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The Promises and Pitfalls of the Competitive Bidding Process

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The Promises and Pitfalls of the Competitive Bidding Process

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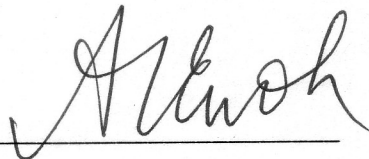
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The Promises and Pitfalls of the Competitive Bidding Process

Executive Summary

The specter of increased taxes casts a dark shadow upon the American landscape. At the same time public satisfaction with schools, public housing, crime, and infrastructure is on the down turn. The negative perception of public agencies as bureaucratic, inefficient, and wasteful is all the more pronounced when compared to the popular refrain lauding the virtues of the private sector. To stem the mounting inequities of public agencies law makers, think tanks, and members from every facet of society have suggested the expansion of private sector contracting into schools, public agency management, health and human services, police and fire, and here-to-fore unseen and untested service areas.

As privatization and contracting out gains traction, both public administration and business scholars have generated an impressive body of work examining contracting out and the private sector; unequivocally lauding or decrying public sector contracting. “With 1400 journals and magazines, 6000 non-serial publications and international thesis ‘Literally one can find what one wants to find’” (Hodge, 1999, 489).

Despite the irreconcilable postulations of contracting experts there are undeniable success and dismal failures in public sector contracting. The purpose of this paper is to identify key factors that lead to successful contracting thereby arming public administrators with the tools and knowledge designed to critically and rationally support or oppose potential contracting expansions in their agencies.

The Promises and Pitfalls of the Competitive Bidding Process

Table of Contents

Executive Summary	<i>i</i>
Acknowledgements	<i>iii</i>
Introduction	1
Literature Review.....	4
Methodology	14
Limits of Contracting-Out: A Critical Review	18
Findings	30
Recommendations	42
Conclusion	46
Reference	47
Appendices	50

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The promises and Pitfalls of the Competitive Bidding Process

Introduction

The United States government has a long history with privatization, particularly contracting-out. Contracting-out can be an expedient method to access specialized technical skills or infrastructure not readily available in the public sector. Over the past 10 years contracting-out has increased in scale and scope. Culminating in today's climate where proponents of privatization argue that public agencies contract-out everything from garbage pickup and public agency management to police and fire protection (Ammons, 2008; Delk, 2008; Schlesinger 1986). Though competitive tendering is clearly useful, contracting-out dogmatically is as likely to lead to failure as it proves to be a successful and prudent vehicle by which to provide citizens with needed services. The public sector's long history with contracting has seen both success and failure. The purpose of this paper is to identify key factors that lead to successful contracting thereby arming public administrators with the tools and knowledge to critically and rationally support or oppose potential contracting expansions in their agencies.

What is contracting-out? Contracting-out is a versatile brand of privatization whereby public organizations permit private sector firms to provide public services. Contracting-out can consist of competitive bidding, competitive negotiation, sole source contracting, auctioning bids, noncompetitive negotiation, and intergovernmental purchasing agreements. Although there are several methods of public sector contracting, this paper focuses on competitive bidding which is the most commonly utilized method. Competitive bidding generally takes

place in three stages: the pre-competition, competition, and post competition phases. During the pre-competition phase, contract administrators make key decisions concerning contracting method, bidding process, scope of work, and requests for proposals. During the competition phase, contracting departments accept and review contractor bids. Lastly, in the post-competition phase administrators negotiate terms, award contracts, and monitor service provision to ensure compliance with contract specifications. When utilizing a competitive bidding approach the public body prepares and issues an invitation to bid, provides public notice of the proposed contract, opens contractor bids, evaluates bids, and awards the contract (LeRoux, 2007, 7).

Competitive bidding can be a lengthy, complex, and expensive to administer. Preparation of bids requires an adequate description of the task to be done in a scope of work which involves skilled professionals, cooperation between the department heads and contracting staff, legal advisors, and depending on the service and contracting history of the department—quite a bit of time. Considering the human resources and logistical challenges present in a scope of work alone, why would a public body elect to contract out rather than provide services themselves?

As society grows more complex, diversified and nuanced, the scope and funding of public services steadily accrue in response to more complex social challenges—at the same time high school dropout rates, below standard public housing, and environmental pollution threaten to undermine our way of life (Pack, 1987, 527). Low service quality and mounting costs have led some to question the monopoly that government holds over service provision.

Lending credence to popular criticisms is a public sector incentive structure which multiplies costs:

A government official ... is rewarded by expanding the size of the agency he or she directs, not by how efficiently the work is performed. The bureaucratic incentive is to increase expenditures, not seek cost savings (Barnekov, 1990, 136).

The litany of services provided by public agencies comes at a heavy cost to taxpayers who bear the burden of funding these programs. Advocates of privatization argue that contracting-out can reduce the size of government and the accompanying tax burden; while improving efficiency, accountability, service quality, and provider responsiveness (Carrick, 1988).

In order to fulfill the purpose of this paper, the research is structured into eight distinct sections. To begin with, this paper examines relevant literature on contracting-out and competitive bidding while accounting for the promises and pitfalls of competitive bidding and contracting-out in the public-sector. Next, it presents the methodology used to identify key indicators of public contracting success. Later, the paper provides a critical review of the limits of contracting-out thereby supplying public administrators with established limits to contracting-out within the public sector, and presents the results of the case study within the findings section. Following this, the paper acknowledges the challenges of the research, and makes recommendations to resolve stated challenges. Lastly, this paper concludes by summarizing the previous sections.

Literature Review

Benefits of Contracting-Out in the Public Sector

The efficiency gains from contracting are largely a function of competition. Public organizations hold a monopoly over service provision, while private firms must compete for business. As private firms compete managers and administrators look for methods which maximize utility while driving down costs. These sentiments are echoed in Hodge's analysis of private and public sector efficiency studies, where he found that the "efficiency of all firms- public or private- is improved by a competitive environment" (Hodge, 1999, 45).

Public organizations are characterized by strict inflexible bureaucracies. Burdened by the accumulation of rules and procedures, public service providers are slow to respond to market conditions. Bureaucracy is meant to discourage biased and unproductive behavior by so thoroughly describing the duties and tasks to be done that little room remains to be exploited through illegitimate methods. Unfortunately, bureaucratic organizations can stifle creativity and displace service goals. Each rule limits the options available to public bureaucrats in innovating processes in the interest of greater efficiency or improved quality. In advanced cases, procedure becomes the primary goal of employees relegating the provision of services to a distant second. When compared to public organizations, private businesses have relatively few rules. Consequently, the private organization can more quickly respond to market demands. Comparatively unfettered with bureaucracy, private firms are free to seek cost cutting methods, secure the most qualified human capital with attractive compensation packages, and respond to market demands: resulting in more responsive higher quality services and products (Hoeger and Waters , 1993, 246).

Instituting competitive bidding structures encourage state agencies to deal equitably with vendors by providing each potential vendor with a chance to compete for state contracts. The competitive bid process also acts as a safeguard by diminishing the chance that state contracts will be awarded based on cronyism, nepotism, and other forms of “spoils” systems (White, 1978). Furthermore, the construction of formal bidding structures bolster transparency (White, 1978). Formal bidding often requires public agencies to advertise contracts, vendor qualifications, and service specifications. Public scrutiny makes it doubly difficult to award a contract for venal and selfish motives. Going further, even if the public does not take an active interest in the contracting process, self interested private contractors provide yet another safeguard. Competitors have an incentive to closely monitor the opposition’s bids, using the legal system as a remedy to suspected unfair contracting processes (LeRoux, 2007).

The foundation of public service is economy, equity, efficiency, and effectiveness. Contracting-out public services can bolster each of these principles by providing a diverse group of contractors who provide better services at lower costs.

Challenges of Contracting-Out in the Public Sector

Although competitive bidding structures show great promise, it is not a panacea for public service challenges. The strengths of contracting-out are tempered by a set of challenges. Private sector vendors have an opportunistic relationship toward their public sector funding. Private contractors are in business to make a profit, the provision of services is merely a means to an end (Globerman and Vining, 1996). This circumstance is thoroughly described by the principal-agent problem, or the problem of agency. The problem of agency is an overarching

theme which informs the behaviors of public agencies and private contractors in the free market.

Consider two individuals who operate in an uncertain environment and for whom risk sharing is desirable. Suppose that one of the individuals (known as the agent) is to take an action which the other individual (known as the principal) cannot observe. Assume that this action affects the total amount of consumption or money which is available to divide between the two individuals (Grossman and Hart, 1983, 7)

In such a situation it is in the best interest of the agent to act such that their portion of the consumption or money is increased. The agent's gain (private contractor) comes at the expense of the principal (public agency).

In every stage of the contracting process the principal agent problem informs the behavior of the contractor and public agency. Competitively contracting-out is meant to decrease the profitability of bidding above marginal costs. Scopes of work are intended to thoroughly describe the services to be delivered that the nondescript facets of the service cannot significantly alter the principal's utility. Through this lens, contract administration is the principal's attempt to secure the most favorable distribution of utility. Despite these safeguards information asymmetries persists, particularly in highly technical services. Unfavorable consequences which may arise from information asymmetries include the inequitable distribution of service, low quality work, and bids which surpass the market value for the services provided (Globerman and Vining, 1983). Unfortunately, the very methods employed by public agencies to resolve the problems of agency can absorb the characteristic benefits of private sector contracting.

Contract Administration

Contracting for services is an intense and specific process which requires experienced professionals well versed in the “ifs” and “buts” of contract administration. Simply put, many departments lack the expertise to tender their own bidding process. As such, some jurisdictions have elected to employ a centralized contracting model. Centralized models allow public agencies to pool their resources to hire and develop contracting expertise. The downside is that central contractors are not necessarily experts on the common issues which attend the diffuse array of public services which are contracted in the public sector. Furthermore, department heads may be antagonized by a perceived loss of authority over their department (LeRoux, 2007, 20).

Decentralized contracting creates a different set of issues. Individual agency contracting leads to variation and inconsistencies between departments. Moreover contracting variation can increase the chance of foul play as well as complicate contract auditing. Individual contracting increases the workload on an already overworked department heads. Although utilizing a decentralized contracting structure makes use of the departmental expertise, this may open the city up to lawsuits and inefficient contracting.

Contract Monitoring

The dichotomy between the goals of the principal and the goals of the agent engender contract monitoring. The ease by which contract administrators are able to monitor contract compliance varies by contractor, service complexity, and jurisdiction. “As a rule the more directly services affect interest groups or citizens, the less monitoring by the principal is

necessary as citizens will actively police the contractor” (Prager, 1994, 181). In addition, technical services are more difficult to monitor.

Anyone can tell whether a bridge has been completely repainted, but to determine whether a contractor used the proper consistency of paint rather than mixing in more thinner ... requires chemical analysis, performed by skilled technicians using sophisticated equipment (Prager, 1994, 181).

When monitoring contracts, public administrators inadvertently export bureaucratic behaviors to their private sector counterparts. Personnel salaries and benefits regularly account for the greatest portion of business overhead cost; as such the ability to freely negotiate compensation packages is extremely important in keeping cost competitive. In some instances, contract employees have successfully lobbied for laws requiring comparable public sector and private sector pay for contracted services. Pursuing this further, some public sector contracts are constructed such that private contractors are required to hire public sector employees to fill needed personnel positions (Pack, 1987, 622). Public contract administrators are well aware of the opportunistic relationship between contractor and contractee. As such, contract administrators craft exceedingly detailed scopes of work to ensure that private firms cannot lower the quality of services to produce greater profits. Quality assurance, contract terms, and contract compliance procedures further restrict the flexibility and agility of private contractors to respond to market demands and thereby partially absorb the benefits of private sector service delivery.

Market Conditions

The incentives of contracting-out are founded on a set of assumptions which may not present themselves in every jurisdiction where competitive contracting might come to bare.

Picture a conceptual marketplace. If a market has multiple producers but a single consumer, producers are encouraged to provide a product at a price which is close to their marginal cost of producing the good. Competition or high contestability produces efficient behaviors in the private sector (Hodge, 1999).

Revisiting the conceptual marketplace, if there is one producer and one consumer the price is dictated by the customer's ability to pay—not the cost of production. This market is characterized by a lack of competition and low contestability. In the world of competitive contracting low contestability is a nearly insurmountable hurdle to efficiently contracting-out. Markets with low contestability encourage contractors to submit bids which are higher than their marginal costs. Low contestability also heightens the chance of breach externalities (Globerman and Vining, 1996).

Some services, particularly those which deal with healthcare and safety, depend upon the service provider to be constant (Schlesinger, Dowart, Pulice, 1986). Service continuity presents a prominent challenge to service contracting in the public sector. In the mental health industry quality of care and the likelihood of success is greatly increased by the continuity and dependability of the caregiver (Schlesinger, Dowart, Pulice, 1986). Continuity interests decrease the chance that public sector contractors will initiate damage provisions, cancel contracts, or seek more suitable providers, particularly in markets with little or no competition. After all, some services are better than no service. A high interest in service continuity can severely diminish the benefits associated with competition. Leaving the private sector contractor with the incentive to do just what is necessary to avoid losing the contract.

Worse still, the contract administrator has an incentive not to change contractors even if contractor performance is inadequate. If a public agency chooses to terminate a contract, then the public agency has the additional problems of finding a suitable replacement, disruption of service, and the administrative burden of conducting an additional bidding process. The public agency is left in a vulnerable position. With a lack of needed services and a decreased contractor pool the consumer is encouraged to accept high bids from less qualified contractors (Schlesinger, Dowart, Pulice, 1986).

Costs to the Public Sector

In addition to the challenges presented by unfavorable market conditions, it is prudent to examine the effects of contracting-out and privatization on the public sector itself. Some advocates of privatization do not support contracting-out for potential fiscal benefits alone; they view contracting-out as a remedy to inadequate and incompetent public agencies. For instance, in an article entitled *A Brief History of Government Bashing*, Bill Bishop blames this "crisis in confidence" on a "crisis in competence"—referring to a 1990s pole in which most people responded that they “did not trust government to do much of anything” (Schoop, 2008). If this is a common motivation behind contracting-out and other forms of privatization, what are the effects of these negative public-sector stereotypes? According to Barnekov, contracting-out to get away from government can seriously damage the public-sector. In his words:

Privatization weakens government by deflecting attention from making government work ... to permit it to fail is to imperil this country's unity and progress at home and its position in the world (Barnekov 1990, 138).

Moreover, faced with the proposition of losing their jobs or working for a private contractor, many public employees oppose contracting-out. Encapsulating this position, Barnekov sums up the effects of private sector contracting on government employees; “some part of the savings from privatization result from lower wage levels and the use of part-time workers with fewer fringe benefits. Thus privatization is really a means of imposing losses on public employees” (Barnekov, 1990). This distinction was further supported by a study done by the Brookings Institute.

Nearly all employees who switched to the contractor’s employment complained that the benefits were not as good as the government’s and that the work was less satisfying than government work (Kettl, 1993, 61-62).

There has been a long tradition of efforts to “make government run more like business” (Kellough and Lu, 1993, 56). Advocates of the "business stereotype" often ignore the unique challenges facing the public sector. For example, success in the public sector is not based purely on financial profit; indeed public agencies do not make profits (Kellough and Lu, 1993). In addition, public agencies define success by the completion of their mission. From this stance, the provision of services could be described as an intrinsic good where costs are a secondary concern. As a result, public agencies are subject to a variety of policies which promote sometimes conflicting values effecting agency’s fiscal efficiency (Kellough and Lu, 1993). For instance, the political context of public sector policy means that popular yet inefficient practices may be continued even when they act as a known loss to agency efficiency. Disjointedly, the primary motivation behind the application of competitive bidding to government contracts is to advance fiscal economy and efficiency (Hillman, 1984). When contemplating the expansion of competitive bidding structures to public services contracts

administrators must be careful not to forsake representation, equity, effectiveness, and quality goals by focusing too narrowly on fiscal efficiency and economy.

If cost savings are the primary motive behind contracting, public sector management can take steps to make the provision of public-sector service more cost effective. Private sector contracting is effective because of the cost shrinking effects of competition and the efficient behaviors promoted by the profit motive. Importantly, neither profit nor competition need be the exclusive domain of private sector business. An example of modified in-house production is a process called “bid to goal.”

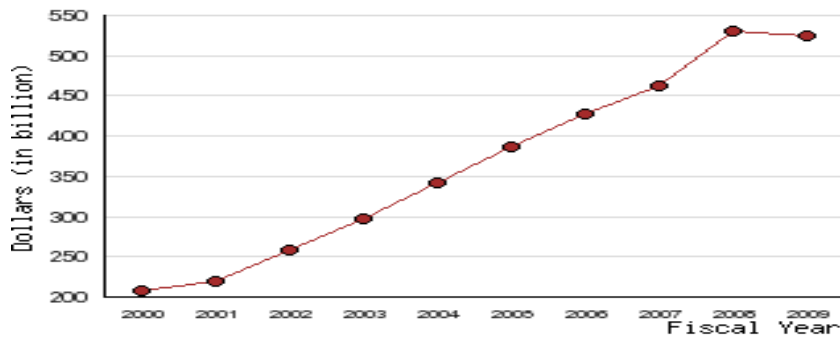
The bid-to-goal process begins with the hiring of a consultant who is an expert in a given local government function. The consultant prepares a cost estimate for performing that function in the client’s jurisdiction, based on his or her familiarity with companies that provide this service. In essence, this estimate is the consultant’s prediction of a competitive contractor’s bid, if bids were being sought. Once the consultant’s figure has been received ... the department responsible for producing the service is invited to match or even beat the bid. If the department cannot do so, the local government is likely to seek outside bids. On the other hand, if the department streamlines its operations, and beats the consultants estimate, the department retains responsibility for producing the service (Ammons, 2008, 133-134).

Furthermore, several local government agencies have had success with gain-sharing. Using gain-sharing the budget for a service acts in a similar manner to an outside contractor’s bid. If public employees reduce costs they keep a portion of the difference to be distributed in the form of bonus checks (Ammons, 2008, 129).

It is possible to envision scenarios where contracting-out produces lower quality services at higher prices while diminishing public sector capacity, complicating the administrative process, and stifling competition by instituting private sector monopolies (Johnston and Romzek, 1999; Van Slyke, 2003). Still, privatization is on the rise. For instance,

half of all funds expended through Title XX Social Security Act are done through contracts (Schlesinger, 1986, 246). In fiscal year 2009, contracting expenditures totaled 523,901,729,866 dollars up from 460,000,000,000 in 2008 (see Figure 1).

Figure 1. Total Spent on federal Contracts (2000-2009)

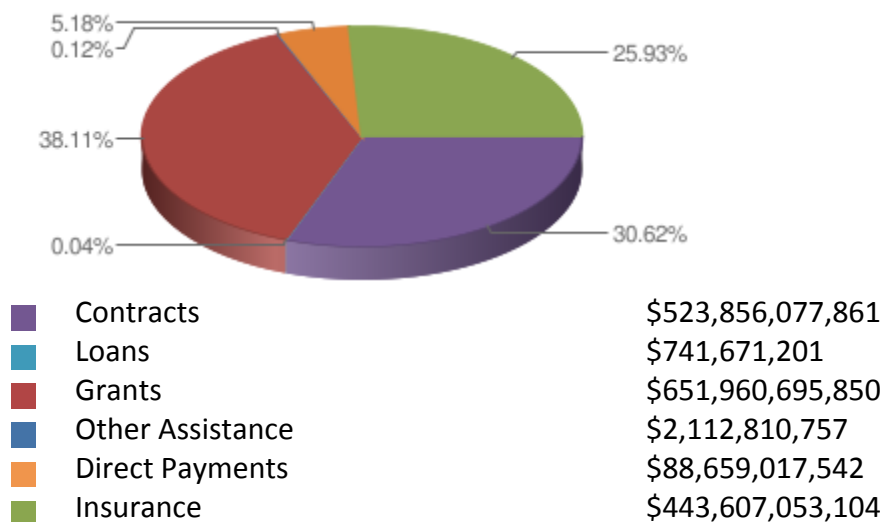


Source: Data from usaspending.gov, accessed March 23, 2010

Further illustrating the pervasiveness of contracting-out, in 2009 contracting accounted for a substantial portion of the overall budget (see Figure 2).

Figure 2. Federal expenditures separated by allocation type (2009)

Federal Spending FY 2009



Source: Data from usaspending.gov, accessed March 23, 2010

Giving pause, the Office of Management and Budget, reported a backlog of 13,000 audits involving 160 billion dollars (Prager, 1994, 181). The massive backlog of audits suggests there may be very productive or unproductive contracting practices which are yet unrecognized for want of timely monitoring. Even worse, the lack of contract monitoring is not confined to the federal arena; when pressed, few (local) officials could supply any hard evidence that private contracting was cheaper than public service provision (Prager, 1994, 182). Given these facts alone, it is essential that public administrators understand why contracting is successful and when it is intractable, or risky.

Methodology

The research utilizes a case study method to gather several types of data from geographically dispersed jurisdictions. This analysis will be confined to Virginia, California, Texas, Maryland, and Massachusetts—the five state jurisdictions which contracted for the greatest aggregate dollar amount of services in fiscal years 2002-2010. The relevant units were identified using data from the Federal Contract Awards by State chart provided by usaspending.com (see Figure 5).

Figure 5. Federal Contract Awards by Contractor State.

Federal Contract Awards by Contractor State. * Dollars in billions.

Contractor State	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2002-2010	FY 2009 Rank
Virginia	\$32.96	\$38.92	\$45.63	\$59.89	\$66.65	\$69.34	\$78.93	\$79.55	\$7.93	\$479.81	1
California	\$41.44	\$46.54	\$51.56	\$54.02	\$57.09	\$57.65	\$63.09	\$66.31	\$10.94	\$448.63	2
Texas	\$17.27	\$30.16	\$34.03	\$33.69	\$41.35	\$46.46	\$67.78	\$37.08	\$6.11	\$313.92	3
Maryland	\$17.49	\$17.43	\$21.84	\$22.38	\$24.95	\$26.47	\$30.29	\$33.20	\$4.37	\$198.43	4
Massachusetts	\$7.00	\$8.43	\$9.83	\$11.28	\$11.97	\$14.34	\$16.16	\$18.31	\$1.63	\$98.96	5
Florida	\$8.09	\$9.39	\$10.04	\$13.13	\$14.22	\$14.93	\$16.58	\$17.51	\$1.93	\$105.82	6
Pennsylvania	\$9.93	\$11.43	\$11.67	\$11.50	\$13.58	\$17.88	\$18.38	\$17.33	\$3.04	\$114.74	7

Source: Data from usaspending.gov accessed March 23, 2010 (for complete list see appendix 2.3). * Dollars in billions.

The analysis is presented in two sections. The first section presents data on key indicators of states' current general contracting and procurement law. In the second section, the study looks at proposed modifications to current state contracting laws. The researcher assumed that proposed modifications indicate dissatisfaction with current contracting and procurement law: and that the higher the number of proposed modifications, the greater the dissatisfaction with current contracting and procurement law. Conversely, the lower the number of proposed modifications the greater the perceived satisfaction with current contracting and procurement law. Thus a policy with fewer proposed modifications is more successful than a policy area with more proposed modifications. The research notes differences between states in current law and proposed modifications to current law. A category, or policy area, with a high number of modifications relevant to other proposed modifications suggests greater dissatisfaction with that facet of general contracting and procurement law.

Key Public Contracting and Procurement Indicators

Data on 3 key factors of states' current general contracting and procurement laws were gathered. The key indicators are classified under the heading of "key public contracting and procurement indicators." The indicators are competitive bidding initiating cost threshold, preferred contracting model, and exemptions from competitive bidding protocols. The competitive bidding initiating cost threshold indicator represents the dollar amount at which the general state procurement laws mandate that public agencies procure services and goods in accordance with each state's competitive bidding protocols. The preferred contracting model indicator represents the contracting type chosen by the state as most beneficial in contracting for goods and services. The exemption indicator represents guidelines within general state contracting and procurement law which permit specified public bodies, goods and services, and situations to deviate from standard public contracting and procurement protocols. Public bodies include state agencies, organizations, departments, municipalities, municipal organizations, and specified nonprofits. Additionally, exemptions must be identified as "exemptions" or "emergency" procurement protocol within state general contracting or procurement law. The exemption indicator is reported as a dichotomous variable with an "X" indicating the presences of the relevant exemption (see Figure 6). This information is compiled in a table entitled "*Key Public Contracting and Procurement Indicators*" (see Figure 6).

Proposed Modifications

The second section identifies proposed modifications to current public contracting and procurement law. Proposed modifications are defined as state senate or house bills on the state's 2010-2011 legislative dockets. Proposed modifications are placed within categories to

establish “policy areas.” The research identifies 6 policy areas: equity, transparency, structural, agency, goods and services, and other modifications. Classification of state senate and house bills were determined by review of the accompanying legislative digest, synopsis, summary, or front matter provided with the text of the bill. Equity modifications represent proposed bills which attempt to modify current public contracting and procurement law in such a way as to restrict or expand current policy as it relates to the participation of small business, women, minority, disabled, and veteran owned businesses in the public contracting process. Transparency modifications represent proposed bills which attempt to modify current public contracting and procurement law in such a way as to restrict or expand current policy as it relates to the public bodies compliance with bid advertisement, requests for proposals, and requests for information or the public’s participation in the public contracting process. Structural modifications represent proposed bills which attempt to modify current public contracting and procurement law in such a way as to restrict or expand current policy as it relates to the initiating cost threshold and methods of contracting utilized in the state contracting policy. Agency, department, and municipality modifications represent proposed bills which attempt to modify current public contracting and procurement law in such a way as to restrict or expand the current policy as it relates to the specified public body. Goods and/or service modifications represent proposed bills which attempt to modify current public contracting and procurement law in such a way as to restrict or expand the current policy as it relates to a specified good or service. Other modifications represent proposed bills which attempt to modify current public contracting and procurement law in such a way as to restrict or expand current policy in ways which are not specified in the preceding five categories. This

information was compiled in a table entitled “Proposed Modifications to Current Contracting and Procurement Law” (see Figure 7).

Limits to Contracting-Out: A Critical Review

When is contracting-out prudent? What services should not be contracted? How do public agencies reduce the chance of unsuccessful contracting? Several scholars and organizations have proposed frameworks, guidelines, and nuanced methods to answer these and other questions (Hodge, 1999; LeRoux, 2007; Prager, 1994; Barnekov, 1990; Poole, 1987). Although this list is far from exhaustive, it provides academic, private, public, and real-world examples of the considerations which responsible administrators should account for when deliberating on expanding or limiting service contracting and procurement.

Contracting by Service

There is a wealth of study analyzing contracting-out and lending credence to the assertion that the private sector is inherently more efficient than the public sector. This stark distinction has been borne out in study after study regardless of state or country, but these studies often have a common factor, namely, the services selected for analysis (Hodge, 1999, 461).

It is more difficult to develop measurable and quantifiable criteria around which to gauge efficiency for some services than others. For instance, it is difficult to develop effective measures for social work or education whereas it is much easier to develop effective measures as it relates to janitorial service or public works projects. In study after study private-sector

provision of public transportation and solid-waste collection appears to be more efficient (Prager, 1994, 614). Although the importance placed on efficiency measures should be taken with a grain of salt. Seemingly valid measures of efficiency can prove to be of less valid upon closer inspection. For example:

In the mid-1990s in San Jose, Wayne Tanda, then director of streets and traffic, was surprised to learn that his sewer cleaning crews focused all scheduled operation on cleaning sewers that were already clean. Crew chiefs told him they were rated on how many miles of sewers they cleaned. Cleaning dirty sewers would slow productivity and cut down the miles of sewers they cleaned. (Ammons, 2008, 67)

Efficiency is measured by creating quantifiable units, miles of sewer cleaned per dollar spent. If measurements of efficiency or quality focus too narrowly on outputs as opposed to the desired outcomes, opportunistic behaviors can maximize measurements, merely presenting the appearance of increased efficiency (Ammons, 2008, 68). Similar measures are doubly troublesome as they can be used to advocate abortive public contracts.

Private sector service is not categorically more efficient than the public sector. According to a macro-study conducted by Graeme Hodge, the public-sector was equally or more efficient than the private-sector depending on service types. For example, in police, fire, and health services the public-sector provided comparable services for lower prices (Hodge, 1999, 461). Moreover, private or public ownership had little effect on efficiency for corporate services and parks and recreation. Hodge's research points to the conclusion that service type is more important than public or private ownership when it comes to efficiency (Hodge, 1999).

New programs often have unintended effects. As contracting expands to a greater variety of services, contract administrators must be careful to base their decisions upon sound

research which is applicable to the service in question. The old adage “start small” may be of use here:

Pilot projects involve short-term contracting-out of part of a service on a pre-established geographic basis in order to test the possibility of contracting-out a total service area (LeRoux, 2007, 12).

Pilot projects may prove to be a valuable strategy when competitively contracting in new service areas.

Contracting Lessons from the Private Sector

Jonas Prager argues that the public sector should heed the lessons of the private sector when deciding whether to contract-out services. Private businesses contract-out when the costs of producing a service in-house exceed the costs of out-of-house production (Prager, 1994, 178). In the minds of many, contracting-out removes the public sector from the equation, but nothing is further from the truth. Privatization does not eliminate government accountability for the results of its expenditures; it simply shifts the locus of service delivery (Barnekov, 1990, 136).

What is relinquished, says James Sundquist, ‘may be the easiest part ... the doing. The conceiving, planning, goal-setting, performance monitoring, evaluating, and the correcting all remain with government’ (Barnekov, 1990, 136).

Since much of the heavy lifting for contracting-out remains within the public sector, public agencies should only contract-out if production costs, organizational costs, and contracting are less than the cost of in house production (Prager, 1994, 179).

Globerman and Vining (1996) further elucidate the out-of-house costs of production. The transaction cost of service contracting may not be accounted for in the purported savings

of private sector service provision. The transaction cost include: the cost arising from negotiating contract details, cost of negotiating changes to the contract in the post-contract stage when unforeseen circumstances arise, the cost of monitoring whether performance is being adhered to by other parties, the costs of disputes which arise where neither party wished to use pre-agreed formal mechanisms, and opportunity costs (Globerman and Vining, 1996, 578). The relative difficulty or ease by which a task can be explained and monitored with sufficient detail ought to be accounted for when crafting a service contract. The more complex the task, the greater the chance of information asymmetries and the higher the probability of externalities, both exacerbating the chances for higher bargaining costs and the potential for foul play (Globerman and Vining, 1996, 579). Transaction costs are substantial and continue to accrue for the life of the contracted service, and must be included in any representative cost benefit analysis.

In general, businesses, firms, and organizations are geared for undertaking a limited number of primary activities. Secondary functions are relegated to outside contractors, and firms rely on contracts rather than permanent staff and facilities to meet temporary needs (Prager, 1994, 176). Through economies of scale, firms specialize to drive down cost and spur innovation. If a firm is too specialized, there will neither be enough demand or profit to sustain the business at that level of specialty (Prager, 1994, 177). The firm will have to diversify to gain a larger market share, but there is a point where firms have maximized scale and scope, and should contract-out. This level is not reached because of a limit to produce but a limit to administer. "The diseconomies of coordinating the operations of an industrial behemoth will

more than offset the production cost savings offered by economies of scope and scale” (Prager, 1994, 177).

Therefore, services should only be contracted if the costs of in-house production exceed the costs of out-of-house production. The transaction cost of contracting can be substantial accounting for upwards of 2 percent of the overall contract (Poole, 1987, 614). Noting Hodge’s (1999) findings on the negligible differences between cost savings in some industries, a fuller accounting of transaction cost might show that the diseconomies of contracting may be more widely spread than initially estimated. Additionally, this analysis of cost does not include the diminished capacity of public agencies, or the political cost to the administration which elects to outsource public sector jobs.

Building upon the service type framework, there are activities which, regardless of financial benefit, should not or cannot be contracted to private sector firms. Some services provided by local, state, and federal government agencies are done so because the free market is inefficient in these areas. Additionally, some services or facets of service should remain under public control because out-of-house provision would impair the governmental body. Still other services fall under the banner of “inherently governmental” activities and as such are exempt from private service provision. There are also services which must be provided by public agencies because of statutory preemptions.

Monopolies, public goods, and externalities are common examples where public service provision is preferable to private sector ownership. When left to the free market, these scenarios produce inefficient behaviors and a lack of needed service.

The classic example of public goods are defense and lighthouses with certain exceptions ... pure public goods will not be supplied at all by markets because of

the inability of private providers to exclude those who do not pay them (Weimer and Vining, 2005, 81).

In these well-known instances the competitive profit seeking motives associated with the public-sector are inadequate to produce services and goods which adequately address the needs of the people (Pack, 1987, 528).

Citizens' desire dependable service, particularly as it pertains to medical care and safety. Contracting for vital human services presents dynamic challenges which are present to lesser degree in other commonly contracted services areas. During the life of a contract, a public agency or contractor may be forced to terminate a contract for any number of reasons. As such, contracting-out emergency services may be unwise even if it is financially feasible. As an alternative, public administrators might consider parceling out services to retain capacity should a contract need to be terminated (Prager, 1994, 181). In addition to emergency services, governmental units may choose to retain control of strategic infrastructure to preserve capacity and ease transition should contractors default.

The City of Weston, Florida has a population of 63,000 ... the city contracts with a firm to do its accounting, accounts receivable/payable, and budgets. In the past the work was done on the contractor's hardware and software, but when the city contemplated changing contractors, it realized that changing software and data from one contractor to another was a complex, cumbersome, and time-consuming task ... The city ultimately chose to purchase the software and hardware necessary to perform the work and lease it to the contractor (LeRoux, 2007, 189).

By retaining control of strategic infrastructure, contract administrators ensure continuity of services, and facilitate transition from one contractor to another.

Office of Management and Budget (OMB) Circular A-76

“Federal policy” concerning privatization has gone through several iterations since its initial stance in 1955 (Ewoh, 1999). Then, the Bureau of the Budget established that:

Federal government will not start or carry on any commercial activity to produce a service or product for its own use if such service can be procured from private enterprise through ordinary channels (Bureau of the Budget Bulletin 55-4, 1955; cited in Ewoh, 1999, 10).

The predecessor to the Bureau of the Budget, OMB establishes current federal policy for the “competition of commercial activities” in Circular A-76 (OMB, 2003). Based on the prescriptions of Circular A-76, all activities performed by governmental personnel are classified as “commercial” or “inherently governmental.” Inherently governmental activity is defined as “a function which is so intimately related to the public interest as to mandate performance by Government employees” (OMB, 2003). This sort of activity requires the “exercise of sovereign authority” and may “commit government to a course of action” for example, policy making (OMB, 2003, A-2). Other functions performed by government personnel are classified as “commercial activities” and are subject to private competition. In some cases, otherwise commercial services may be removed from the private competition pool if the agency submits an acceptable reason code and rational to a Competitive Sourcing Official (see Figure 3).

Figure 3. Reason Codes and Definitions for Commercial Activities Inventory

REASON CODES AND DEFINITIONS FOR COMMERCIAL ACTIVITIES INVENTORY	
CODES	DEFINITIONS
A	The commercial activity is not appropriate for private sector performance pursuant to a written determination by the CSO.
B	The commercial activity is suitable for a streamlined or standard competition.
C	The commercial activity is the subject of an in-progress streamlined or standard competition.
D	The commercial activity is performed by government personnel as the result of a standard or streamlined competition (or a cost comparison, streamlined cost comparison, or direct conversion) within the past five years.
E	The commercial activity is pending an agency approved restructuring decision (e.g., closure, realignment).
F	The commercial activity is performed by government personnel due to a statutory prohibition against private sector performance.

This is a list of acceptable reason codes which permit federal agencies to deviate from general contracting policy set out in revised OMB Circular A-76 Source: Data from OMB A-76 Circular (Revised) , 2003, A-3.

The OMB Circular A-76 draws a firm line limiting the contracting-out of public services. However, in Ewoh’s words, “it should be noted that the circular is frequently amended and updated” (Ewoh, 1999, 10).

Situational Contracting

There is no lack of guidelines or frameworks with which to guide public-sector contracting decisions due to an uncertain contracting environment with countless scenarios with exceeding particular solutions. This sentiment is echoed in Kelly LeRoux’s *Service Contracting a Local Government Guide*:

Contracting a Local Government Guide:

The issues service contracting raises are highly individual and depend on factors such as labor agreements and the policies of the governing body, there are few simple answers for broadly applicable guidelines (LeRoux, 2007, 5).

However, this should not be construed to suggest that there are no solutions or common practices which can be applied to a number of contracting dilemmas. Contracting literature focuses on several common issues, low balling, low contestability, poor continuity, collusion, and as providence would have it, provides some common sense solutions and advice.

The strength of contracting-out is based on several assumptions, one of which is the presence of competition. Ideally, competition drives down prices in an effort to increase the contractor's chance at securing a winning bid. When contractors collude with one another, the incentive to submit the lowest possible bids are erased, and the efficiency motive is seriously impaired. A market with multiple producers and a single consumer will not drive down prices if producers work with one another to exploit the consumer.

A potential solution has been employed by several U.S. automobile manufactures among others. Awarding contracts to multiple contractors allows for comparison of services and diminishes the profitability of collusion. Multiple contractors give the principal more information with which to track expenses and negotiate contracts. Additionally, by awarding multiple contracts the contractor reduces the incentive to collude; bidding beyond the marginal costs increases the chance that contractors will be underbid by competition or that the principal will choose not to renew the contract. This method does have its drawbacks, namely, increased contracting costs. Contract administrators must be cognizant of this trade-off when constructing their contract procedures (Prager, 1994, 178). Furthermore, contractors can construct contracts which penalize higher bids while rewarding lower bids. When awarding multiple contracts the client will choose the lowest responsible bidder. The client can penalize higher bids by awarding the contract at the lowest bidder rate. Conversely, the client

encourages lower bids by awarding the actual lowest bidder at the next lowest bidder's price (Prager, 1994).

Contractors may submit intentionally low bids in a practice referred to as "low-balling" (LeRoux, 2007, 115). Low-ball bids may not accurately account for the costs of production in an "attempt to exclude competition" (LeRoux, 2007, 115). Once competitors have moved on and the low-ball contractor's position has ossified, the contractor increases costs to recoup losses and reflect market prices. In the interest of service continuity, and with a lack of available competitors, the public agency is forced to pay higher prices.

Exceptionally low bids should be considered with great care, contractors can take additional steps to modify contracts in such a way as to make it more difficult for low-ball contractors to recoup losses (LeRoux, 2007). Shorter contracts can remedy the challenge of low-balling. Shorter contracts diminish the chances that a private contractor can absorb the cost of underbidding for long enough to exclude competition; since more frequent contracting increases turn-over and acts as a built in check to the development of monopolistic contracts (Poole, 1987, 616). Public agencies could also mandate performance bonds or construct stiff penalties for post competition price negotiations. Performance bonds are:

Insurance issued by an insurance company to a local government on ... behalf of its client, the bidder, guaranteeing payment of all claimants and subcontractors who have and fulfill contracts to supply labor or materials to the bidder if the bidder is awarded the contract (LeRoux, 2007, 258).

Steven Globerman and Aidan R. Vining propose an axiomatic system toward contracting that is tailored to the broad circumstances and problems which tend to produce high contractor bids, poor quality, or monopolistic contractor behavior. Adverse contracting results are produced by unfavorable market conditions. However, if contract administrators accurately

judge market conditions, they can construct contracts that capitalize on these circumstances. According to Globerman and Vining (1996), public contractors should account for task contestability, specificity, and asset contestability as it pertains to the proposed contracted service.

Task complexity describes the degree of difficulty in specifying and monitoring the terms and conditions of a transaction ... In a contestable market, only a few firms are immediately available to contract with, but many firms would quickly become available if the price paid by government exceeded the average cost incurred by contractees ... An asset is specific if it makes a necessary contribution to production of a good and has much lower value in alternative uses (Globerman and Vining, 1996, 580).

As an example, a market with low contestability will encourage contractors to bid higher than marginal costs, while heightening the chances for breach externalities, and interruptions in service (Globerman and Vining, 1996, 580). If contract administrators anticipate a market with low contestability they can incorporate mitigating strategies before bidding the contract, and negotiate the contract so as to influence behaviors after the contract has been awarded (Globerman and Vining, 1996, 581). For instance, the firm can negotiate stiff penalties for defaulting on contract terms, mandate performance bonds, and negotiate alternative methods of service provision should the primary contractor default on the current contract.

Contracting scenarios are highly individual and may be composed of one, some, or entirely different conditions than those discussed above. Despite highly specific contracting conditions, Globerman and Vining (1996) demonstrate how public agencies can use a combination of pre-contracting and post-contracting strategies to mitigate a combination of unfavorable market conditions (see Figure 4).

Figure 4. A Summary of Contracting-Out States

Table 1 A Summary of Contracting-Out States					
Case	Task Complexity	Specificity	Asset Contestability	Dominant Problem	Solution(s)
1	low	high	Low	Few problems	Rely primarily on contestability via contract termination (i.e., increase potential suppliers)
2	low	high	High	Once a contractee has invested Government owns specific assets in specific assets (i.e., assets that are uniquely used in transaction), it is vulnerable to opportunism.	Government owns specific assets
3	low	low	High	Usually specific assets are incurred by contractee, while costs of low contestability are borne by government.	This is a mutual hostage situation. Where hostages are not of equal value: (a) If contestability problems are greater, reduce minimum Efficient Scale where possible (again increase potential number of supplier(s)). (b) If asset specificity problems are greater, government holds some of the specific assets.
4	high	high	Low	Genuine uncertainty about costs and/or performance. Can involve major breach externalities.	Either: (a) Mechanisms to reduce complexity- e.g. prototyping (b) Independent arbitration
5	high	low	Low	Difficult to distinguish between genuine disagreement over satisfaction of specifications and opportunistic behavior.	Dual source prototyping. Arbitration from other (noncontestable) firms, consulting firms, and academics.
6	low	low	High	Lack of contestability	Multiple sourcing as duplication is not that costly
7	high	low	High	Ugly!	Any solution approximates the firm performing the activity

Source: Data from *A Framework for Evaluating the Government Contracting-Out Decision with an Application to Information Technology* (1996, 583)

Though these scholars analyze public sector-contracting from different perspectives and with sometimes conflicting motives, their assertions often arrive at a common destination.

The literature urges contract administrators to assiduously craft contracts which anticipate particular jurisdictional challenges. Similarly, contracting must more fully account for the transaction costs in contracting decisions. Current contracts should be reviewed to ensure that performance indicators are valid. Beyond the financial concerns, contracts should account for the strategic ability of the public agencies to retain capacity. Diminishing trust in government and increasing prevalence of contracting-out necessitate a change in behavior. Public administrators cannot afford to make contracting expansions based on ideology, bias, or favoritism.

In the pursuit of the quest, ideologues have a pathological blindness to the unintended impacts and downsides of their own reforms ... prudent reforms ought to be adopted, but if promised gains are illusory, caution would be more appropriate (Hodge, 1999, 456).

Contracting policy expansions must be informed by sound data and best practices, not gut feelings, philosophical presumptions, or ideology leanings.

Findings

The ultimate goal of this project is to provide public administrators with the knowledge to critically and rationally support or oppose potential contracting expansions in their agencies. Since the goal is to provide public administrators with the tools to critically and rationally assess contracting expansions and modifications on the merits of the proposition, public administrators need the data necessary to make decisions based on facts. Unfortunately, contracting out and competitive bidding is at the same time a very broad and highly specific subject, making it difficult to differentiate between factors that are important, and factors which have little if any effect on the success of competitive contracting in the public sector.

This analysis attempts to make this distinction by analyzing general contracting and procurement laws as well as the proposed changes to current law. The researcher assumes that legislators propose modifications to unsuccessful policies more frequently than successful policies. If this is true, then policy areas with relatively high numbers of modifications represent areas where modifications would make the policy more successful.

Figure 6. Key Factors on Public Sector Contracting

Key Public Sector Contracting and Procurement Indicators							
Unit	Relevant Law	Initiating Cost Threshold	Preferred Contracting type	Exemptions			
				Goods and services	Agency	Emergencies	Intergovernmental Agreement
California (2)	State Contract Act	\$25,000	lowest reasonable bidder	X	X	X	
Maryland (4)	Maryland State Finance & Procurement	\$25,000	competitive sealed bids	X		X	X
Massachusetts (5)	Uniform Procurement Act	\$25,000	competitive sealed bids	X	X	X	X
Texas (3)	Texas Building and Procurement Commission	\$15,000	competitive sealed bids		X	X	
Virginia (1)	Virginia Procurement Act	\$30,000	competitive sealed bids				
		\$50,000	competitive negotiations	X	X	X	X

Sources: Information from California State Contract Act, Maryland State Finance and Procurement Act, Massachusetts Uniform Procurement Act, Texas Building and Procurement Commission, and the Virginia Procurement Act accessed.

Findings

This case study compiled key factors from the five states that contracted for the greatest aggregate amount of services from 2002-2009. Of the factors measured, the initiating cost threshold showed the greatest variation and preferred contracting type revealed the greatest uniformity. The following is a more detailed description of the findings indicated in Figure 6.

Initiating Cost Threshold

The test groups general public contracting and procurement laws showed substantial variation. The most common initiating cost threshold was \$25,000. However, Virginia, the state with the greatest total dollar amount of contracted services, had the highest initiating cost threshold of \$30,000. Texas had the lowest initiating cost threshold of \$15,000. Additionally, Texas law retained discretion to use the central state contracting authority when bidding departmental purchases above \$30,000.

Preferred Contracting Type

Of the key public contracting indicators, preferred contracting type showed the least variation. Although each jurisdiction permitted alternative contracting methods, such as sole source contracting, noncompetitive negotiation, auction bids, intergovernmental cooperative purchasing agreement, and unsolicited proposals. Competitive sealed bidding was by far the most commonly preferred contracting type. Competitive sealed bidding can be modified at several points (e.g., providing public notice, bid evaluation, and award process), however, what

differentiates this process from other competitive bidding structure is the lack of negotiation. During the competitive sealed bid process, the award process is based strictly on potential contractor's adherence to guidelines set forth by the public agency. This is contrasted with competitive negotiation where "the price of service, the method of service delivery, and the conditions of performance are all negotiated" (LeRoux, 2007, 8-9). Notably, Virginia was the only state that included competitive negotiation as a preferred contracting type, but only when contracting for professional services.

Agency

The agency category included municipalities, counties, state agencies, departments, and schools. States varied widely in the number and types of public bodies exempted from compliance with general competitive contracting policy. In general, most states exempted at least one state university, their Board of Regents, or local school systems from some aspects of the competitive contracting process.

Goods and Services

Exemptions for goods and service tended to be tailored narrowly in scope. For instance, general contracting procedure would not apply for materials to build certain highways or other capital improvement projects. Several states include exemptions for professional services such as, contract consulting, project advertising, and education for special needs citizens. Goods and/or service exemptions would have been more pervasive, but a number of exemptions tended to be crafted to apply to particular agencies, departments, municipalities, and cities; as a result these exemptions were classified as agency exemptions.

Emergency Procurement

According to the Massachusetts Uniform Procurement Act:

Whenever the time required to comply with a requirement of this chapter would endanger the health or safety of the people or their property a procurement officer may make an emergency procurement without following that requirement (Massachusetts, 2010, Section 30 B).

This sentiment was echoed by the general contracting policy of each jurisdiction observed. Although, California's State Contract Act made a notable addition, Section 1430 of California's General Contracting Code expressly provides for the purchase of "emergency protective vests for correctional peace officers whose duties require routine contact with state prison officers" (California Public, 2010, Section 10430). Additionally, emergency procurements were uniformly limited in scope to procurements necessary to meet the emergency, and required immediate documentation of such procurement.

Other Exemptions

Without exception, states had exemptions which did not fall squarely in the other categories. Examples of other exemptions include clauses for intergovernmental agreements, contracts with other governmental bodies and contracts with faith-based organizations. Intergovernmental agreements include cooperative purchasing plans which can act to decrease costs but are not well suited to competitive contracting protocols. Virginia's Uniform Procurement Act is prominent because it is the only jurisdiction to include exemptions that expressly applied to faith-based organizations.

Proposed Modifications

The 2010-2011 state senate and house bills designed to affect some aspect of state general contracting policy, are examined here. After accounting for the current state of general contracting law and the proposed modifications, this analyses identifies contract areas which require further research (contracting areas that fall in the upper half of proposed modifications) and common contracting attributes that have few proposed modifications (contracting areas that fall in the bottom half of proposed modification types).

Figure 7. Proposed Modifications to Current Contracting Policy

Proposed Modifications to Current Contracting and Procurement Law							
State	Agency Department or Municipality	Goods Services	and/or	Equity Bills	Transparency Bills	Other Bills	Structural Bills
Virginia (1)	3	9		4	7	2	4
California (2)	7	24		3	3	2	12
Texas (3)	NA	NA		NA	NA	NA	NA
Maryland (4)	2	2		3	7	2	2
Massachusetts (5)		6			1		5
Total	12	41		10	18	6	23

Sources: Information provided by (Virginia State Legislature, California State Legislature, Texas State Legislature, Maryland State legislature (for a full list of SB and HB pertaining to public contracting see appendix 2)

Goods and/or service Modifications

The category with the most proposed contracting modifications is goods and/or services. A number of legislators proposed changes to current contracting procedure to allow for specific goods and/or service needs. Within the goods and/or services category, legislators tended to craft legislation that modified contracting procedure surrounding purchase of hospital supplies and infrastructure, contract consultation, and education services and materials. Additionally, it should be noted that proposed bills within this category deal with very detailed service and goods issues across a broad range of subjects. For instance, Senator Cogdill proposed an amendment to the 2007 California Senate Bill 451 concerning forest products.

This bill would require any state agency that contracts for, or acquires, lumber or other solid wood products, excluding paper and other types of secondary manufactured goods, to give preference, if price, fitness, and quality are equal, to lumber and other solid wood products that are harvested from forests within this state (California, 2010, SB 451).

This bill is emblematic of the complexity of goods and service bills, and helps to explain the prevalence of goods and services modifications. The public sector contracts for a broad range of materials, services, and real property to help an expansive variety of public agencies reach diffuse goals. State-wide contracting policy is faced with the seemingly impossible task of crafting uniform policy which satisfies public service values while not unduly hampering a particular public agency. The amount of goods and services public contracting applies to necessitate a proportional amount of modifications to better tailor general policy to specific circumstances.

Agency, Department, and Municipality Modifications

Agency, department, and municipality modifications are proposed bills designed to change the composition of groups that are subject to general state contracting procedures. Agency modifications are similar to goods and service modifications, but are normally distinguished by their scope of application. These modifications include wording that narrows the scope of application to a single agency or small group. On the other hand goods and service modifications apply to all applicable public contracts. It is rare that these proposed modifications exempt an entire department from the competitive biddings procedures. More commonly, exemptions from state contracting procedures usually cover particular facets of general contracting policy. For example, Maryland SB 791 gives the Board of Public Works flexibility in negotiating certain long-term contracts.

Authorizing, on the recommendation of the Secretary of General Services, the Board of Public Works to waive a requirement to include an automatic termination clause in specified multi-year contracts ... and requiring the Board to consider a specified factor in determining whether to grant a specified waiver (Maryland, 2010, SB 791).

Agency, department, and municipality modifications were normally applied to business empowerment zones, municipal contracting policy, school contracting policy, and public bodies.

Structural Modifications

Structural modifications are the second most common proposal to current contracting policy. Structural modifications encompass a substantial variety of factors that affect competitive bidding structures such as changes to initiating cost thresholds, available methods of contracting, and the means by which these contracts are administered. Structural exemptions are distinguished from agency modifications in that they establish protocols that

apply to all applicable competitive contracting. In addition, structural modifications modify existing state protocols for alternative means of procurement (sole-source, noncompetitive negotiation, auction bids, intergovernmental cooperative purchase, and small procurement). For instance, the Virginia HB 831, Virginia Public Procurement Act; foreign business entities, proposes to modify the means by which public bodies may administer a contract by requiring:

...all public bodies to include in every written contract a provision that the contractor must be authorized to transact business in Virginia as a domestic or foreign business entity as required by the State Corporation Commission, if such is required by law. Such status shall be maintained during the term of a contract. A contract entered into by a business in violation of the requirements is voidable at the option of the public body (Virginia, 2010, HB811).

This structural modification would act to add an additional layer of certification to the contracting process and modify the process by which public contracts are administered.

Transparency Modifications

Transparency modifications were the third most common type of bills proposed. The Transparency modifications concerned citizen involvement in the contracting process by making procedures more accessible to public scrutiny, or by strengthening compliance with existing laws that did not expressly deal with a subject matter covered by another category. For instance, a bill that is intended to ensure compliance with strategies that encourage the award of public contracts to minority owned businesses would not fall within the transparency category, but bills that are intended to ensure compliance with human resources, bid advertising, or auditing protocols, RFPs, and RFIs are included within transparency modifications. For instance, Maryland HB 430 titled State Procurement – Purposes and Policies, intends to add transparency concerns to existing procurement policy considerations:

Expanding the purposes and policies of the State procurement law to require that the purposes and policies include providing safeguards for maintaining transparency in the procurement process; and ensuring that all persons involved with the administration of the State procurement process meet specified requirements in a specified manner and in accordance with applicable law (Maryland, 2010, HB 430).

This bill is characteristic of the great majority of transparency modifications. Proposed bills are often amendments to current policies aimed to shore up public support by adding clauses that reflect transparency values. For instance, Maryland HB 430 summarized above originally accounted for “quality” and “ethics” in contracting policy, this proposed bill explicitly adds transparency to these values.

Equity Modifications

Equity modifications are in the lower half of bills submitted by legislators in 2010. By far the most typical equity bills are proposed expansions tightening current equity safeguards in competitive contracting and procurement procedures. Equity bills cover a broad range of minority, women, disabled, and veteran issues. Across this spectrum, legislators propose bills to increase minority participation in public contracts, increasing the scope of power granted to compliance committees, and constructed policies that tighten loop-holes which can be exploited to present the spurious appearance of greater representation from such groups. For example, House Bill 615 authored by Virginia Congressman Matthew J. Lohr tightens the restrictions governing small businesses and businesses owned by women, minorities, disabled, and veteran contractors. The House Bill 615:

Provides that for the solicitation or awarding of contracts with small, women-owned, minority-owned, or service disabled veteran-owned businesses, all public bodies shall include in every such contract the following provision: During

the performance of this contract, the contractor agrees that no more than 20 percent of the contracted work will be subcontracted to any business that does not meet the definition of small, women-owned, minority-owned, or service disabled veteran-owned business, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth these requirements. The bill provides that notices, advertisements, and solicitations placed in accordance with federal law, rule, or regulation shall be deemed sufficient posting. The bill contains technical amendments (Virginia, 2010, HB 615).

Not surprisingly equity bills are not among the most numerous modifications proposed by state legislators. Equity issues deal with minority groups and they are a substantial but relatively small percentage of the population and public contracting.

Other Modifications

Public contracting is a massive subject. As a result, the proposed modifications for this subject are not fully encompassed by the preceding indicators. Proposed modifications that were technical as opposed to substantive in nature, deal with contracting procedures surrounding foreign and expatriate contractors, or contracting as it pertains to issues of national security do not fall squarely into any of the previous categories.

Recommendations

Through competitive bidding and contracting-out, several factors coalesce to produce combined results. Consequently, it can be difficult to distinguish which factor was, or a combination of factors were, critical in producing an outcome. Thus, ambiguity clouds the analysis of competitive bidding and contracting-out. In particular, during this research the

ambiguity of the subject affected the choice of key public contracting factors, and the classification of proposed modifications into policy areas. The following passages further explain the role ambiguity had in this analysis and recommends solutions to mitigate its effect upon future research.

The research compiled several key public contracting factors on current contracting and procurement laws. In the research, proposed modifications served as a measure of dissatisfaction with each state's current contracting law. Although proposed modifications often applied to one or more of the key contracting factors, this alone does not indicate that these factors are the only factors, or even the primary factors, around which successful competitive contracting centers. Furthermore, to interpret the importance of the frequency of proposed modifications, the analysis requires a reference point for comparison.

To establish a point of reference and support for the choice of key contracting factors, the researcher recommends the use of a time-series research design. A time-series would provide a point of reference, and establish the significance of the number of proposed modifications. For example, the current research identified 41 goods and/or service, modifications in 2010. If 2006 and 2008 reported an average of 82 annual goods and/or service, modifications were 82, then the 2010 findings are substantial. The 2010 findings would indicate that earlier policy modifications substantially decreased the number of proposed modifications, suggesting greater satisfaction with current law and more successful contracting. However, if 2006 and 2008 reported an average of 20 goods and service modifications, then the findings would suggest increased dissatisfaction with current law and less successful contracting.

Furthermore, time-series are useful in demonstrating the effect a variable has, or group of variables have on measured outcomes. When applied to this research a time-series could demonstrate the effect a key contracting factor, had on proposed modifications. For example, if a key contracting factor is modified but the amount of proposed modifications remains constant, then the modified key contracting factor has little effect upon the proposed modifications policy area. In this circumstance the researcher would postulate that another unidentified factor may be affecting the proposed policy modification area.

The future research should subdivide and add modifications categories. Legislators craft bills that pertain to multiple policy areas. With the current modifications categories, the researcher is left to decide if a senate or house bill is more in one category than another. For instance, Virginia SB 703, entitled the Public Procurement Act; preference for construction contractors hiring local residents: “Authorizes a locality to develop and implement a bidding system providing a preference to construction contractors that hire residents of the locality or the Commonwealth.”

Virginia SB 703 could be classified as an agency, department, or municipal modification because it is designed to permit such an organization to modify general contracting procedure, but the same bill could be viewed as a structural change since it applies to all localities, and changes the method by which competitive bidding structures are administered. Furthermore, SB 703 might even be framed as an equity issue since its intent is to aid local contractors while diminishing the ability of nonlocal contractors, who may or may not be minority, women, disabled, or veteran business owners to compete for public contracts.

Adding additional modification categories would decrease the researcher's discretion when classifying proposed modifications into policy areas. Likewise, the inclusion of a crossover modifications category will better represent bills that have multiple policy foci. Similarly, key factors should be further subdivided to better represent prevalent modification categories, i.e., goods and/or services subdivided into goods modifications and service modifications

Methodological improvements notwithstanding, this study suggests several areas for continued research. State legislators have proposed a number of modifications to current general contracting and procurement law. The researcher postulated about the high frequency of proposed modifications in some policy areas and relative dearth of proposed modifications in others. For example, the lack of equity modifications in comparison to goods and/or service modifications could be due to the relatively small population that is affected by equity modifications. Whereas contracting has expanded in scope and scale in recent years, legislators are continually confronted with an increasing number of contracts to which goods and/or service modifications apply. This researcher recommends for a further study that will develop a theoretical link between the number of proposed modifications and their relevant policy area. Future research might examine the following questions: Is the number of proposed goods and/or service modifications due to an increase in the number of applicable service contracts, a nation-wide shift in policy focus, or symptomatic of the increased affect lobbyist have on the legislative process? Is the relative dearth of equity modifications due to the relatively small number of applicable contractors, modern success in tackling discrimination in the public contracting process, or a lack or response to minority issues in the surveyed states?

Conclusion

The literature and data suggest that competitive bidding and contracting-out will continue to play a substantial role in the delivery of public services now and in the years to come. In light of today's economic climate, it is quite possible that there will be a greater focus on efficiency, economy, and the methods to promote them. Therefore, it is critical that more studies are conducted to explore changes in competitive bidding, the market where it functions, and the services it is applied to, so that policy makers, public administrators, and contracting personnel can utilize prudent methods that aid public agencies in achieving their varied missions.

The purpose of this paper has been to identify key factors that lead to successful contracting thereby arming public administrators with the tools and knowledge to critically and rationally support or oppose potential contracting expansions in their agencies. Admittedly, this paper has only partially succeeded in fulfilling its purpose. The researcher compiles data on key factors which through continued analysis may be shown to be critical, or unimportant in relation to policy satisfaction, and the success of competitive bidding and contracting-out. This research is most successful in establishing a framework that can differentiate between satisfactory and unsatisfactory contracting policy. As this research continues in the future, it will provide more data and identify trends which consistently lead to greater satisfaction with contracting and procurement law. Public administrators can then compare modification trends that produce greater policy satisfaction to any proposed contracting modifications within their agencies.

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Appendices

Appendix 1. Federal Contract Awards by Contractor State.

Federal Contract Awards by Contractor State. * Dollars in billions.

Contractor State	FY										FY 2009 Rank
	FY 2002	FY 2003	2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	2010	FY 2002-2010	
Virginia	\$32.96	\$38.92	\$45.63	\$59.89	\$66.65	\$69.34	\$78.93	\$79.55	\$7.93	\$479.81	1
California	\$41.44	\$46.54	\$51.56	\$54.02	\$57.09	\$57.65	\$63.09	\$66.31	\$10.94	\$448.63	2
Texas	\$17.27	\$30.16	\$34.03	\$33.69	\$41.35	\$46.46	\$67.78	\$37.08	\$6.11	\$313.92	3
Maryland	\$17.49	\$17.43	\$21.84	\$22.38	\$24.95	\$26.47	\$30.29	\$33.20	\$4.37	\$198.43	4
Massachusetts	\$7.00	\$8.43	\$9.83	\$11.28	\$11.97	\$14.34	\$16.16	\$18.31	\$1.63	\$98.96	5
Florida	\$8.09	\$9.39	\$10.04	\$13.13	\$14.22	\$14.93	\$16.58	\$17.51	\$1.93	\$105.82	6
Pennsylvania	\$9.93	\$11.43	\$11.67	\$11.50	\$13.58	\$17.88	\$18.38	\$17.33	\$3.04	\$114.74	7
Arizona	\$7.12	\$6.79	\$8.77	\$9.12	\$9.32	\$11.00	\$12.19	\$13.26	\$1.13	\$78.68	8
New York	\$7.71	\$7.00	\$9.00	\$9.64	\$11.21	\$11.20	\$12.75	\$13.10	\$2.01	\$83.61	9
Missouri	\$7.31	\$7.34	\$8.28	\$8.44	\$11.05	\$12.91	\$14.51	\$13.10	\$1.69	\$84.62	10
Connecticut	\$6.71	\$8.20	\$9.46	\$9.72	\$8.46	\$9.29	\$12.70	\$12.75	\$0.57	\$77.85	11
New Jersey	\$5.29	\$5.47	\$6.14	\$7.99	\$7.98	\$10.20	\$10.30	\$11.39	\$1.07	\$65.83	12
Illinois	\$4.69	\$4.88	\$5.56	\$6.29	\$6.23	\$8.64	\$13.22	\$10.62	\$2.34	\$62.47	13
Colorado	\$4.07	\$5.06	\$5.51	\$5.90	\$7.64	\$7.65	\$8.80	\$10.55	\$1.64	\$56.83	14
Alabama	\$4.10	\$4.10	\$7.36	\$5.37	\$6.02	\$9.08	\$9.59	\$9.83	\$0.65	\$56.11	15
Wisconsin	\$1.66	\$2.04	\$2.69	\$3.59	\$3.19	\$4.71	\$4.60	\$9.18	\$1.01	\$32.66	16
Michigan	\$3.25	\$3.96	\$4.21	\$5.90	\$5.99	\$7.56	\$8.38	\$8.65	\$0.48	\$48.37	17
Washington	\$4.03	\$4.47	\$5.27	\$6.06	\$5.35	\$6.11	\$6.91	\$8.64	\$1.65	\$48.50	18
Ohio	\$5.30	\$6.40	\$6.14	\$7.75	\$8.34	\$8.65	\$8.63	\$8.40	\$0.67	\$60.28	19
Tennessee	\$3.90	\$5.26	\$5.80	\$7.19	\$7.25	\$8.42	\$6.65	\$8.03	\$2.94	\$55.44	20
South Carolina	\$1.07	\$1.52	\$3.06	\$3.74	\$4.24	\$5.21	\$5.87	\$8.01	\$1.49	\$34.20	21
Indiana	\$1.90	\$2.61	\$3.62	\$5.48	\$5.36	\$6.32	\$8.51	\$7.61	\$0.29	\$41.70	22
New Mexico	\$7.21	\$7.43	\$5.87	\$6.49	\$7.69	\$6.89	\$6.88	\$7.53	\$3.61	\$59.59	23
District of Columbia	\$5.94	\$5.62	\$7.29	\$5.59	\$6.18	\$5.79	\$7.00	\$7.46	\$1.68	\$52.54	24
Georgia	\$6.55	\$3.47	\$4.15	\$6.96	\$6.48	\$6.72	\$7.48	\$7.19	\$0.89	\$49.89	25
Kentucky	\$2.33	\$3.74	\$2.73	\$4.11	\$4.84	\$5.68	\$5.18	\$5.57	\$0.74	\$34.91	26
Alaska	\$1.44	\$2.29	\$2.63	\$3.49	\$3.45	\$3.78	\$4.24	\$4.82	\$0.53	\$26.66	27
Mississippi	\$2.59	\$2.77	\$2.40	\$3.76	\$5.75	\$5.05	\$4.86	\$4.56	\$0.26	\$31.98	28
North Carolina	\$2.37	\$2.64	\$2.88	\$3.88	\$3.85	\$4.22	\$4.12	\$4.47	\$1.09	\$29.52	29

Minnesota	\$2.35	\$2.46	\$2.31	\$3.78	\$4.10	\$4.28	\$4.48	\$4.36	\$0.65	\$28.77	30	
Louisiana	\$1.72	\$2.01	\$2.87	\$2.81	\$4.51	\$3.56	\$4.06	\$3.82	\$0.79	\$26.13	31	
Utah	\$1.98	\$2.26	\$2.44	\$2.96	\$3.19	\$4.50	\$3.03	\$3.64	\$0.53	\$24.52	32	
Idaho	\$1.43	\$1.47	\$1.78	\$1.89	\$2.46	\$2.71	\$2.50	\$3.36	\$1.36	\$18.97	33	
Oklahoma	\$1.54	\$1.98	\$2.45	\$2.56	\$2.66	\$2.60	\$2.82	\$3.00	\$0.35	\$19.96	34	
Kansas	\$1.99	\$1.79	\$1.51	\$1.75	\$1.77	\$1.85	\$2.63	\$2.80	\$0.24	\$16.32	35	
Iowa	\$0.97	\$2.00	\$1.51	\$1.58	\$1.92	\$2.22	\$2.04	\$2.11	\$0.14	\$14.49	36	
Oregon	\$0.88	\$1.00	\$1.09	\$1.22	\$1.07	\$1.61	\$2.13	\$2.01	\$0.17	\$11.18	37	
Nevada	\$1.62	\$1.67	\$1.78	\$1.64	\$1.56	\$1.30	\$1.73	\$1.91	\$0.21	\$13.41	38	
New Hampshire	\$0.61	\$0.62	\$0.90	\$1.18	\$1.37	\$1.68	\$1.88	\$1.82	\$0.08	\$10.13	39	
Hawaii	\$1.24	\$1.18	\$1.10	\$1.14	\$1.22	\$1.39	\$1.68	\$1.75	\$0.12	\$10.81	40	
Maine	\$1.05	\$1.08	\$1.50	\$1.69	\$1.01	\$1.46	\$0.79	\$1.34	\$0.11	\$10.03	41	
Nebraska	\$0.34	\$0.41	\$0.39	\$0.56	\$0.75	\$0.72	\$1.25	\$1.02	\$0.15	\$5.58	42	
Vermont	\$0.39	\$0.52	\$0.47	\$0.70	\$1.35	\$1.26	\$0.87	\$1.01	\$0.08	\$6.64	43	
Arkansas	\$0.80	\$0.56	\$0.54	\$0.59	\$0.70	\$0.60	\$0.70	\$0.86	\$0.10	\$5.44	44	
West Virginia	\$0.26	\$0.27	\$0.36	\$0.50	\$0.50	\$0.56	\$0.68	\$0.71	\$0.12	\$3.95	45	
Rhode Island	\$0.27	\$0.45	\$0.38	\$0.47	\$0.49	\$0.38	\$0.53	\$0.62	\$0.04	\$3.63	46	
Delaware	\$0.19	\$0.22	\$0.19	\$0.29	\$0.16	\$0.25	\$0.46	\$0.57	\$0.05	\$2.37	47	
South Dakota	\$0.24	\$0.26	\$0.31	\$0.41	\$0.45	\$0.43	\$0.44	\$0.51	\$0.07	\$3.12	48	
Puerto Rico	\$0.17	\$0.23	\$0.21	\$0.28	\$0.36	\$0.60	\$0.58	\$0.50	\$0.04	\$2.97	49	
Montana	\$0.31	\$0.45	\$0.44	\$0.54	\$0.41	\$0.43	\$0.44	\$0.44	\$0.10	\$3.55	50	
North Dakota	\$0.19	\$0.25	\$0.32	\$0.32	\$0.33	\$0.51	\$0.41	\$0.42	\$0.09	\$2.84	51	
Guam	\$0.18	\$0.22	\$0.17	\$0.21	\$0.23	\$0.31	\$0.29	\$0.30	\$0.01	\$1.94	52	
Wyoming	\$0.23	\$0.09	\$0.09	\$0.09	\$0.10	\$0.10	\$0.12	\$0.09	\$0.01	\$0.91	53	
Virgin Islands of the U.S.	\$0.02	\$0.02	\$0.01	\$0.02	\$0.01	\$0.07	\$0.05	\$0.07	\$0.01	\$0.27	54	
Northern Mariana Islands	\$0.00	\$0.00	\$0.01	\$0.00	\$0.00	\$0.00	\$0.01	\$0.01	\$0.00	\$0.03	55	
American Samoa	\$0.07	\$0.02	\$0.00	\$0.01	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.12	56	
Marshall Islands	\$0.00	\$0.01	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.01	57	
Federated States of Micronesia	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	58	
Palau	\$0.00	\$0.00	\$0.00	**	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	--	
U.S. Minor Outlying Islands	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	--	
Navajo Nation	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	60	
Invalid or blank Invalid or blank help link	\$7.24	\$8.96	\$12.71	\$14.41	\$18.28	\$15.57	\$18.65	\$20.82	\$2.47	\$119.11	--	
Total	#####	#####	#####	#####	#####	#####	#####	#####	#####	\$72.44	\$3,299.71	--

Source: Data from usaspending.gov accessed March 23, 2010. * Dollars in billions.

Appendix 2. State Legislative Bills 2010-2011

State Legislative Bills 2010-2011				
California	California	Virginia	Maryland	Massachusetts
Bill Number	Bill Number	Bill Number	Bill Number	Bill Number
SB 694	AB 21	HB 426	HB 268	HB H3037
SB 894	AB 1062	HB 444	HB 359	SB S1398
SB 879	AB 1063	HB 532	HB 430	SB S1411
SB 451	AB 1064	HB 567	HB 458	SB S1459
SB 967	AB 216	HB 615	HB 638	SB S578
SB 43	AB 4	HB 633	HB 647	SB S1426
SB 113	AB 610	HB 719	HB 690	SB S1427
SB 9	AB 641	HB 789	SB 979	SB S541
SB 532	AB 1229	HB 831	SB 845	SB S1437
SB 755	AB 405	HB 1019	SB 844	SB S1448
SB 802	AB 1755	HB 1038	SB 791	
SB 830	AB 958	HB 1228	SB 785	
SB 1017	AB 396	HB 1258	SB 627	
AB 116	AB 701	HB 1279	SB 551	
AB 815	AB 759	HB 1309		
AB 729	AB 1364	HJ 161		
AB 958	AB 759	SB 159		
AB 732	AB 755	SB 204		
AB 1064	AB 1531	SB 225		
AB 1409	AB 1087	SB 378		
AB 1650	AB 1097	SB 439		
AB 1471	AB 930	SB 499		
AB 1086	AB 926	SB 695		
AB 569	AB 1444	SB 703		
AB 1558	AB 1570			

Source: Data from Virginia General Assembly Legislative Information System, Maryland General Assembly, The Commonwealth of Massachusetts, and Official California Legislative accessed March 23, 2010