

Performance, Accountability, and the Debate over Rules

Perspectives on Performance Management

Does compliance with rules ensure better program performance and accountability? Since the 1980s, many scholars have answered no to this question, arguing that as managers attempt to comply with a growing thicket of rules, they often lose sight of the performance of their agencies and programs. Even the defenders of a rules-based approach have tended to view it as a necessary, though inconvenient, means of ensuring that democratic values and public rights are protected in the functioning of government. But does compliance with rules inevitably result in a loss of efficiency and effectiveness in the performance of public projects? This essay presents a case study of a public works project and three additional case summaries to demonstrate a theoretical proposition that compliance with rules for contracting and competitive selection of contractors can be an essential element of both a project's success and its accountability.

A key debate among scholars since the 1980s has been concerned with the impact on public agency performance and accountability as managers seek to comply with rules. Many scholars have argued that traditional public administration has placed an undue emphasis on compliance with rules, to the detriment of the actual performance of agencies or programs and their accountability (Anechiarico and Jacobs 1996; Behn 2001; Dicke and Ott 1999; Kelman 1990; Osborne and Gaebler 1992). At the same time, the traditional reliance on rules as an important means of ensuring accountability has had its defenders (deLeon and Denhardt 2000; Gilmour and Jensen 1998; Moe and Gilmour 1995; Piotrowski and Rosenbloom 2002). Nevertheless, the defenders have tended to limit their arguments in favor of rules to their importance in checking the unbridled power of administrators and in preserving democratic values and citizens' rights. Many of these defenders appear to have conceded that an attention to rules can entail a loss of program performance. Piotrowski and Rosenbloom note, "Congress understood that instilling democratic-

constitutional values in federal administration and 'keeping a watchful eye on the administration of the laws' could undercut efficiency. But it strongly preferred democratic constitutionalism" (2002, 645).

Moe and Gilmour, while forcefully defending public law as the "under-appreciated 'cement' that ... ensures political and legal accountability of its [the administrative state's] officials," nevertheless conclude that "[t]he value of accountability to politically chosen leaders outranks the premium placed on efficient, low-cost service" (1995, 138).

The traditional reliance of public managers on compliance with rules evolved as a response to the corruption in government that was pervasive during the 19th century, Behn (2001) contends. However, at the start of the 21st century, Behn writes, "American government is plagued less by the problem of corruption than by the problem of performance" (23). If rules act to hamper performance, then those rules should be loosened or eliminated in order to give managers the discretion needed to ensure good performance. "One of the core principles of the new public management is that public officials *should* exercise discretion," he states. "Tight, hierarchical supervision is out. The intelligent exercise of discretion is in" (98). Jos and Tompkins note that "there is

growing concern that [rules] compliance-based [accountability] strategies are not only costly ... but also hinder the formation of firm commitments to ethical ideals" (2004, 264).

In 1993, former vice president Al Gore launched the National Performance Review (NPR), which adopted this call of

the New Public Management or reinventing government movement for more managerial discretion.¹ Piotrowski and Rosenbloom state, "The NPR preferred to rely on public employees' innate goodness and commitment to democratic values—not rules—as the chief protection against abuse" (2002, 649).

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In concert with these critiques of rules have been many calls and attempts in recent years to overhaul and reduce “cumbersome” regulations. These calls have come from entities as varied as the National Commission on Public Service (Volcker Commission) in 1989, the NPR in 1993, and the current administration of George W. Bush (Brinkley 2004; Pope 2005; Volcker and Winter 1994). DiIulio describes the deregulation of procurement and personnel procedures as “the nation’s best available chance to improve administration in ways that matter to public employees and citizens” (1994, 3).

Osborne and Gaebler’s 1992 book *Reinventing Government*, as Kearns observes, advanced the argument that government organizations must be “liberated from the stranglehold of regulations, bureaucratic procedures, line-item budgets, and risk averse organizational cultures” (1996, 23). Employing some of the terms of the New Public Management movement, the Massachusetts Taxpayers Association, in a 2003 report, decries the “duplicative and often conflicting regulations” governing the state’s human services contracting system. “Rather than tapping the energy of [human services] providers to produce quality services and positive outcomes for clients, the procurement process has devolved into a tool for micro-management and compliance with bureaucratic requirements” (30), the report adds.

Furthermore, many critics of the rules-based approach to public administration claim that auditors and inspectors general, in particular, either tend to, or have the potential to, focus on compliance with rules rather than performance (Behn 2001; Moore and Gates 1986). Behn contends that the result of this “accountability bias” has been a hunt for “scapegoats” rather than “programmatically ambiguities,” “policy contradictions,” or other factors that may have caused an organizational failure (2001, 70). He adds that “among both practitioners and academics, there is a certain respect for those public managers who figure out how to evade the various rules and regulations that inhibit performance and then deploy this flexibility to actually produce results, while escaping capture by the regulatory police” (29). Moore and Gates state that if inspectors general were to help public managers in their attempts to wrestle with the balance of cost and social value in their programs, they would “leave some of their precious objectivity behind,” and consequently “some of their power” (1986, 27).²

Is it a correct assumption that complying with rules governing public programs and projects inevitably results in delays, inefficiencies, and poorer results? Is it possible that the “regulatory police” are called in, in some cases, not just because public managers have evaded rules but because that evasion has caused their projects to be subjected to unanticipated cost increases

and delays in completion? Moreover, is it possible that a reasonable focus on rules might actually help managers find the right balance of cost and social value and thus produce good results?

This article evaluates these questions in the context of a Massachusetts-based public works project that was reviewed by the state’s Office of the Inspector General. In this case, in which municipal officials assumed wide-ranging discretion to manage the project, numerous bidding and contracting rules were disregarded. The project was plagued by unanticipated, unbudgeted costs and expensive environmental problems.

The article also presents short summaries of three “design-build” contracting cases reviewed by the Inspector General’s Office. In these additional cases, traditional bidding rules were also bypassed, although legal exemptions were sought in two instances. These projects were nevertheless also characterized by delays and higher-than-projected costs.

The article then discusses a theoretical proposition that the evasion of—or exemptions from—procurement and contracting rules in public works and construction projects can cause performance and accountability failures and, conversely, that compliance with such rules can result in the achievement of five conditions that can ensure project success. These five conditions are adequate project planning, the selection of the best agent for the task, the adoption of mutually advantageous agreements between the principal and agent, the existence of adequate and accurate information about completion of the work, and the enforcement of appropriate agreements.

“Rules” are defined here as a broad range of requirements, including laws, regulations, and agency policies and procedures. “Project success” will be referred to in this article as achieving expected performance and accountability. “Expected performance,” in turn, is defined as achieving, at a minimum, the expected quality of work within a project’s anticipated budget and time frame. “Expected accountability” is defined as managing and, at a minimum, meeting public and other expectations for performance and responsiveness (Kearns 1996; Romzek and Dubnick 1987).

The Use of Case Studies in the Debate over Rules

Because the application of rules to projects and programs is so complex and varied, much of the debate over the impact of rules on performance and accountability has been anecdotal in nature or has involved the discussion of case studies (Moe and Gilmour 1995, 145). Osborne and Gaebler, for instance, use several case studies in *Reinventing*

Government (1992), such as a case in Visalia, California, in which a new city budgeting system allowed a city employee to circumvent appropriation and procurement rules and therefore act quickly in purchasing a much wanted swimming pool for the school district at a relatively low price. Anechiarico and Jacobs use a multifaceted case study of corruption and racketeering in the New York City construction industry to bolster their argument that the adoption of rules and other anticorruption measures has had “profound, complicating, and often negative implications for the organization and operation of public administration” (1996, xv). Kelman (1990) employs nine case studies and surveys of managers involved in the procurement of computer equipment and services in federal agencies and the private sector, concluding that in these instances the federal system was beset by rules that prevented the use of “good sense and good judgment” in procurement.

It would appear that critics of rules such as these consider the cases they cite to be typical within public administration. However, for every case study that shows a deleterious impact of compliance with rules on performance and accountability, it may well be possible to discover a case, such as those described here, in which the *avoidance* of rules appears to have hindered performance and accountability. As will be discussed, the question that remains to be explored is why rules appear to play such contradictory roles in these cases.

Mount Hood Public Works Project in Melrose, Massachusetts

The discussion of this case will focus on violations of three rules:

1. The state’s public works construction bidding law (Massachusetts General Laws, chap. 30, sec. 39M), which requires public agencies to select the most “eligible and responsible” bidder that submits the lowest cost proposal for projects with expected costs of more than \$10,000.
2. A state municipal finance law (Massachusetts General Laws, chap. 43, sec. 29), which requires that written contracts be used in transactions between municipalities and vendors with values over \$5,000.
3. The Mount Hood Memorial Park and Golf Course enabling statute (Massachusetts Session Laws, chap. 124 of the Acts of 1936), which requires that all revenue generated at Mount Hood be placed in a city account, and that the board of aldermen appropriate all funds for park uses.

In April 2000, the president of Gator Development Company, Inc., sent a memorandum to the mayor of Melrose, Massachusetts, offering to pay the city to accept approximately 300,000 tons of fill. The fill was

being excavated as part of a major public works construction project, the “Big Dig” (Central Artery/Third Harbor Tunnel project) under way in Boston. Melrose is a city with a population of 27,134, located approximately seven miles north of Boston. The fill was to be delivered to the Melrose site by the Modern Continental Construction Company, which held several construction and excavation contracts with the Big Dig project. Modern Continental held a separate contract with Gator (Commonwealth of Massachusetts, Office of the Inspector General 2002).

On April 19, one week after receiving the Gator memo, the Melrose parks superintendent sent a memo to the mayor, recommending that the city charge at least 70 cents per ton for the material. The parks superintendent’s memo included a project scope of work for the fill that called for reconstruction of the 12th fairway of the Mount Hood Memorial Park and Golf Course. Mount Hood is a 230-acre city park in Melrose with hiking trails, an 18-hole golf course, and other recreational features. The park is funded largely through revenues from the golf course, leases, and grants (Commonwealth of Massachusetts, Office of the Inspector General 2002).

Violation of the Enabling Statute

Modern Continental began deliveries of fill to the city on May 3, 2000. Under an arrangement worked out informally with the city, Gator made payments to suppliers and other contractors for site preparation expenses and deducted those payments from the revenues it owed the city for delivery of the fill. The city’s Park Department had procured those services. The arrangement therefore circumvented the requirement of the Mount Hood enabling statute that the board of aldermen appropriate all funds for park uses, according to the state Inspector General’s Office.

In mid-May 2000, several Melrose citizens attended a meeting of the city’s Conservation Commission to express “shock and outrage” over the removal of trees at Mount Hood and the dumping of fill without a master plan, appropriation by the board of aldermen for site preparation work, or a vote by the citizens (Commonwealth of Massachusetts, Office of the Inspector General 2002, 14). The Massachusetts Inspector General’s Office concluded that the city had authorized the fill deliveries without having accurately determined the scope, requirements, or cost of the project.

It was not until July 12, more than two months after fill deliveries began, that the city signed a formal contract with Gator specifying that fill would be delivered to Mount Hood. The contract, though, was not subject to any competitive procurement law,

and the city did not hold a competitive selection process for it.³

Violations of the Municipal Finance Law and the Public Works Bidding Law

In 16 instances involving the procurement of construction and other services for the fill delivery project, the city failed to comply with the law requiring written contracts; in six of those cases, the city also failed to comply with the public works bid law (Commonwealth of Massachusetts, Office of the Inspector General 2002, 54). One of those instances, which had particularly serious consequences, involved the installation of a drainpipe on the 12th fairway of the golf course.

The Park Department hired Dami and Sons, a private contractor, in early 2001 to install the drainpipe. City records contained no evidence that the pipe installation work was competitively bid, as required by the public works bid law. Furthermore, the city did not have a written contract with Dami and Sons, a violation of the municipal finance law (Commonwealth of Massachusetts, Office of the Inspector General 2002).

The Massachusetts Inspector General's Office found that the Park Department had failed to provide Dami and Sons with any detailed design documents for the installation of the drainpipe. Records provided by Modern Continental indicated that the drainpipe was partially installed by Dami and Sons in an area of the fairway where peat was present and that "portions of the pipe became dislodged when the peat moved, or 'heaved' underneath the drainpipe" (Commonwealth of Massachusetts, Office of the Inspector General 2002, 55). A Dami and Sons excavator became buried in the fairway. A decision was later made by the city to abandon the failed pipe and cover it with fill (Commonwealth of Massachusetts, Office of the Inspector General 2002).

High Project Costs

In October 2001, project engineers described a number of environmental problems caused by the fill delivery project, including flooding of wetlands and adjacent upland areas and deposits of sediment in four resource areas. Trees and other vegetation in a number of those areas had died or had been stressed, the engineers reported (Commonwealth of Massachusetts, Office of the Inspector General 2002). The proposed restoration plan included, among other measures, pumping water, removing sediment, replacing soil, and planting trees and vegetation near two of the resource areas. The plan also called for grading and stabilizing the slopes of filled areas and installing a new drainpipe on the 12th fairway (Commonwealth of Massachusetts, Office of the Inspector General 2002).

The final total cost of the proposed project, including construction of a baseball field, completion of the 12th fairway, and remediation of the environmental issues, was estimated to be \$1.8 million—an amount "far greater than anticipated and [which] created a financial strain on the City" (Commonwealth of Massachusetts, Office of the Inspector General 2002, 79). This was less than the amount the city would have paid had it purchased 700,000 tons of fill at market rates, which could have been as high as \$3 million, according to the Inspector General's Office. But it is an unknown whether the city would have purchased that much fill had it properly planned for the project. The amount of tonnage received by the city was driven by the fill disposal needs of the Big Dig project, Modern Continental, and Gator.

In its report issued in October 2002, the Massachusetts Inspector General's Office concluded that "the history of this project demonstrates the importance of adhering to legal requirements, sound contracting practices, and principles of public accountability" (81). Among the office's recommendations for all public jurisdictions were the institution of protective measures in undertaking major public works projects, including front-end planning, a competitive selection process for contractors and suppliers with contract terms and conditions incorporated into the bid specifications, clear oversight plans, and the hiring of a project manager and full-time professional project supervision.

Other Cases

In three other cases reviewed by the Massachusetts Inspector General's Office that are summarized here, special legislation was enacted to exempt the projects from the state's designer selection law or from separate construction bidding laws for public buildings and public works, allowing the projects to proceed according to fast-track "design-build" or "design-build-operate" methods.⁴ Design-build contracts, which are often competitively procured through a request for proposal process, are based on conceptual plans, which have a level of completion varying from 5 percent to 50 percent (Bloomfield, Westerling, and Carey 1998).

Plymouth County Correctional Facility

In 1991, the state of Massachusetts enacted special legislation exempting Plymouth County in southeastern Massachusetts from the designer selection law and public construction bidding law in constructing a new correctional facility to house federal, state, and county inmates (Bloomfield, Westerling, and Carey 1998). The project was constructed under a \$69.3 million design-build contract, which contained no information "defining the functional requirements to be met by the facility design; [in addition,] the specifications included in the contract were sketchy and

incomplete, as is typical of design-build contract documents” (464).

According to Bloomfield, Westerling, and Carey, these sketchy design requirements made the project vulnerable to cost increases. The authors also note that disputes over construction defects remained unresolved three years after the facility was substantially completed. Moreover, during the same period in which the facility was designed and constructed, the state built a slightly larger county correctional facility elsewhere in Massachusetts at a lower construction cost per square foot and on a faster schedule than the Plymouth facility, even though a similar pre-cast concrete construction method was used. That building had been constructed without any exemptions from the design and construction bid laws.

Privatization of Wastewater Facilities in Lynn, Massachusetts

In 1997, the Lynn Water and Sewer Commission (LWSC) initiated a procurement process for long-term design-build-operate contracts for the city’s wastewater treatment plant and for combined sewer overflow work in order to eliminate sewer overflows and flooding problems (Commonwealth of Massachusetts, Office of the Inspector General 2001a). The LWSC obtained authorization under special legislation to exempt the contracts from the state’s public works bidding law.

The request for proposals issued by the LWSC for the sewer separation project did not specify the design that would be used for the project, nor did it provide detailed information on the nature and extent of the work needed to alleviate combined sewer overflow problems. The open-ended design competition led to two proposals with scopes of work that were so different that their prices were not comparable (Commonwealth of Massachusetts, Office of the Inspector General 2001a).

After a proposal evaluation and contract negotiation period that lasted 15 months, the LWSC awarded a \$48 million contract to U.S. Filter for the sewer separation project. The Massachusetts Inspector General’s Office, however, found that the contract was “one-sided” in that it placed the risks of sewer overflows and flooding on the LWSC. The review also concluded that U.S. Filter’s \$47 million bid price was \$22 million higher than the cost of comparable sewer separation work, which the LWSC had previously procured in a traditional manner under the state’s public works bidding law.

Design and Construction of the University of Massachusetts Computer Science Center

In 1999, the state of Massachusetts completed construction of a three-story Computer Science Research

and Development Center at the University of Massachusetts Amherst campus. In this case, the Division of Capital Asset Management, the state’s public construction management agency, sought an exemption from the design and public building construction bid laws, which is available under the state’s modular building statute (Massachusetts General Laws, chap. 149, sec. 44E). However, the Massachusetts Inspector General’s Office (2001b) determined that the Computer Center was a conventionally constructed building and that the Department of Capital Asset Management had improperly avoided the separate designer selection and construction bid procedures required for public building projects.

A feasibility study for the project had estimated that the Computer Center would be built at a cost of \$10.4 million and would be completed within 18 months using the design-build approach (Commonwealth of Massachusetts, Office of the Inspector General 2001b). The project, however, actually took 37 months to complete, and change orders sought by the design-build contractor increased the cost of the project by more than one-third (Commonwealth of Massachusetts, Office of the Inspector General 2001b). The Inspector General’s Office determined that most of the project’s major problems were attributable to the design-build contractor’s “failure to ensure that design work was complete, accurate, and timely; [to the contractor’s] continual efforts to reduce construction costs through design revisions; and [to the contractor’s] failure to take timely steps to replace non-performing subcontractors” (v).

A Theoretical Model for Analyzing the Impact of Rules on Performance and Accountability

In each of the cases presented here, expected performance and accountability were not achieved. This article postulates a theoretical proposition, based on these cases, that the evasion of—or exemptions from—procurement and contracting rules can cause performance and accountability failures and, conversely, that compliance with such rules can ensure project success. This theoretical proposition uses a “logic model” technique of analyzing case study evidence in which empirically observed events are matched to theoretically predicted events. Under this logic model format, an observed “public program intervention” is postulated to be a cause of a series of “immediate,” “intermediate,” and “final outcomes” (Yin 2003, 127).

The enactment of rules is the public program intervention in this model. An immediate outcome of the enactment of such rules is either compliance with them by project managers or avoidance of them. An intermediate outcome resulting from *complying* with rules is postulated as the ability of managers to achieve

five project performance and accountability conditions. These conditions, when met, are then postulated to help ensure the achievement of expected project performance and accountability as the final outcome.⁵ The conditions are as follows:

1. The principal undertakes a planning process for the project that accurately identifies the project's scope of work.
2. The principal selects the best agent based on the advance planning that has been done.
3. The principal and agent enact and carry out mutually advantageous, clear, and lawful agreements regarding the project's scope of work.
4. An adequate and accurate flow of information exists between the agent and principal regarding the completion of the work.
5. The principal and agent enforce appropriate agreements.

Table 1 depicts a sequentially staged logic model to illustrate this article's proposition that procurement and contracting rules compliance can result in the achievement of expected performance and accountability.

Rules Compliance and the Agency Challenge

Discussing the performance accountability model just introduced in terms of principal-agent relationships appears to offer insight into why compliance with rules may help managers ensure expected performance and accountability in the projects they undertake. As Pratt and Zeckhauser observe, a salient "challenge" in the agency relationship "arises whenever—which is almost always—the principal cannot perfectly and costlessly monitor the agent's action and information. The problems of inducement and enforcement then come to the fore" (1991, 2–3). The principal's difficulty in observing the agent's efforts and the problems of perfect and costless monitoring are basic problems of accountability and can result in problems in performance. Each of the five performance and accountability conditions presented here addresses this challenge of the principal-agent relationship. Thus, to the extent that rules require principals to meet one or more of these conditions in undertaking projects—particularly the first condition

regarding project planning—rules should help managers ensure expected project performance and accountability.

The following is a brief discussion of how the five performance and accountability conditions in this model address the agency challenge and how compliance with rules can help achieve those conditions. It is followed by a discussion of the Mount Hood case in the context of the model.

The principal undertakes a planning process for the project that accurately identifies the project's scope of work.

Effective planning is critically important to all the steps that follow in the execution of a public project, including the selection of agents to carry out the work, the signing of agreements with those agents, and the completion and monitoring of the work. Planning specifies the agent's tasks. Without a clear conception of the work to be done, principals will be more likely to be faced with higher costs, poorer performance, and little accountability. Werkman and Westerling (2000), for example, observe that contract operation of wastewater treatment plants produces lower costs than public operation when (1) the scope of work is precisely specified in advance in bid documents and contracts, (2) the contractor's performance can be readily evaluated, and (3) the contractor can be replaced or penalized if it fails to perform (see condition 5 of this framework).

Public bidding statutes are an example of rules that encourage project planning to the extent that they require that plans or specifications be provided to all prospective bidders. Under Massachusetts law, state-funded building projects start with the preparation of a plan or study that identifies the public agency's functional requirements, design alternatives to meet these requirements, and a cost estimate for the recommended design (Bloomfield, Westerling, and Carey 1998). Following this feasibility study, a competitively selected designer prepares the final design in the form of biddable plans and specifications. Prequalified contractors then submit competitive bids for the construction work.

Table 1 A Model Postulating Cause-and-Effect Relationships between Rules Compliance and the Achievement of Expected Performance and Accountability

Intervention and immediate outcome	→	Intermediate outcome (achievement of performance/ accountability conditions)	→	Final Outcome
<ul style="list-style-type: none"> • Procurement rules are enacted and principal complies with them. • Contracting rules are enacted and the principal complies with them. 		<ul style="list-style-type: none"> • Principal engages in accurate project planning process. • Principal selects the best agent. • Mutually advantageous agreements are enacted. • Adequate flow of information exists between agent and principal. • Enforcement of agreements is ensured. 		<ul style="list-style-type: none"> • Greater likelihood of achieving expected project performance and accountability.

The Massachusetts public buildings construction bid law (Massachusetts General Laws, chap. 149, sec. 44A–M), requires that prequalified contractors bid on projects based on a complete design provided by the designer. Section 44B requires the inclusion of both plans and specifications in the bid documents. The public agency must select the most “eligible and responsible” bidder that submits the lowest cost proposal.

The Massachusetts public works bid statute (Massachusetts General Laws, chap. 39, sec. 39M), which applies to nonbuilding projects, such as work on a road, bridge, traffic signal, or water or sewer main, requires that awarding authorities include specifications with their invitations for bid that “shall be written to provide for full competition for each item of material to be furnished under the contract.” This statute does not specifically require that plans be included in the bid documents. However, the Massachusetts Inspector General’s Office has recommended that both plans and specifications be included in invitations for bid in both public works and public buildings projects (Commonwealth of Massachusetts, Office of the Inspector General 1998, sec. 4, p. 2).

Bloomfield, Westerling, and Carey (1998) find that fast-track public construction methods that are based on incomplete plans and specifications, such as the “design-build” projects in the cases cited here, tend to pose higher risks to public jurisdictions of cost overruns and poor design quality than do traditionally procured “design-bid-build” projects.⁶

Advance planning has its critics as well. Kelman (1990) describes a drawback to the advance development of detailed plans for features and applications in the procurement of computer systems. Such “grand designs,” he states, can increase the risk of “failure on a grand scale” (87) if the technology fails to work as expected or if the original idea was misconceived. There are, however, adaptations that can be made to project designs even under some strict procurement laws. For example, “value engineering” is a technique allowed under Massachusetts construction procurement laws that allows changes to be made to the proposed design of a facility or project to best match the design to the facility’s or project’s desired functions (Commonwealth of Massachusetts, Office of the Inspector General 2005, 38).

Achievement of the following four conditions of this performance and accountability model flows from the achievement of this first condition regarding planning. In other words, adequate project planning is necessary before the additional conditions can be met.

The principal selects the best agent based on the advance planning that has been done. This is intended to mean an agent that has the experience and motivation to carry out the mission-based tasks effectively and efficiently. Competitive selection rules are a frequently used means of helping managers meet this condition of the model. Donahue (1989) finds that public contracting tends to be successful only when the contracts are subject to competition. Competitive contracting can provide an incentive to agents to complete the tasks efficiently and effectively or face the prospect of losing the contract when it is subject to a new round of competitive selection. Donahue notes the benefit to privatization when contractors are kept in a “state of healthy insecurity” (218).⁷

Competitive selection rules have been among the rules most frequently cited as candidates for deregulation for having caused delays and other procurement and performance problems in public construction and the delivery of public services (DiIulio 1994; Kelman 1990). Kelman contends, for instance, that computer systems procurement officials in the federal agencies he surveyed had so little discretion in managing competitive selection systems for vendors that they were frequently unable to take into account the previous experience of their own agencies with specific vendors who were vying for new contract awards.

It is important to remember, however, that findings such as these do not necessarily constitute an argument for throwing out all procurement rules. They could constitute an argument for improving them.⁸ For instance, the Massachusetts public buildings construction bid law requires the state’s public construction management agency to evaluate the past performance of contractors before allowing them to bid on public projects. In addition, public agencies are encouraged by the Massachusetts Inspector General’s Office to contact references listed in bidders’ “update statements” to determine for themselves whether the contractors meet the statutory definition of being “responsible” to perform the work. Public agencies have clear discretion under the statute to disqualify bidders with histories of poor performance (Commonwealth of Massachusetts, Office of the Inspector General 2000, 57).

The principal and agent enact and carry out mutually advantageous, clear, and lawful agreements regarding the project’s scope of work. Achievement of this third condition flows, as noted, from the first condition regarding proper planning. In privatized relationships between principals and agents, clearly drawn contracts with proper performance standards and incentives are necessary to ensure that the agents carry out the organization’s mission-based tasks

efficiently and effectively (Donahue 1989; Reh fuss 1989; Romzek and Johnston 2005).

Advance project planning by the principal is necessary to ensure that in addition to being clear, the contract terms and provisions will be advantageous to the principal as well as the agent. The imbalance of risk in contractual arrangements, particularly between public principals and private agents, can be a frequent problem. Werkman and Westerling (2000) note that long-term design-build-operate contracts for wastewater treatment plants often contain terms and provisions that impose risks of higher costs on the public owner than on the private contractor. Johnston and Romzek, in discussing the contracting of Medicaid services, find that political clout of the contractors “coupled with the monopolistic features of the contract, increase the potential for ‘milking’ the Medicaid system” (1999, 395).

An adequate and accurate flow of information exists between the agent and principal regarding the completion of the work. Accurate information is key to the principal’s ability to hold agents accountable for completing their tasks in accordance with the terms and provisions of the contract. Thus, once again, the process starts with planning, during which the principal develops the contractual standards.

Contract monitoring is a key means of obtaining information about the agent’s conformance with the contract, particularly in the aftermath of the increasing privatization of government functions since the 1980s (Auger 1999; Avery 2000; Reh fuss 1989). Johnston and Romzek point out the difficulties government faces in monitoring compliance with contracts because “government is necessarily at the mercy of the contractor to provide information on its compliance with terms of the contract” (1999, 389).

Effective monitoring gauges the agent’s adherence to the standards established during the project planning phase. Without such standards, monitoring would be meaningless.

The principals and agent enforce appropriate agreements. Project planning, experienced and motivated agents, mutually advantageous agreements, and accurate information are still not sufficient to ensure expected project accountability and performance. If the principal has access to information about the agents’ performance with respect to contractual standards but is unable to make use of that information, agents may still have no incentive to act accountably or perform adequately. Pratt and

Project planning, experienced and motivated agents, mutually advantageous agreements and accurate information are still not sufficient to ensure expected project accountability and performance.

Zeckhauser note, “The parties whose interests are affected by others’ actions must be willing and able to oversee and influence the behavior of their agents” (1991, x). Thus, when contractual standards exist, the parties must be willing and able to enforce them. Enforcement can take the form of terminating or penalizing agents who fail to meet agreed-upon standards in contractual relationships.

Application of the Performance and Accountability Model to the Mount Hood Case

It can be difficult, if not impossible, to determine precisely the impact that compliance with specific rules might have had on a public project. In a number of instances in the Mount Hood case, it appears likely that complying with rules would have prevented, or helped to prevent, the problems and cost overruns that occurred. In some instances, compliance might have simply protected the city against problems that might have occurred but did not happen to occur. It is also possible that if the city had complied with certain onerous or burdensome rules, the project’s problems would have been even worse than they were.

In considering the Mount Hood case in terms of the model described here, it is possible to make some more definite assertions about the project’s likely final outcome had the three cited rules been followed.

Compliance with the public works bidding law. A key violation of the public works bidding law occurred in the case of the drainpipe installation in the golf course fairway. The faulty installation turned out to be a particularly expensive problem in that the failure of the drainpipe appears to have caused flooding and silt deposits in the surrounding wetlands. Not only did the drainage system have to be redesigned, but also the city was forced to spend money for remediation work in the wetland areas.

The drainpipe failure appears to have resulted from the lack of a planning process to accurately identify the scope of the installation work. Thus, the first condition of the performance and accountability model was not met in this instance. The question is whether compliance with the public works bidding statute would have helped the project managers meet this first condition.

In other words, would compliance with the bidding rule have resulted in the achievement of adequate planning of the project as an intermediate outcome?

As previously noted, the Massachusetts construction bid laws require the preparation of plans or specifications in the solicitation documents sent to bidders.

Therefore, it is likely that if city officials had followed the requirements of the law and sought bids for the drainpipe installation, they would have hired an engineering firm to prepare plans and specifications on which interested contractors could have bid. Such plans and specifications likely would have been based on the existing conditions of the fairway and the presence of peat there, and presumably those conditions would have been disclosed to the bidders as well.⁹ Thus, it appears the answer to the question is yes—compliance with the public works bid law would have helped the project meet this first condition for performance and accountability.

The city was not specifically required, as noted, to seek bids for the actual fill delivery contract with Gator. However, the city’s consequent lack of plans and specifications in this instance also appears to have had a direct impact on the city’s ability to prevent the environmental problems that occurred.

Compliance with the municipal finance law requiring written contracts. The drainpipe installation also provides an example of a violation of the law requiring written contracts in transactions over \$5,000. This instance of noncompliance with rules flowed from the failure to follow the procurement rules and to plan the project accordingly. Not having done the necessary project planning, the city did not develop any performance standards or specifications to which it could contractually bind the agent.

Thus, the city had no legal means to protect its interests in this case. Even though the drainpipe installation turned out to be an expensive failure, the city had no legal basis to seek any monetary or other redress from the contractor. Had the city complied with the procurement and written contract rules, it is likely that an agreement with the drainpipe contractor that would have protected its interests would have been achieved as an intermediate outcome.

The drainpipe installation also provides an example of a failure to meet conditions 4 and 5 of the performance and accountability model, involving the existence of adequate information regarding the agent’s completion of the work and the ability to enforce compliance with agreements. The city apparently kept no meeting notes or project logs documenting the process of installing the pipe or the actions that led to the pipe failure. In addition, no city official was apparently present when the pipe was moved out of position (Commonwealth of Massachusetts, Office of the Inspector General 2002). Thus, the city had no source of information on the cause of this expensive problem and therefore was not in a position to make a

determination as to whether the contractor could be held responsible. Once again, these monitoring and enforcement problems appear to be intermediate outcomes of the city’s evasion of both the bidding law and the law requiring a contract for the work. Without any project specifications and without a contract, there was little purpose in monitoring the drainpipe installation because there was no agreement or standards with which to enforce compliance.

Compliance with the enabling statute. The compliance issues discussed so far concern the ability of city managers to ensure the performance and accountability of the project. But there were other principals involved, such as the board of aldermen and the citizens themselves. Compliance with the Mount Hood enabling statute by the city managers would have enhanced the ability of these other principals to hold the various contractors accountable as well. For instance, the citizens’ concern over the lack of an appropriation by the board of aldermen reflected more than just anger over the technical violation of the enabling statute. It also reflected a presumption that before appropriating money for the project, the aldermen would have evaluated the feasibility of the city’s plans to dump fill in the park and remove trees. The lack of an appropriation was thus a sign that a principal in Kearns’s (1996) “accountability environment”—the board of aldermen—had been denied the opportunity to exercise any control over the project. The lack of an appropriation thus resulted in failures to meet several conditions of performance and accountability in a political as well as a legal context.

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Conclusion

From the vantage point of the New Public Management movement, the fill delivery project at Mount Hood could be described as an innovative and entrepreneurial project in which discretion was given to the key managers to achieve results. But in this case, the expected results were not achieved, and the costs were far higher than anticipated. There were numerous instances in which public managers failed to meet the conditions for expected project performance and accountability. Had the contracting and contractor selection rules been followed—and consequently, the planning done and the necessary agreements enacted—this may well have been a highly successful and cost-effective project that could have been seen as a model of innovative public management.

Similarly, in each of the three additional cases that were summarized, public managers bypassed bidding rules, either legally or illegally, because they believed

that doing so would help them complete their projects more quickly and at a lower cost. Their projections turned out to be wrong in every case. In each instance, the exemptions from or avoidance of the traditional procurement process resulted in failures to meet, at the least, the first condition of the performance and accountability model—the adoption of an accurate project planning process. In many instances, other conditions of the model were not met as well.

In the case of the Plymouth County Correctional Facility, the bypassing of procurement rules resulted in an incomplete project planning process, consequent disputes, and a risk of cost increases. In the Lynn wastewater facilities case, the contract between the LWSC and U.S. Filter was not mutually advantageous; rather, it placed most of the financial risk on the public agency. Both of these situations flowed from a lack of advance project planning that, had it been done, would have produced bid or proposal solicitation processes that would have specified the project designs and led to contracts that more equitably distributed the financial risks between the public jurisdictions and contractors and avoided costly disputes. In the case of the University of Massachusetts Computer Science Center, the avoidance of procurement laws again resulted in a lack of project planning, which, in turn, resulted in numerous design revisions and consequent delays and cost overruns.

It is important to emphasize that the discussion of these cases is intended only to illustrate how a mindset of complying with rules can, in fact, help a manager achieve good results and achieve them efficiently. These cases, obviously, cannot prove that compliance with rules will always improve a project's performance and accountability. This discussion is also not meant to imply that rules in themselves should be followed blindly or that doing so will always serve the public interest. Managers, even when confronted with a thicket of rules, do have discretion as they interpret those rules and consider what compliance with those rules really entails. Similarly, inspectors general and other watchdogs must use sound judgment and sort through the managers' options in what Jos and Tompkins term a "reflective way" (2004, 261) in determining whether the managers' actions have met not only the letter of the rules but have served the public interest.

Kelman has argued that rules are established to promote "integrity, equity, and economy" in government organizations, but that there is no goal in the establishment of rules of "excellence in performance" (1990, 11). However, as the Massachusetts cases demonstrate, the state's procurement and contracting laws contain numerous provisions that, if complied with, can help ensure expected performance.¹⁰

As noted, the question remains why the cases discussed here and those cited by Osborne and Gaebler (1992), Anechiarico and Jacobs (1996), and Kelman (1990) could result in such opposing conclusions about the impact of rules on performance and accountability. Further case study research is needed of projects in which expected performance and accountability were achieved and those in which they were not achieved. Such cases could be analyzed to determine the answers to such questions as whether rules were complied with or avoided in carrying out the selected projects; whether the characteristics of rules postulated to ensure performance and accountability in fact did so; and what factors contributed to the success of projects in which rules were avoided. Research and analysis such as this might be useful both in the improvement of existing rules and the drafting of new ones, or they might lend support to the cause of further deregulation.

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Notes

1. An emphasis on performance or results is one of several salient features of the New Public Management or reinventing government movement. Other features include a market model for governmental functioning, an emphasis on customer service, and a focus on the administrator as entrepreneur (deLeon and Denhardt 2000).
2. The criticism of government auditors as concerned with compliance with rules rather than performance does not take into account a distinction that has been made since at least the early 1990s between different types of auditing processes. The U.S. Government Accountability Office (until 2004, the General Accounting Office) now distinguishes in its Government Auditing Standards manual (the "Yellow Book" 2003 revision) between "financial audits," "internal control audits," "compliance audits," "attestation engagements," and "performance audits," which are broken down into "economy and efficiency audits" and "program effectiveness and results audits." The 1994 revision of the Yellow Book distinguished between financial and performance audits and broke down performance audits further into "economy and efficiency" and "program" audits. Under the 1994 revision, "program audits" might consider such things as whether "a program achieves a desired level of program *results*" (2.9[b]; emphasis added). Under the 1994 revision, economy and efficiency audits might consider, among other things, whether an entity "is complying with the requirements of

- laws and regulations” (2.8[h]). In the 2003 revision, objectives for program audits and economy and efficiency audits were combined (2.10), and a separate set of objectives was listed for compliance audits, including “compliance criteria established by laws, regulations, contract provisions, grant agreements and other requirements” (2.12).
3. The bid law governing contracts for public works construction services and materials (Massachusetts General Laws, chap. 30, sec. 39M) requires an advertised bid process but applies only to contracts costing \$10,000 or more. Because the city’s agreement with Gator did not entail a payment by the city, the bid law did not apply in this case. The Massachusetts Inspector General’s Office, however, concluded that “the Park Commission could and should have attempted to foster competition in the private marketplace for the fill and public works construction services offered by Gator” (2002, 13).
 4. The Massachusetts Designer Selection Law (Massachusetts General Laws, chap. 7, sec. 38A1/2–O) contains procedures for selecting designers for building projects through an advertised competitive process.
 5. The conditions that make up this framework are intended to fit within the tenets of strategic management, which Kearns defines as a series of strategies and actions that allow an organization to “capitalize on existing or emerging opportunities in its external environment” (1996, 57). This framework might be considered operational or tactical rather than strategic, however.
 6. In 2004, the Massachusetts legislature approved several reforms to the state’s design and construction bidding statutes intended, in part, to permit the use of design-build methods for larger buildings in conjunction with safeguards to prevent problems associated with inadequate project planning and design. Those safeguards include a requirement for prior approval by the Massachusetts Inspector General’s Office, which must determine that “the public agency has a plan and procedures in place to effectively procure and manage a design build firm” (Commonwealth of Massachusetts, Division of Capital Asset Management 2005, 21).
 7. There are, of course, many other means of motivating agents to complete tasks efficiently and effectively. In a business context, Austin discusses several “organization and task features” that affect the “internal motivation” of agents and the costs of internal motivation, including the size of the organization, its cultural homogeneity, the duration of the relationship between the principal and agent and other features (1996, 98–99). Similarly, the measurement of the agent’s performance and the provision of bonuses and other performance incentives are means of “external motivation” of the agent, according to Austin (82).
 8. Kelman notes, in fact, that there is no actual provision in the Federal Acquisition Regulations prohibiting procurement officers from considering the past performance of vendors on contracts in their own agencies. The inability to do so, he states, “has emerged in the procurement culture from the doctrine that vendors may be evaluated only on their proposals” (1990, 43).
 9. The installation of the drainpipe without detailed design documents also violated a November 2000 order of the Melrose Conservation Commission that required the preparation of detailed design documents prior to the undertaking of additional work at the Mount Hood site (Commonwealth of Massachusetts, Office of the Inspector General 2002).
 10. The argument that rules are not concerned with performance is not borne out by the history of public construction reform in Massachusetts. In 1980, the Ward Commission proposed major reforms to the state’s procurement laws as a result of widespread corruption in public contracting in the state. The commission’s 12-volume report documented numerous failures in construction performance as a direct result of corrupt procurement practices. The commission proposed legislative reforms “that focused on four areas: corruption, political influence, shoddy work, and poor administration” (Commonwealth of Massachusetts, Office of the Inspector General 1998, sec. 1, p. 4). Thus, the intention of the commission, in proposing its procurement reforms, was at least partly to improve public construction performance in the state.

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