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PROACTIVE PROCUREMENT: USING NEW YORK CITY'S PROCUREMENT RULES TO FOSTER POSITIVE HUMAN SERVICES POLICIES AND SERVE PUBLIC GOALS

Natalie Gomez-Velez*

When we think about providing equitable access to quality social services or improving outcomes in public services relating to public assistance,¹ employment,² homelessness prevention,³ child care, and child protective services,⁴ we generally don't think about procurement rules. When we think about improving the environment,⁵ promoting fair trade,⁶ or supporting community development,⁷ we probably don't think about procurement rules. Yet

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¹ For a discussion of the New York City Human Resources Administration's procurement initiatives, see *infra* Part III.A.2.

² See, e.g., N.Y. CITY DEP'T OF SMALL BUS. SERVS., NEW YORK CITY WORKFORCE INNOVATION FUND'S NEW YORK CITY SECTORS INITIATIVE REQUEST FOR PROPOSALS, available at http://www.ppv.org/ppv/pdf_uploads/14_publication.pdf (last visited Aug. 24, 2006).

³ See *infra* note 9.

⁴ See *id.*

⁵ See generally Peter Kunzlik, *Making the Market Work for the Environment: Acceptance of (Some) 'Green' Contract Award Criteria in Public Procurement*, 15 J. ENVTL. L. 175, 195 (2003) (analyzing a case which upholding "the City of Helsinki's system of awarding points to tenderers whose bus fleets met specified nitrous oxide emissions and noise levels" and rejecting the argument that "environmental criteria could only be adopted if they provided an economic advantage to the authority"); Patrick Flynn, *Incentive—A Better Approach to Affirmative Procurement for the Environment*, PROCUREMENT LAW., Winter 2002, at 5; N.C. Div. of Pollution Prevention & Env'tl. Assistance, Environmentally Preferable Procurement, <http://www.p2pays.org/epp/links.asp> (last visited Oct. 3, 2006).

⁶ See, e.g., Press Release, Me. Fair Trade Campaign, Maine Withdraws from Government Procurement Deals in New Trade Agreements (May 20, 2004), available at <http://www.pica.ws/mftc/procurementpressrelease.htm>.

⁷ See, e.g., Small Business Selling to Gov't in N.Y. State, http://www.nylovessmallbiz.com/growing_a_business/selling_to_government.asp (last visited Oct. 17, 2006) (describing Empire State Development's Division for Small Business' efforts to provide government contracting opportunities to small businesses).

thinking differently about procurement rules and about government's role in human services contracting and procurement may help to achieve worthwhile policy goals.

Most of the government's provision of social services occurs through procurement of services through contracts with nonprofit organizations; these contracts consume a substantial share of government social services budgets⁸ and provide a significant source of income for nonprofit providers.⁹ Public procurement involves the purchase of goods or services by the government through contracts with private entities.¹⁰ Many people think of public procurement primarily in terms of the purchase of goods, like asphalt for roadways or paper for offices, but public procurement also involves the purchase of a wide range of services including consultant contracts for architectural, technological, or even military projects; and social services like homeless assistance, job placement, and day and after-school care.¹¹

Government decisions about the procurement of social services say a lot about its priorities and can have a significant impact on service delivery and civic and community health in both the short- and the long-term. Too often, however, government contracting agencies get caught up in procurement rules that center primarily on ensuring low price, fairness to vendors, and the avoid-

⁸ See, e.g., CITY OF N.Y., MAYOR'S OFFICE OF CONTRACT SERVS., AGENCY PROCUREMENT INDICATORS 5 (2005), available at http://nyc.gov/html/selltonyc/pdf/procurement_indicators_2005.pdf [hereinafter PROCUREMENT INDICATORS] (noting that in fiscal year 2005, human services procurement constituted 23% of New York City's overall \$11.4 billion procurement budget).

⁹ For many of the agencies listed as holding contracts with the City of New York, the revenue from government contributions (including contracts and grants) constitutes a significant portion of the nonprofit agency's budget. For example, Women In Need, Inc., a nonprofit provider of homeless services that contracts with the New York City Department of Homeless Services, reported on its 2004 IRS Form 990 that of its total revenue of \$29,490,088 for that year, \$20,316,288 came from government contributions. Women In Need, Inc., IRS Form 990 (2004), available at <http://www.guidestar.org>; see also N.Y. City Dep't of Homeless Servs., Meet Our Family Providers, <http://www.nyc.gov/html/dhs/html/providers/meetfamily.shtml> (last visited Oct. 24, 2006). Similarly, Neighborhood Youth and Family Services, which contracts with the New York City Administration for Children's Services (ACS), received \$7,299,218 in government funds out of \$8,339,440 in total revenue. Neighborhood Youth & Family Services, IRS Form 990 (2004), available at <http://www.guidestar.org>. The Chinese American Planning Council, which also contracts with ACS, received \$19,856,025 in government money out of \$21,859,611 in total revenue. The Chinese American Planning Council, Inc., IRS Form 990 (2004), available at <http://www.guidestar.org>.

¹⁰ See, e.g., PROCUREMENT INDICATORS, *supra* note 8, at 1.

¹¹ See, e.g., PROCUREMENT INDICATORS, *supra* note 8, at 6-8 (describing the range of goods and services purchased by the City of New York).

ance of corruption. Less attention is paid to the substantive quality of programs, procedural protections for third-party clients, and the outcomes associated with various kinds of programs.¹² As the proportion of government services contracted out has increased, concerns have been raised about the dilution or elimination of regulatory oversight and its effect on both the substantive and procedural interests of third-party recipients and the programs' public goals. One way to begin to address those concerns is to ensure that those responsible for procurement remain engaged in and accountable for the services provided, as well as for the overarching public goals associated with the provision of those services.

An engaged and proactive approach to human services procurement that may provide broader lessons for government procurement is beginning to take place in New York City. Small but significant steps are being taken to improve the quality of human services provided through city contracts with private nonprofit organizations in a manner that better serves overarching public policy objectives.

This Article examines recent developments in human services contracting in New York City which, while using elements of the marketplace model, place greater focus on the core public service goals of serving communities most in need with quality and cost-effective programs. It focuses on the goals of improving substantive quality and equity in the distribution of such programs and examines the degree to which changes in the human services procurement process to address these goals might also address broader structural and procedural issues involving the privatization of government services.

This Article begins with a brief overview of current legal discourse about public procurement in the context of what is com-

¹² For example, the New York City Mayor's Office of Contract Services places great emphasis on the time it takes to complete the contracting process, vendor responsibility, and the fiscal implications of contracts with less attention paid to the specifics of programmatic quality or outcomes. See *PROCUREMENT INDICATORS*, *supra* note 8, at 4-5. Similarly, procurement oversight reports by the New York State Comptroller focus primarily on anti-corruption or fiscal accountability goals. See, e.g., OFFICE OF THE N.Y. STATE COMPTROLLER, *VENDOR RESPONSIBILITY* 7-11 (Mar. 2006), available at <http://www.osc.state.ny.us/reports/other/vendorresponsibility306.pdf>. Of course, ensuring procedural and fiscal accountability is important and not wholly unrelated to program quality. See, e.g., William C. Thompson, New York City Comptroller, Testimony Before the General Welfare Comm., N.Y. City Council (Oct. 6, 2005), available at http://www.comptroller.nyc.gov/press/testimonies/10-06-05_AIDS_Housing_testimony%20.pdf (describing audit that revealed the Human Resources Administration's failure to comply with procurement procedures resulted in questionable payments to vendors who failed to provide adequate services).

monly called “privatization,” noting different theoretical constructs used to help determine the appropriate roles and responsibilities of public and private actors with a particular focus on the provision of human services. Part II provides a summary of the recent history of public procurement in New York City, focusing on changes made with the 1989 Charter Revision and the establishment of the Procurement Policy Board (PPB). This Section also examines the development of New York City’s procurement rules, which were initially modeled on private-sector procurement of goods. This Article then discusses the initial awkward application of those same rules to the procurement of human services, which causes many problems, including how to effectively address: (1) the evaluation of cost, quality, and price given variations in the capabilities, strengths, and weaknesses of nonprofit service providers; (2) the need to tailor programs to meet particular needs while ensuring competition and accountability and avoiding favoritism and corruption; (3) monitoring and evaluation to ensure quality service delivery and fiscal accountability; and (4) issues of governance and control.

Part III describes recent New York City procurement initiatives designed to improve the quality and distribution of social services rather than simply contracting out to serve the greatest number of participants at the lowest cost. By utilizing demographic data, information, and input from local communities, government agencies, and nonprofit organizations, several New York City agencies have implemented strategies to ensure that needs-based analysis, outcome measures, cost, and efficiency are all factored into awarding contracts to nonprofits providing human services programs in New York City.

The Article concludes with an examination of the pros and cons of this more engaged and proactive approach, given the various goals of human services procurement from nonprofit entities. It considers whether the treatment of procurement through nonprofit organizations should differ from contracting with for-profit entities. It also explores the degree to which this approach is responsive to broader concerns about excessive “corporatization” of public services to the detriment of civic involvement and democratic governance and the degree to which the approach contrasts with—or reinforces—existing theories of “privatization” (or “publicization”) in the context of government contracting.

I. THEORIES OF PUBLIC PROCUREMENT: “PRIVATIZATION,”
“PUBLICIZATION,” GOVERNANCE, AND GOVERNMENT ACCOUNTABILITY

The discourse on privatization and the appropriate relationships between public and private (including nonprofit) entities reflects a wide variety of perspectives and frameworks.¹³ Some view privatization from the perspective of government regulation and responsibility. Others consider privatization from the viewpoint of preserving safeguards for individual recipients of government benefits and maintaining broader democratic norms and values. From any of these perspectives, the privatization debate raises fundamental questions about the role of government versus that of private interests and the relationship between the two.

A. *Privatization, the Transition from Regulation to Governance, and the Need for New Accountability Mechanisms*

According to Dan Guttman, privatization represents a change in government’s oversight role from one of regulation to one of “governance.”¹⁴ Guttman discusses different frameworks within which to view the government’s role in ensuring accountability in public procurement.¹⁵ He refers to “governance” as “the operative bipartisan political consensus that public purposes are best performed by a mixture of state, market, and civil society actors.”¹⁶

¹³ See generally Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397 (2006); Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573 (2005); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003); Lewis D. Solomon, *Edison Schools and the Privatization of K–12 Public Education: A Legal and Policy Analysis*, 30 FORDHAM URB. L.J. 1281 (2003); Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739 (2002); Michele Estrin Gilman, “Charitable Choice” and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses, 55 VAND. L. REV. 799 (2002); Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859 (2000); Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign’s Immunities from Exemplary Damages?*, 58 OHIO ST. L.J. 175 (1997).

¹⁴ In defining “governance” Guttman refers to “the network of public institutions, nonprofit organizations, and private companies that share in the implementation of public policy.” Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 323 n.2 (2004). Guttman views privatization as part of a trend away from government-driven control of public functions and toward a model of public policy and government work driven by government, nonprofit organizations, and private companies working together. *Id.* at 322–23. Given this trend, the question is how should public law operate in a system of “governance” to ensure public accountability in the performance of public functions.

¹⁵ *Id.* at 324.

¹⁶ *Id.*

Guttman also observes that existing regulation operates to varying degrees based on the vision of the government's role in an increasingly privatized world.¹⁷

Guttman notes that "governance calls into question the future of the rule of law in the sense of a body of public law that limits those entrusted with public purpose."¹⁸ He goes on to say, however, that the state action doctrine and public procurement law provide the "tools to craft a public law to govern contractors who perform the basic work of government."¹⁹ Governance "does not render public law irrelevant, but provides that it should evolve in keeping with the modern jurisprudential view that social and management science will replace tradition, legal precedent, and natural law as the basis for laws and rules."²⁰ Thus, although Guttman recognizes the need to view the role of public law differently given the changing roles of public and private entities and the inclusion of both public and private actors in making and carrying out public policy, he seems to believe that existing public law doctrine can adapt to supply sufficient accountability in the face of these changes.

B. Privatization Transforming the Public/Private Distinction

Several administrative law scholars characterize the increased use of contracts with private entities to provide public services as changing the roles and relationships between agencies, the public, and among the various branches of government.²¹ These changes,

¹⁷ Guttman observes three visions of the government's role. First, the "presumption of regularity/rule of law/public law" vision "presumes that [government] officials have the experience and expertise to oversee and control Government" and thus the capacity to control the procurement process much in the same way that government controls its internal functions. *Id.* at 324. Second, the "governance/accountability" vision, "[w]hile not forsaking the premise that officials must account for all government work, . . . suggest[s] that the civil service workforce must transform itself into a workforce that functions substantially, or even primarily, to effectively manage third parties." *Id.* at 324–25. This vision cedes more to the private sector while affirmatively recognizing a need to re-train government actors to ensure their capacity to evaluate the work contracted out. Third, the "muddling through/common law" vision "accepts that rules of public law should apply to those who perform public tasks; the model then applies those rules—on an ad hoc basis—to nongovernmental actors who perform the public's work." *Id.* at 325.

¹⁸ *Id.* at 357.

¹⁹ *Id.*

²⁰ *Id.*

²¹ As Michele Estrin Gilman puts it:

As a matter of law, the legal tools that can be used to improve service quality differ radically based on whether the provider is a government agency, for-profit corporation, nonprofit entity, or religious organiza-

they say, highlight the need for existing administrative law doctrines and theoretical frameworks to adapt in fundamental yet manageable ways consistent with constitutional requirements and regulatory accountability.²²

Some administrative law scholars seek to identify ways to structure the public/private relationships that result from government outsourcing to address constitutional, separation-of-powers, and regulatory-accountability concerns while still retaining efficiency and flexibility in government contracting.²³ Certainly, there is a need to determine whether and how a middle ground might be found between a notion of privatization as extreme deregulation (and abdication of government responsibility) and concerns about the costs and burdens of over-regulation. At the same time, it is important to articulate in that middle ground a coherent distinction between public and private, recognizing the legal responsibili-

tion. The mission of administrative law is to hold government agencies accountable to the public, given that agencies are not democratically elected bodies. Thus, administrative law centers on limiting agency discretion by enforcing norms of fairness, openness, and judicial review. By contrast, corporate law has never embodied these norms because corporations have never been deemed accountable to the public at large, but rather, only to their own shareholders. In corporate law, accountability comes largely through a fiduciary model. The law governing nonprofits is based on the corporate law model, even though nonprofits do not share the hallmark of ownership interests. This inexact fit is one reason why nonprofits have long faced an accountability challenge.

Gilman, *supra* note 13, at 814–15.

²² Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 159–60 (2000).

Contractual instruments pose a host of doctrinal and theoretical problems for which administrative law provides no ready answers. Administrative law theory has yet to explore, let alone internalize, such a contractual model of governance. Each of the competing theories of the field—public interest, pluralist, civic republican, and public choice—consists at its core of a distinctive understanding of the agency’s function and a unique justification for judicial review, but they share a hierarchical vision of governance. A conception of the government agency as “contracting partner” fits comfortably with none of these accounts.

Id. But see Mark Seidenfeld, *An Apology for Administrative Law in The Contracting State*, 28 FLA. ST. U. L. REV. 215, 239 (2000) (arguing that administrative law doctrine “includes understandings that allow for the use of contracts as a regulatory mechanism”).

²³ See, e.g., Gilman, *supra* note 13; Gillian E. Metzger et al., *The Changing Shape of Government*, FORDHAM URB. L.J. 1319 (2001) [hereinafter Metzger, *Changing Shape*]; see generally Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) [hereinafter Metzger, *Privatization as Delegation*]; Freeman, *supra* note 22; Verkuil, *supra* note 13.

ties borne by the various actors crafting public policy and providing public benefits.

For example, Gillian Metzger notes the limits of state action doctrine in ensuring the maintenance of constitutional protections in the context of privatized government services.²⁴ This is because state action doctrine is inconsistently applied and rarely used to impose constitutional constraints on private actors,²⁵ and because, when applied, it imposes the full panoply of constitutional requirements on private entities, potentially eliminating the benefits of efficiency and flexibility sought through privatization.²⁶

Metzger also identifies the limits of regulatory oversight reforms to ensure the full range of protections afforded to private citizens. While she agrees that non-constitutional regulatory reforms are important vehicles for enhancing accountability and guarding against an abuse of power, she argues that they are not sufficient to address concerns about the loss of constitutional protection in a privatized world.²⁷ Metzger proposes a new private delegation analysis as a way of avoiding the limited availability and “all or nothing” character of state action doctrine as a means of imposing constitutional constraints on privatized government action.

Under a private delegation approach, the key issue becomes not whether private entities wield government power, but rather whether grants of government power to private entities are adequately structured to preserve constitutional accountability. Provided that alternative mechanisms exist to ensure that government power ultimately stays within constitutional limits, exercises of government power by constitutionally immune private actors do not present constitutional concerns. This approach secures constitutional accountability by ensuring that individuals are able to enforce constitutional limits on government power; but it also grants government more flexibility by allowing

²⁴ Metzger, *Privatization as Delegation*, *supra* note 23.

²⁵ A notable example of the failure of state action doctrine—or any doctrine for that matter—to impose constitutional constraints in the context of public procurement of social services is evident in *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223 (S.D.N.Y. 2005). There, the plaintiff claimed that the Salvation Army, a nonprofit religious organization under contract with various New York City agencies to provide foster care and other social services, diverted public dollars to support the Salvation Army Church and required its employees to “promote the unique spirit of Salvationism in social services.” *Id.* at 230. The district court dismissed the complaint alleging Establishment Clause, Equal Protection, and civil rights violations under the New York Constitution, finding that the Salvation Army did not engage in state action. *Id.* at 255.

²⁶ See Metzger, *Privatization as Delegation*, *supra* note 23, at 1421–27.

²⁷ *Id.* at 1452.

choices of how best to preserve constitutional limits to be made by the political branches in the first instance.²⁸

Metzger notes “that nonconstitutional accountability mechanisms can adequately address the constitutional concerns that private delegations might otherwise create.”²⁹ Thus, under a private delegation approach, the existence of oversight and accountability measures in private contracting may approximate constitutional requirements, such as due process and fairness in the allocation of government benefits or services. To achieve a private delegation structure that targets the kinds of delegations specific to privatization (without sweeping in every form of government interaction with private parties),³⁰ Metzger invokes principles of “agency.”³¹ Her proposed private delegation structure asks whether grants of government power to private entities as “agents” of government are structured to preserve constitutional as well as regulatory accountability.³²

Paul Verkuil asserts the need to structure privatized government to preserve government control over core government functions, including policymaking and other “inherent functions.”³³ Verkuil examines the public-private distinction with respect to the Fifth Amendment’s “public use” requirement, which limits government “takings” of private property; tests, including “public function,” to determine when private parties may be treated as state actors; and the use of the “public interest” test as a limit on regulation.³⁴ While noting the limitations of the various tests used to draw the public-private distinction, Verkuil argues that the recognition of public (versus private) authority is essential, specifically in the context of outsourcing government services and responsibili-

²⁸ *Id.* at 1456.

²⁹ *Id.* at 1457.

³⁰ *Id.* at 1462.

³¹ *Id.* at 1463–64.

³² *Id.* at 1464.

³³ Verkuil explains:

To decide if privatization has reached its limits, we must know whether “inherent functions” of government are being delegated. It may be no easier to locate these functions than it was to determine what businesses are affected with a public interest, what private actions are public functions, or what property transfers amount to public use. But the inquiry cannot be avoided. Certain exercises of public authority in the liberal state must be performed by government. These duties are nondelegable, or at least not delegable without continuing governmental oversight. The public-private distinction still has a role to play in locating limits on the transfer of political power to private hands.

Verkuil, *supra* note 13, at 420–21.

³⁴ *Id.* at 407–15.

ties.³⁵ With respect to public contracting on the federal level, Verkuil refers to the federal Office of Management and Budget's (OMB) Circular A-76 process. This process requires that competitive outsourcing involve private vendors, but it "permits government services to be outsourced only after a review process and makes 'inherent' government functions ineligible to be outsourced at all."³⁶ Notwithstanding this and other limitations, Verkuil notes that much government contracting is not subject to the limitations of Circular A-76.³⁷ Specifically, he observes the lack of reflection or concern about the degree to which such outsourcing involves "inherent" government functions and the fundamental problems this creates.³⁸ Verkuil cites single-source military contracting with private vendors in the Iraq war as a particularly egregious example of government going too far in the direction of privatizing government services, including "inherent government functions," with vir-

³⁵ *Id.* at 420–21.

³⁶ *Id.* at 437. Among the non-delegable functions outlined in Circular A-76 are the following "inherently governmental" activities:

- (1) Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (2) Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (3) Significantly affecting the life, liberty, or property of private persons; or
- (4) Exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control or disbursement of appropriated and other federal funds.

Id. at 438 (citing OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR A-76, at A-2, available at http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf).

³⁷ *Id.* at 441. Verkuil specifically cites procurement in the Department of Defense (DOD), which, he says is "by far the largest government contracting agency." *Id.* Noting that a large percentage of DOD contracts are for services, some of which "potentially involve significant or inherent functions of government," and that many of these services are not subject to competitive bidding and thus not within the constraints of Circular A-76, Verkuil characterizes private contracting in connection with the war in Iraq as "either an outsourcing nightmare or a bonanza depending on whether you are the government or the private contractor." *Id.*

³⁸ *Id.* at 441-42. Verkuil goes on to note the abuse of detainees at Abu Ghraib prison as an example of out-of-control outsourcing: "private contractors were employed as interrogators By any measure . . . interrogation of prisoners should qualify as an inherently governmental function. Interrogation involves 'military action and matters significantly affecting life, liberty, and property.'" *Id.* While Verkuil does not assert private contracting alone was responsible for Abu Ghraib, he presents it as a particularly compelling example of the need for both clear limitations on the kinds of public functions that may be outsourced and effective oversight of government contracts. *Id.*

tually no oversight or control.³⁹

Verkuil contrasts the Department of Defense's extreme and unchecked reliance on private contractors in the Iraq war with the Transportation Security Administration's replacement of private contractors with government employees for airport security after September 11, 2001, focusing on the question of "inherent" government authority:

The arguments in favor of federal employees turned on the issue of what functions should be inherently governmental. Proponents emphasized that since government was responsible for security functions (e.g., FBI, CIA, Border Patrol, and INS), Congress should not privatize airport security because '[l]aw enforcement is a proper function of the federal government.' While that proposition may state matters too broadly (private security guards are sometimes employed by government), it does highlight the essential role of government when it comes to the use of force. The presence of a badge, much like the requirement of an oath, is an indicator of government authority and control.⁴⁰

Verkuil uses these and other examples to emphasize the importance of "connecting the distinction between public and private to who runs the government and for what reasons" and protecting the public by placing some functions beyond the reach of privatization.⁴¹

³⁹ Jon D. Michaels argues even more strongly that privatization should not extend to military combat functions. Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001 (2004). In his view, "privatization of military functions poses a slew of problems too complicated and varied to resolve merely by enhancing accountability, strengthening contract laws, and tightening contract management." *Id.* at 1009. Beyond the extremely troublesome "allegations of 'sweetheart' deals between the federal government and the likes of, say, Halliburton for energy services in Iraq or Boeing for Tanker aircraft[.]" Michaels argues that contracting out military combat duties is far more dangerous. *Id.* at 1007. "It has the potential to introduce a range of novel constitutional, democratic, and strategic harms that have few, if any, analogues in the context of domestic, commercial outsourcing." *Id.* at 1008. See also Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989 (2005).

⁴⁰ Verkuil, *supra* note 13, at 446–47. More recently, Homeland Security Secretary Michael Chertoff announced a further move away from using private contractors to perform airport security screenings. He intends to replace contractors who inspect passenger identification at airport checkpoints with staff of the Transportation Security Administration. See Eric Lipton & Christine Hauser, *Screeners to Be Changed at U.S. Airports*, N.Y. TIMES, Aug. 14, 2006, at A18.

⁴¹ Verkuil goes on to note that:

Giving the public sector an independent value does not undermine the private sector. This is not a zero sum game. Indeed, in terms of democratic theory this is a positive sum game where both sides can win. If the

Thus, in re-examining and re-framing the public/private distinction in the context of privatization, both Metzger and Verkuil argue for the preservation and indeed reinforcement of public law norms, values, and protections in an environment of increasing and often unchecked (or inadequately checked) privatization of government services and responsibilities. But giving the public sector independent value means more than limiting privatization's extension into "inherent" functions: It means assuring that private entities providing government services do so consistent with not only the particular job to be performed but also with public law norms.

C. Nonprofits: Public, Private, or Both?

Another question that arises is whether the public/private distinction should take on a different dimension in the context of nonprofit organizations, which ostensibly exist to perform a public function—a pre-requisite to their corporate and tax-exempt status. As Martha Minow has noted:

The case of non-profits exemplifies the critical approach to the public/private distinction, for the critic would challenge the idea that any nonprofit is "private," given its reliance on a governmentally-determined tax-exempt status and tax deductions for donations, which economists would view as a public subsidy.⁴²

From this perspective, it may be argued that privatization ought to be viewed through a different lens when the private contractor is a nonprofit rather than a for-profit entity.⁴³

For example, Miriam Galston addresses privatization involving nonprofits from the perspective of the role nonprofits play in supporting civic renewal.⁴⁴ She considers the ways in which nonprofits contribute to the "public law" goals of civic involvement and civic

public sector is given independent value, the private sector benefits from clearer rules and better oversight. Our tradition of political liberalism keeps the public sector from usurping the essential role of private enterprise. But our notions of civil society require that the public enterprise operate effectively as well.

Verkuil, *supra* note 13, at 467.

⁴² Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1080 (2000).

⁴³ Though, of course, some would argue that for-profit corporations similarly exist by virtue of government graces or that nonprofits operate in ways sometimes indistinguishable from for-profit entities. See, e.g., Metzger, *Changing Shape*, *supra* note 23.

⁴⁴ Miriam Galston, *Civic Renewal and the Regulation of Non-Profits*, 13 CORNELL J.L. & PUB. POL'Y 289 (2004).

renewal. Galston offers four perspectives on how nonprofits contribute to civic participation. The first is a cooperation perspective, in which nonprofits working in communities are viewed as enhancing relationships of trust among community members; minimizing the need for detailed rules or contracts to engage in mutually beneficial interactions; and achieving community-wide goals through cooperation.⁴⁵ Another perspective focuses on self-governance, emphasizing the role of nonprofits in enabling community members to be involved in decisions affecting how they live.⁴⁶ The third is a representative-institution perspective, which posits that nonprofits enhance civic health by mediating relationships with representative institutions and strengthening democratic practices and values.⁴⁷ Finally, the community-morality perspective views nonprofits as promoting and enhancing notions of community morality by fostering the acceptance of a core set of moral norms and a sense of obligation to the self and the community.⁴⁸

Galston articulates various ways in which nonprofits participate in fostering civic goals. She also discusses the tensions among these perspectives and how they have affected civic renewal advocates' view of the role of the public contracting process and tax policy *vis à vis* nonprofit entities. Galston notes the limited degree to which voluntary associations can fulfill the goals of civic renewal from the various perspectives discussed. Even in "those areas in which associations can make meaningful contributions to civic life, different types of organizations and organizational activities are likely to result in distinct, sometimes competing civic impacts."⁴⁹ There are limitations inherent in any legal regime's attempt to improve civil society or further social goals.⁵⁰

Each of the constructs Galston sets forth carries the expectation that nonprofit entities play an important role in supporting civic renewal by actively fostering public participation and enhancing democratic values while engaging in their primary substantive work. Galston envisions nonprofits not so much as private entities, but more like quasi-public entities that bear some responsibility for fostering civic goals.

Notwithstanding the quasi-public role attributed to nonprofits, often the same considerations come into play in the discussion of

⁴⁵ *Id.* at 295–06.

⁴⁶ *Id.* at 306–09.

⁴⁷ *Id.* at 309–14.

⁴⁸ *Id.* at 315–24.

⁴⁹ *Id.* at 404.

⁵⁰ *Id.*

privatization involving both for-profit and nonprofit entities.⁵¹ Metzger seems to view private delegation in the same terms regardless of whether the private contractor is a for- or nonprofit entity.⁵² For Metzger, the focus is on the existence of appropriate oversight mechanisms to ensure that the delegation remains within constitutional and regulatory boundaries.⁵³ In general, this is the right approach. The question is whether the nature and sufficiency of contractual oversight mechanisms might differ between nonprofits providing human services with a public service mission versus for-profits providing fungible goods and services with a profit-making goal. This question is not often explored closely, perhaps because the perceived differences between for-profit and nonprofit entities amount to less than meets the eye. It is also a question that tends to go beyond the core focus of policy discussions about the values and drawbacks of privatization.

D. *Privatization or “Publicization?”*

Generally the discourse on privatization pits the interests in more efficient, cost-effective, and responsive service provision against concerns about the loss of procedural and substantive safeguards and democratic accountability.⁵⁴ On one side, proponents of privatization view public procurement through the lens of economic efficiency⁵⁵ or, in more ideological terms, “shrinking gov-

⁵¹ As Martha Minow notes:

From the perspective of people with needs—children to educate, housing crises, joblessness, alcoholism or drug abuse—religious and secular nonprofit organizations exist alongside for-profit companies and governments as potential resources. Both kinds of entities do, or should, abide by the same basic rules and do, or should, pursue overlapping, if not identical, purposes. Yet determining and enforcing those basic rules remains centrally a public task, to be pursued according to democratic means and purposes even while seeking efficiencies.

Minow, *supra* note 13, at 1257.

⁵² *See id.* at 1091–92.

⁵³ *Id.*

⁵⁴ *See, e.g.,* Seidenfeld, *supra* note 22, at 228 (“When government decisions affect individual rights, political accountability provides additional checks on abuses of the government’s coercive powers. Because private contractors are not politically accountable, I would argue that they should be subject to greater constraints when making decisions affecting such rights.”).

⁵⁵ *See, e.g.,* Freeman, *supra* note 22, at 170 (“Because the case for privatization has sounded largely in the language of cost savings and, to some extent increased effectiveness, demonstrating whether these gains will in fact obtain has become both politically and practically important to the privatization movement. Those who support privatization on such instrumental, rather than ideological, grounds are advocates of what one scholar calls ‘pragmatic privatization.’”).

ernment.”⁵⁶ These proponents tend to pay little heed to distinctions between for-profit and nonprofit providers or concerns about governance or public law norms; indeed they often see regulatory and constitutional concerns as obstacles to efficiency.⁵⁷ On the other side are those concerned with the preservation of public law norms, such as constitutional and regulatory requirements, public accountability, and civic participation in the context of privatization.⁵⁸ Is there a way of viewing human services contracting outside of these traditional privatization camps?

In her article *Extending Public Law Norms Through Privatization*,⁵⁹ Jody Freeman takes a different view of privatization, one that is particularly apt in the context of the human services procurement with nonprofit entities: “Instead of seeing privatization as a means of shrinking government, . . . imagine it as a mechanism for expanding government’s reach into realms traditionally thought private.”⁶⁰ In other words, she says, what is called “privatization” can be seen as a means of “publicization.”⁶¹

The idea that public procurement in the human services context is more akin to “publicization” than “privatization” may resonate with the experience of nonprofit organizations and government entities engaged in providing human services through government contracts. Nonprofits, facing many layers of regulation—from charities regulation to regulation based on their service areas—may see government procurement of human services as a form of “publicization” rather than privatization.⁶² This view of

⁵⁶ See John Forrer & James Edwin Kee, *Public Servants as Contract Managers*, 33 PUB. CONT. L.J. 361, 362 (2004) (“The crusade for shrinking government employment took firm hold at the end of the last century and continues into the 21st century with no flagging in sight For decades, advocates of privatization . . . have been assailing the poor performance of government workers and extolling the virtues of private sector management. That view—some label it an ideology—has gained converts to the idea that the private sector is preferred to the public sector when it comes to the efficient provision of goods and services.”).

⁵⁷ See generally Forrer & Kee, *supra* note 56, at 363–64.

⁵⁸ See, e.g., Freeman, *supra* note 22, at 175 (“[C]ontracting out presents serious and complicated questions about the rationality, public participation, openness, and accountability of publicly funded and privately conferred services—concerns that are likely to be important to administrative law scholars and not easily assuaged.”).

⁵⁹ Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² For example, in New York, nonprofits incorporated under the state’s Not-for-Profit Corporation Law are required to produce internal reports verified by their officers, directors, or a financial professional. N.Y. NOT-FOR-PROFIT CORP. LAW § 519(a) (McKinney 2006). Nonprofits that hold charitable assets or solicit charitable contri-

public procurement can highlight both opportunities for proactive policymaking and the inclusion of democratic ideals in the public contracting process as well as the limitations on the ability to achieve broad public policy and public law goals through procurement.

The process of designing public procurement and establishing the rules for soliciting bids or proposals is structured in a way which incorporates administrative law norms of public notice, opportunity to participate, and avenues for addressing perceived procedural irregularities *vis à vis* proposed vendors and contracting agencies. This process may be viewed as “publicization” of non-profits engaged in the public procurement process. Perhaps more significantly, government agencies exercise oversight to maintain integrity in the selection process and ensure fiscal and legal accountability in public contracts. Such policing is more in accord with the fiscal accountability and corruption control goals of privatization than program quality or public law concerns.

The question is whether, in the context of human services procurement, anti-corruption and fiscal accountability goals can be met by more than just policing government agencies and nonprofit providers. Applying a substantive notion of “publicization,” to what extent can the procurement process be used to foster qualitative policy goals? More specifically, is it possible to make the process of public contracting—from contractor solicitation and selection to contract development, monitoring, and evaluation—involve more than just ensuring that the competitive, fiscal, and anti-corruption goals of privatization are being met? Given the differences between the contracting model of governance and traditional notions of agency regulation, as well as the strictures imposed on public procurement, to what extent can the procurement process be used proactively to better serve public policy goals from both substantive and governance perspectives?

II. PUBLIC PROCUREMENT AND NEW YORK CITY’S EXPERIENCE

*By dollar value, the vast scale of New York City procurement exceeds that of all but a handful of states.*⁶³

butions are required to file annual reports with the state attorney general. N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(d), (f), (r) (McKinney 2006); N.Y. EXEC. LAW § 172-b (McKinney 2006). There are some exceptions, though. *See, e.g.*, § 172-a(1), (2)(a), (2)(g) (exempting religious organizations and many educational institutions from filing requirements).

⁶³ PROCUREMENT INDICATORS, *supra* note 8, at 14.

To place the discussion of procurement in concrete terms, this Article will look specifically at the public procurement experience in New York City—a city with a huge public procurement budget which addresses procurement on a “local” level. It will consider human services procurement innovations initiated by various New York City agencies aimed at addressing issues of substantive program quality, as well as need-based, equitable service provision. This Article will also assess the degree to which such innovations might address not only particular programmatic concerns, but also some of the concerns about public accountability raised in the context of private delegation or “publicization.”

A. *Recent History of Procurement in New York City*

Public procurement is the process for the government’s purchase of goods and services from the private and not-for-profit sectors.⁶⁴ The procurement process applies not only to “hard” commodities like paper or asphalt, but also to the provision of human services provided primarily through contracts with non-profit entities.⁶⁵ Procurement is an essential component of government efforts to privatize the provision of certain goods and services, and it has been the subject of much attention and debate since the surge in interest in “reinventing government” that began in the 1980s and 1990s and continues today.⁶⁶ Procurement is a fundamental function of government and a concrete expression of governmental goals and priorities.

Day by day, year by year, the most fundamental decisions that American governments make involve which services to provide and who should bear the costs of those services. As Justice Ken-

⁶⁴ See N.Y. STATE FIN. LAW § 163(2)(c) (McKinney 2006).

⁶⁵ See PROCUREMENT INDICATORS, *supra* note 8, at 5.

⁶⁶ As Guttman observes:

In the 1980s and 1990s, the notion of shrinking Government gained popular support around the globe. Citizens, however, generally wanted small Government without diminution in governmental functions. To address this inconsistency, new strategies for reform took hold at home and abroad under banners touting “reinventing government,” “public-private partnerships,” “devolution,” “privatization,” and “deregulation.” These strategies sought to make Government more responsive and efficient by engaging non-government actors in its functions.

The Federal Government embraced the new strategies with little regard for the fact that they had long been adopted.

Guttman, *supra* note 14, at 329. See also Forrer & Kee, *supra* note 56, at 363 (“In the United States, ‘reinventing Government’ became the buzzword for reforming and improving the efficiency of government programs. In many cases, however, the bottom-line translation meant replacing government workers with attractive retirement and health benefits with less-expensive private sector workers with less worker benefits.”).

nedly recently wrote: “Money is the instrument of policy and policy affects the lives of citizens.” This is particularly true at the local levels of government because, despite the primary regulatory powers of the federal and state government, it is at the local level where most services are actually delivered.⁶⁷

New York City provides a particularly interesting local example because of relatively recent revisions to the City Charter that changed the city government structure and resulted in significant changes to the procurement process. It also provides an interesting case study because it provides an example of high volume procurement within a local context.⁶⁸

The process of public procurement in New York City has undergone several transformations and continues to be a subject of evolution and reform. New York City’s current procurement rules exist pursuant to the New York City Charter⁶⁹ and Procurement Policy Board Rules.⁷⁰ The Procurement Policy Board (PPB) was established as part of a series of significant Charter Revision reforms in 1989,⁷¹ which were prompted by contracting scandals—most notably the Parking Violations Bureau (PVB) scandal⁷²—as

⁶⁷ Frederick A. O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City’s 1989 Charter* (pt. 2), 42 N.Y.L. SCH. L. REV. 775, 825 (1998) (quoting *Clinton v. New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring)) [hereinafter Schwarz & Lane, *Charter Making* (pt. 2)].

⁶⁸ For example, in fiscal year 2005, New York City spent \$11.4 billion on procurement contracts. PROCUREMENT INDICATORS, *supra* note 8, at 3.

⁶⁹ N.Y. CITY, N.Y., CHARTER ch. 13, §§ 310–11 (N.Y. Legal Publishing Co. 2001).

⁷⁰ N.Y. CITY, N.Y., PROCUREMENT POL’Y Bd. RULES, tit. 9, §§ 1–4 (2003).

⁷¹ “The City’s procurement process reflects reactions to the 1986 PVB scandal, the need to devolve the Board of Estimate’s contracting powers after it was held unconstitutional, and efforts to effect social policy through the procurement process.” STAFF OF N.Y. CITY CHARTER REVISION COMM., PRELIMINARY RECOMMENDATIONS, THE RFP: REFORM FOR PROCUREMENT 17 (2003), http://www.nyc.gov/html/charter/downloads/pdf/reform_for_procurement.pdf.

⁷² Frank Aneciarico and James B. Jacobs discuss the impact of the Parking Violations Bureau scandal on the reformation of the New York City Charter:

The 1986 New York City Parking Violations Bureau (PVB) scandals reinforced distrust of and opposition to non-competitively bid contracts. The PVB used the sole-source exception to competitive bidding to award sweetheart contracts for collecting parking fines to companies with connections to top PVB officials and Democratic Party bosses, Donald Manes and Stanley Friedman. Even when competitive bids were sought by the PVB, the process was corruptly manipulated. The City’s contract for hand-held computers was “fixed” for Citisource, the firm in which Stanley Friedman was the controlling shareholder The media and reformers blasted the contracting process that permitted officials to bypass or manipulate the competitive bidding system

When the corruption scandals erupted in 1986, the Charter Revision Commission, appointed several years earlier to redesign City gov-

well as a successful legal challenge to the structure of the City's Board of Estimate, which was held to violate the "one-person, one-vote" requirement.⁷³

Thus, the new procurement rules were developed with an eye toward corruption control⁷⁴ and accountability in the context of broader governance changes. These changes raised questions of representation, including adequate minority representation;⁷⁵ the

ernment, was already well into its deliberations about the future structure of City government. According to one of the principle drafters, the charter's new procurement systems were shaped primarily in reaction to the corruption scandals. The 1989 charter restricts the types of contracts (principally emergency) that can be awarded without competitive bids The charter also excuses an agency from competitive bidding where it is "not practicable or not advantageous." The agency head must submit a written explanation to the Procurement Policy Board for approval. Competitive bidding may also be avoided where there is only one source for goods or services (a sole source contract) or where the contract is for \$500 or less. In all other cases, competitive bidding must be used and the contract let to the lowest responsible bidder.

Frank Anechiarico & James B. Jacobs, *Purging Corruption from Public Contracting: The "Solutions" Are Now Part of the Problem*, 40 N.Y.L. SCH. L. REV. 143, 147-49 (1995).

⁷³ See *Bd. of Estimate v. Morris*, 489 U.S. 688, 690 (1989) (holding that the Board of Estimate's structure violated the "one-person, one-vote" requirement implicit in the Fourteenth Amendment's Equal Protection Clause "[b]ecause the boroughs have widely disparate populations—yet each has equal representation on the board . . .").

⁷⁴ See Anechiarico & Jacobs, *supra* note 72, at 143-44 ("The whole public contracting process, its law and administration, is significantly affected by the goals of preventing corruption and, more recently, even the appearance of corruption The dilemma is that in trying to corruption-proof public contracting, corruption controllers mire the process in red tape, undermining the government's capacity to carry out essential goals and, ironically, creating new opportunities for corruption and fraud.").

⁷⁵ Indeed, the issue of minority representation figured rather prominently in the deliberations regarding the re-structuring of New York City government in the wake of the Board of Estimate's demise. See Frederick A. O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter* (pt. 1), 42 N.Y.L. SCH. L. REV. 723, 744 (1998) [hereinafter Schwarz & Lane, *Charter Making* (pt. 1)] ("A dominant theme in the Commission's work was enhancing minority political opportunities and increasing the likelihood of minority political participation. Something was seriously wrong with race relations in the City. A Charter that failed to address race relations—but only to the extent charters can—would leave behind a ticking time bomb for the City."). See also Schwarz & Lane, *Charter Making* (pt. 2), *supra* note 67, at 778 (noting concerns about minority representation during the 1989 Charter Revision). For example, the structure of the City Council as a unicameral fifty-one member body was said to be based largely on concerns about minority representation: "Our own choice of a unicameral body consisting of fifty-one single member districts reflected several goals: (1) to enhance minority opportunities to elect candidates of their own choice; (2) to increase minority membership (and minority-party membership); . . . and (4) to increase constituent responsiveness by decreasing the size of each district." *Id.* at 786.

In the increasingly "privatized" world that followed the 1989 restructuring, the

appropriate allocation of centralized versus localized power;⁷⁶ and increased government efficiency and fiscal accountability. This discussion took place within the constraints of existing state law requirements regarding procurement and governance.⁷⁷

One of the major changes in the procurement structure following the demise of the Board of Estimate was to place control over procurement in the hands of the Mayor rather than in a legislative or quasi-legislative body.⁷⁸ The Charter Revision Commission was persuaded by the view of then-State Comptroller Edward Regan that

[contracting] is an administrative function if ever there was one. It ought to be placed with the administrator Richard Ravitch had reached the same conclusion in 1988, listing as one of his proposals for a new government: “[To] hold the mayor clearly accountable for the procurement activities and decisions of the administration while subjecting the process to checks and balances which do not diffuse responsibility.”⁷⁹

As a result, the responsibility for contracting was placed at the Commissioner level, with certain contracts subject to approval by the mayor or a designated deputy mayor.⁸⁰

The new procurement rules—requiring open competitive bid-

question of minority representation remains an issue in the procurement context. The changing role of government requires local communities to approach organizing and public participation in different and innovative ways to ensure inclusion and representation. See generally Julissa Reynoso, *The Impact of Identity Politics and Public Sector Reform on Organizing and the Practice of Democracy*, 37 COLUM. HUM. RTS. L. REV. 149 (2005).

⁷⁶ See Schwarz & Lane, *Charter Making* (pt. 1), *supra* note 75, at 747.

⁷⁷ STAFF OF N.Y. CITY CHARTER REVISION COMM., *supra* note 71, at 12–13.

Both state and local law govern the City’s procurement practice. Of primary importance is Article 5-A of the General Municipal Law (GML), which contains the basic procurement instruction to all municipalities. Specifically, GML § 103 requires all municipalities to award all (1) contracts for public works and (2) all purchase (i.e., goods or commodities) contracts over a specified minimum amount through competitive sealed bid after public advertisement to the lowest responsible bidder

GML § 104-b instructs municipalities to adopt policies and procedures for alternative methods of procurement—those procurement processes other than competitive sealed bidding—so that contracts are let in a manner to assure prudent and economical use of public funds in the best interest of taxpayers, to obtain maximum quality at lowest possible cost under the circumstances and to guard against favoritism, improvidence, extravagance, fraud and corruption.

Id.

⁷⁸ Schwarz & Lane, *Charter Making* (pt. 2), *supra* note 67, at 885.

⁷⁹ *Id.* at 885–86.

⁸⁰ *Id.* at 888.

ding, a level playing field, and a transparent process—applied not only to the purchase of “hard” goods and services like the ticketing machines that were the subject of the PVB scandals,⁸¹ but also to contracts with nonprofits for human services such as after-school, senior, and summer youth services.⁸² The drafters of the new Charter and PPB Rules recognized that different procedures might be applicable to human services contracts, but felt constrained by state law to apply a competitive sealed bidding process to all procurement.⁸³

B. Procurement Reform and Reinvented Government?

Many observers viewed the procurement changes in the Charter revision as a major step in placing New York City at the vanguard of government “reinvention.”⁸⁴ While these changes were taking place, Osborne and Gaebler’s *Reinventing Government* was all the rage, and there was much focus on the privatization of government services as the key to better and cheaper services.⁸⁵ Some proponents of privatization were motivated by ideological goals that included shrinking government and shifting responsibility from government to private hands. This, despite Osborne and Gaebler’s characterization of privatization in technocratic rather than ideological terms and their admonition that privatization does not shift the ultimate responsibility for services away from government.⁸⁶

⁸¹ *Id.* at 880–81.

⁸² See PROCUREMENT INDICATORS, *supra* note 8, at 6–8 (detailing New York City’s procurement expenditures for goods, services, and construction in fiscal year 2005).

⁸³ At the time, there were proposals for improving the contracting process, some of which focused specifically on contracting for human services with nonprofit providers. See Schwarz & Lane, *Charter Making* (pt. 2), *supra* note 67, at 890.

⁸⁴ “[T]he New York City Charter Revision Commission, in creating the Procurement Policy Board, established the potential for continuous improvement in City procurement policy making. The Board’s continuous focus on procurement may help break the cycle of reactionary policy making.” Joseph A. Cosentino, Jr., Note, *New York City’s Procurement System: Reversing the Cycle of Corruption and Reactionary Reform*, 42 N.Y.L. SCH. L. REV. 1183, 1187 (1998).

⁸⁵ DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1992).

⁸⁶ As Osborne and Gaebler noted:

Privatization is one arrow in government’s quiver. But just as obviously, privatization is not *the* solution. Those who advocate it on ideological grounds—because they believe business is always superior to government—are selling the American people snake oil

It makes sense to put the delivery of many public services in private hands (whether for-profit or nonprofit), if by doing so a government can get more effectiveness, efficiency, equity, or accountability. But we

Yet as noted above, privatization *is* having a significant impact in transforming the structure of government, including the degree of responsibility for failures in service provision, due process, equitable distribution, and more. At the time of New York's procurement restructuring, little attention was paid to the manner in which privatization might transform the structure of government or the distinctions between competitive bidding for goods and services by nonprofits versus for-profits.⁸⁷ While the structural changes in the Board of Estimate's duties took into consideration the appropriate roles of the executive and legislative branches and considered issues such as representation and accountability generally, less attention was paid to the overall impact of increased "private delegation"⁸⁸ through procurement. This may be because New York City had long been involved in contracting out for goods and services so the debate centered not on whether to contract out, but rather on who in government would be responsible for management, oversight, cost effectiveness, and minimizing corruption.

The procurement rules were designed primarily with the procurement of goods and easily quantifiable services.⁸⁹ The goals of public procurement were consistently presented in market and technocratic terms as ensuring the purchase of optimal goods and services at the best prices through competition and efficient oversight.⁹⁰ The view that public procurement ought to mirror the pri-

should not mistake this for some grand ideology of privatizing government. When governments contract with private businesses, both conservatives and liberals often talk as if they are shifting a fundamental public responsibility to the private sector. This is nonsense: they are shifting the delivery of services, not the responsibility for services.

OSBORNE & GAEBLER, *supra* note 85, at 45, 47. *See also* DAVID OSBORNE & PETER PLASTRIK, *BANISHING BUREAUCRACY: THE FIVE STRATEGIES FOR REINVENTING GOVERNMENT* (1997).

⁸⁷ These distinctions were not completely ignored in the context of procurement reform. For example, the PPB Rules explicitly preferred requests for proposals for human services contracts. *See* N.Y. CITY, N.Y., *PROCUREMENT POL'Y Bd. RULES*, tit. 9, § 1-01(e) (defining "client services") and § 3-01(c) (indicating preference for requests for proposals method of source selection for client services contracts) (2003).

⁸⁸ *See* Metzger, *Changing Shape*, *supra* note 23, at 1437-38 and accompanying text.

⁸⁹ The explicit preference in state law and in the City Charter for competitive sealed bidding evidences this emphasis on market-type goods and services. *See* N.Y. MUN. LAW § 103 (McKinney 2006); N.Y. CITY, N.Y., *CHARTER* ch. 13, § 313(b) (N.Y. Legal Publishing Co. 2001).

⁹⁰ Much of the reporting on procurement is focused on obtaining tax-dollar value based on a market model of competition in which contracting entities are viewed as "business partners" and economic engines:

[A]gencies must strive to achieve the best value *and* to ensure that our business partners are responsible, from the standpoint of business integ-

vate sector procurement's focus on a market model of competition is still central.⁹¹ Other goals of public procurement include transparent and fair procedures, public input and oversight, and the prevention of corruption and favoritism.⁹² Also, as noted earlier, anti-corruption goals figured prominently in New York City procurement reform.⁹³

C. Current Procurement Policies

While the market-centered view still holds in many quarters, the City Charter⁹⁴ and PPB Rules⁹⁵ allow for fundamental differences in the procurement of human services, as opposed to goods and other municipal services such as sanitation. The practice in some New York City agencies has evolved to recognize and respond to these differences. Unlike many contracts for goods, human services contracts should not be structured simply to go to the lowest bidder. The more particularized range of needs in human services contracting require a flexible approach consistent enough to ensure both fair competition and substantive, qualitative accountability mechanisms.

To address some of these concerns, provisions in the PPB Rules for human services contracts state a preference for Requests for Proposals (RFPs) for such contracts.⁹⁶ Even with RFPs for human services contracts, however, the emphasis is on procedural

ity, financial capacity and performance ability. Agencies must also treat such business partners fairly, recognizing that City procurement represents an important opportunity for economic development and business growth in New York City and the surrounding region.

PROCUREMENT INDICATORS, *supra* note 8, at 1.

⁹¹ *See id.*

⁹² For example, the Mayor's Office of Contract Services issued a report noting the opportunities for notice and input in the contracting process and delineating the steps taken to avoid corruption in the award and administration of contracts. *Id.* at 1.

⁹³ *See Anechiarico & Jacobs, supra* note 72.

⁹⁴ New York City Charter § 319 states:

[P]roposals may be solicited through a request for proposals with award to the responsible offeror whose proposal is determined to be the most advantageous to the city, taking into consideration the price and such other factors or criteria as are set forth in the request for proposals. No other factors or criteria shall be used in the evaluation and award of the contract except those specified in the request for proposals. Discussions may be conducted with responsible offerors who submit proposals, provided that offerors shall be accorded fair treatment with respect to any opportunity for discussion and revision of the proposals.

N.Y. CITY, N.Y., CHARTER ch. 13, § 319 (N.Y. Legal Publishing Co. 2001).

⁹⁵ *See, e.g.,* N.Y. CITY, N.Y., PROCUREMENT POL'Y Bd. RULES, tit. 9, § 3-01 (2003) (addressing human services or client services procurements).

⁹⁶ § 3-01(c).

fairness for vendors and avoidance of public corruption rather than on the substantive quality of the programs for third-party recipients of services. For example, section 3-03 of the PPB Rules sets forth the requirements for competitive sealed proposals.⁹⁷ These requirements focus primarily on the form of the proposals;⁹⁸ the criteria and relative weights to be used to judge proposals;⁹⁹ submission requirements;¹⁰⁰ time frames;¹⁰¹ notices regarding applicable terms and conditions;¹⁰² rights to appeal;¹⁰³ legal requirements;¹⁰⁴ and contact information.¹⁰⁵ The rules are primarily geared toward providing notice and fairness to vendors and transparency to the public with a focus on cost savings and corruption control. There is generally less focus on incorporating mechanisms to improve program quality for those receiving services or addressing issues of equitable distribution or procedural fairness to ultimate clients.

Some recent changes to the PPB Rules appear designed to do more to address the quality and distribution of services. For example, a recent amendment provides for the development of a “concept report” for “new client services.”¹⁰⁶ The concept report requirement is meant to provide an opportunity for vendor and community input into shaping the contract parameters and selection process prior to the issuance of a RFP.¹⁰⁷ By providing a mechanism for dialogue between service providers and contracting agencies prior to solicitation, the concept report can get the best ideas on the table regarding how to serve clients’ needs. Still, the procurement provisions set forth under section 3-12 of the City Charter and in the PPB Rules can be perceived as restrictive, discouraging innovation and creativity.¹⁰⁸ Applied pro forma, the

⁹⁷ § 3-03(a).

⁹⁸ § 3-03(a)(1).

⁹⁹ § 3-03(a)(2).

¹⁰⁰ § 3-03(a)(3).

¹⁰¹ § 3-03(a)(4).

¹⁰² § 3-03(a)(5).

¹⁰³ § 3-03(a)(6).

¹⁰⁴ § 3-03(a)(16)–(20).

¹⁰⁵ § 3-03(a)(22).

¹⁰⁶ § 3-03(b).

¹⁰⁷ As noted in the fiscal year 2005 Report of the Mayor’s Office of Contract Services: “Before releasing an RFP for a new or substantially restructured human services program, the City now publishes a ‘concept report’ describing the initiative, so that potential vendors and interested members of the public can have an opportunity to comment on program design.” PROCUREMENT INDICATORS, *supra* note 8, at 1.

¹⁰⁸ See generally Anthony Crowell, *The Business of Government: The Charter Commission’s Proposal to Revise the City’s System of \$9 Billion in Annual Purchases*, GOTHAM GAZETTE, Oct. 20, 2003, <http://www.gothamgazette.com/article//20031020/202/571> (noting

procurement provisions of the Charter and Rules could become little more than procedural safeguards for vendors and bureaucratic obstacles for nonprofits, increasing the cost of service provision without adding the kind of value ultimately sought through public contracting for human services.¹⁰⁹ If procurement rules are applied narrowly to serve only the goals of preventing fraud and corruption, getting the lowest price, and providing fairness in contractor selection, contracting agencies can lose sight of the substantive goals of the contract and the related public policy objectives.¹¹⁰ Yet agency officials often feel constrained by procurement rules' focus on bidding procedures to achieve low price and fair selection methods.¹¹¹

In response to the actual and perceived limitations imposed by procurement rules, many city agency heads have focused largely on a private sector or "market" model of procurement, which uses competition to reduce costs within a procedural framework designed to ensure fairness to vendors and the avoidance of corruption.¹¹² While there are many useful lessons that can be taken from this model, the core goals of public procurement of human services should focus on the public benefits to be provided. These include obtaining quality services responsive to community needs in a manner that comports with public law norms and democratic principles of participation. Too much emphasis on a market-based, vendor-focused procedural approach can obscure the overarching public purpose behind the procurement of these services and may go too far in absolving government actors of their respon-

the lack of flexibility in New York City's procurement system and outlining proposed changes).

¹⁰⁹ See, e.g., Robert Jackson, Chair, N.Y. City Council Comm. on Contracts, Oversight: Addressing Retroactive Human Services Contracts (Jan. 22, 2003), <http://webdocs.nycouncil.info/attachments/56073.htm> (characterizing the human services procurement process as slow, bureaucratic, and burdensome).

¹¹⁰ For example, as Commissioner Mullgrav noted in her remarks during this Symposium, the pro forma renewal of youth services contracts with no attention paid to demographic shifts or to changes in need rendered the services less effective and less able to meet broad public objectives than they might have been. See Jeanne B. Mullgrav, *Government Gets in the Game: Strategic Philanthropy Isn't Just for Foundations Anymore*, 9 N.Y. CITY L. REV. 295, 298 (2006).

¹¹¹ In addition to the rules requirements are the more general restrictions on using procurement to advance certain kinds of policy objectives. For a more extensive discussion about limits on using procurement as a means of expressing opposition to apartheid and to promote or discourage other policies, see *infra* note 119 and accompanying text.

¹¹² It is notable that the Mayor's Office of Contract Services, the city's procurement oversight agency, places a great deal of focus on numbers, timing, and vendor responsibility. See generally PROCUREMENT INDICATORS, *supra* note 8.

sibility to direct services and to do so based upon public, rather than market, goals.

Experience has shown that those involved in the process of human services procurement, whether government actors procuring services or nonprofits seeking government contracts, often focus on particular issues like continuity of service versus competition, or cost savings, or the avoidance of corruption.¹¹³ Experience has also shown that, left unchecked or unexamined, even what began as a sound procurement process can result in services going disproportionately to individuals and communities favored by the market and political influence rather than those in greatest need.¹¹⁴ In the process, both government agencies and nonprofit providers may lose sight of broader public purposes. To the extent that the procurement process can be designed to focus on core public purposes—including quality service provision; broad access for eligible communities; equitable, need-based distribution of services; and efficiency and cost effectiveness—these important goals must continually be factored into the human services procurement process—and perhaps into all government procurement efforts.

To accomplish these objectives, government officials engaged in human services procurement should take proactive steps focused on core public purposes like improving short- and long-term outcomes and ensuring equitable distribution of services rather than simply responding passively to procurement rules focused exclusively on market-competition, low price, and the avoidance of corruption. Procedural and substantive protections must flow not only to vendors, but also to the specific clients for whom the services are being provided and to the general public, which has an interest in understanding how government dollars are being spent.

This is why approaches to public procurement which focus on fostering public policy goals as they relate to both the clients for whom the services exist and to the public are so important. Most creative procurement policymaking work takes place in the framing of the contracts themselves, which starts with the pre-solicitation review and requests for proposals processes through contract monitoring and evaluation.¹¹⁵ Indeed, much debate and innovation is taking place in the context of setting the initial criteria for

¹¹³ See, e.g., Jackson, *supra* note 109.

¹¹⁴ See, e.g., Mullgrav, *supra* note 110, at 296–98 (noting need to use demographic and other data in determining contract specifications and awards to ensure that services are targeted appropriately to meet current needs).

¹¹⁵ N.Y. CITY, N.Y., PROCUREMENT POL'Y Bd. RULES, tit. 9, § 3-03 (2003).

public contracts, from which everything else flows.¹¹⁶

Of course, there are limits to the extent to which public procurement may be used to foster broad public policy goals not closely tied to the purpose of the procurement itself. A recent example is the February 2006 New York Court of Appeals decision in *City Council v. Bloomberg*, which set limits on the use of the public procurement process to enact social policy.¹¹⁷ The Equal Benefits Law, passed by the City Council over the Mayor's veto, provided that "no city agency may enter into contracts having a value of \$100,000 or more annually with any person or firm that fails to provide its employees' domestic partners employment benefits equal to those provided to spouses."¹¹⁸ The Court of Appeals held that the Equal Benefits Law conflicted with Municipal Law section 103's requirement that municipalities contract with the lowest responsible bidder. The court stated that "[t]he requirement of § 103 that municipalities contract with the lowest responsible bidder is plainly in tension with the right of a municipality to say that it will contract only with firms that provide certain benefits. Where the two conflict, as they do here, the legislative restriction on the municipality's power prevails."¹¹⁹ The court emphasized section 103's predominant purpose as "protection of the public fisc by requiring competitive bidding"¹²⁰ and went on to note that "[a]part from its purely financial effect, competitive bidding serves to prevent 'favoritism, improvidence, fraud and corruption in the awarding of public contracts.'¹²¹ Thus, a primary goal of public procurement in New York is cost savings through competition—efforts to enact broad social policy through procurement that conflict with that goal cannot stand. Notwithstanding this statement by the Court of Appeals, there have been several examples of instances in which localities, including New York City, have used the

¹¹⁶ For example, recent changes to New York City's procurement rules provide that the "City now posts the full text of all Requests for Proposals (RFPs), along with notices of all other contract opportunities at www.nyc.gov/cityrecord." PROCUREMENT INDICATORS, *supra* note 8, at 1 (citing summary of Local Law 11 and Resolution 13). The recently adopted Local Law 13, codified in PPB Rule 3-03(b), requires the publication of a "concept report" for new or substantially changed human services programs to permit potential vendors and the public an opportunity for input on program design. *Id.* (citing summary of Local Law 13); tit. 9, § 3-03(b).

¹¹⁷ 846 N.E.2d 433 (N.Y. 2006).

¹¹⁸ *Id.* at 435.

¹¹⁹ *Id.* at 440.

¹²⁰ *Id.* at 438 (quoting *Associated Builders & Contractors, Inc. v. City of Rochester*, 492 N.E.2d 781, 782-83 (1986)).

¹²¹ *Id.* (quoting *In re N.Y. State Chapter, Inc. v. N.Y. State Thruway*, 666 N.E.2d 185, 190 (N.Y. 1996)).

procurement process to promote particular public policy goals arguably unrelated to achieving low price or corruption control.¹²² Such efforts to foster positive public goals through procurement should be encouraged, not stifled, particularly where there is general consensus in support and where the impact on cost or the availability of quality services is minimal. Apart from injecting broad social policy goals into the procurement process, the question is how can RFP and contract design—as well as monitoring and evaluation—improve the quality of human services contracts? Fairness to vendors and the avoidance of corruption are important goals in public procurement. A more important consideration, however, is ensuring that (1) inherent governmental functions are not shifted to private actors; (2) public goals are met; and (3) public law norms and protections are not diluted or lost through privatization.

III. PROACTIVE PROCUREMENT: STRUCTURING HUMAN SERVICES PROCUREMENT TO BEST SERVE CORE PUBLIC GOALS OF SUBSTANTIVE QUALITY, MEANINGFUL OUTCOMES, AND EQUITABLE DISTRIBUTION OF SERVICES

Rather than approach the PPB Rules as restrictive and limiting, some agencies are identifying ways in which the contract solici-

¹²² See Andrea L. McArdle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policymaking*, 62 TEMP. L. REV. 813, 814 n.14 (1989) (“A reported thirty cities had imposed procurement restrictions against companies doing business with South Africa.”). Professor McArdle argues that there is a role for state and local governments in expressing views regarding foreign policy measures through procurement restrictions and otherwise:

Absent a national foreign policy imperative, strong countervailing first amendment and local self-determination values argue in favor of allowing the divestment and debarment measures. Provided that the national government controls the final formulation and communication of external policy, an enhanced role for the people through their state and local governments would not diminish the national government’s plenary position and would serve important democratic values. For although it is essential that the nation speak with one voice concerning external relations, in the final analysis, a foreign policy that is “gathered out of a multitude of tongues” is far more likely to reflect the national will.

Id. at 846–47. *But see* Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 366 (2000) (holding invalid law a Massachusetts law restricting procurement of goods and services from companies doing business with Burma as violating the U.S. Constitution’s Supremacy Clause). See generally David D. Caron, *The Structure and Pathologies of Local Selective Procurement Ordinances: A Study of the Apartheid-Era South Africa Ordinances*, 21 BERKELEY J. INT’L L. 159 (2003) (discussing local ordinances and practices barring procurement of goods and services from vendors with relationships to apartheid South Africa).

tation and drafting processes may be structured to serve broader policy goals consistent with the agency mission, focusing not only on vendors but the ultimate clients as well. For example, a number of city human services agencies have undertaken to compile and use current demographic and other data when designing contract solicitations to assess and target services to areas of greatest need. Several city human services agencies have moved toward performance-based contracting, placing greater emphasis on the outcomes sought and on the degree to which those outcomes are addressed through public contracts.¹²³ These approaches, though modest, may provide examples of a more engaged procurement approach that begins to get at some of the concerns about the absence of public goals and public law norms in privatization.

A. *Structuring the Solicitation and Designing the Contract*

1. *Planning for Equity and Accountability: Using Current Demographic and Population Data to Target Programs Based on Need and Evaluate Outcomes*

One way in which city agencies have begun to think about their contracting plans is to make better use of demographic and other data to target services where most needed, and to help ensure equity in the distribution of services (or at least coverage in areas of highest need) while also providing a basis for assessing outcomes and providing accountability.

Beginning with the idea behind the New York City Police Department's CompStat¹²⁴ program, which focused on using current,

¹²³ See generally DENNIS C. SMITH & WILLIAM J. GRINKER, *THE PROMISE AND PITFALLS OF PERFORMANCE-BASED CONTRACTING* (2004), available at http://www.seedco.org/publications/publications/promise_and_pitfalls.pdf.

¹²⁴ As the New York City Police Department describes it:

This Department began conducting weekly Crime Control Strategy Meetings as a means to increase the flow of information between the agency's executives and the commanders of operational units, with particular emphasis on the flow of crime and quality of life enforcement information. In the Department vernacular, these briefings are referred to as COMPSTAT (Computerized Statistics) meetings, since many of the discussions are based upon the statistical analyses contained within our weekly CompStat Report. These meetings are an integral facet of a comprehensive interactive management strategy which enhances accountability while providing local commanders with considerable discretion and the resources necessary to properly manage their commands.

NYPD, COMPSTAT Process, <http://www.nyc.gov/html/nypd/html/chfdept/compstat-process.html> (last visited Nov. 28, 2006).

dynamic data about criminal activity in specific areas of the city to target police resources to problem areas, the city has begun other efforts to track relevant data, design agency initiatives to respond to what that data shows, use ongoing information to assist planning, and assess outcomes and provide accountability through its Citywide Accountability Program: Capstat.¹²⁵

Of course, using data tracking and numbers alone cannot address substantive issues. Rather, it is how agencies make use of this information to craft effective responses that will be most likely to improve both short- and long-term outcomes. Several city agencies that rely on human services contracts with non-profit providers are beginning to utilize current demographic data to plan proposal solicitations and design contracts. As one observer has put it: "We count what we care about."¹²⁶ Getting agencies in the habit of focusing in a dynamic way on areas of highest need and on the manner in which needs are met can encourage improvements in the substantive quality and distribution of programs.

For example, the New York City Department of Homeless Services (DHS) recently announced an initiative to reduce homelessness that uses data showing the neighborhoods most likely to

¹²⁵ Capstat is described as:

a program designed to enhance both internal performance-based management and public accountability through the Internet for City agencies. Based on the CompStat system developed by the Police Department and the TEAMS system used by the Department of Correction, the Capstat approach to performance evaluation defines areas of accountability for all levels of management. Achievement of stated goals and objectives is pursued through analysis of a set of performance indicators. The systematic collection and analysis of timely information are critical components of the process, as managers learn the importance of "knowing the numbers" and using them to measure success, identify emerging issues, substantiate opinions, and form strategies for improvement. Executive staff reinforces operational goals and utilizes the performance indicators to hold managers accountable for achieving them. The success of the program is to be measured not on the strategies presented at the meetings, but rather on how well the strategies are implemented in operational settings.

Mayor's Office of Operations, Citywide Accountability Program, <http://www.nyc.gov/html/ops/html/capstat/capstat.shtml> (last visited Nov. 28, 2006).

A similar initiative is being undertaken in the context of child protection. "ChildStat is a management and accountability tool modeled on Compstat, the New York City Police Department's acclaimed crime fighting program. ChildStat is intended to help Children's Services to strengthen our ability to protect and serve children who are being monitored by the Agency." Online Chat with Jan Flory, Deputy Commissioner of the Administration for Children's Services, *GOTHAM GAZETTE* (June 7, 2006), <http://www.gothamgazette.com/article/children/20060612/2/1877>.

¹²⁶ Minow, *supra* note 13, at 1268.

encounter homelessness. Based on this data, DHS designed and executed contracts with community-based nonprofit providers for homelessness prevention.

“We now have the ability to look at the community districts, the census tracts, the very apartment buildings that experience the most homelessness in our City,” said DHS Commissioner Gibbs. “Through technological advances and mapping techniques, we’ve increased the probability of finding those most likely to become homeless before they reach the steps of the shelter intake center.”¹²⁷

The ability to use data in this way has led DHS to implement a “prevention first” agenda, shifting some resources from shelters to preventive services.¹²⁸

Similarly, the city’s Administration for Children’s Services is engaged in a restructuring of its child-care contracts. An important component of the restructuring involves analyzing current data to target areas of highest need.

[T]he first area of the plan is maximizing resources and meeting community needs. Our goal in this area is to analyze a community’s childcare needs and to reallocate services and to build a system that integrates these with contracts and vouchers. And build a system that maximizes resources at any point in time. The first step to this, as Commissioner Mattingly alluded to, was comprehensive utilization review and community-needs assessment¹²⁹

Under this plan, the agency aims not only to identify the kinds of services that should be provided (for example, the age ranges for which child-care services are most needed), but to distribute services more equitably by considering the number and characteristics of children in poverty as well as the areas of the city with the highest concentrations of poverty.¹³⁰ This kind of approach, to the

¹²⁷ Press Release, N.Y. City Dep’t of Homeless Servs., Mayor Michael R. Bloomberg Outlines Aggressive Timeframe & Targets for Implementation of Five-Year Action Plan to Drastically Reduce Homelessness (Sept. 22, 2004), *available at* <http://www.nyc.gov/html/dhs/html/press/pr092204.shtml>.

¹²⁸ See N.Y. City Dep’t of Homeless Servs., *Uniting For Solutions Beyond Shelter: The Action Plan for New York City*, Ch. 7, http://nyc.gov/html/endinghomelessness/html/action_plan/chapter_7.shtml.

¹²⁹ Ajay Chaudry, Deputy Comm’r, N.Y. City Admin. for Children’s Serv., Div. of Child Care and Head Start, Remarks at the Center for New York City Affairs Conference: Taking Care of New York’s Children (I): Rethinking Child Care 11 (Oct. 25, 2005), *available at* http://www.newschool.edu/milano/nyc affairs/trans/care_nyc_child.pdf.

¹³⁰ As Chaudry said:

[O]ur objectives for maximizing resources in community needs are two:

extent that it places greater emphasis on keeping in regular touch with third-party clients in the context of the agency's public goals, can help shift the contracting process away from too great an emphasis on procedure or form over substance. If done thoughtfully, it can foster an active, engaged procurement planning and review process that places substantive public goals first, requiring continuous, active planning and oversight of human services contracts to provide quality services, not bureaucratic rubber stamps.

2. Focusing on Outcomes for Human Services Clients and the Public and the Debate About Performance-Based Contracts

Related to the efforts to improve program quality and equity by responding to identified needs based on the dynamic use of demographic data is an increased focus on program performance. Several New York City agencies—as well as federal¹³¹ and state¹³² agencies—are placing greater emphasis on the quality of the contract services provided by measuring the outcomes achieved. Some agencies use “performance-based contracting,” which ties the achievement of outcomes to compensation under the contracts.¹³³ This focus on the substantive quality of programs and on outcomes

one is to shift services, expand services to the areas of greatest unmet need, . . . [a]nd to bring our services down in age. To target the underserved age groups and particularly in the near term to begin to serve two year olds more and work downward from there.

And our second objective is to maximize resources. We want to modify our contracting process so that contracts reflect actual enrollment history and to enable programs to accept contracts and vouchers and encourage them to accept contracts and vouchers simultaneously to maximize enrollment and to provide greater access to families who have vouchers into our contracted system.

Id. at 12.

¹³¹ See generally OFFICE OF MGMT. & BUDGET, OFFICE OF FEDERAL PROCUREMENT POLICY, PERFORMANCE-BASED SERVICE ACQUISITION: CONTRACTING FOR THE FUTURE (July 2003), <http://www.whitehouse.gov/OMB/procurement/0703pbsat.pdf>.

¹³² See, e.g., N.Y. State Office of Mental Health, Creating an Environment of Quality Through Evidence-Based Practices, <http://www.omh.state.ny.us/omhweb/ebp/index.htm> (last visited Nov. 28, 2006).

¹³³ See SMITH & GRINKER, *supra* note 123, at 9. A performance-based contract “builds on performance management techniques, but adds the critical factor of financial incentives that reward organizations for good performance and sometimes penalize them for failing to achieve outcomes. As with performance measurement and management, the focus of performance-based contracting can be on inputs, activities, outputs, or outcomes.” *Id.*; see also DENNIS C. SMITH & WILLIAM J. GRINKER, THE TRANSFORMATION OF SOCIAL SERVICES MANAGEMENT IN NEW YORK CITY: “COMPSTATING” WELFARE (2005), http://www.seedco.org/publications/publications/compstating_welfare.pdf.

may keep the ultimate public goals and ultimate “clients” in mind as opposed to procurement that considers primarily vendors and government actors. From this perspective, it is difficult to argue with performance-based contracting, so long as it takes into account the realities inherent in the provision of social services and the often lengthy investment necessary to achieve long-term public goals like homelessness prevention or permanent employment.

Performance-based contracting has also been criticized in the human services context as attempting to employ a corporatized bottom-line approach to the provision of human services—an approach that can be burdensome, inappropriate and contrary to achieving meaningful long-term goals.¹³⁴ For example, New York City’s Human Resources Administration has used performance-based contracting in its welfare-to-work solicitations:

The contracts are fully performance-based, with payment contingent on success in placement and retention. Vendors will receive only a nominal administrative payment for clients who are not placed in jobs, and they will receive only partial payment for clients who are placed in jobs but return to the welfare rolls within six months. Placements into jobs that allow for the transition from cash assistance, and the successful job placement of clients with multiple barriers to employment, will merit enhanced payments.¹³⁵

Some observers have expressed concern that performance-based contracting will result in “creaming” or having contractors “seek out those clients that are easiest to serve and . . . avoid those clients that are hardest to serve.”¹³⁶ Others question the long-term effectiveness of highly pressured, performance-based welfare-to-work requirements.¹³⁷ In addition, some have noted that performance-

¹³⁴ See, e.g., Dennis Derryck & Rikki Abzug, *Lessons from Crisis: New York City Nonprofits Post-September 11*, NON PROFIT Q., Spring 2002, available at <http://www.nonprofitquarterly.org/section/288.html> (noting cash flow problems and inflexibility with performance-based contracts as nonprofits attempted to provide human services in the aftermath of the September 11, 2001 terrorist attacks).

¹³⁵ Verna Eggleston, Human Resources Admin. Comm’r, Testimony Before the General Welfare and Finance Committees on The Fiscal Year 2007 Executive Budget, N.Y. City Council 4 (June 7, 2006), available at http://www.nyc.gov/html/hra/downloads/pdf/fy07_executive_budget_testimony.pdf.

¹³⁶ LAWRENCE L. MARTIN, PERFORMANCE-BASED CONTRACTING (PBC) FOR HUMAN SERVICES: A REVIEW OF THE LITERATURE 19 (Dec. 2003), available at <http://www.cohpa.ucf.edu/ccp/library/workpaper1.pdf>.

¹³⁷ Whether the emphasis on quick job placement and reducing the welfare rolls actually helps people escape poverty, however, is less clear. No one seems to know what happens to people six months after they are placed in jobs. Are they able to support themselves on the wage they receive, or do they end up returning to the welfare rolls? Former Mayor Giuliani has cited civil liberties reasons to explain why

based contracts are more difficult to administer than cost-reimbursement contracts because proper reporting, performance measures, and payment level are tough to define.¹³⁸

As a general matter, the move toward performance- or outcome-based human services contracts is a step in the right direction: It places the focus of the contracting enterprise on the overarching public goals and on the quality of service to third-party recipients of the benefits. In these ways it can be said to incorporate substantive public goals and public norms into the procurement process. It is not without its drawbacks and limitations, however. If performance-based contracting takes on a rigid, market-based “bottom line” approach to human services it is likely to be ineffective—and indeed counterproductive. If it is used in the human services context as a mechanism to keep both government agencies and nonprofit contractors focused on quality service and broader social goals, it can be a step in the direction of structuring contracts to ensure some form of substantive accountability.¹³⁹

B. Contract Monitoring and Evaluation: More Than Just Policing Nonprofits

*Public procurement law presumes that officials exert control over the process. At least at present, the law fails to contemplate circumstances where, in effect, no one is minding the store.*¹⁴⁰

Contract monitoring and evaluation are essential to accountability and the provision of quality services. On a very basic level, the function of monitoring is to ensure that the government con-

the city has made no tracking efforts: “‘Of course I don’t have plans to keep track of people,’ he said. ‘I’d be being Big Brother.’” Jason DeParle, *What Welfare-to-Work Really Means*, N.Y. TIMES MAG., Dec. 20, 1998, at 55. There has been no research to determine the overall impact of New York City’s welfare-to-work program. To address this research gap, Besharov said HRA should undertake a rigorous evaluation to determine if people exposed to workfare were less likely to return to welfare after leaving it, and if HRA’s remedial and treatment services had any impact on caseloads. See DOUGLAS J. BESHAROV & PETER GERMANIS, FULL ENGAGEMENT WELFARE IN NEW YORK CITY: LESSONS FROM TANF’S PARTICIPATION REQUIREMENTS 8 (2004), available at http://www.welfareacademy.org/pubs/welfare/nyc_hra.pdf.

¹³⁸ KARIN MARTINSON & PAMELA A. HOLCOMB, THE URBAN INST. OCCASIONAL PAPER NO. 60, REFORMING WELFARE: INSTITUTIONAL CHANGE AND CHALLENGES (2002), available at http://www.urban.org/UploadedPDF/310535_OP60.pdf.

¹³⁹ See discussion of Metzger’s private delegation doctrine in *Privatization as Delegation*, *supra* note 23. While the procurement innovations discussed here may not address the issue of constitutional accountability, they begin to introduce elements of regulatory oversight and accountability in the contracting and oversight structure that may ease certain constitutional concerns about the process provided to third-party clients and about equitable distribution of services.

¹⁴⁰ Guttman, *supra* note 14, at 337.

tractor is getting what tax dollars are paying for.¹⁴¹ Yet on closer analysis, the process of contract monitoring and evaluation raises a number of issues related to governance, responsibility, liability, and the very essence of the interplay between private and public actors in the provision of human services.

These issues go to the heart of the theoretical debate about whether we are talking about privatization; the increasing role and power of private entities in providing public services and shaping public policies; or whether the trend should be re-framed as “publicization”—the extension of public law and policy norms into the private sector.¹⁴² Or, stated another way, whether these private delegations are structured in a way that provides sufficient regulatory accountability. In that discussion lies the interesting question of whether nonprofits are primarily private or public actors. Certainly their existence as tax-exempt and mostly publicly supported entities depends in large part on government munificence.¹⁴³ With regard to social services provision, nonprofits have long been the primary providers of government-financed social services.¹⁴⁴ Therefore, effective monitoring of human services contracts with nonprofit entities is critically important to ensuring adequate social services delivery.

The traditional view of contract monitoring under restrictive procurement rules is that of a policing function—basic government oversight to ensure that money is being spent in appropriate ways, without fraud, and that those holding public contracts are “responsible.”¹⁴⁵ Yet effective contract monitoring and evaluation

¹⁴¹ See N.Y. MUN. LAW § 103 (McKinney 2006); N.Y. CITY, N.Y., PROCUREMENT POL'Y BD. RULES, tit. 9, § 4-01(a) (2003).

¹⁴² For a discussion of Jody Freeman's use of the term “publicization” see *supra* note 59 and accompanying text.

¹⁴³ See Minow, *supra* note 42.

¹⁴⁴ Gilman notes:

Social services nonprofits, which constitute the largest component of the nonprofit sector, “deliver a larger share of the services government finances than do government agencies themselves.” Indeed, government is not, and never has been, the primary deliverer of social services, despite the rhetoric of government downsizing. Rather, there is an “extensive pattern of government-nonprofit cooperation in the delivery of human services, with government functioning as the financier and the nonprofit sector as the deliverers of the services.”

Gilman, *supra* note 13, at 823 (citations omitted).

¹⁴⁵ See generally Robert Jackson, Oversight: Vendor Integrity—What's Wrong With VENDEX and How Do We Make It Better? (Sept. 16, 2003), <http://webdocs.nycouncil.info/attachments/58753.htm> (describing contract monitoring and oversight to determine vendor “responsibility” and noting the limitations of the use of an outdated reporting system).

should involve macro considerations about the relationships between government and private actors as well as micro considerations about how, on a very practical level, to conduct effective monitoring and evaluation. This gets at fundamental questions about fiscal accountability and fraud prevention and considers improving substantive service quality.

Of course, the value of contract monitoring and evaluation to achieve substantive improvement depends entirely on the content of the contract, since the requirements and expectations it contains define the parameters of agency monitoring.¹⁴⁶ There is a lot of room in section 4-01 of the PPB Rules for contract design and evaluation criteria and monitoring mechanisms that increase the quality of the services provided. With respect to human services contracts—for things like homeless services, employment programs, and day care—there is room to make contract monitoring and evaluation fit a substantive “publicization” model. As noted above, several New York City agencies have begun to re-think monitoring and evaluation from a substantive standpoint as requiring more than just counting heads and following dollars.¹⁴⁷

Some might not think contract monitoring and evaluation can be given more substance.¹⁴⁸ With increased emphasis on the need to monitor for legal and fiscal accountability as well as the avoidance of corruption, favoritism, and self-dealing in light of seemingly ever-present revelations of irregularities and waste when government services are privatized, the emphasis in contract monitoring will likely remain on fiscal regularity and corruption control.¹⁴⁹ Moreover, many contracting agencies currently find it

¹⁴⁶ As section 4-01(a) of the PPB Rules says:

Performance evaluation shall conform to the requirements of the contract, including, but not limited to, quality and timeliness of performance, and fiscal administration and accountability. The agency awarding the contract shall identify specific objectives and evaluation criteria to be included as part of the contract. Where practicable, the agency shall develop both qualitative and quantitative performance indicators, including outcome criteria.

N.Y. CITY, N.Y., PROCUREMENT POL'Y BD. RULES, tit. 9, § 4-01(a) (2003).

¹⁴⁷ See *supra* notes 127–129 and accompanying text.

¹⁴⁸ See Geoffrey A. Manne, *Agency Costs and the Oversight of Charitable Organizations*, 1999 WIS. L. REV. 227 (1999); Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. DAVIS L. REV. 205, 269–72 (2004).

¹⁴⁹ And that is as it should be, particularly given recent examples of egregious contracting scandals, such as those involving the Halliburton Company's contracts in connection with the Iraq war:

Congressional and media sources charge the Halliburton Company, a Houston-based oil services firm previously headed by Vice President

difficult to do *any* meaningful contract monitoring at all given limitations on resources, staff, and adequately trained evaluators.¹⁵⁰ It therefore may seem unrealistic to propose that government contracting agencies monitor and evaluate human services contracts in a more substantive, qualitative way.

If policy makers re-think monitoring for basic fiscal and programmatic regularity to streamline, centralize, and avoid duplication and consider other, more participatory evaluation models, it may be possible to implement substantive evaluation that fosters the goal of improving service quality.

Given the multiple ways in which nonprofits providing human services are regulated, monitored, and evaluated, there are certainly opportunities for government agencies to work collaboratively to centralize and streamline basic oversight and accountability reporting. For example, other presenters at this Symposium have discussed the attorney general's role in monitoring nonprofits in New York State and the regulatory burden they face.¹⁵¹ Contracting agencies should consider the extent to which existing regulatory requirements duplicate city procurement requirements and whether there are ways of centralizing certain aspects of oversight to reduce the burden on both agencies and nonprofits.

Some New York City human services contracting agencies are moving in this direction as they streamline and coordinate community-based services.¹⁵² As Ajay Chaudry of Administration for Children's Services said:

Richard Cheney, with overcharging \$61 million worth of gasoline and for charging \$186 million for meals not actually served as part of its \$10 billion worth of contracts with the Department of Defense to support the U.S. military effort in Iraq. Halliburton holds the two largest contracts for reconstruction in Iraq with \$2.5 billion to restore the oil infrastructure and \$6.5 billion to provide the troops with housing, food, laundry, and other services. The contracts guaranteed the company a profit and allowed it to pass on all of its expenses to the government. One account indicates that the unaccounted-for charges amount to 43% of the amount the company billed, though that estimate understates the full \$5.6 billion of contracts awarded since the start of the Iraq war.

Minow, *supra* note 39, at 990–91 (internal citations omitted).

¹⁵⁰ See, e.g., Thomas I. Miller et al., *Insourcing, Not Capacity Building, a Better Model for Sustained Program Evaluation*, 27 AM. J. EVALUATION 83 (2006) (describing some of the difficulties with contract monitoring).

¹⁵¹ See Seth Perlman, *Government Regulation of Charitable Solicitations Advising Nonprofit Organizations*, in PRACTISING LAW INSTITUTE, ADVISING NONPROFIT ORGANIZATIONS 83 (2005) (discussing regulation of nonprofits).

¹⁵² See, e.g., Mullgrav, *supra* note 110, at 296–98 (discussing the use of technology by

[W]e want to improve and better monitor the quality of early care resources. Currently, programs have somewhat different requirements from each of the overseeing agencies. Many of the providers I see in the room today have Head Start contracts, have childcare contracts and have DOE contracts. And you are in fact audited for quality separately with separate procedures. We are working on creating a single assessment mechanism across all the programs. And a single protocol for how we do it, including cross-agency teams for doing that.¹⁵³

In looking at substantive policy issues in the evaluation context, it should be noted that in most cases of human services contracting, the service provision goals of the government agency and the nonprofit are aligned.¹⁵⁴ Often the best monitors are clients, community members, other nonprofits, and foundations. At times, it may be helpful to subcontract for a professional evaluator with expertise in the particular program area. If those responsible for public procurement move away from a vision of privatization that views government's role as no more than an arm's-length fiscal policeman, they may begin to see opportunities for more coordinated, textured, and qualitative monitoring without dramatically increasing either the workload of city agency personnel or the regulatory burden on nonprofit organizations. This can be done through approaches that include elements of the traditional market model with a more participatory, two-way approach to evaluation.

For example, as noted in an article in the *American Journal of Evaluation* about what is called an "insourcing" model of evaluation:

the New York City Department of Youth and Community Development to track program participation and outcomes).

¹⁵³ See Chaudry, *supra* note 129, at 14.

¹⁵⁴ For example, the mission statement of the Children's Aid Society is "[t]o ensure the physical and emotional well being of children and families, and to provide each child with the support and opportunities needed to become a happy, healthy and productive adult." Children's Aid Soc'y, Our Mission, <http://www.childrengroups.org/about> (last visited Oct. 17, 2006). This is consistent with the mission of the New York City Administration for Children's Services "to ensure the safety and well being of New York City children." N.Y. City Admin. for Child. Servs., Mission & Organization, <http://www.nyc.gov/html/acs/html/about/mission.shtml> (last visited Oct. 17, 2006). Similarly, Women In Need, Inc. states its goal as "to help women and their families, who are homeless, realize self-determination," Women in Need, <http://www.women-in-need.org> (last visited Nov. 28, 2006), which is consistent with the mission of the New York City Department of Homeless Services "to overcome homelessness in New York City." N.Y. City Dep't of Homeless Servs., Agency Introduction, <http://www.nyc.gov/html/dhs/html/about/agencyintro.shtml> (last visited Oct. 17, 2006).

The insourcing model we recommend relies on a single evaluation contractor who works for a group of like agencies. Insourcing requires that CBOs [community-based organizations] contribute pooled funds or that a granter underwrite the cost to hire an evaluator, which would be far more expensive per agency if each CBO had to contract for the work separately. This would work particularly well, for example, with CBOs funded under the same initiative.¹⁵⁵

The article goes on to discuss the insourcing model in the context of community coalitions:

Another useful context for the insourcing model is community coalitions. There has been a significant trend in the past decades to create strategic partnerships among community organizations. These partnerships are called community coalitions Thousands of coalitions anchored by government or CBOs have formed to support community-based health prevention activities in the areas of violence, substance abuse, teen pregnancy, infant mortality, asthma, and health insurance for the poor, as examples The leveraging of programmatic resources in the community coalition model can be expanded to include the leveraging of evaluation resources by insourcing.¹⁵⁶

This passage describes a model of privatization that might also be described as what Jody Freeman calls “publicization.”¹⁵⁷ Here, it is a two way process: Public law norms are extended into the non-profit CBO sector and the nonprofit provider’s purposes and goals are fulfilled in partnership with government.

Perhaps this kind of “publicization” is only possible in a closely regulated nonprofit context. Concerns about the development of public/private relationships that are too “cozy” or that raise risks of corruption and favoritism are valid and warrant examination. However, while there is always the prospect of agency capture or of creating public/private relationships that are too close, in some cases, agencies might do no worse with monitoring than they do now, and they might use competition in another way: as a lever to help ensure that private contractors comply with substantive as well as democratic norms. As Jody Freeman puts it:

I use [the] word [publicization] to suggest that private-sector entities could be enlisted in the project of protecting democratic norms, and not just in ways they will resent and resist (though the latter is, of course, possible—there is certainly no

¹⁵⁵ Miller et al., *supra* note 150, at 87.

¹⁵⁶ *Id.* at 91 (internal citations omitted).

¹⁵⁷ See *supra* note 59 and accompanying text.

dearth of examples of corporate resistance to government regulation). Whether either nonprofit or for-profit firms would enthusiastically embrace these norms is a still more remote possibility, though not unthinkable.¹⁵⁸

Whatever the form of monitoring and evaluation, it is crucial that the government agency remain involved and focused on the public goals of the contract: service delivery to clients and over-arching social service and democratic objectives.

CONCLUSION

A number of New York City agencies have begun the process of using current demographic data and including the network of community-based human services organizations in designing, monitoring, and evaluating contracts to improve substantive outputs. This more engaged, proactive, and substantive approach to the contracting process may help address some of the concerns about the abandonment of public law norms in privatization—at least in the context of nonprofits providing human services.

Of course, these approaches are fairly modest and do not address fundamental questions about the extent to which constitutional and regulatory protections might be afforded recipients of government benefits provided by private parties.¹⁵⁹ In addition, to the extent that this proactive, substantive approach engages contracting parties in a way that may be viewed as ceding greater control to private actors or going too far in the direction of serving the interests of nonprofit providers, there is a great deal of skepticism about whether it can address concerns about regulation, control, and the prevention of fraud and abuse. Here again, however, where nonprofits share public purposes and goals—and where nonprofits are or should be regulated in other ways—creating or indeed increasing the expectation that they will serve those goals may go a long way toward addressing the regulatory shortcomings of privatization. If government actors increasingly and aggressively take the view that privatization does not and cannot mean abdication of public responsibility or an abandonment of public law norms, we might see contracts structured to prohibit procedural and substantive violations. Though perhaps small examples, some

¹⁵⁸ Freeman, *supra* note 59, at 1327.

¹⁵⁹ *Lown v. Salvation Army*, 393 F. Supp. 2d 223 (S.D.N.Y. 2005), provides a potent example of the difficulty presented when courts fail to apply state action doctrine to impose constraints to address what may be considered fairly clear violations of the federal Constitution's religion clauses.

of the innovations New York City agencies are undertaking appear to be moving in this direction. By using up-to-date demographic data, collaborating with nonprofits and community leaders on concept papers, and prioritizing quality long-term outcomes, these agencies demonstrate an engaged, proactive approach to procurement that may begin to address some of privatization's procedural and substantive shortcomings in the social services context. Certainly, by moving away from a vision of privatization as government or regulatory abdication to a model where the expectation is that government actors will remain engaged, up-to-date, and proactive in enlisting private entities to serve as agents in helping carry out public work, there is a greater chance that public law norms and values will be maintained.

