. It is therefore assumed that an offeror who meets the first criterion for an optimal transaction (submission of the best offer from the Government's perspective) automatically meets the second criterion (optimal efficiency from an overall economic perspective) as well. But is this assumption necessarily borne out by reality?

2. Relationship Between the Different Criteria of Economic Efficiency

As noted above, the assumption underlying the economic approach, which also figures in Coase's theorem,[21] is that, in a perfect market with no externalities, the most efficient (utility-maximizing) transaction will be the one made with the offeror who makes the best offer. That is, the utility-maximizing offeror will be willing to pay the highest price in a sales transaction or provide the good or service at the lowest price in a purchase transaction. This approach, then, sees no difference between the two different criteria of economic efficiency. However, an absolutely perfect market is a construct of economic models and is far removed from reality. The economy as we know it

19. The expression "lowest possible price" means, in this context, "the best value for money," so that the expression "low" incorporates aspects of reliability, quality, etc.

20. Posner, *supra* note 17, at 13–14.

21. *See* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

is not usually characterized by perfect information and transactions have costs that reduce their efficiency. Thus, it is quite possible that, due to a market failure, the highest or lowest offer, as the case may be, will not necessarily be submitted by the most efficient offeror.

Assume, for example, that the Government wishes to sell a wheat field through competitive bidding. Farmer *A*, estimating the potential yield from the field at 100, offers to buy it at 90 because, based on Farmer *A*'s familiarity with the market and with the other contenders, he estimates that no other bidder can beat this offer.[22] However, due to incomplete information, this turns out to be a mistake: Farmer *B*, estimating the potential yield from the field at 92, offers to buy it at 91. Thus, due to incomplete information, Farmer *A* has misjudged the other offerors' situation, with the result being that his offer is not the highest. If the normal rules of competitive bidding apply, the field will be sold in this case to Farmer *B*. Under the circumstances, its sale to Farmer *B* (who offered 91), instead of to Farmer *A* (who offered 90), will be optimal in terms of the seller's sales revenue, but suboptimal in terms of overall economic utility since the field has not been allocated to the utility maximizer (Farmer *B* can use the field to produce only 92, as compared with Farmer *A*'s 100.). This outcome is economically inefficient.

An economist would nevertheless dismiss the suboptimal allocation of the field to *B* as a minor problem, arguing that the inefficiency would be promptly remedied since Farmer *B* now has a worthwhile opportunity to sell the field to Farmer *A* at a price ranging from 93 to 99. The field would therefore end up in *A*'s hands anyhow, aggregate efficiency would not suffer, and the allocation would ultimately be optimal. The counterargument is that this would indeed have happened had the transactions not involved additional costs and time. Indeed, such transaction costs are inevitable and, because of them, the field might not be transferred from *B* to *A*. For example, if the transaction's cost is 9 and upwards, it will not be worthwhile, the field will remain *B*'s, and the inefficiency will be perpetuated. Furthermore, even if the transaction is concluded and *A* acquires the field, the fact that this will have required two transactions instead of one makes for inefficiency and wasted resources.

What does all this mean in practical terms? Two conclusions may be drawn. First, in evaluating transaction efficiency, we must bear in mind that "economic efficiency" is a complex term that can be evaluated using different criteria. The second conclusion is that the public tender mechanism should optimally be designed in such a way as to reduce the risk of the occurrence of a market failure of the kind described above. For example, this goal can be achieved by using the English auction mechanism instead of the sealed bidding mechanism. The former system is not subject to the above-mentioned

22. Of course, all offerors are motivated to buy the field at the lowest price possible and thus increase their profits from it.

market failure, which may sometimes give it an advantage over the usual public tender mechanism.[23]

In summary, one objective of the public tender mechanism is to allow the Government to conclude economically efficient transactions. An efficient transaction is one in which the Government contracts business with the best offeror at the lowest or highest price possible, as the case may be. The selection of the best offer submitted will usually suffice to achieve this objective; however, a conflict might arise between the perspective of the procuring entity (which seeks to select the best offer) and that of the economy as a whole (which benefits from the selection of the best, i.e., the most efficient, offeror). This tension needs to be addressed by designing a contracting mechanism that is optimally tailored to the specific circumstances.[24]

C. *Equal Opportunity*

In selecting its business partners, a procuring entity determines who will benefit from the economic advantage inherent in a contractual relationship with it. This advantage is derived from the access to public funds or assets held in trust by the contracting authority. The fact that the transaction involves public funds or assets, coupled with the fact that Government owes a fiduciary duty to the public at large, obligates the contracting authority to accord all members of the public an equal opportunity to enjoy this public benefit that the Government has decided to allocate.[25]

A separate issue is how much weight should be attributed to the duty to accord equal treatment to the contenders in a public tender process and, more particularly, how important the principle of equal opportunity is relative to the Government's obligation to ensure economic efficiency, if these two values are in conflict. When deciding this key question, three observations must be kept in mind. The first, a philosophical observation, is that commitment to equal opportunity constitutes an intrinsic value of the public tender mechanism, rather than just an instrumental value whose sole purpose is to serve the other values of the public tender, which are to achieve efficiency and ensure integrity. The second observation, a conceptual one, is that the public tender mechanism ought to ensure substantive rather than formal equality. The third observation, also conceptual, is that the public tender mechanism is usually

23. McAfee & McMillan, *supra* note 18, at 708.

24. Game-theory researchers devote considerable efforts to designing the optimal public tender mechanism from the perspective of the public tender issuer. *See generally* Paul Klemperer, Auctions: Theory and Practice (2004); Vijay Krishna, Auction Theory (2002); Paul Milgrom, Putting Auction Theory to Work (2004); Eric Maskin & John G. Riley, *Optimal Auctions with Risk Averse Buyers*, 52 Econometrica 1473 (1984); R. Preston McAfee & Daniel Vincent, *Sequentially Optimal Auctions*, 18 Games & Econ. Behavior 246 (1997); Roger B. Myerson, *Optimal Auction Design*, 6 Mathematics Operation Res. 58 (1981); John G. Riley & William F. Samuelson, *Optimal Auctions*, 71 Am. Econ. Rev. 381 (1981).

25. It should be noted that the duty is owed to the country's citizens, as opposed to foreigners, who are generally not entitled to expect equal treatment by the Government in this context since its fiduciary duty is not owed to them.

required in order to maintain "administrative equality" more than it is needed in order to guard against "unconstitutional discrimination."

1. Commitment to Equality as an Intrinsic Value of the Public Tender Mechanism

On the one hand, commitment to equality may be viewed as an intrinsic[26] value of the public tender mechanism, in light of the Government's status as the public's trustee. On the other hand, it can be argued that Government's commitment to equal opportunity in its contracting is purely instrumental and only justified if it promotes economic efficiency or prevents corruption. It follows from the latter that if the commitment to equal opportunity fails to serve these purposes or even runs counter to any of them, it should give way to these more important, independent values. Typically, this distinction will have practical significance when a particular public tender process pits equality against efficiency. If equality is purely instrumental, its importance will recede when it conflicts with the value of economic efficiency. On the other hand, if equality constitutes an intrinsic value of the public tender mechanism, it is by no means self-evident that efficiency should be preferred over equality in the event of a conflict between them.

The following example can serve to illustrate this distinction: kept by a traffic jam from reaching the procuring entity's offices on time, an offeror is slightly late in submitting her offer. It later transpires that hers was the best offer, far better than the runner-up's. If equality is considered to be of instrumental value only, the tendency to overlook the flaw and accept the better offer will be greater than if equality is perceived as an intrinsic public tender value.[27]

A look at legal arrangements regulating government procurement reveals an incoherent approach to the equality principle in the context of government contracting. Thus, the introduction to the Federal Acquisition Regulation (FAR) includes a "Statement of Guiding Principles for the Federal Acquisition System."[28] According to this statement, "[t]he vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives."[29] The regulation also provides that "[t]he Federal Acquisition System will—[s]atisfy the customer in terms of cost, quality, and timeliness of the delivered product or service…; [c]onduct business with integrity, fairness,

26. For a definition of "intrinsic value," *see* Michael J. Zimmerman, *Intrinsic vs. Extrinsic Value*, *in* Stanford Encyclopedia of Philosophy (Feb. 2007), http://plato.stanford.edu/archives/spr2007/entries/value-intrinsic-extrinsic/.

27. Disqualification of a late offer also can be justified on grounds of efficiency, by arguing that even if its rejection is inefficient in the short run, it is nevertheless efficient in the long run as it reinforces the public's faith in the public tender mechanism. *See* the discussion *infra* at the text accompanying note 63.

28. FAR 1.102.

29. FAR 1.102(a).

and openness; and [f]ulfill public policy objectives."[30] Further on, the regulation clarifies what is included within the obligation to conduct business "with integrity, fairness, and openness." The regulation states, *inter alia*, that "[a]ll contractors and prospective contractors shall be treated fairly and impartially but need not be treated the same."[31] In other words, not only is there no mention of maintaining equal opportunity as one of the objectives of the federal acquisition system, but the introduction to the regulations suggests an almost explicit reservation concerning this notion. It should be noted, however, that this reservation is sometimes out of keeping with the arrangements specified in the regulations themselves, which frequently emphasize the CO's duty to treat offerors equally.[32]

On the other hand, the *Model Procurement Code for State and Local Governments*, drafted by the American Bar Association and adopted by several states and numerous local governments, expressly lists equal treatment of individuals (alongside fairness and economic efficiency) as one of its objectives.[33] The *Model Law on Procurement* proposed by the United Nations also sets forth the equality principle as one of the objectives of the public tender mechanism.[34] However, the explanatory notes attached to the proposed UN model suggest that the primary objective of the government procurement system is economic efficiency, while the other objectives are only instrumental and thus subservient to the need to achieve economic efficiency.[35]

A review of the relevant federal case law and comptroller general's decisions[36] indicates that the courts view the duty to treat offerors equally as a

30. FAR 1.102(b).

31. FAR 1.102-2(c)(3).

32. For example, FAR 15.306(e)(1) provides that "Government personnel involved in the acquisition shall not engage in conduct that—(1) Favors one offeror over another. . . ." It might be possible to reconcile this contradiction by assuming that although equality is not among the objectives of the federal acquisition system, it nevertheless has instrumental value to the regulator as a prerequisite for the existence of effective competition and for the credibility of the entire acquisition system in the eyes of offerors. *But see* Christopher R. Yukins, Editor's Note: A Response to Omer Dekel's "Legal Theory of Competitive Bidding," *infra this issue* (noting U.S. law regarding principle of equality).

33. Am. Bar Ass'n, Steering Committee Recommended Draft: The Model Procurement Code Revision Project § 1-101(2)(e) (Apr. 3, 2000), *available at* http://www.aia.org/static/state_local_resources/projectdelivery/Final%20MPC.pdf. This section provides that one of the code's purposes is "to ensure the fair and equitable treatment of all persons who deal with the procurement system of this [State]." However, it should be kept in mind that this model was developed primarily by private-sector lawyers, who are more likely to stress the importance of equal opportunity, which protects the interests of individuals, than public-sector lawyers would be. The latter would presumably tend to emphasize efficiency considerations rather than considerations that reinforce the offerors' position.

34. United Nations Comm'n on Int'l Trade Law [UNCITRAL], UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment pmbl. (1994), *available at* http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf.

35. *Id.* at *Guide to Enactment* ¶ 8. The guide to the model is attached to the model itself and may be consulted on the same website.

36. The comptroller general, who heads the Federal Government's Government Accountability Office, began to rule on matters relating to precontract decisions of administrative authorities in 1925. This adjudicative function was anchored in legislation only in 1984; prior to that time,

fundamental principle of the federal acquisition system,[37] but it is nevertheless viewed primarily as one of several safeguards that serve to protect the integrity of the public tender[38] rather than as an independent objective.

Thus, the picture that emerges is not uniform. Some regimes and models do not include the equality principle among the objectives of contracting, while others do, either as an intrinsic value or as an instrumental value subservient to economic efficiency. Since the Government's duty to ensure equal opportunity is derived from values that are not necessarily consistent with economic efficiency— such as the Government's fiduciary duty to individual citizens to protect their individual rights—it would seem that the abovementioned duty to provide equal opportunities when conducting economic transactions constitutes an intrinsic value of the public tender mechanism.

An additional question requiring examination is the type of equality that the public tender mechanism ought to ensure.

2. Substantive versus Formal Equality

To what standard of equality is civilized society obligated or what constitutes equality that is just? These questions elicit a variety of views and approaches.[39] For our purposes, it is important to distinguish between two definitions of equality: formal equality and substantive equality.

Under the formal or procedural equality approach, equality means identical treatment for all. Here, any distinction between individuals will be deemed discriminatory and harmful to the equality principle. Thus, no distinction is

the comptroller general's rulings had force only because of the various authorities' willingness to accept them. In 1984 the comptroller general's adjudicative function was formalized in the Competition in Contracting Act (CICA) and his rulings became binding. Keyes, *supra* note 4, at 675–76. A party dissapointed by a GAO decision may seek relief in the Court of Federal Claims. *See* 28 U.S.C. § 1491 (vesting "bid protest" jurisdiction in COFC).

37. ITT Fed. Servs. Corp. v. United States, 45 Fed. Cl. 174, 190 (1999) (citation omitted) (stating "it is a fundamental principle of federal procurement that offerors be treated equally").

38. *See*, *e.g.*, Argencord Mach. & Equip., Inc. v. United States, 68 Fed. Cl. 167, 173 (2005).

39. *See* Mihailo Markovic, *The Relationship Between Equality and Local Autonomy*, *in* Equality and Social Policy 82 (Walter Feinberg ed., 1978), for a review of the development of the concept of equality and the various approaches to equality throughout history, from ancient times to the present. *See* Louis Pojman, *Theories of Equality: A Critical Analysis*, 23 Behav. & Phil. 1 (1995); Joseph Raz, *Principles of Equality*, 87 Mind 321 (1978); Peter Westen, *The Concept of Equal Opportunity*, 95 Ethics 837 (1985); Stefan Gosepath, *Equality*, *in* Stanford Encyclopedia of Philosophy (2007), *available at* http://plato.stanford.edu/entries/equality/#ForEqu, for a systematic analysis of the concept of equality in its various meanings. *See also* Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 Phil. & Pub. Aff. 185 (1981); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 Phil. & Pub. Aff. 283 (1981); Ronald Dworkin, *What Is Equality? Part 3: The Place of Liberty*, 73 Iowa L. Rev. 1 (1987); Ronald Dworkin, *What Is Equality? Part 4: Political Equality*, 22 U.S.F. L. Rev. 1 (1987), for a series of four articles by Ronald Dworkin in which the author argues that "just equality" is equality in the allocation of resources in society. Oppenheim distinguishes between three criteria for equality: equality in character, equality of treatment, and equality in resource allocation. He goes on to present eight different approaches to equality in resource allocation, to which he adds a ninth of his own. Felix E. Oppenheim, *Egalitarianism as a Descriptive Concept*, 7 Am. Phil. Q. 143 (1970). Amartya Sen analyzes and criticizes three different approaches to the concept of equality (two utilitarian approaches plus J. Rawls' approach) and also suggests what he believes to be a better alternative. *See* Amartya Sen, *Equality of What? in* Equal Freedom 307 (Stephen Darwall ed., 1995).

to be made, for any purpose whatsoever, between rich and poor, young and old, men and women, or sick and healthy. This is an arithmetic-technical form of equality—easy to apply and to administer. Equality of this kind is characteristic of, for example, the lottery mechanism, where the winning contenders are chosen by drawing lots and each contender stands an equal chance of winning.

The second type of equality is substantive. A common nutshell definition of this type of equality is that it consists of equal treatment of equals and different treatment for those who are different when the circumstances justify such a differentiation.[40] It is important to emphasize that, unlike formal equality, the principle of substantive equality does not involve a determination of whether a particular type of treatment is just or whether it constitutes unlawful discrimination. The concept of substantive equality is not an absolute one but rather a principle that prescribes different results for different circumstances.[41] In this context, one more step is required in order to answer the question of what constitutes equal treatment: one must define the characteristics that are relevant to the particular circumstances, which either justify or rule out the equal or unequal treatment. Naturally, this step requires the making of value judgments, which often breed dispute and controversy.[42]

Of the two types of equality, the public tender mechanism is primarily committed to the principle of substantive equality. This is evident in two aspects of the mechanism. The first is participation in the public tender. Even if the procuring entity limits the right to participate in the public tender process to offerors who meet certain criteria, this will not affect the principle of substantive equality as long as the criteria that are used are relevant to the circumstances of the transaction. On the other hand, if the criteria are irrelevant to the circumstances of the transaction, the limitation on participation will violate the principle of substantive equality, as the use of such criteria creates a distinction between equals, which constitutes unlawful discrimination according to that principle.

To illustrate this, assume that a solicitation of offers regarding the purchase of tables allows bidding by carpenters only. While this criterion excludes

40. This definition has its origin in Aristotle, Nichomachean Ethics, bk. V, ch. 3 (W. D. Ross trans. 1980).

41. *See*, *generally*, Kent Greenawalt, *How Empty Is the Idea of Equality?* 83 Colum. L. Rev. 1167 (1983); Julius Stone, *Equal Protection and the Search for Justice*, 22 Ariz. L. Rev. 1 (1980); Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982).

42. It should be noted that, unlike legal terminology, which regards the "equal treatment of equals" formula as "substantive equality," philosophers commonly define this type of equality as "formal equality" because this formula, as previously mentioned, does not involve a value judgment regarding the criterion that ought to be used to distinguish between individuals. According to philosophical terminology, "substantive equality" makes an explicit value judgment regarding the criterion for just allocation or treatment. Such, for example, is the claim that just equality is equality in the allocation of resources in society, equality in human happiness, or equality of income. *See* Gosepath, *supra* note 39. This article uses the legal terminology in referring to the different types of equality.

noncarpenters (e.g., lawyers), it does not contradict the principle of substantive equality because the distinction would seem to be relevant to the particular solicitation. On the other hand, were it stipulated that only married carpenters may take part in the public tender, a seemingly irrelevant criterion under the circumstances, the equality principle would be violated and this particular criterion must therefore be rejected if substantive equality is to be upheld. Of course, the distinction between a relevant criterion that does not violate the equality principle and an irrelevant criterion that does is not always clear. Assume, for example, a stipulation limiting participation to carpenters located within fifty miles of the place where the tables are to be supplied. Does this constitute unlawful discrimination or a legitimate distinction? Unlike the previous examples, there is no obvious answer and the use of the distinction might be controversial.

The second aspect in which the principle of substantive equality manifests itself is the fact that, according to the general rules of the public tender mechanism, each individual is equally entitled to participate, but the best offer will win the contract. Does the fact that this system thus favors the best offer violate the equality principle? Certainly not. The best offer differs from the other offers in ways that are relevant to the circumstances of the transaction and is therefore justifiably awarded different treatment. Consequently, the selection of the best offer instead of any other offer actually exemplifies the principle of substantive equality and will not constitute unlawful discrimination or favoritism in accordance with that principle.

3. Administrative Equality versus Unconstitutional Inequality?

It is indisputable that the equality principle is a constitutional one in almost all democracies[43] and is therefore to be "strongly" protected by the law. However, it is not a monolithic principle and there is a distinction to be made between different kinds of equality and different kinds of violations thereof. Thus, a school segregation policy discriminating between blacks and whites[44] does not compare to discriminatory income tax rates imposed on citizens of different regions;[45] discrimination between women and men in hiring employees does not compare to a government-contracting decision that discriminates between two computer firms with regard to purchasing computers; discrimination on grounds of religion, race, gender, ethnic origin, color of skin, etc. is not akin to discrimination that does not involve these types of

43. *See*, *e.g.*, U.S. Const., amend. XIV, § 1; Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, art. 15(1) (U.K.).

44. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22 (1971).

45. *See* Banner v. United States, 428 F.3d 303, 310, 312 (D.C. Cir. 2005). It was alleged in this case that the statutory distinction between residents of the District of Columbia who work in it and residents of other states who work there for purposes of income tax calculation was unconstitutional in that it discriminated between citizens of the District of Columbia and citizens of other states who worked in the District. *Id.*

criteria. All the above examples could involve a possibly unjustifiable form of discrimination and, yet, everyone will agree that the types of discrimination are not the same in the sense that the first kind is more objectionable and more severe than the second.

The distinction between different kinds of unequal treatment and the different levels of protection against them that the legal system affords is reflected in the distinction drawn in American case law between a "suspicious" classification, a "mildly suspicious" classification, and a nonsuspect classification.[46] According to this categorization, when an administrative differentiation between individuals rests on a "suspicious" classification (e.g., on grounds of race or nationality), the court will subject the administrative action to strict scrutiny and, for the unequal treatment to be justified, the court must be satisfied that the discriminatory action is necessary to further a compelling governmental interest so long as it is narrowly tailored to further that interest.[47] If the administrative denial of equality rests on a "mildly suspicious" classification (e.g., on grounds such as gender), the burden upon the authority to justify its decision will be weaker (intermediate scrutiny) and it will have to show that the discriminatory action "serve[s] important governmental objectives and must be substantially related to achievement of those objectives."[48] On the other hand, if the inequality is the result of a "nonsuspect" classification, in the sense that even if it does infringe upon a legitimate interest of the injured party, it does not demean that party in any way, it will be sufficient for the government authority to demonstrate that the administrative decision was meant to achieve a legal purpose and that it is founded on a rational basis ("rational basis" review or minimal scrutiny).[49]

The dividing line between the different types of discrimination described above is that discrimination of the first two types can be demeaning, harmful to an individual's self-respect and self-esteem, and offensive to an individual because of his or her status as a minority group member or because of his or her membership in some other type of underprivileged group within society. However, in cases of the third kind, the unlawful discrimination is not usually accompanied by humiliation, a violation of dignity, or a sense that the discrimination is based on the individual's affiliation with one group or another. The first and second types of discrimination can be grouped within the general

46. *See* John H. Ely, Democracy and Distrust: A Theory of Judicial Review 30–31 (1980).

47. Grutter v. Bollinger, 539 U.S. 306, 326 (2003); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

48. Craig v. Boren, 429 U.S. 190, 197 (1976).

49. For a description of the development of the tiered-scrutiny doctrine and a critical review of its use in judicial review of administrative action, *see*, *generally*, Calvin R. Massey, The New Formalism: Requiem for Tiered Scrutiny? (Working Paper Series, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=540122.

category of "unconstitutional discrimination" and the third type of discrimination, the type that does not involve an association with minority or underprivileged status, may be referred to as "administrative discrimination."

Theoretically, a violation of the "equal opportunity" principle within the framework of a public tender can be on either a constitutional or an administrative plane. For example, if the solicitation documents exclude minorities or women from participating, the restriction will constitute either suspicious or mildly suspicious discrimination—i.e., unconstitutional discrimination, which is properly subjected to strict judicial scrutiny.[50] On the other hand, if, for the sake of economically efficient contracting, the procuring entity lets a given offeror correct her offer or decides to consider an offer despite its late submission, the various other offerors have been denied fully equal treatment, but in a nonsuspicious manner, and, consequently, minimal scrutiny should suffice. Of course, this type of violation may still be unlawful and the procuring entity's action may still be a flawed one. However, in such a case, although the discriminatory decision may well be rejected as arbitrary, unreasonable, or discriminatory, the standards to which the court will hold the decision when it determines its validity will be the usual administrative "rational basis" standards rather than the strict ones used to review a state action that is potentially an act of unconstitutional discrimination.

In summary, the Government's obligation to uphold the principle of equal opportunity depends on the manner in which a particular decision violates this principle and on the values or interests supported by the violation. Any procuring entity is "strongly" obligated to avoid all violations of the principle of equality on a constitutional level. Consequently, it would be virtually impossible to justify a public tender process that creates a preference on grounds of religion, race, nationality, gender, sexual inclination, ethnic origin, etc. On the other hand, the Government's obligation to adhere to the principle of "administrative" equality of opportunity is qualitatively different than its commitment to avoid unconstitutional differentiation and the extent to which a state action may legitimately abandon such administrative equality should be subjected only to the "rational basis" level of scrutiny. Indeed, a close look at the ample body of federal rulings dealing with the public tender issue suggests that when government actors make decisions that violate the equality principle in one way or another, the violation involved is almost always administrative in nature. As shall be clarified later, this fact has practical significance when the duty to treat all offerors equally conflicts with the duty to engage in economically efficient contracting.

4. Equality and Integrity: Separate Objectives of the Public Tender?

Is it justified to view the preservation of equality and of integrity as different and independent objectives of the public tender mechanism? This question

50. *See*, *e.g.*, *Adarand*, 515 U.S. at 227.

arises because any decision that is tainted by corruption is in fact a private case of an equality violation or, put differently, any corrupt decision within a public tender process also infringes upon the equality principle. There are four separate reasons for answering this question in the affirmative.

The first and foremost reason for distinguishing between the need to maintain the principle of equal opportunity and the need to act with integrity and avoid corruption is that while an administrative decision driven by favoritism or corruption does infringe upon equality, it does so under "aggravating circumstances." This claim is strengthened by the very characteristics of the equality principle itself. Thus, a discriminatory administrative decision often constitutes a private case of an improper reliance on a nonrelevant consideration. For example, a public employer's decision not to hire a candidate because she is a woman and a state's decision to withhold funds from a school because the majority of its students belong to a minority group are decisions that are based on nonrelevant considerations (the gender of the applicant for the job or the ethnic origin of the school students). At the very moment these improper considerations lead to a decision, they give rise to discrimination. In these circumstances, a court will not be content to declare the decision flawed because it was based on a nonrelevant consideration but will emphasize the discriminatory outcome of the improper administrative decision. This is because the discrimination resulting from the flawed government decision is more objectionable than the fact that the administrative agency had relied upon a nonrelevant consideration.

Similarly, the fact that a government contracting decision that is tainted by favoritism or corruption also constitutes some type of discrimination does not obviate the need to emphasize the favoritism and distinguish it from the discrimination because the favoritism problem is by far the more severe issue. Thus, it is fairly obvious that discrimination in a public tender that is brought about by a desire to prefer a political ally or by bribing a CO is much more severe than a decision with a discriminatory effect but that was made in good faith or without any corrupt motive. In other words, the recognition of a distinction between the duty to treat all offerors equally and the duty to act with integrity, as two separate objectives of the public tender mechanism, is justified, even if all violations of the duty to act with integrity are a subset of the larger category consisting of violations of the equality principle.

In direct continuation and reinforcement of this argument, one may justify the distinction between "regular" discrimination and discrimination rooted in corruption based on the intuitive sense of an essential difference in their relative severity. The chief objective of the public tender mechanism—its very *raison d'être*—is to minimize the principal-agent problem and to avoid corruption and favoritism in a government contracting decision. The public tender mechanism reflects, more than anything else, the public's distrust and suspicion of the executive branch and its officials (i.e., the fear that such officials might be tempted to misuse the considerable power vested in them in order to further their personal interests at the expense of the needs of the public to

whom they owe a fiduciary duty). As a result, the public tender mechanism is, by far, more committed to the concept of impartiality and the preservation of integrity than it is to maintaining the equality principle (in its administrative dimension). While it should be possible to show some laxity when discrimination arises in the context of a public tender process as a result of a decision that has been made in good faith, an administrative action that is rooted in favoritism or corruption will never be overlooked and will always be nullified. This is yet another justification for distinguishing between the goal of maintaining integrity and that of maintaining equal opportunity.

A second justification for distinguishing between the equality principle and the preservation of integrity is that different rationales underlie these two principles. The rationales underlying the equal treatment requirement are, primarily, the concept of justice and the Government's fiduciary duty to its citizens. On the other hand, the rationales underlying the commitment to impartiality do include the above-mentioned principles, but, more than that, they include ethical principles pertaining to the existential foundation of any civilized society and modern economy.

The third reason for distinguishing between the equality principle and the need to maintain integrity lies in the difference between the ways and means deployed in dealing with the principal-agent problem and the ways and means through which the legal system implements the equality principle. The equality principle is primarily guaranteed by general legal rules that obligate the Government to treat citizens equally.[51] On the other hand, the means employed in dealing with concerns about favoritism and corruption include both direct ones such as prohibitions enshrined in rules[52] and indirect and structural ones such as the imposition of a duty of transparency[53] and the reduction of the discretion given to the COs in the process in the context of a public tender.[54]

A fourth reason for setting the two objectives apart is that the implementation of the equality principle does not involve the issue of maintaining

51. While the FAR's introductory declarative articles do not obligate the executive to ensure equal treatment, this duty is inferred from specific provisions. *See* FAR 15.306(e)(1). *See also supra* note 32.

52. *See* FAR 3.101-1 (providing government transactions should be conducted without favoritism while avoiding conflicts of interest in any form).

53. For example, the regulations impose an obligation to open offers publicly. FAR 14.402-1(a). Also imposed is an obligation to record offers "as soon after bid opening as practical" (with records to be accessible to the public). FAR 14.403. In public tender processes that include a negotiation stage, the CO must send out a notice to all offerors specifying the number of offers submitted, the details of the winning offeror, details of the winning offer (*e.g.*, quantities, prices), and a concise explanation of the reasons for the unsuccessful offerors not having been awarded the contract. FAR 15.503(b). A losing offeror is entitled to request more detailed explanations concerning this issue and to receive information regarding the other offers submitted. FAR 15.503(b)(2) & (3).

54. For example, by establishing a closed and short list of situations in which a late offer can be accepted. *See* FAR 15.208(b). Another expression of reduced discretion can be found in FAR 15.203(a)(4), which stipulates that RFP solicitation documents must include a list of the

the appearance of equality. On the other hand, the prohibition against partiality is coupled with the duty to avoid the appearance of favoritism. This difference—the lack of an ancillary "appearance" prohibition accompanying the prohibition against unequal treatment—is no accident. The Government's image stands to suffer far more from conduct that smacks of favoritism than it might from some action that smacks of "plain" inequality, without there being any suspicion of favoritism. This is the rationale behind the prohibition against entering into transactions that merely appear to be based on favoritism. That the objective of preventing favoritism also has a secondary objective—preventing any appearance of favoritism—also underpins the argument that this objective outweighs the equality principle because it indicates that this objective (maintaining integrity) is so important that even an apparent violation requires regulation. The same cannot be said of the principle of equal opportunity.

In summary, maintaining equal opportunity is a key objective of the public tender process. The public tender mechanism is committed to the principle of substantive equality, which prohibits discrimination between equals but allows differentiation between those who are different when the differentiation is relevant to the circumstances. More often than not, the kind of equality that is at issue in the context of a public tender process will be of the administrative kind. Finally, it should be noted that the principle of equal opportunity is an independent value of the public tender mechanism, which stands alone apart from another public tender mechanism objective, the need to maintain integrity.

III. WHAT IS THE PROPER HIERARCHY AMONG THE PUBLIC TENDER OBJECTIVES?

Having defined the three above-mentioned public tender objectives and considered various aspects relating to their nature, it is necessary here to deal with the question of the proper hierarchy among these different objectives. Do they carry equal weight? Can they be ranked by order of importance? And, most importantly, what is the appropriate solution when the public tender objectives are in conflict with each other?

As long as there is no conflict between the three objectives of the public tender mechanism, the CO's decision making is straightforward. Assume, for example, that the Government wants to acquire pencils. Accordingly, it issues a public tender specifying the contract terms and allows all interested parties to compete. A number of offers are submitted, compared by the CO, and the best offer is selected. In this example, all public tender objectives have been fulfilled: the Government provided equal opportunity for all to win the

"[f]actors and significant subfactors that will be used to evaluate the proposal and their relative importance." This duty limits the discretion given to the CO in the source selection process. *See* Kelman, *supra* note 9, at 1, for criticism of the statutory restriction of administrative discretion from a perspective of economic efficiency.

contract, treated the offers impartially, and selected the best offer. Again, this is a simple, straightforward situation. We also might imagine a situation in which, although the specific public tender process is flawed, the pursuit of all three values that the public tender mechanism is supposed to achieve will nevertheless point to the same solution. Assume, for example, that one of the offerors has bribed the CO and, as a result, the Government entered into a contract with a bad pencil manufacturer, whose offer is worse than the other manufacturers' offers. Not only is this a corrupt act and a violation of the equality principle, the transaction itself is inefficient. However, regardless of the perspective taken, the same solution emerges: the annulment of the public tender and of the contract. This is, again, a harmonic outcome, devoid of conflict between the different public tender objectives. The same result also would suggest itself had the contract been awarded to the bad manufacturer not through corruption but through sheer negligence in the conduct of the public tender process. Under such circumstances, the equality principle and the economic interest both require that the contract be annulled, whereas the prohibition on favoritism does not need to be taken into consideration. Here, again, the objectives of the public tender process do not conflict with each other and the obvious solution is simple and straightforward.

However, in a large variety of situations, the public tender objectives do clash and the CO must then decide which value ought to prevail under the circumstances. Assume, for example, that the best offer submitted in response to the pencil solicitation turns out to be flawed (e.g., the offeror forgot to sign it, the bid bond attached to it was made out for a lower amount than required, the offeror made his or her offer conditional on a larger order than was indicated in the solicitation documents, or the offer was submitted late). This creates a dilemma for the CO, who has to decide whether to overlook the flaw (or allow it to be corrected) or, alternatively, to reject the flawed offer. This dilemma presents a conflict between two of the public tender objectives: equal treatment versus economic efficiency. It is a conflict that cannot be reconciled by balancing, but only by deciding which objective (or which interest) should be favored under the specific circumstances of the particular public tender. Any action or avoidance thereof on the CO's part in these circumstances will signify some sort of preference—be it deliberate or inadvertent—of one value over another or others that the public tender process is intended to carry out. As noted above, a review of the court rulings dealing with public tenders reveals that almost any dilemma or dispute arising in connection with a public tender process may be described as a conflict between two or more of the public tender objectives. What is the appropriate solution for this conflict? Can one value be said to be obviously and absolutely superior to another or should a more complex mechanism be established to help resolve situations of this kind?

In view of the fact that the public tender mechanism is meant to achieve three objectives—the preservation of integrity, economic efficiency, and equal opportunity—it is necessary to decide on the appropriate hierarchy among these objectives and to establish a decision-making mechanism to be used

whenever they clash. As for the proper hierarchy among the public tender objectives, it has been argued above that the foremost public tender objective is to preserve integrity and minimize the principal-agent problem. Indeed, the main reason for imposing a legal requirement of public tender–based procurement on government agencies is the fear that the position of power given to civil servants, coupled with the temptations and the opportunities for abuse inherent in managing large-scale transactions, will lead to corruption and favoritism. Contracting decisions that are tainted by favoritism run counter to every acceptable moral code in a modern society. They create a strong sense of injustice; they cause the public to lose faith in the administrative systems; they lead to public corruption and a corruption of social behavior norms; and they thus undermine the very foundations of society's existence. Naturally, corruption and favoritism also have a strong and profound negative economic impact on the public and on the economy as a whole—in the short run because of their adverse effect on contracting efficiency and in the long run because of the public's loss of faith in the Government. It follows from all of the above that partiality in contracting is not to be tolerated, either before or after the fact. The preservation of integrity is the primary objective that the public tender mechanism is meant to achieve, and it clearly outweighs the public tender's two other objectives.[55]

A much more difficult decision is the determination of which is the second most important objective of the public tender mechanism, whether it is to grant all possible contenders equal opportunity to contract business with the Government or to achieve economic efficiency in government transactions. When the principle of "constitutional" equality is at play, it is relatively clear that this type of equality ranks higher than the need to achieve economic efficiency. In other words, discrimination on grounds of religion, race, gender, ethnic origin, etc. cannot be justified as a means to be used in achieving more efficient contracting. However, as previously mentioned, the common variety public tender process poses no difficulty on the constitutional plane and if it involves some type of unequal treatment, it is of the administrative type only.[56] It is indeed difficult to decide which value matters more in this situation: equal opportunity in its administrative sense or economic efficiency. It would therefore appear that in this context—i.e., the Government's contracting activity—both objectives ought to

55. Confirmation for the importance of integrity in Government's contracting can be found in both judicial decisions and in the legal literature. *See*, *e.g.*, Argencord Mach. & Equip., Inc. v. United States, 68 Fed. Cl. 167, 173 (2005); Inland Serv. Corp., Comp. Gen. B-252947.4, 93-2 CPD ¶ 266, at 3 (Nov. 4, 1993); A & A Roofing Co., Comp. Gen. B-219645, 85-2 CPD ¶ 463, at 3 (Oct. 25, 1985); Design Eng'rs, Comp. Gen. B-214658, 84-1 CPD ¶ 408, at 3 (Apr. 10, 1984); Paul Shnitzer, Government Contract Bidding 3–556. 3d57. d. 1992); Trowbridge Vom Baur, *A Personal History of the Model Procurement Code*, 25 Pub. Cont. L.J. 149, 153 (1996).

56. Regarding the distinction between the "constitutional" and "administrative" levels of equality, *see supra* notes 43–50 and accompanying text.

be considered equal in status. At any rate, even if it were possible to rank these objectives by some order of importance, the difference between them would certainly be very slight.

In summary, the preservation of integrity is the main objective of the public tender mechanism and of public tender law in general and it is therefore never acceptable to overlook a flaw that consists of the abandonment of that objective. Far behind are the two other objectives: (administrative) equality of opportunity and the attainment of economic efficiency. These objectives are hierarchically identical or close. If that is the case, how is one to decide between them when they clash?

A. *Should the CO Be Granted Discretion to Weigh These Values If a Conflict Exists Between Them?*

Because the duty to treat contenders with (administrative) equality and the duty to engage in efficient contracting appear to be of similar importance, it would seem that the proper solution to adopt when they are in conflict is to weigh the two values and to favor the objective that is of greater importance under the specific circumstances. In practical terms, this policy requires that a CO faced with a flawed offer be granted the discretion to compare the two available alternatives: to select the best offer despite its flaw or to reject it. The CO should be allowed to consider which of the alternatives contributes more (or is less damaging) to the public interest and opt for that course of action. Disqualifying the flawed offer will be justified only if the CO concludes that the rejection of the offer would do less damage to the public interest than its legitimization would.

Thus, when a CO is called upon to decide on how to handle a flawed offer, he or she must ask him- or herself a series of questions such as the following: will rectifying or overlooking the flaw give the offeror an unfair advantage over others (an outcome that violates the equality principle)? If so, how material an advantage will be gained by the offeror with the flawed offer (i.e., what is the extent of the violation of the equality principle)? What were the circumstances that brought about the flaw? Did it come about in good faith or is there a suspicion of corruption or of a prohibited manipulation of the public tender (the preservation of integrity)? What are the economic implications, under the circumstances, of rejecting the offer or of rectifying it (striving towards economic efficiency)? What might be the long-term economic implications of the decision (efficiency considerations)? How will the decision affect the public's faith in the Government and in the entire concept of the public tender process? Only after the CO has considered all these questions and others like them will he or she be ready to weigh the different considerations and decide which of the courses of action available to him or her under the circumstances is more in keeping with the public interest at large. Obviously, as part of this process, the CO also must consider the hierarchy among the different public tender objectives and the way in which this hierarchy manifests itself with regard to the specific public tender process under discussion.

In the common scenario where the conflicting values are equal opportunity and economic efficiency, the more serious the expected violation of equality and/or the smaller the economic damage expected as a result of rejecting the offer, the greater the justification for insisting on full compliance with the public tender's original rules and for rejecting the flawed offer. Conversely, the slighter the violation of equality and/or the more significant the economic gap between the faulty offer and next best offer, the greater the justification for overlooking the flaw and legitimizing the flawed offer, even if this means accepting some degree of a violation of the equality principle. However, if it is suspected that the flaw in the offer was deliberate or involved some manipulation on the part of the offeror or of someone else, the appropriate equilibrium point will shift again and might require the rejection of the offer, even if it is a very good one. However, a review of a series of relevant federal rulings dealing with this issue suggests that the federal courts have adopted a different policy regarding such conflict situations.

B. *What Is the Judicial Policy Regarding the Proper Hierarchy Among the Public Tender Objectives?*

Even though the federal courts have not explicitly ranked the objectives of the public tender, an analysis of the courts' rulings in a series of relevant federal government acquisition cases indicates that when the equality principle clashes with economic efficiency, the courts will strongly prefer equality as the goal to be upheld. While this preference is not usually articulated, the courts have invariably prescribed a rigid adherence to the formal public tender rules in every case presenting this type of conflict, public tender, without examining whether the CO's decision to accept or reject a flawed offer will ultimately lead to contracting efficiency. The courts do not appear to consider whether the economic utility inherent in a flawed offer might justify leniency with regard to an inadvertent flaw. Two examples will illustrate this approach.

One example is the comptroller general's treatment of late submissions of bids, even when such submissions are indisputably the result of a *bona fide* accident, from which the offeror gains no advantage or benefit. Several comptroller general's decisions dealing with this issue suggest that the obligation to reject the late offer is virtually absolute, allowing exceptions to be made only as expressly provided in the regulations.[57] The main argument made

57. Thus, for example, in Silvics, Comp. Gen. B-225299, 87-1 CPD ¶ 204, at 1–4 (Feb. 24, 1987), the offer was supposed to be submitted by 11:00 a.m. It was delivered by courier at 9:37 a.m. but was dropped off at the wrong room, without being marked as an offer pertaining to the solicitation in question. *Id.* As a result, it was only forwarded to the CO at 11:24 a.m. and was rejected as a late offer. *Id.* Although the comptroller general accepted the assumption that the offer was submitted on time, it upheld the CO's decision. *Id.* The comptroller general noted that maintaining equitable and impartial treatment and "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." *Id.* A similar scenario was involved in Secure Applications Inc., Comp. Gen. B-261885, 95-2 CPD ¶ 190, at 1–4 (Oct. 26, 1995). The deadline for submitting offers was 12:00 p.m. *Id.* The offeror in question sent the offer one day earlier by courier,

in support of this position is that a rigid and formalistic policy precludes both favoritism and the unequal treatment of offerors and that strengthening the public's faith in the Government's procurement mechanism overrides the short-term gain that might be obtained from legitimizing a particular late offer.[58] Another example illustrating this judicial policy may be found in the attitude toward offerors whose bonds have turned out to be flawed. In a long line of rulings, the comptroller general has determined that bidders should not be granted the opportunity to correct a flaw in a bid bond, nor should they be permitted to submit a bid bond after the deadline,[59] even if the flaw in the bond (or the delay in its delivery) is a minor one and/or has developed despite a good faith effort to comply. Several court rulings and comptroller general decisions include statements to the effect that the

who handed in the envelope with the offer to the mailroom at 10:00 a.m. on the day of submission. *Id.* There was nothing on the envelope to indicate that it was submitted in connection with the solicitation and it carried only the addressee's general address. *Id.* Since the mailroom clerk distributed the mail only twice a day, at 9:30 a.m. and 1:30 p.m., the envelope was delivered to the CO only at 1:30 p.m. and was rejected as late. *Id.* Here, too, the comptroller general upheld the decision to disqualify the offer, even though there was no doubt that the envelope was delivered to the agency before the deadline for submitting the offers. *Id.* Explaining its decision, the comptroller general reasoned as follows: "While the government's application of the late proposal rules sometimes may seem harsh, and the government may lose the benefit of proposals that offer terms more advantageous than those that were timely received, protecting the integrity of the procurement process by ensuring that fair and impartial treatment is guaranteed and maintaining confidence in the competitive system are of greater importance than the possible advantage to be gained by considering a late proposal in a single procurement." *Id.* Yet another example of this rigid policy may be found in the case of Phoenix Research Group, Inc., Comp. Gen. B-240840, 90-2 CPD ¶ 514, at 1–4 (Dec. 21, 1990). The Phoenix offer included 38 pages that were faxed to the CO's office. *Id.* The deadline for submitting the offers was 3:00 p.m. *Id.* Phoenix began transmitting its offer at 2:47 p.m. *Id.* By 3:00 p.m., 30 of the 38 pages had been transmitted and transmission of the offer in its entirety was completed at 3:09 p.m. *Id.* The part of the offer that was transmitted after 3:00 p.m. included a model contract for hiring a subcontractor, which was not needed for grading the offer. *Id.* In other words, it was indisputable that Phoenix did not and could not have acquired any advantage by having the CO consider the eight (nonrequired) pages of the offer that had been received late by the agency. *Id.* Still, the CO rejected the proposal and the comptroller general upheld the rejection. *Id.* In response to Phoenix's claim that the CO's decision ran counter to the public interest, the comptroller general stated that "the purpose of the late proposal rules is to insure that the government conducts its procurements so that fair and impartial treatment is guaranteed and 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." *Id.* Another example of this policy may be found in the case of Morrison Constr. Servs., Comp. Gen. B-266233, B-266234, 1996 U.S. Comp. Gen. LEXIS 39, at *1–3 (C.G. 1996), in which the CO refused to legitimize an offer to which a photocopy of the bid bond was attached, although there was no disputing that the original bid bond had been posted prior to the deadline for submitting the offers, but it had reached its destination only eight days thereafter.

58. *See supra* note 57; *see*, *also*, *Argencord Mach. & Equip*, 68 Fed. Cl. at 173; Zebra Techs. Int'l, LLC, Comp. Gen. B-296158, 2005 CPD ¶ 122, at 3 (June 24, 2005); Siemens Hearing Instruments, Inc., Comp. Gen. B-225548, 86-2 CPD ¶ 721, at 2 (Dec. 30, 1986).

59. *See*, *e.g.*, Johnson Machine Works, Inc., Comp. Gen. B-297115, 2005 CPD ¶ 188, at 1 (Oct. 20, 2005); R.P. Richards, Inc., Comp. Gen. B-272430, 96-2 CPD ¶ 138, at 1 (Oct. 8, 1996); Kentucky Bridge & Dam, Inc., Comp. Gen. B-240484, 90-2 CPD ¶ 405, at 1 (Nov. 19, 1990); Nova Group, Inc., Comp. Gen. B-220626, 86-1 CPD ¶ 80, at 1 (Jan. 23, 1986).

potential for savings in government expenditure is not a sufficient justification for deviating from a strict adherence to the public tender rules.[60]

This policy is surprising for two reasons. First, in view of the difficulty in justifying an automatic preference for the equality principle over efficient contracting, the courts' consistent refusal to consider both issues requires at least some explanation. Second, in view of the fact that the regulations concerning the government procurement mechanism clearly put efficiency considerations before equal opportunity,[61] one would expect the judiciary to at least occasionally prefer contracting efficiency to the preservation of (administrative) equality of opportunity. However, the federal judiciary and the comptroller general appear to have adopted the opposite policy.

An attempt to determine the reasons underlying this rigid judicial policy reveals one openly expressed explanation for the courts' approach and two undeclared reasons that would seem to justify the courts' attitudes, although they are not made explicit in court rulings. These reasons are discussed below.

C. *What Are the Declared and the Undeclared Reasons for the Courts' Rigid Approach?*

There are a number of possible explanations for the rigid judicial policy characterizing court decisions dealing with public tenders. The courts express some of them openly. Others are not made explicit, for reasons that are unclear.

> The openly expressed explanation provided by the courts themselves for their rigid approach actually draws on an economic argument, to the effect that the rejection of a flawed offer, even if it is the best offer submitted, is ultimately economically efficient. Although disqualifying a good but flawed offer can entail the loss of public funds in the short run, so the argument goes, it will turn out to be efficient in the long term, because the disqualification will strengthen the public's faith in the public tender system and will teach offerors to take solicitation requirements seriously; it will prevent a "slippery slope" leading to the evasion of all inconvenient public tender rules; and it can prevent possible corruption. In other words, considerable long-term economic gain ought to be preferred, even at the cost of some economic loss in the short term.[62]

This explanation is a problematic one and it is doubtful that it reflects the "real" reasons behind the rigid judicial approach. The explanation is questionable for four reasons. First, while strengthening public faith in the public

60. *See*, *e.g.*, *A & A Roofing Co.*, 85-2 CPD ¶ 463, at 3 ("Concerning the protester's contention that it is in the best interest of the government to award the contract to A&A because it is the low bidder, the submission of a bid bond may not be waived where it is called for by the solicitation because it is a material requirement.... [T]he 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."); *see also* Armstrong Elevator Co., Comp Gen. B-292864.2, 2004 CPD ¶ 90, at 3 (Apr. 13, 2004); Cherokee Enters., Inc., Comp. Gen. B-252948, B-252950, 93-1 CPD ¶ 429, at 4 (June 3, 1993).

61. *See supra* text accompanying notes 28–31.

62. *See supra* notes 57–60.

tender system does have some economic value, it is doubtful that an absurd public tender outcome (and absurd outcomes have a natural tendency to make headlines) will have the effect of building trust in the public tender mechanism, especially when such outcomes frequently signify glaringly inefficient contracting or the placing of considerable and seemingly undue burdens on the public purse. Second, a policy that favors rejecting offers that are indeed meritorious (by economic standards) on the ground that they contain minute flaws is intuitively disturbing, and it therefore creates a strong incentive for offerors who have submitted such flawed but economically efficient offers to institute litigation. Such litigation is in itself a time-consuming and costly matter that constitutes a patently inefficient outcome. Third, a process that favors inefficient outcomes undermines the administration's own faith in the public tender system, enticing even honest officials to attempt to avoid a public tender process even when one is obviously required. Fourth, the theory that a rigid uncompromising attitude will "educate" the public to carefully observe the terms stipulated in solicitations is a questionable one. Judicial decisions dealing with public tender processes reveal typical flaws that have been recurring for years,[63] indicating that the "educational" policy adopted by the courts is not particularly effective (although, of course, it is difficult to draw a definitive conclusion regarding this matter). Furthermore, it is unrealistic to expect that a rigid judicial policy will educate future offerors since the identities of the offerors change from one solicitation to another and bids are often submitted without legal advice having been obtained beforehand by those submitting them. Thus, the offerors in one solicitation will not usually be aware of a judicial decision regarding a different, earlier solicitation. It is therefore doubtful that judicial policy can be justified by the above-mentioned economic or educational arguments.

This being said, it still does not follow that this strict adherence approach is without merit since there are other, at least equally valid arguments that can be made to support it. The first argument is derived from the evidentiary problems of proving corruption or partiality. Assuming that there is no dispute that the chief objective of the public tender mechanism is to prevent corruption and that the courts are deeply concerned with ensuring integrity in the public tender process, it could be argued that a rigid policy promotes this interest (i.e., the preservation of integrity) even when no evidence for corruption exists. Corrupt acts are rarely committed out in the open, and only seldom do corrupted motives manifest themselves externally. They are thus extremely hard to prove. Proving corruption is harder still whenever the party seeking to do so (i.e., an unsuccessful offeror challenging the public tender outcome) is not a prosecuting or law-enforcement authority, with all

63. For example, there are numerous decisions, handed down over a period of many years, all dealing with the issue of late submissions or offers accompanied by a faulty bid bond. *E.g.*, *supra* notes 57–60.

the means and powers available to them, but is instead a private player with no real investigative abilities in most cases. Thus, if courts were to require proof of corruption or favoritism as a condition for intervening in a CO's decisions, there would be almost no real opportunity to review such decisions. On the other hand, it is much easier to prove that a CO's decision involves a violation of the equality principle, as such violations are by nature immediately reflected in outcomes, without necessarily requiring proof of motives and intentions. Thus, a court might focus on the issue of strict adherence to technical public tender requirements even in cases when the relevant parties appear to have acted in good faith, on the assumption that no rejected offeror would have any chance of actually proving bad faith or corrupt activity. In other words, the courts choose to implement a rigid approach regarding compliance with public tender rules not because they prefer equality of opportunity to economic efficiency as an objective of the public tender mechanism, but because such an approach is the only way to fight corruption, by widening the net in which corrupt offerors or COs may be caught.

The second argument that might justify a policy of strict adherence to rules, as well as a restriction of the discretion that a CO may exercise, is derived from the structural conflict of interests facing the CO when called upon to weigh the concern for efficiency against the need to maintain equal opportunity.[64] Government agencies with limited budgets have an obvious incentive to prefer immediate economic utility (which means budget savings) over compliance with the equality principle or the preservation of the public's faith in governmental authorities, even when such a preference is not justified from the broader perspective of the overall public interest. In other words, the courts rule the way they do because they do not trust COs to exercise well-balanced discretion. Judges focus on compliance with technical public tender requirements, this argument suggests, in order to counteract what they believe to be the CO's natural tendency to favor the Government's narrow and immediate interests in economically efficient contracting and in budget savings, and therefore to ignore the overall public interest, which incorporates broader considerations (such as the equality principle) and more long-term considerations (such as the preservation of the public's faith in the executive). In practical terms, this means that granting broad discretion to the CO might lead to a sweeping sacrifice of the equality principle and of other general values in order to achieve some minor, but immediate, economic gain. Considering the conflicts of interest built into the CO's role in the procurement system, the courts believe that they cannot rely on the CO to use proper discretion and weigh the immediate public interest inherent in an economically efficient

64. For an argument regarding the existence of another type of institutional conflict of interest in which government representatives may find themselves in the context of government acquisition, *see* Daniel I. Gordon, Organizational Conflicts of Interest: A Growing Integrity Challenge (GWU Law Sch. Public Law and Legal Theory Working Paper No. 127, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=665274#PaperDownload.

transaction against the broad public interest inherent in maintaining equality of opportunity and the public's faith in the government acquisition system

In summary, the judicial policy regarding dilemmas arising in the government procurement system reflects a tendency to prefer the principles of fairness and equality to the need to achieve economically efficient contracting. The openly stated argument made in support of this policy is that long-term efficiency (with regard to maintaining the public's faith in the public tender system) outweighs any short-term inefficiency (created by the rejection of utility-maximizing offers that are technically flawed). To this one may add two undeclared motives: the first is derived from the evidentiary difficulty in proving corruption and partiality, as opposed to the relative ease with which a violation of the equality principle can be proven. The second is the courts' perceived need to fight the built-in bias of government agencies in favor of immediate economic advantage as opposed to broader considerations such as equality of opportunity, the prevention of corruption, and the strengthening of the public's faith in the government acquisition system.

IV. SUGGESTED MODEL—"DISQUALIFICATION PRESUMPTION"

The policy expressed in the court rulings and the comptroller general's decisions dealing with this issue has advantages and disadvantages. The advantages include the fact that the ease with which the policy can be implemented leaves less room for error; its low cost saves public funds and time; the fact that it makes for a clear and unambiguous rule provides effective and efficient guidance for potential offerors; it prevents the erosion of procurement law and thus helps maintain the public's faith in the Government; and by reducing the discretion granted to the CO, it reduces the principal-agent problem and the fear of corruption. The disadvantages of this approach are that it can frequently lead to the endorsement of distorted outcomes that run counter to basic intuitions of justice and common sense[65] and to the endorsement of outcomes that will inevitably detract from the trust placed in the public tender system by both the Government and the public at large. This "strict adherence" approach also might clash with the principle of proportionality, which requires the Government to make decisions that reflect a proper consideration and balancing of cost and efficiency.[66]

The alternative proposed here to the above-mentioned judicial policy would ensure a balance between the considerations supporting a flexible approach and those supporting a rigid approach. On the one hand, in order to ensure efficient contracting, the CO should be granted broad discretion

65. See the examples cited *supra* note 57.

66. For example, the Government could reject an offer because of a bid bond that has been made out in a slightly lower amount than required. Under such circumstances, while the defect may mean a few dollars in savings for the offeror, disqualification of the entire offer might cost the public millions of dollars.

whenever a decision is to be made between competing public tender values. On the other hand, granting broad discretion to the CO is problematic. This is so because of the inherent conflict of interests in which the CO finds him- or herself when deciding between economic efficiency and maintaining equal opportunity and integrity because of the evidentiary difficulty in actually proving corruption and because of the need to maintain the public's faith in the public tender system. A possible solution for such cases is a decision-making model based on the use of a type of presumption, whereby a flawed offer must be disqualified unless the CO can demonstrate that the damage to be caused by the offer's rejection exceeds the utility to be achieved by legitimizing it.

Thus, the alternative proposed here is the use of a "disqualification presumption," whereby the starting presumption is that an offer that is found to be flawed should be disqualified if rectifying or overlooking the flaw violates, in any way, the equality principle or any other public tender values. However, the CO may depart from this presumption if he or she is able to invoke weighty considerations to justify such a departure. Thus, the "disqualification presumption" essentially favors the equality principle and the outcomes resulting from strict adherence to public tender rules and places a heavy burden on the CO to justify a preference for a short-term economic benefit over other considerations (i.e., those related to upholding the equality principle). The presumption approach thus allows for a considered balancing of the interest in granting broad discretion to the CO in selecting the appropriate course of action when public tender objectives clash, against the public's interest in guarding against a CO's natural tendency to favor efficient contracting in the short term over long-term achievement of the public tender mechanism's other values.

As mentioned above, the disqualification presumption would most frequently be applied to a situation where the CO is required to determine how to handle a best offer that is unintentionally flawed. Applying the disqualification presumption in such circumstances will mean that the CO will, in such a situation, reject the flawed offer if he or she concludes that rectifying or overlooking the flaw would violate the equality principle or any other values that the public tender is meant to implement. However, the CO can act otherwise, i.e., accept the flawed offer or allow the offeror to correct it, if there are convincing arguments to justify such action. A convincing argument might be that the legitimization of the flawed offer would violate the principle of equal opportunities for all offerors only slightly, whereas the offer's disqualification would seriously strain a limited government budget. Under these circumstances, the overall public interest would justify a departure from the disqualification presumption and the legitimization of the flawed offer.

To conclude, if a flaw is discovered in any of the offers submitted in response to a public tender, or if any other difficulty arises in a public tender procedure, the CO will generally have two courses of action available: the first

is to annul the procedure or reject a flawed offer and the second is to overlook the flaw[67] or allow it to be rectified.[68] The disqualification presumption model requires that the flawed offer be disqualified and rejected if correcting or overlooking the flaw would, under the circumstances, entail a violation of the equality principle, other key public policy values, or both. However, a CO may abandon this presumption if he or she is convinced that the legitimization of the flawed procedure or offer is more beneficial, from an overall public interest perspective, than its disqualification would be.

V. CONCLUSION

The public tender mechanism is meant to achieve three objectives: the first is to preserve integrity, prevent corruption, and deal effectively with the principal-agent problem; the second is to achieve economic efficiency in the Government's contracting; and the third is to provide equal opportunities to all those contending for government contracts. To this another objective needs to be added, a "subobjective" of the integrity issue, which is the prevention of the appearance of partiality. As far as the third objective goes—maintaining equality of opportunity—the public tender mechanism should be designed to ensure substantive rather than formal equality and a violation of the equality principle arising in connection with a public tender is usually administrative rather than constitutional (i.e., a violation of substantive equality rather than of formal equality).

Of the three objectives of the public tender, the most critical is that of ensuring integrity and preventing corruption. The two other objectives—achieving economic efficiency and maintaining (administrative) equality—are equally important, but far less important than the integrity objective, which is the public tender mechanism's primary goal. Ranked fourth is the objective of preventing the appearance of partiality or corruption, a goal that will usually give way when it is in conflict with the other public tender objectives.

Almost any dilemma arising in connection with a public tender reflects a conflict between at least two of the three public tender objectives. Neither federal legislation, the various legislative model codes discussed above, nor the court rulings are sufficiently clear regarding the definition of the set of objectives underlying the public tender mechanism, and, in particular, they fail to establish the appropriate hierarchy to be followed among such objectives when they are in conflict. The relevant legislation ignores the issue of a possible conflict. The courts appear to have adopted a radical position, which accords preponderant weight to the formal aspects of the public tender requirements and none to efficiency considerations that may arise in connection with

67. For example, to consider the offer even though it was submitted late.

68. For example, to allow the offeror to correct the offer or to attach a required document that was not attached to it at the time that it was submitted.

specific transactions or particular offers. This judicial policy may be based on three rationales. The first, which is openly expressed in the opinions, is that although a rigid, formalistic approach may be inefficient in the short run, it is efficient in the long run. Additional, undeclared rationales for this policy are (a) the formal public tender rules must be adhered to because of the evidentiary difficulty of proving corruption and favoritism and (b) strict adherence to formal requirements is necessary because of the inadvisability of trusting a CO to strike a proper balance between the different interests affected by public tender decisions, in view of the structural conflict of interests in which COs find themselves when making such decisions.

This article proposes an alternative to the judicial approach described above: a decision-making model that could resolve precisely those difficulties that the courts sought to avoid by adopting a very rigid attitude. Under this proposed arrangement, called the "disqualification presumption," the initial presumption is that a flawed offer should be disqualified, but the CO may depart from this presumption when it can be demonstrated that legitimizing the flawed offer better serves the public interest than a decision to disqualify it. The presumption would typically be overcome when a minor flaw is present in an offer that otherwise greatly surpasses all the other offers participating in the public tender. A decision-making model of this kind deals appropriately with the concerns involved in granting a CO broad discretion in handling all public tender issues. At the same time, the model avoids the problems presented by a policy of denying the CO any discretion at all.