

Socioeconomic Policies in Public Procurement: What Should We Be Asking of Public Procurement Systems?

FERNANDO MENDOZA LOPEZ* & JONI HERSCH**

Abstract

The Biden Administration, in its first few days in office, clearly stated its intention of using the public procurement system to achieve goals such as favoring domestic companies and workers, ensuring a sustainable public health supply chain, protecting the federal workforce, advancing racial equity, and replacing the federal government's fleet of vehicles with electric vehicles. The use of public procurement systems in this manner is not new. In fact, it has become commonplace for incoming administrations at different levels of government both in the United States and abroad to announce broad policy objectives when entering office. While there is wide consensus that it is possible to leverage procurement systems to achieve societal goals beyond the purchase of the good or service itself, the reliance on the system to provide such far-ranging solutions coupled with the mixed evidence on the effectiveness of some policies raises concerns over whether the procurement system can achieve its primary goal of efficiency in procurement while simultaneously meeting societal goals.

*Mendoza Lopez: Vanderbilt Law & Economics Ph.D./J.D. 2024, Vanderbilt Law School, fernando.mendoza.lopez@vanderbilt.edu, (512) 578-9817. The authors thank the editors of *The University of Memphis Law Review*, especially J. David Coats and Katelyn E. Jackson, for their helpful and insightful comments.

**Hersch: Cornelius Vanderbilt Professor of Law and Economics, Vanderbilt Law School, 131 21st Avenue South, Nashville, TN 37203. joni.hersch@vanderbilt.edu. (615) 343-7717.

In this Article, we advocate for increased rigor in the assessment of costs and benefits derived from the application of socioeconomic policies in public procurement and for changes in the governance structure that would place the burden of justifying use of the procurement system on the agencies in charge of the specific policy. In this scenario, the procurement officer would remain the ultimate decision-maker regarding a specific procurement, but now equipped with better information, would be able to make better decisions. To this end, we provide a taxonomy of socioeconomic procurement policies that are used in the United States and in other countries and review evidence of the effectiveness of different mechanisms used. We develop and provide a conceptual framework on how to review socioeconomic policies coherently while respecting the efficiency goal of the procurement system.

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I. INTRODUCTION

On his first day in office, President Biden issued Executive Order 13985 titled “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.”¹ The order establishes the policy of advancing equity for all by creating opportunities for “historically underserved” communities, and, in the process, revoking President Trump’s Executive Order 13950. Trump’s executive order, issued on September 22, 2020, prohibited federal contractors from providing training to their employees on issues related to race, sex stereotyping, and scapegoating that were deemed anti-American.²

In the first forty days of his administration, President Biden issued five executive orders that directly mandate the use of the public procurement system to achieve several socioeconomic policy goals.³ The Executive Orders have signaled the incoming administration’s intent to use the public procurement system to promote sustainability in the public health supply chain, to address climate change, and to maximize the use of domestic contractors and their employees to the extent possible under the current rules and international commitments.⁴

The explicit use of public procurement to achieve broader societal goals is a practice almost as old as the procurement function itself. In the United States, early development of the federal procurement law was closely entwined with the military warranting a preference for domestic suppliers due to national security concerns.⁵ In fact, most governments around the world have identified the government’s purchasing power as a tool to leverage the attainment of socioeconomic policy

1. Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 20, 2021).

2. *Id.*; Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020).

3. Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 20, 2021); Exec. Order No. 14,001, 86 Fed. Reg. 7,219 (Jan. 21, 2021); Exec. Order No. 14,005, 86 Fed. Reg. 7,475 (Jan. 25, 2021); Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Jan. 27, 2021); Exec. Order No. 14,017, 86 Fed. Reg. 11,849 (Feb. 24, 2021).

4. *See supra* note 3.

5. Christopher Yukins, *The U.S. Federal Procurement System: An Introduction*, 3 UPPHANDLINGSRÄTTSLIG TIDSKRIFT 69, 70–72 (2017) (Swed.), <https://www.urt.cc/?q=node/187>.

goals. These goals take on different relevance for the multiple stakeholders involved, where the agencies in charge of socioeconomic policies, such as the Environmental Protection Agency (EPA), the Small Business Administration (SBA), and the Office of Federal Contract Compliance Programs (OFCCP), all have mandates authorizing them to use the public procurement system to achieve their policy objectives.⁶

Procurement officials are required to strive for efficient purchasing. Efficiency can be defined broadly to integrate the economic benefits from diverse objectives such as competition, integrity, customer satisfaction, and wealth distribution, among others. In a fully competitive market, the efficient purchase would be readily identified as the cost-minimizing expenditure, which entails a balancing of benefits and costs. Consequently, any deviation from full and open competition imposes a cost on the procurement system, no matter the intent.

Public procurement systems use a wide range of incentives and deterrents to support socioeconomic policies while simultaneously meeting the efficiency requirement, each with different costs and benefits. The most used incentive-based tools are subsidies, bid evaluation preferences, quotas, certification requirements, minimum content requirements, and differentiated financing options. Deterrent tools or regulations such as fines, contractual rescission, and temporary prohibitions to contract with the government are also employed. Each of these tools merit separate consideration because each have been used to promote different objectives to different effects.⁷

Balancing efficiency with socioeconomic goals proves difficult considering that the procurement system bears the costs of policy implementation, yet rarely reaps the benefits. Proponents of socioeconomic policies often cite the urgency or primacy of their objectives with vague descriptions of their benefits and little consideration of the costs levied upon the procurement system. Conflictingly, opponents cite costs as the rationale for limiting or eliminating the use of socioeconomic policies in procurement. In practice, the prevalence of

6. Exec. Order No. 13,423, 72 Fed. Reg. 3,919 (Jan. 24, 2007); Exec. Order No. 13,514, 74 Fed. Reg. 52,117 (Oct. 5, 2009); Small Business Act, Pub. L. No. 85-536, 72 Stat. 384 (1958); Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), *as amended by* Exec. Order No. 11,375, 32 Fed. Reg. 14,403 (Oct. 13, 1967).

7. *See infra* §§ II.D., V.A, V.B.

socioeconomic policies suggests that governments implicitly believe that the social, economic, and political benefits outweigh the costs.

Fulfillment of societal goals often places procurement officers in the unenviable position of having to analyze and balance several competing objectives in addition to their usual regulated cost-benefit analysis for many specific purchases of goods or services.⁸ The increased policy pressure placed upon each procurement action inevitably leads to situations where contracting officers are given responsibilities that go beyond the scope of procurement policy.⁹ To improve the ability of the procurement system to effectively achieve social goals, we recommend placing the burden of justifying policy implementations upon the proponent of the policy. Shifting the responsibility of cost-benefit analyses to the proponent of the policy, while maintaining the procurement official as the ultimate decision-maker, ensures that procurement objectives are respected, socioeconomic concerns may be considered equally, and procurement officers' administrative burden is alleviated.

This Article proceeds as follows: Part II establishes what is meant by procurement policy, drawing from the constitutional authority to enter contracts, and the need for this authority to be exercised efficiently. Part III provides an overview of the procurement process to provide a better understanding of the stages and the way different policy tools or mechanisms generate costs, as well as the governance structure tasked with making important balancing decisions. Part IV provides a comprehensive review of the most common socioeconomic policy objectives and their associated taxonomy. For each of the policies, we describe examples of how socioeconomic policies are being applied in different countries. Part V provides a description and analysis of the categories of costs and benefits generated by socioeconomic policies and reviews studies analyzing the effectiveness of the different policy tools associated with the different socioeconomic policies. Part VI concludes.

8. John S. Pachter, *The Incredible Shrinking Contracting Officer*, 39 PUB. CONT. L.J. 705, 706–08 (2010).

9. Omer Dekel, *The Legal Theory of Competitive Bidding for Government Contracts*, 37 PUB. CONT. L.J. 237, 256–59 (2008).

II. PUBLIC PROCUREMENT POLICY

The authority for the U.S. government to enter into contracts derives from the Constitution, namely, the implied authority that stems from the necessary and proper clause.¹⁰ Consequently, the power to enter into contracts is considered necessary and proper for the procurement of goods and services associated with the government's enumerated powers.¹¹

There are two necessary conditions for a government purchase to be considered procurement. First, it must follow a specific procedure that begins with the determination of the need and ends with contract completion.¹² Second, it must be considered a commercial activity as opposed to an inherently governmental activity. Once a need is determined the government faces the choice of undertaking it internally or approaching the private sector for solutions. This distinction is often made by distinguishing inherently governmental activities from commercial activities.¹³

In general, inherently governmental activities are those that are “so intimately related to the public interest as to mandate performance by government personnel.”¹⁴ An inherently governmental activity involves substantial discretion in the exercise of government authority, specifically, “the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.”¹⁵

It then follows that public procurement policy is intertwined with every other governmental function. For example, building a school can be thought of as part of an overall education policy. Building a highway is central to a transportation or communications policy. Even office supplies, if they are within a certain agency or department,

10. U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

11. See U.S. CONST. art. I, § 8.

12. 41 U.S.C. § 111.

13. See, e.g., Off. of Mgmt. and Budget, *Circular No. A-76 Revised*, OBAMA WHITE HOUSE (May 29, 2003), https://obamawhitehouse.archives.gov/omb/circulars_a076_a76_incl_tech_correction/#a (defining an inherently governmental activity at Attachment A, § B (1)(a) of the circular).

14. See, e.g., *id.*

15. See, e.g., *id.*

may be considered an ancillary purchase to support the policy of that specific agency. With this in mind, many governments go beyond this acknowledgement and explicitly expand the stated purpose of their system to encompass additional indirect goals. For example, when revising their procurement directives, the European Union specifically stated the goals of their revision. While their goals were centered on efficiency, they also included the goals of increasing access for small and medium-sized enterprises and enabling procurement officials to “make better use of public procurement in support of common societal goals.”¹⁶

At first glance, the massive scope of the responsibilities being placed on public procurement should convince legislators, academics, and the general public of the importance of having a coherent policy. In many countries perception of public procurement has only recently evolved from being considered menial and perfunctory to a more strategic and complex function.¹⁷ This evolution has been primarily driven by increased public scrutiny on government expenditure and the additional policy demands of citizens.¹⁸ This, in turn, has brought about greater demands on the preparation and training of the government officials in charge of procurement and increased complexity in the procedures and safeguards mandated in relevant regulations.¹⁹

A. The Pursuit of Efficiency

Governments create procurement systems when doing so will decrease the average cost per dollar expended and when these savings are greater than the costs required to maintain it. Indeed, any set of regulations bears costs. In the context of public procurement, however, a proper cost-benefit analysis of the procurement system should

16. 2014 O.J. (L 94) 65.

17. See JOAO N. VEIGA MALTA, PAUL SCHAPPER, OSCAR CALVO-GONZALEZ & DIOMEDES BERROA, OLD RULES, NEW REALITIES: ARE EXISTING PUBLIC PROCUREMENT SYSTEMS ADDRESSING CURRENT AND FUTURE NEEDS? 3 (2011)[hereinafter OLD RULES, NEW REALITIES], <https://documents1.worldbank.org/curated/en/532481468300694974/pdf/664270WP00PUBL0rement0Sept20110Web2.pdf> (describing changes in the way governments viewed public procurement).

18. See *id.*

19. See *id.* at 14; see also Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103 (2002) (advocating for the importance of policy uniformity on government buyer training).

balance transaction costs and the net social welfare effect of socioeconomic policies on markets with the benefits that socioeconomic policies are generating in their respective fields. Ultimately, the goal of maximizing the net benefits from a regulation is a way of attempting to achieve efficiency.

Efficiency is often cited directly or indirectly in the articulation of many procurement policies around the globe. For example, the U.S. Office of Federal Procurement Policy is tasked with directing government-wide procurement policies, with the general purpose being to “promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government.”²⁰ Similarly, European Directive 2014/24/EU on public procurement was enacted as a part of a more comprehensive growth strategy for the European Union, where it viewed public procurement as one of a set of “market-based instruments” used to promote economic growth, while “ensuring the most efficient use of public funds.”²¹

Some scholars define as many as nine competing principles that drive public procurement policy.²² While each proposed principle is effectively a valid objective of any procurement system, three overarching principles emerge: efficiency, integrity, and equal opportunity or fairness.²³ In fact, we propose that while integrity and fairness are essential qualitative characteristics of the procurement function, the quantitative benefits that they generate have direct incidence on their efficiency. Practitioners worldwide often synthesize the goal of

20. 41 USC § 1101(b)(2).

21. 2014 O.J. (L 94) 65.

22. See Schooner, *supra* note 19 (describing the following objectives of the American procurement system: (1) competition, (2) integrity, (3) transparency, (4) efficiency, (5) customer satisfaction, (6) best value, (7) wealth distribution, (8) risk avoidance, and (9) uniformity); see also David Drabkin & Khi V Thai, *Emergency Contracting in the US Federal Government*, 7 J. PUB. PROCUREMENT 84, 85 (2007) (suggesting that the goal of the American procurement system is to provide best value, integrity, and trust by taxpayers); Dekel, *supra* note 9, at 256–59 (describing the three objectives of the procurement system as (1) integrity in the awarding of contracts, (2) efficient contracting, and (3) equal opportunity to all members of society); Ian Ayres & Peter Cramton, *Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition*, 48 STAN. L. REV. 761, 803 (1996) (citing Jerry Mashaw, *The Fear of Discretion in Government Procurement*, 8 YALE J. ON REG. 511, 512 (1991)).

23. See *supra* note 22.

procurement as obtaining the best “Value for Money,” and in the European Union the primary criteria for evaluating tenders are termed “most economically advantageous tender,” for which award decisions are required to not be based solely on cost criteria.²⁴ For simplicity, we will refer to the principle as efficiency, with the understanding that the array of factors we have alluded to may be encompassed within the principle. And while achieving efficiency as described herein is the guiding principle for procurement systems across the world, countries have sought to promote socioeconomic policy objectives that are facially external to the goal of efficiency. These socioeconomic policies are also known in relevant literature as horizontal policies or “linkages.”²⁵

Over time governments have widened the scope of policies focused on achieving socioeconomic goals through public procurement.²⁶ Protection of national industry and promotion of small businesses and labor standards were some of the earlier goals promoted by governments. Environmental policies, promotion of innovation, and gender and racial equality are more recent developments. The latter is one of the more frequently sought objectives, of which affirmative action is an important component. Affirmative action and similar policies are important considerations in the awards of federal contracts in many countries including the United States, Canada, Mexico, South Africa, Malaysia, and Australia.²⁷

B. Full and Open Competition

In the United States, the Federal Acquisition Regulation (FAR) is the primary compendium of rules on public procurement. Under the FAR, full and open competition is the default mechanism through

24. Carol Cravero, *Socially Responsible Public Procurement and Set-Asides: A Comparative Analysis of the US, Canada and the EU*, 8 ARCTIC REV. ON L. & POL. 174, 175–79 (2017); 2014 O.J. (L 94) 65; see also OLD RULES, NEW REALITIES, *supra* note 17, at 17. See generally 41 U.S.C. § 1101(b)(2).

25. Sue Arrowsmith, *A Taxonomy of Horizontal Policies in Public Procurement*, in SOCIAL AND ENVIRONMENTAL POLICIES IN EC PROCUREMENT LAW 108 (2009); CHRISTOPHER MCCRUDDEN, BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT, AND LEGAL CHANGE 3 (2007).

26. Arrowsmith, *supra* note 25, at 108–46.

27. MCCRUDDEN, *supra* note 25, at 3; Cravero, *supra* note 24, at 175–84.

which governments achieve economically efficient outcomes when contracting.²⁸ Accordingly, no matter what policy objective is being pursued through an acquisition, efficiency is established as the main principle to be followed. Consequently, when governments employ the procurement system to achieve other objectives, they are deviating to some degree from the standard procedure which comes at a cost to efficiency.

Economists view the full and open competition requirement as essential to obtaining the most allocatively efficient solution. Accordingly, any exception to this rule would be justified only if the assumption of a competitive market for a given good or service is not reasonable, if there is an emergency, if the procurement involves considerations of national security, or if we seek to implement a socioeconomic policy.

While there are undoubtedly times when socioeconomic policies may warrant deviations from the standard procedure, there are relatively few comprehensive analyses of the costs they generate. Academic studies have shown the varying degrees of effectiveness of different policies as will be discussed in Part IV below, yet there is a lack of consensus on the cost effectiveness of each policy. It is therefore necessary to establish full and open competition requirements as the baseline procedure against which we evaluate the implementation of new regulations promoting socioeconomic goals.

C. Exceptions to Full and Open Competition

While the default system may prove ideal for most acquisitions, certain recurring exceptions come up frequently enough that alternative procedures or exemptions may actually prove beneficial from a cost-benefit perspective. This is particularly true with low-risk projects that may not necessitate some of the cumbersome requirements involved in default procedures. For many low-value contracts, governments have implemented streamlined procedures applicable for purchases under a certain threshold.

The requirement of full and open competition is also waived or modified in emergency situations. On March 11, 2020, everyday life was altered drastically for the American public. The World Health

28. 41 U.S.C. § 3301.

Organization declared the outbreak of the COVID-19 a pandemic, professional sports suspended their activities indefinitely after the first players tested positive for the virus, and many universities suspended in-person classes.²⁹ In response to the pandemic, Congress allocated additional resources for federal agencies to provide assistance, resulting in a rapid increase in purchases of medical and surgical equipment, hospital and surgical clothing, and investment in advanced biomedical research and development.³⁰ Additionally, the government lowered the monetary thresholds to use streamlined procurement processes.³¹ The emergency response to COVID-19 highlights the flexibility of procurement systems to the requirements of other public policy objectives, and to changes in the urgency of those requirements.³²

It is now recognized that there are transitory situations in which streamlined processes may be desirable. These situations, often emergencies, represent a temporary change in the costs and benefits of a specific purchase. These accepted exceptions highlight a desirable feature of any socioeconomic policy one would want to have in the procurement system. Ideally, every socioeconomic policy should operate in coordination with procurement policy in the same way.

National security is another situation in which an exception to the standard procedure is warranted. Although national security usually justifies restricted competition, as the need to vet suppliers or contractors is different, this in turn will often result in an increased cost structure and not necessarily a streamlined process. In that sense, while there is no international consensus as to what goods and services should be considered a national security exception, the fact that it creates an increased cost structure makes it advisable to attempt to minimize the amount of procedures in this category. Notwithstanding the restriction

29. U.S. GOV'T ACCOUNTABILITY OFF., COVID-19 CONTRACTING OBSERVATIONS ON FEDERAL CONTRACTING IN RESPONSE TO THE PANDEMIC 1 (2020), <https://www.gao.gov/assets/710/708455.pdf>; Ben Golliver, *Ridiculed and Alone, Rudy Gobert was the Face of Coronavirus in Sports. Now He's Ready to Return*, WASH. POST (July 29, 2020), <https://www.washingtonpost.com/sports/2020/07/29/rudy-gobert-coronavirus-nba-return/>.

30. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 29, at 12.

31. *Id.*

32. *See generally* OFF. OF FED. PROCUREMENT POL'Y ET AL., EMERGENCY ACQUISITIONS GUIDE (2011), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/procurement_guides/emergency_acquisitions_guide.pdf.

of competition derived from the heightened security requirements, it is still advisable to attempt to foster the greatest amount of competition possible within the constraints.

D. Policy Tools

Socioeconomic goals are promoted in public procurement by the enactment of regulation that imposes requirements on the different actors and stages of the procurement process, which we refer to as “policy tools.” There are several ways to classify the different policy tools that governments have at their disposal to support socioeconomic policies, as illustrated in Table 1.³³

Table 1

Classification of Socioeconomic Policies³⁴

Classification	Categories
By Level of Compliance	I. Policies that require contract workers to comply with existing legal requirements II. Policies that require more than the legal minimum
By Intended Beneficiary	I. Contractors (or a subset of contractors) ³⁵ II. Contractor employees (or a subset of employees) III. Consumers IV. Society
By Type of Intervention ³⁶	I. Participation restrictions II. Improving access III. Award (or bid evaluation) criteria IV. Contractual requirements

33. Arrowsmith, *surpa* note 25, at 130–46 (identifying nine types of tools or mechanisms used in the European Union: 1) Decision to purchase, or not to purchase; 2) Decision on what to purchase; 3) Contractual requirements laid down by the purchaser; 4) Packaging and timing of orders; 5) Set-asides; 6) Exclusion from contracts for non-compliance with government policies; 7) Preferences in inviting firms to tender; 8) Award criteria; 9) Measures for improving access to government contracts).

34. *Id.* at 108. The first two classifications closely follow the taxonomy offered by Arrowsmith, while the third is an extension of Arrowsmith’s taxonomy.

35. In the U.S. most policies targeted at contractors include subcontractors as well.

36. These types of interventions impact differentially across different phases of the procurement process. See *infra* Part III for an explanation of these phases.

The level of compliance is important to our efficiency evaluation because higher levels of compliance generally suggest higher costs. Where the policy calls for compliance with existing rules, costs are not increased for contractors if they are complying at the time of implementation. If overall compliance in the market is low then the effect of the socioeconomic policy would be to increase costs for non-complying contractors, given that their compliance decision may have changed due to the increased probability of being caught and punished. Costs are also increased for the government given that monitoring costs are generated and, in some cases, can be substantial.³⁷

Considering the intended beneficiary ensures that the stakeholders whose benefits we want to quantify are identified. It is important to note that the intended beneficiaries described in Table 1 are the beneficiaries of the socioeconomic policies themselves. Hence, these beneficiaries do not represent a comprehensive list of stakeholders in the procurement process itself, which may have its own separate interested parties. In other words, a specific procurement purchase may be intended to benefit a specific subset of the population, and the socioeconomic policy will have its own beneficiaries, which may or may not be the same.³⁸ We provide specific descriptions of the policy tools used for different socioeconomic policies, and briefly describe the most common tools or mechanisms used.

Following the third classification described in Table 1, the type of intervention, comes with four types of tools which are not necessarily mutually exclusive. First, participation restrictions are a frequently used tool. Governments regularly seek to support targeted groups such as small businesses and domestic industries. This tool is effectuated by restricting competition only to companies that comply with certain requirements to certify that they are in fact a member of the targeted group. This tool is commonly referred to as “set-asides.”

37. For example, Exec. Order No. 13,673, 48 C.F.R. §§ 22, 52 (2014) (*revoked by Pub. L. No. 115-11 (2017)*) mandated the creation of new positions within agencies that would be in charge of monitoring compliance and making policy recommendations.

38. To illustrate, consider a policy to purchase electric vehicles. In that case, the beneficiary of the procurement procedure itself is the end user of the vehicle, while the beneficiary of the “electric vehicle” purchasing policy would presumably be society through the environmental benefits that may be achieved.

Set-asides present the distinct advantages of being straightforward in application and preventing non-targeted companies from investing time and effort into preparing their bid. Nevertheless, restriction of competition may in fact increase the direct costs of bids and increase administrative cost of certifying compliance by requiring government officials to review more documentation. Increased compliance costs are particularly relevant in the case of firms that are subjected to a multi-factor evaluation of their company to be allowed to participate, in contrast to a simpler criterion of a firm being part of a preferred group to merit consideration.³⁹

Second, policy tools seeking to improve targeted groups' access to government contracting opportunities may be provided by alternative methods such as training programs, access to financing, measures to simplify tendering, and divisions of contracts into smaller lots in spaced-out intervals to increase the likelihood that more businesses may be able to participate.⁴⁰

A third way to promote socioeconomic policies is by modifying the factors (and the weights of these factors) on which bids can be evaluated for award. As previously mentioned, the European Union, as well as most other countries, allows for consideration of non-price factors when evaluating bids.⁴¹ This use of award criteria to promote socioeconomic policies is usually done through a point system, where a certain allotment of points is granted upon compliance with certain requirements. In this scheme, the procuring agency designs an evaluation mechanism where points are divided between different facets of a bid. For example, a common evaluation scheme could award fifty points to the price, thirty points for technical aspects of the product, and twenty for compliance with environmental standards.

Yet another way to affect the award criteria is by using bid preferences. Bid preferences, as the name suggests, is usually a benefit awarded to qualifying bidders whose bids are evaluated at an x percent

39. When evaluating a bid, governments evaluate both the supplier's traits as well as the bid itself. These two types of evaluations can be done jointly or separately and are sometimes referred to in terms of the criteria to be met as (supplier) selection criteria and (contract) award criteria. In Europe, the law mandates for the selection and award criteria to be evaluated separately. See Case C-532/06, *Lianakis v. Alexandroupolis*, 2008 E.C.R. I-00251.

40. *Id.*

41. 2014 O.J. (L 94) 65, 82.

discount. For example, an agency may seek to incentivize contractors to obtain specific technical certifications and may choose to award a ten percent award preference to bidders who can present documentation proving they are certified. In that case, where a hypothetical bidder A is not certified and bids a unit price of \$91, while bidder B is certified and bids \$100, the bid preference would apply to bidder B. Accordingly, B's bid would be evaluated at \$90, while bidder A would have no preference applied and be evaluated at \$91. The award criteria, moreover, can be used to grant a preference to contractors or a preference to products. Examples of contractor preferences are those seeking to support minority-owned businesses, or domestic contractors, while product preferences may be applied to contractors who comply with certain environmental standards, or when innovative solutions are being incentivized.

Lastly, contractual requirements can promote socioeconomic policies. Government agencies may contractually require that contractors comply with certain standards such as wage levels or non-discriminatory hiring practices. Alternatively, governments may place the requirement on the product or service they provide, and this may impose compliance with environmental standards, national content, or technological specifications.

III. OVERVIEW OF THE PUBLIC PROCUREMENT PROCESS

To understand how a focus on efficiency will affect the entire process, it is illustrative to provide a brief explanation of the procurement process. In general, typical procurement processes have seven phases: 1) Needs analysis; 2) Drafting of technical specifications or terms of reference; 3) Market analysis and budgeting; 4) Selection of the procurement procedure; 5) Bid selection; 6) Contract management; and 7) Feedback.⁴² The order and the names of the phases differ in

42. Sources may differ in the number of phases or stages officially recognized in public procurement, but a detailed description of each stage or phase typically leads to the same process with small differences in the order or the emphasis placed on each phase. We have determined these seven stages in an attempt to provide detail that is both sufficient and representative of the process. Compare OLD RULES, NEW REALITIES, *supra* note 17, at 10, 18 (describing sixteen specific procedural steps, while also describing seven stages: Needs analysis, solution, specification, budget approval, bid selection, litigation, management), with 48 C.F.R. § 4.403 (2020) (describing the

each country, state, or city, but each one is almost certainly a part of any government procurement system.

Initially governments have a need that requires a purchase of a good or service, or some combination of goods and services.⁴³ Governments will study, at varying degrees of complexity, the different ways in which they can cover these needs. As part of their governmental functions, projects in fields such as infrastructure, public health, or telecommunications may require feasibility studies and consideration of a wide range of alternatives, while purchases of simpler products such as office supplies, food, or beverages may not require extensive evaluation.⁴⁴

Eventually, governments must determine the breadth of options that they will consider to be acceptable and proceed to the second stage—draft the technical specifications for the goods or the terms of reference for the services required. Governments differ on the degree of specificity required at this phase.⁴⁵ Some place responsibility on their public servants to draft narrow technical specifications with the thought that the government should know exactly what it needs.⁴⁶

phases of the procurement process as: 1) Presolicitation phase, 2) Solicitation phase, and 3) Award phase), and 2014 O.J. (L 94) 65, 92–94 (outlining the process in the European Union as: 1) Preparation, 2) Publication and transparency, 3) Choice of participants and award of contracts, and 4) Contract performance).

43. 41 U.S.C. § 111.

44. Public works are often viewed as more complex than procurement of other goods and services. Mexican procurement law requires a wider and more diverse array of studies to be undertaken before publishing notice for the procurement of public works as compared to other purchases. Compare *Ley de Obras Públicas y Servicios Relacionados con las Mismas* [LOPSRM] art. 4, 21, & 25, *Diario Oficial de la Federación* [DOF] 04-01-2000, últimas reformas DOF 20-05-2021 (Mex.) (requiring government agencies that procure public works to undertake economic, pre-investment, feasibility, and other studies, prior to initiating the procurement of public works), with *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público* [LAASSP] art. 12 & 12 bis, *Diario Oficial de la Federación* [DOF] 04-01-2000, últimas reformas DOF 20-05-2021 (Mex.).

45. See generally OLD RULES, NEW REALITIES, *supra* note 17, at 12–13.

46. Different governments and international organizations have viewed the determination of technical specifications as an area where the contracting officer's discretion should be limited. This is often reflected in laws that require strict adherence to national or international standards, insofar that they do not restrict competition. See U.N. Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment,

Others believe governments should present problems to the market in a broader manner to obtain solutions from the market, thereby promoting competition and innovation.⁴⁷

In the third phase, governments conduct studies on the markets from which they must purchase. At this stage, governments typically have only public information and information from prior government purchases at their disposal to analyze the market.⁴⁸ Market analysis may be undertaken in a centralized or decentralized manner at different levels of depth and are usually constrained by deadlines. This task may further be complicated by the fact that close contact between suppliers and government officials in charge of procurement decisions is usually frowned upon due to probity concerns. Therefore, requests for information may be restricted or completely barred. As output from this phase, officers are usually tasked with gathering some information on the number of competitors in the market, the types of competitors, pricing structures, bundling options, and others depending on the particular requirements in the country.⁴⁹ As a result of gaining an understanding of what governments need to buy, who they can potentially buy from,

Article 16 (1994) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml-procure.pdf>; LAASSP art. 12 & 12 bis, Diario Oficial de la Federación [DOF] 04-01-2000, últimas reformas DOF 20-05-2021 (Mex.).

47. The European Union states that “technical specifications should be drafted in such a way as to avoid artificially narrowing down competition Functional and performance-related requirements are also appropriate means to favour innovation in public procurement and should be used as widely as possible.” *See* 2014 O.J. (L 94) 65, 79–80.

48. Traditionally, governments have afforded little discretion to contracting officers, therefore limiting their contact with contractors. Recent trends have tended to afford greater discretion and have therefore allowed for communication with contractors at the market research stage. *See* OLD RULES, NEW REALITIES, *supra* note 17, at 7–10; *see also* 48 C.F.R. § 10.002(b)(2) (2020) (listing nine techniques for conducting market research including communication with potential contractors and use of secondary sources); Reglamento de la Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público [RLAASSP], art. 28, Diario Oficial de la Federación [DOF] 28-07-2010, últimas reformas DOF 14-06-2021 (Mex.) (stipulating that market research must be obtained from the official federal procurement portal, CompraNet, information from industry, and other public information).

49. Determination of types of competitors can include verifying if a company is minority owned, local, small or medium sized, or foreign.

and potential costs, governments can now undertake all the budgeting and appropriations processes necessary.⁵⁰

Using the information from the prior phases, in the fourth phase, governments decide on the appropriate procurement procedure to use. Here, the term procurement procedure refers to the competitive design of bidding processes, which can be classified as full and open competition, restricted competition, or sole source.⁵¹ The latter two can also be classified as competition “other than full and open competition.”⁵² Usually, information gathered in the market analysis stage will determine which procedure is appropriate, with direct awards only being warranted in a narrow set of circumstances such as when only a sole supplier exists or in emergencies.⁵³ Once selected, the ensuing procedure usually involves a public announcement or notice, question and answer sessions, bidding, evaluation, and award of a contract. Each of these steps are statutorily prescribed with defined timelines and evaluation methods, and with a mechanism to evaluate bids.⁵⁴ This process involves strict procedures and leaves detailed paper trails to appease the probity concerns involved in interactions between government officials and potential contractors or suppliers.

Once the contract is awarded and signed, the government agency enters the contract management phase. Contract management can be as simple as verifying the receipt of goods according to specifications, or as complex as monitoring progress on a multi-year construction project. Most systems would also include post-contractual evaluation of contract performance.⁵⁵ Some governments allow for a systematic evaluation of contract performance by the contracting officials or end-users. Furthermore, procurement processes are subject to

50. Part 10 of the FAR describes the general purpose of market research as “arriv[ing] at the most suitable approach to acquiring, distributing, and supporting supplies and services.” 48 C.F.R. § 10.000 (2020).

51. 41 U.S.C. § 3304.

52. 48 C.F.R. § 6.3 (2020).

53. *Id.*

54. *E.g.*, United States-Mexico-Canada Agreement, art. 13.6–13.8, 13.13, 13.15, Jan. 29, 2020, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/13_Government_Procurement.pdf (establishing general procedures and timelines from public notice to post-award).

55. 3 HENRY L. GOLDBERG, CHRISTOPHER K. SMITH, & NORMAN A. STEIGER, FEDERAL CONTRACT MANAGEMENT ¶ 16.01 (2021).

public scrutiny and auditing procedures which can also be considered another aspect of a feedback process that may provide information to improve future purchases. Taking a holistic view of the procurement process allows a better understanding of how different socioeconomic policies will affect the public procurement process and ultimately procurement policy.

IV. AN OVERVIEW OF SOCIOECONOMIC POLICIES

Consider the average contracting officer in Europe. The European Directive—as does legislation in many other countries—tasks their procurement officials with increasing access by small and medium sized enterprises to public procurement markets.⁵⁶ Moreover, some governments task their officials with pursuing environmental protection goals, as well as protection of domestic industries. To some extent, this leads these officers to the increasingly complex task of conducting economic development, environmental, and international trade policies, all while attempting to comply with the rigid procedures mandated by the procurement laws that primarily seek efficiency. Ultimately, if anything goes wrong with the performance of the contract, they may be found liable, and public trust in the government as a buyer of goods and services may deteriorate. Although this example grossly oversimplifies governance issues, it serves to highlight the intersection of policies and the importance not only of defining policies, but of harmonizing their interaction. In the following subsections we explore some of the main policies that over time have been explicitly grouped with procurement policy.

A. Protection of Domestic Industry

On January 25, 2021, President Biden signed Executive Order 14005, titled “Ensuring the Future is Made in All of America by All of America’s Workers.”⁵⁷ The Executive Order establishes a policy under which the Federal Government must purchase, whenever possible, goods and services produced in the United States. Additionally, the order asserts that, when possible, these goods and services should be

56. 2014 O.J. (L 94) 65, 65.

57. Exec. Order No. 14,005, 86 Fed. Reg. 7,475 (2021).

procured from sources that will help improve the competitiveness of American businesses and their workers.⁵⁸

Protection of domestic industries may be *the* original socioeconomic policy in most procurement systems. Although efficiency has always been the primary objective, governments still attempt to promote economic development by protecting domestic contractors, at least in so-called strategic sectors. For example, in the 1970s, during an important period of economic growth in South Korea, the government used procurement preferences to secure markets for the nascent industries it was supporting, such as shipbuilding and textiles.⁵⁹ In the United States, similar support has been shown for the protection of national industries since the Buy American Act of 1933, which mandates a preference for the procurement of goods produced in the United States.⁶⁰

Most countries have adopted these types of policies at some point, with some scholars suggesting that it is simply bad policy for procurement due to allocative efficiency concerns.⁶¹ These concerns reside in the fact that by restricting competition to domestic suppliers only, governments are no longer promoting full and open competition.⁶² Conversely, increasing focus on efficiency has led to the liberalization of public procurement markets, making them an important component of both bilateral and multilateral free trade agreements, where the lifting of domestic restrictions becomes the main bargaining chip in negotiations.⁶³ Many free trade agreements include chapters on access to procurement markets. For example, the aforementioned

58. *Id.*

59. ALICE H. AMSDEN, *ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* 39–40 (1989); *see also* Dani Rodrik, *Getting Interventions Right: How South Korea and Taiwan Grew Rich*, 20 *ECON. POL'Y* 55, 81–82 (1994) (explaining the role of governmental investment in the development of national industry).

60. 41 U.S.C. § 8302.

61. Steven L. Schooner & Christopher R. Yukins, *Public Procurement: Focus on People, Value for Money and Systemic Integrity, Not Protectionism*, in *THE COLLAPSE OF GLOBAL TRADE, MURKY PROTECTIONISM, AND THE CRISIS: RECOMMENDATIONS FOR THE G20* 87, 88–89 (Richard Baldwin & Simon Evenett eds., 2009).

62. *See supra* Section II.B.

63. United States-Mexico-Canada Agreement, Ch. 13, Jan. 29, 2020, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/13_Government_Procurement.pdf.

European Directive on public procurement placed access to these markets as an important part of economic integration. Similarly, forty-eight countries are currently parties to the Agreement of Government Procurement established under the auspices of the World Trade Organization that holds liberalization of procurement markets as one of its main tenets.⁶⁴

In most cases protection of domestic industries takes the form of participation restrictions on foreign firms. This favors any firm, foreign or domestic, that employs domestic workers.⁶⁵ For example, Executive Order 14005 called for a review of internal procurement practices, heightened reporting requirements for waiving the application of domestic requirements by federal agencies, and a commitment to promote the enforcement of the Buy American Act.⁶⁶ In proposing these changes, the Biden Administration effectively revoked several presidential and regulatory actions.⁶⁷ The effects of the changes are yet to be seen, but this focus on domestic industry through government contracting shows both the importance of the policy and the fact that it has remained relevant for almost ninety years.⁶⁸ What is certain is that this type of policy is permanent considering the weight afforded to supporting domestic industries in the political arena, as well as the strategic value that access to procurement markets has in diplomatic trade relations.

B. Promotion of Small Business

Promotion of small business has also been a focus of government procurement. This goal follows the logic that economic development can be promoted through the fostering of competition, and the support of small business interests helps develop future competition. Further, small businesses are often viewed as a means to promote

64. *Agreement on Government Procurement: Parties, Observers and Accessions*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (last visited Oct. 17, 2021).

65. Exec. Order No. 14,005, 86 Fed. Reg. 7,475 (2021).

66. *Id.* at §§ 3–4, 14.

67. Exec. Order No. 14,005, 86 Fed. Reg. 7,475 (2021) (revoking Exec. Orders No. 13,788, 13,858, and 13,975, and superseding sections of Exec. Orders 10,582 and 13,881).

68. 41 U.S.C. § 8301; Exec. Order No. 14,005, 86 Fed. Reg. 7,475 (2021).

equality, by granting greater access to business opportunities and ultimately reducing income disparities.⁶⁹

This policy is used in many countries, and it is arguably one of the quintessential features of the American Procurement Policy.⁷⁰ In 1953, Congress enacted the Small Business Act, through which it created the Small Business Administration (SBA), and with it the §8(a) program.⁷¹ The program gave the SBA the authority to enter into contracts with other government agencies and subsequently enter into subcontracts with small businesses.⁷² Furthermore, in 1968 President Johnson required that the SBA use the §8(a) program to aid small businesses owned by “socially or economically disadvantaged” persons.⁷³ Subsequently, in 1977, Congress required government agencies to set percentage goals for contract awards to small minority-owned businesses.⁷⁴ Since then these tools, known colloquially as “set-asides,” have been used widely to pursue political agendas such as affirmative action, environmental policies, incentives for innovation, and protection of local industries.⁷⁵

C. Competition Policy

The efficiency goal of procurement is consistent with antitrust law and other competition policies that seek to promote economic efficiency. This goal is based on the expectation that more competitors lead to a more efficient market. With that in mind, the Competition in Contracting Act of 1984 ostensibly prescribes full and open competition as the default procedures to obtain efficiency in procurement

69. Max V. Kidalov, *Small Business Contracting in the United States and Europe: A Comparative Assessment*, 40 PUB. CONT. L. J. 443, 445–50 (2011).

70. *Id.*

71. 15 U.S.C. §631.

72. Lynn Ridgeway Zehrt, *A Decade Later: Adarand and Croson and the Status of Minority Preferences in Government Contracting*, 21 NAT'L BLACK L. J. 1, 3–4 (2009).

73. *Id.* at 3 (citing *Fullilove v. Klutznick*, 448 U.S. 448 (1980)).

74. *Id.* at 4.

75. Arrowsmith, *supra* note 25, at 137–38; David Seth Jones, *Recent Reforms to Promote Social Responsibility Procurement in East Asian States: A Comparative Analysis*, 11 J. PUB. PROCUREMENT 61, 63–70 (2011).

procedures, with similar laws and regulations being available in other jurisdictions.⁷⁶

In practice, however, the importance of governments seeking to promote competition becomes more acute in markets where the government holds a significant amount of market power as a buyer. In certain markets, where the government is not a relatively large buyer, the government's effect on the market is, in general, substantially similar to other buyers. In contrast, in markets such as public infrastructure, raw materials for public utilities, and other goods that are related to exclusively governmental functions, the government exercises significant market power.⁷⁷ In these markets, public procurement decisions may effectively act as market regulation.⁷⁸

For example, if the government is the only buyer in a market and it requires contractors to comply with a specific quality standard, it is effectively regulating that market. In this way, procurement decisions can affect or restrict competition, and regulate the pace of innovation in an industry.⁷⁹ The relation is explicit in some countries; for instance, in Mexico, the primary public procurement statute calls for coordination between the government agencies and the competition authority regarding several instances in the procurement process.⁸⁰

D. Labor Standards

In the United States, four statutes have been enacted to ensure compliance with certain labor standards when engaged in government contracts.⁸¹ the Davis-Bacon Act, the Walsh-Healey Public Contracts Act, the McNamara-O'Hara Service Contract Act of 1965, and the

76. 41 U.S.C. § 253; *see also* 2014 O.J. (L 94) 110; CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, CPEUM, [CONSTITUTION], art. 123, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex).

77. Consider national defense, through which governments can significantly affect price determination and product design. *E.g.*, 48 C.F.R. §§ 17.7, 34.1 (2021); 2014 O.J. (L 94) 65, 104–05.

78. MCCRUDDEN, *supra* note 25, at 3

79. *See infra* Section V.G.

80. LAASSP art. 29, 34, & 39, Diario Oficial de la Federación [DOF] 04-01-2000, últimas reformas DOF 20-05-2021 (Mex.).

81. 2 GOLDBERG, SMITH, & STEIGER, *supra* note 55, at ¶ 10.13.

Contract Work Hours and Safety Standards Act.⁸² The Davis-Bacon Act was enacted in 1931 with the goal of protecting labor wage rates in the construction industry. The Walsh-Healey Public Contracts Act, enacted five years later, supplements the Davis-Bacon Act in adding stipulations of wages being determined by the Secretary of Labor in accordance with local industry levels, provisions on work hours, minimum age requirements, and workplace conditions.⁸³ The Contract Work and Safety Standards Act, enacted in 1962, also deals with the hours of certain laborers employed by contractors or subcontractors. Finally, the McNamara-O'Hara Service Act of 1965 aims to have services in the United States furnished by the domestic industry.⁸⁴

In many ways, the implementation of labor policies in public procurement sectors represent the primary example of the distinction between policies that require compliance with existing regulation and those requiring increased standards as described in Table 1.⁸⁵ For example, some countries simply use the procurement system as an additional way to monitor compliance of labor standards, while others view the government as an employer with a moral imperative to have an exemplary treatment of their workers.⁸⁶ The European Union provides a more complex regulatory system regarding labor policies given labor mobility and the position of the procurement system within the greater policy goal of market integration.⁸⁷

E. Affirmative Action

Affirmative action in public contracts is another policy objective. In the United States, affirmative action is possibly the most controversial policy objective. As such, it has been subject to the most

82. *Id.*

83. *Id.*

84. *Frequently Asked Questions Pertaining to the Issuance of Wage Determinations Under the McNamara-O'Hara Service Contract Act (SCA) of 1965, as Amended*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/government-contracts/service-contracts/faq> (last visited Dec. 16, 2021).

85. *See supra* p. 10.

86. Clemens Kaupa, *Public Procurement, Social Policy and Minimum Wage Regulation for Posted Workers: Towards a More Balanced Socio-Economic Integration Process?*, 1 EUROPEAN PAPERS 127, 128–29 (2016).

87. *Id.*

analysis, both by academics and by the judicial system, making it the richest area from which some indications of effectiveness may be assessed. Typical policy tools include requiring that contractors ensure equality of employment opportunities by use of contracts that have explicitly been set aside for competition amongst companies owned by minorities, as well as bidding preferences awarded to those same companies.

President Biden's Executive Order 13985, signed on January 20, 2021, announced the administration's intention to address the "unbearable human costs of systemic racism," and called upon the Federal Government to assess ways in which they can advance equities of historically underserved sectors.⁸⁸ The order follows a long-standing tradition to use procurement to improve racial equity, amongst other intended beneficiaries, which as a group are often termed as affirmative action policies.

While the term affirmative action may receive different names, the intended policy outcome is often the same in trying to confer advantages to minorities who have historically faced discrimination and therefore lacked access to economic opportunities afforded by public procurement.⁸⁹ The most used mechanisms in the United States have been: (1) requiring contractors—and in some cases subcontractors—to comply with workforce composition requirements; (2) restricting a percentage of the market to competition amongst qualifying businesses⁹⁰; (3) granting bid preferences to qualifying businesses, or alternatively by granting bid subsidies.⁹¹

In 1965, President Johnson issued Executive Order No. 11,246, requiring contracting officials to take affirmative action to attempt to end racial discrimination in public procurement.⁹² The order, as amended by Executive Order No. 11375, prohibits companies that contract with the federal government from "discriminat[ing] against any

88. Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 25, 2021).

89. *Id.*; Cravero, *supra* note 24, at 181.

90. Also known as "set-asides." Cravero, *supra* note 24 at 179.

91. Susan Athey, Dominic Coey, & Jonathan Levin, *Set-Asides and Subsidies in Auctions*, 5 AM. ECON. J.: MICROECONOMICS 1, 1–2 (2013); Ayres & Cramton, *supra* note 22, at 801–04; Arrowsmith, *supra* note 25, at 124–25; Small Business Administration Act of 1953, 15 U.S.C. § 631.

92. Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965), *as amended by* Exec. Order No. 11,375.

employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin.”⁹³ Additionally, the Office of Federal Contract Compliance Programs (OFCCP) is tasked with monitoring contractor and agency compliance with affirmative action policies.⁹⁴

In 1980, the Supreme Court dealt with set-asides in *Fullilove v. Klutznick*. In *Fullilove*, the plaintiffs challenged the constitutionality of the Public Works Employment Act of 1977 (PWEA).⁹⁵ The PWEA required at least 10% of federal contracting dollars to be awarded to minority business enterprises (MBE).⁹⁶ The court upheld the constitutionality of PWEA although it did not go as far as to establish a standard of review.⁹⁷

In *City of Richmond v. J.A. Croson Co.*, decided in 1989, the City had implemented a plan that required prime contractors to subcontract 30% or more of each contract with minority businesses following policies designed to be compliant with *Fullilove*.⁹⁸ The court established a strict scrutiny standard to review affirmative action programs, and determined that strict scrutiny was not satisfied.⁹⁹ Just a year later, in *Metro Broadcasting v. FCC*, the court reaffirmed *Fullilove* with respect to a Federal Communications Commission program seeking to increase broadcast diversity.¹⁰⁰

In 1995, the Court decided *Adarand Constructors v. Peña*, in which the plaintiffs challenged the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA). STURAA established that a minimum of 10% of a state’s subcontracting funds go to socially

93. *Id.*

94. 2 GOLDBERG, SMITH, & STEIGER, *supra* note, at ¶ 10.13.

95. *See Fullilove v. Klutznick*, 448 U.S. 448, 453–54 (1980).

96. *Id.* at 454 (minority businesses were defined by ownership, and, in some cases, workplace composition).

97. *Id.* at 492, 519.

98. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477–78 (1989).

99. Regarding the use of racial classifications in public procurement, the strict scrutiny standard of review places the burden on local, state, and federal governments to show that the classification is justified by a compelling interest and that the socio-economic program is narrowly tailored to achieve a remedial purpose. *Id.* at 493, 505–08.

100. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 563–66 (1990).

and economically disadvantaged businesses.¹⁰¹ In particular, the challenged procedure was the award of a federal highway construction project in Colorado under STURAA.¹⁰² In this case, the court found that STURAA was supported by evidence from congressional hearings and the Court ratified the award.¹⁰³

In *Croson*, as Justice Marshall expressed in his *Adarand* dissent, the adoption of strict scrutiny by the Court created a “dismal future” for state and local affirmative action policies.¹⁰⁴ Since *Adarand*, the Supreme Court has not decided any cases on the subject, and few cases have been able to survive strict scrutiny on the federal appellate level. While the standard has clearly been heightened, the decisions in which policies have been upheld have helped clarify to some extent what qualifies as the compelling interest for which the government can narrowly tailor a policy to help remedy.¹⁰⁵

In the period following *Adarand*, nine states have proceeded to pass ballot initiatives or legislative referenda that have effectively eliminated race and gender conscious criteria from consideration in the allocation of public contracts.¹⁰⁶ These changes have led to reliance on alternative policies that benefit socioeconomically disadvantaged groups that are aimed at producing similar results to those generated through race and gender conscious policies.¹⁰⁷

101. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 208 (1995).

102. *Id.* at 208–10.

103. *Id.* at 208; see also Trent Taylor, Note, *The End of an Era? How Affirmative Action in Government Contracting Can Survive After Rothe*, 39 PUB. CONT. L.J. 853, 859 (2010).

104. Lynn Ridgeway Zehrt, *A Decade Later: Adarand and Croson and the Status of Minority Preferences in Government Contracting*, 21 NAT'L BLACK L.J. 1, 2 (2009).

105. *Id.* at 2–3.

106. Dominique J. Baker, *Pathways to Racial Equity in Higher Education: Modeling the Antecedents of State Affirmative Action Bans*, 56 AM. EDUC. RSCH. J. 1861, 1862 (2019).

107. See Elena Krasnokutskaya & Katja Seim, *Bid Preference Programs and Participation in Highway Procurement Auctions*, 101 AM. ECON. REV. 2653, 2656 (2011) (showing that price preferences for small and medium businesses can be a cost-effective way to achieve allocative goals). *But see* Rodrigo Lovaton Davila, Inhyuck “Steve” Ha, & Samuel L. Myers, *Affirmative Action Retrenchment in Public Procurement and Contracting*, 19 APPLIED ECON. LETTERS 1857, 1860 (2012) (explaining that

Because the goals of affirmative action and efficiency are apparently incompatible, critics of the affirmative action purpose of federal contracting have advocated for eliminating any objectives other than efficiency from the procurement process, arguing that other societal objectives that may be obtained through affirmative action would be more effectively pursued outside of the procurement process.

F. Environmental Protection

The use of public procurement to support wider environmental protection goals is now a widely accepted secondary goal of procurement. For example, even before the proposed policy of the Biden administration to purchase electric vehicles, FAR Part 23 already mandated several sustainable procurement standards that must be used for different products, such as Energy Star® information technology.¹⁰⁸ The military has also adopted several policies such as the use of solar arrays on military installations and the “U.S. Navy’s Great Green Fleet,” powered by a mix of alternative energy sources.¹⁰⁹

Generally, environmental policies may be the socioeconomic policy that has made use of the widest array of policy tools, with all four primary categories being used. Environmental policy has been reflected through changes in the award criteria, as reflected by the incorporation of life-cycle cost analysis in procurement.¹¹⁰ Set-asides have been used by favoring companies that comply with certain standards, and heavy use of contractual performance specifications have been used by requiring building and many other products comply with eco-friendly standards.¹¹¹

Environmental protection is also notable because it may be the policy which highlights the greatest need for coordination. Because environmental harms may be the classic example of externalities, the

even though price preferences can achieve allocative goals regarding business size, race-neutral policies do not necessarily help the groups for which they were intended).

108. 48 C.F.R. § 7.503 (2019).

109. *Id.*; Steven L. Schooner & Markus Speidel, ‘Warming Up’ to Sustainable Procurement, 60 *CONT. MGMT.* 32, 36 (2020).

110. Lauren Olmsted, *A Common Taxonomy for Carbon: How States and Cities Use Public Procurement to Combat Climate Change*, 49 *PUB. CONT. L.J.* 691, 703 (2020).

111. *Id.* at 698–705.

value of coordination among different countries at every level of government is greater than with many other policies. While this should not discourage each government from pursuing their own environmental policies it may be a persuasive argument for more countries to become signatories of bilateral or multilateral agreements regarding environmental protections.

G. Public Procurement for Innovation

One of the policies that has received greater attention by both academics and practitioners, in recent years, is frequently termed “public procurement for innovation.”¹¹² This policy is often construed as a demand-side approach of a broader policy of promoting innovation in a particular industry.¹¹³ A well-known example of the influence of public procurement for innovation is provided by the National Health Service in the United Kingdom.¹¹⁴ In the procurement of hearing aids in the late 1990’s, the public sector—which was an important buyer albeit not a monopsony—was slow to adopt digital technology that was beginning to become more prevalent in foreign markets. In 2000, the government decided to invest in a project to modernize the hearing aid market in the country, and in four years transitioned from prescribing no digital hearing aids to prescribing them for all appropriately identified users.¹¹⁵ A central part of their policy was leveraging public

112. *E.g.*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PUBLIC PROCUREMENT FOR INNOVATION: GOOD PRACTICES AND STRATEGIES (2017), https://read.oecd-ilibrary.org/governance/public-procurement-for-innovation_9789264265820-en#page1 (defining public procurement for innovation as “any kind of public procurement practice (pre-commercial or commercial) that is intended to stimulate innovation through research and development and the market uptake of innovative products and services”).

113. Luke Georghiou, Jakob Edler, Elvira Uyarra, & Jillian Yeow, *Policy Instruments for Public Procurement of Innovation: Choice, Design and Assessment*, 86 *TECH. FORECASTING & SOC. CHANGE* 1, 1–2 (2014); *see also* Directive 2014/24/EU of the European Parliament and of the Council of 26 Feb. 2014 on Public Procurement and Repealing Directive 2004/18/EC, 2014 O.J. (L 94) 65 (highlighting public procurement generally as a “market-based instrument to achieve smart, sustainable and inclusive growth”).

114. Wendy Phillips, Louise Knight, Nigel Caldwell, & John Warrington, *Policy Through Procurement—The Introduction of Digital Signal Process (DSP) Hearing Aids into the English NHS*, 80 *HEALTH POL’Y* 77, 79 (2007).

115. *Id.* at 80.

procurement demand to make it feasible for the hearing aid manufacturers to implement the digital standard across both public and private sectors in the UK.¹¹⁶

Public procurement for innovation can undoubtedly be related to a broader policy of economic development, yet it is deserving of separate mention due to the specific emphasis it has been given in many countries. In fact, several academics and practitioners tend to include public procurement policy within a subset of policies for innovation, and that tension for the primacy of policy foreshadows a larger issue of how to design these policies in ways that allow for harmonious coexistence.¹¹⁷

V. ANALYZING EFFICIENCY

The array of socioeconomic policies, coupled with the inherent difficulties that arise in comparing data within the procurement context results in a lack of knowledge regarding the efficiency of different policies and policy design.¹¹⁸ Every country, state, and municipality presents distinct features in terms of volume, policy design, political and regulatory environments, and suppliers, all of which impact the effectiveness and efficiency of socioeconomic policies.

The lack of comparable features leads to greater difficulty in any level of government being able to effectively compare the effectiveness of different policy tools, much less argue that the implementation of a policy within the context of public procurement can pass an efficiency analysis. This problem is accentuated when governments must satisfy requirements such as those imposed for affirmative action in the United States, where the strict scrutiny standard required by the Supreme Court demands governments to show the policy is narrowly tailored to satisfy a compelling government interest.¹¹⁹

When making generalized conclusions on the policy effects on efficiency, there is an initial issue to define regarding the

116. *Id.* at 80–84.

117. Dirk Czarnitzki, Paul Hünermund & Nima Moshgbar, *Public Procurement of Innovation: Evidence from a German Legislative Reform*, 71 INT'L J. INDUS. ORG. 1, 1–3 (2020).

118. Conrad Miller, *Affirmative Action and Its Persistent Effects: A New Perspective*, 61 CAL. MGMT. REV. 19, 24–26 (2019).

119. Ayres & Cramton, *supra* note 22, at 811–12.

categorizations of costs and benefits. To this point, most analyses focus on specific costs or benefits. However, when looking at the overall effects on efficiency, we must first look to include all the costs and benefits that arise from the different policies in a manner akin to regulatory cost-benefit analyses as conducted by many governments. For this purpose, the dimensions of analysis described in subpart I.D. will prove helpful.

Generally, both costs and benefits can be divided by stakeholders, contractors, and governments (taxpayers). For contractors, there are increased transaction costs arising from heightened compliance standards and increased complexity in participating in government procurement. Ultimately, these costs affect the contractor's decision of whether to bid and, if so, how much to bid. Unfortunately, it is difficult to measure decreased participation among different groups of bidders and corresponding price changes.¹²⁰ Despite the lack of empirical data, the fact that litigation is still pursued to challenge socioeconomic programs suggests that the costs are substantial.¹²¹

With respect to costs to the government, the direct effects on allocative efficiency arise from distortions to the competitive process which affect bid prices and increase transaction costs that arise throughout the procurement process. These costs have differential effects at different stages of the procurement process, depending on the policy tool selected. Hence, subpart A below describes the costs generated throughout the process.

Regarding the benefits arising from the implementation of socioeconomic tools, the beneficiary is not the government itself in its procurement function. Instead, the beneficiary is the contractors, their workers, the general public, or the government itself in their pursuit of socioeconomic policies. Subpart B provides a review of benefits found from the use of socioeconomic policies, divided by the type of policy tool used.

120. See *infra* Parts V.A and V.B.

121. See, e.g., *PDS Consultants, Inc. v. United States*, 907 F.3d 1345 (Fed. Cir. 2018) (involving a challenge to the Department of Veterans Affairs' preferential programs); see also *Am. Relocation Connections v. United States*, 139 Fed. Cl. 747 (Fed. Cl. 2018) (involving a protest alleging the United States Customs and Border Protection failed to apply a small business set-aside).

A. Costs Generated to the Public Procurement System

As previously mentioned, the costs generated for contractors and governments can be divided into costs born due to increased transaction costs, or due to effects on the allocative efficiency of each procedure. To best visualize the effects, Table 2 highlights the phases in which additional costs are generated and describes some of the most important costs generated.

Table 2
Costs Generated at Different Phases of the Procurement Process

Phase	Costs for Contractors	Costs for Governments
1: Needs analysis	Negligible.	Negligible. ¹²²
2: Technical Specifications/Terms of Reference	Increased cost of adapting to the governmental standard or obtaining the required certification.	Search costs derived from identifying the technical capabilities of targeted firms.
3: Market Analysis and Budgeting	Negligible.	Increased search costs due to identification and certification of targeted firms. Increased knowledge of price differentials between targeted and non-targeted firms.
4: Selection of Procurement Procedure	Increased complexity in the procurement system may burden newer firms more and discourage them from entering the public procurement market.	The choice of procedure may be modified but transaction costs are not likely to increase at this stage.

122. Arrowsmith views this as a “linkage” or socioeconomic policy according to the law in the European Union. *See* Arrowsmith, *supra* note 25. In the United States, this phase may require more analysis as part of the appropriations process, and in other nations it is expressly separated from the procurement process itself. In the present article we will not focus on the decision of whether to buy.

5: Bid evaluation and selection	Costs of preparing a bid are increased and may affect contractors' decision of whether to participate.	Increased costs due to departure from full and open competition. Transaction costs may also increase if procurement officials are required to review additional documentation or apply more complex award criteria. In some cases, the complexity of the award criteria or other restrictions may lead to increased litigation in a later stage.
6: Contract Management	Costs are increased due to the increased probability of being caught if a contractor is non-compliant.	Increased monitoring costs due additional compliance requirements.
7: Feedback	Increased potential for litigation due to losing firms contesting the application of the policy.	Monitoring costs are increased due to additional auditing requirements. Potential litigation costs.

As an example of how costs are incurred in pursuit of policy goals, consider the requirement of affirmative action in awarding federal contracts. Following Table 2, affirmative action creates additional costs in different phases of the process. The increased costs on phases two and three arise because procurement officers must now identify the companies who qualify as the targeted beneficiaries of affirmative action programs. On the federal level in the United States, the OFCCP is tasked with monitoring contractor and agency compliance, including affirmative action, and the SBA oversees certifying small businesses as

being owned by socially and economically disadvantaged people or entities, and therefore qualifying for programs that entitle them to receive benefits.¹²³

The costs generated in the bid evaluation and selection phase are the most visible, although there is some dispute on the appropriate way to calculate the costs.¹²⁴ Procurement systems prescribe full and open competition as the default procedure under the implicit assumption that they are buying in competitive markets. The efficiency costs are the theoretical loss derived from the deviation from full and open competition. Therefore, restrictions on competition will tend to increase prices. Finally, there are increased monitoring costs created primarily in the final two phases of the process, which are often borne by separate agencies tasked with oversight.

Because of the difficulty in evaluating policies, academic literature has focused on estimating the marginal costs of procurement under socioeconomic policies relative to the costs under the full and open competition requirement. It is from the bidding process itself where some costs have primarily been identified.¹²⁵ For example, California prohibited consideration of race or gender in awarding state-funded contracts, and procurement prices for highway construction in the state decreased 5.6% compared to federally funded contracts.¹²⁶

An important concern involves the incentives of the policymaker attempting to use the procurement market to achieve other objectives. Support of environmental, economic, and social objectives are all attractive goals that appeal to different constituencies, and, in the event of successful implementation, political benefits may be reaped by lawmakers promoting the policy. Conversely, in cases where success cannot be clearly identified, the costs are generally not detected, making it politically costless to the lawmaker with only the contracting agency that suffers the public backlash.

123. 13 C.F.R. § 124; Cravero, *supra* note 24, at 179–80; Miller, *supra* note 118, at 25–27.

124. Allan Corns & Andrew Schotter, *Can Affirmative Action Be Cost Effective? An Experimental Examination of Price-Preference Auctions*, 89 AM. ECON. REV. 291, 292–93 (1999).

125. Justin Marion, *How Costly Is Affirmative Action? Government Contracting and California's Proposition 209*, 91 REV. ECON. & STAT. 503, 508–13 (2009); Ayres & Cramton, *supra* note 22, at 780–93.

126. Marion, *supra* note 125, at 508–13.

B. Benefits of Socioeconomic Policies on Public Procurement

An analysis based on the type of policy tool used is appropriate when considering the benefits derived from the use of socioeconomic policies on public procurement. Therefore, a review of the benefits analysis drawn from existing academic literature from different fields is warranted.

1. Participation Restrictions

The most common policy tools used for a wide array of policy goals are participation restraints by way of set-asides or quotas.¹²⁷ The tool effectively restricts competition to include, often exclusively, targeted businesses.¹²⁸ These tools, whatever the end goal, appear to be in direct conflict with the spirit of the Competition in Contracting Act of 1984.¹²⁹ The ideal design of procurement procedures is to allow for full and open competition and, by doing so, obtain the most efficient result.

In the late 1970s, the contracting trend was to develop small businesses combined with gender and racially conscious affirmative action policies.¹³⁰ The benefit was partly justified by the obvious wealth disparities and the historical difficulties for minorities to access credit.¹³¹ The policy in most cases is designed to restrict competition to those companies who can prove to comply with at least 51% ownership by racial minorities or by women.¹³²

This type of policy is prevalent, partly due to the apparent simplicity of implementation. There have been several studies reviewing its effectiveness, with some authors concluding that there are clear

127. Athey, Coey, & Levin, *supra* note 91, at 26; Ayres & Cramton, *supra* note 22, at 803.

128. Cravero, *supra* note 24, at 178–79.

129. 41 U.S.C. § 253.

130. Marion, *supra* note 125, at 503–22.

131. Justin Marion, *Affirmative Action and the Utilization of Minority and Women-Owned Businesses in Highway Procurement*, 49 ECON. INQUIRY 899, 899–900 (2011).

132. 2 GOLDBERG, SMITH, & STEIGER, *supra* note 55, at ¶ 10.13.

benefits for governments if the set-aside is well-designed by considering the specific conditions of the industry.¹³³

In a study of effects of set-asides in Japanese construction, with approximately 60% of civil engineering contracts set aside for small and medium firms, it was estimated that 40% of small contractors would not participate if the set-aside were discontinued.¹³⁴ The same study also found that set-asides in a subset of projects could help decrease prices across all construction projects.¹³⁵ In this case, the 0.22% decrease in prices is mostly derived from the change that set-asides caused large firms who chose to bid more aggressively in the projects that had not been set aside, thereby decreasing the aggregate cost of procurement.¹³⁶

While it is not reasonable to expect set-asides to reduce prices in all cases, the use of set-asides illustrates that analysts must broaden the scope when assessing the benefits from socioeconomic policies. In some markets, set-asides will often directly increase prices for a project, but may indirectly increase competition in others. This finding is consistent with theoretical models that suggest that in markets where there are asymmetric cost structures, introducing set-asides may be cost-decreasing for the government given that it is inducing greater competition among the different groups.¹³⁷

Additionally, some evidence has been found that set-asides have generated significant indirect benefits to minority businesses. In the construction industry, where long-term profitability requires continued access to the market, affirmative action policies have been shown to aid in breaking down entry barriers.¹³⁸ At the city level in the U.S., affirmative action policies have been found to increase self-

133. Athey, Coey, & Levin, *supra* note 91, at 26; Ayres & Cramton, *supra* note 22, at 801–04; Jun Nakabayashi, *Small Business Set-Asides in Procurement Auctions: An Empirical Analysis*, 100 J. PUB. ECON. 28, 43 (2013).

134. Nakabayashi, *supra* note 133, at 42.

135. *Id.* at 29.

136. *Id.* at 42.

137. Simma Mummalaneni, *Affirmative Action as a Cost Cutting Tool in Procurement Markets*, UNIV. OF WASH. 2–5 (Sept. 30, 2020), https://faculty.washington.edu/simha/Affirmative_Action_as_a_Cost_Cutting_Tool.pdf.

138. Timothy Bates, *Contested Terrain: The Role of Preferential Policies in Opening Government and Corporate Procurement Markets to Black-Owned Businesses*, 12 DU BOIS REV. 137, 154–57 (2015); Taylor, *supra* note 103, at 870.

employment rates in the Black population and reduce the self-employment gap between Black and White populations by three percentage points.¹³⁹ This result was obtained despite a national climate where the OFCCP suffered large budget cuts during the Reagan administration, and Supreme Court decisions restricted affirmative action at the end of the decade.¹⁴⁰

Ultimately, many scholars agree that the costs of set-aside programs may be overestimated given that they actually foster greater competition, and, in the long run, the benefits may outweigh the costs.¹⁴¹ A counterargument is that the efficiency benefits are questionable and that the use of set-asides incentivizes investment by minority entrepreneurs in businesses that would otherwise not be a good investment. Also, set-aside programs may encourage companies that are not eligible for the benefit to engage in fraudulent practices. Some argue, therefore, that the benefits of set-aside programs are not sustainable and may even be illusory.¹⁴²

Notwithstanding the potential benefits from set-asides, the presumption that it will have a negative effect on efficiency is still the default. However, the benefits should be evaluated to overcome this obstacle. As was the case in *Croson* and *Adarand*, where set-asides were at the heart of the conflict, set-asides affect the perception of fairness and ultimately efficiency of the process. Thus, governments must improve at articulating and estimating the benefits of their proposed programs.

2. Improving Access

An alternative to restricting other contractors is to help increase the participation of targeted beneficiaries in public procurement. Two

139. Aaron K. Chatterji, Kenneth Y. Chay & Robert W. Fairlie, *The Impact of City Contracting Set-Asides on Black Self-Employment and Employment*, 32 J. LAB. ECON. 507, 528–29 (2014) (analyzing the impact of set-asides for minority-owned businesses in twenty-five metro areas in the U.S. in the 1980s).

140. Miller, *supra* note 118, at 155.

141. Athey, Coey, & Levin, *supra* note 91, at 6–7, 21; Nakabayashi, *supra* note 133, at 42–43; Ayres & Cramton, *supra* note 22, at 801–04.

142. Grant Lewis, *Effects of Federal Socioeconomic Contracting Preferences*, 49 SMALL BUS. ECON. 763, 764 (2017) (providing a summary of studies that have found evidence that set-aside programs may not be achieving their intended results).

common approaches for doing this are providing beneficiaries with training on how to participate in government procurement and improving their access to financing.

The benefits of training and financing have generated less procurement-specific analysis. Nonetheless, there is reason to believe that financing may be the most effective of these tools. In a study comparing two SBA programs, where both provided the same financial benefits but only one program provided mentoring and training by the government, no significant differences were found in program outcomes.¹⁴³ Furthermore, financial benefits can have differential effects depending on the beneficiary. The same study found that the financing benefits increased the likelihood of disabled-veteran owned businesses to stay in business over a six-year period by 22%, yet failed to drive any improvement for small, disadvantaged businesses.

Access to preferential financing has also been shown to provide benefits to small businesses. In the U.S., the implementation of *Quick-pay* in 2011, through which the government accelerated payments to a group of qualifying small business contractors from thirty to fifteen days, was shown to have strong effects on employment growth in certain types of labor markets.¹⁴⁴ Considering that this simple improvement in financing has been shown to have potential to generate important effects in reducing the risk exposure of small businesses, it seems that there may be greater benefits for more robust financing option in countries or subnational governments that have greater problems with late payments.¹⁴⁵

143. The study compared the §8(a) small, disadvantaged business program and a similar program that benefits businesses owned by service-disabled veterans, where both programs provide financial benefits, but the §8(a) program also provides mentoring and training. §8(a) beneficiaries do not show any improvement in their likelihood to stay in business over a six-year period with respect to comparable firms, while the disabled-veterans benefits increased this likelihood by 22%. *Id.* at 776.

144. Jean-Noël Barrot & Ramana Nanda, *The Employment Effects of Faster Payment: Evidence from the Federal Quickpay Reform*, 75 J. FIN. 3139, 3142, 3170 (2020).

145. For example, the Mexican procurement system features a program that provides preferential financing for small and medium sized businesses, for which benefits could potentially be shown to be significant in certain markets. Disposiciones Generales a las que Deberán Sujetarse las Dependencias y Entidades de la Administración Pública Federal, así como las Empresas Productivas del Estado, para su Incorporación al Programa de Cadenas Productivas de Nacional Financiera, Diario Oficial de la

3. Award Criteria

While using set-asides as a tool to advance socioeconomic objectives may be commonplace in many jurisdictions, modifications to the award criteria are also frequently used. Modifications to award criteria come in two main forms, price or bid preferences and point allocations. Generally, price preferences consist of evaluating a bid by a beneficiary of the program at a specific percentage discount with respect to bids by non-benefitted contractors. This ultimately allows the government buyer to award a contract to a bidder who did not make the lowest bid.¹⁴⁶ As mentioned earlier, governments have moved away from evaluations that solely consider price, and criteria such as the Most Economically Advantageous Tender used in the European Union, have become more common. In some cases, these multi-factor or multi-attribute award criteria are based on a points system, with a certain number of points being awarded according to a price formula that allocates more points to lower prices and points for non-price factors such as compliance with certain socioeconomic objectives.¹⁴⁷

For price preferences, specific percentages vary by country or region. In some cases, acceptance of the bid is mandatory for government buyers. In others, it is discretionary. In still other cases, there are specific purchases that are set aside, not for exclusive participation of minority businesses but instead for the application of price preferences.

With price preferences, a similar argument to set-asides has been proposed to justify their use. There is evidence that in certain cases price preferences can not only achieve their purported goal of enhancing minority representation without significant cost increases but also lower the costs of procurement.¹⁴⁸ Ayres and Cramton suggest

Federación [DOF] 24-07-2020 (Mex.), formato HTML, http://www.dof.gob.mx/nota_detalle.php?codigo=5597257&fecha=24/07/2020 (last visited Sept. 10, 2021).

146. Corns & Schotter, *supra* note 124, at 292–94; Mummalaneni, *supra* note 137, at 3.

147. Federico Dini, Riccardo Pacini & Tommaso Valletti, *Scoring Rules*, in *HANDBOOK OF PROCUREMENT* 293, 294–95 (Nicola Dimitri, Gustavo Piga, & Giancarlo Spagnolo eds., 2006).

148. See Krasnokutskaya & Seim, *supra* note 107, at 2684–85 (finding small cost increases in procurement when seeking to attain allocation goals towards small businesses, although this is highly dependent on the underlying product or service market); Mummalaneni, *supra* note 137, at 38 (finding cost decreases in auctions

that these types of price preferences, or bid subsidizing, may actually be cost saving.¹⁴⁹ While their focus was on the Federal Communications Commission's positive experience in auctions for selling licenses for the use of radio spectrum, they theorized that the same results could be found in government purchasing.¹⁵⁰

Similarly, it has been shown that a price preference can be cost reducing if the correct percentage preference is selected.¹⁵¹ The correct calibration of a price preference may differ across markets and over time, but price preferences may increase minority representation while also achieving efficiency.¹⁵² The preference selection is highly dependent on the cost structures in the industry of interest, and the identification of some of these factors may be precisely what is required to satisfy a strict scrutiny standard—the policy is narrowly tailored to further the compelling interest.

The strategy of allocating points in multi-attribute award criteria to support socioeconomic objectives warrants greater scrutiny. If the application of price preferences requires thoughtful consideration of market characteristics, point allocations in these types of evaluations prove more difficult in some cases. For example, when basing an evaluation on a one-hundred-point scale, where price may compose half of the points and non-price considerations the other half, ideally the procurement agency should seek to calibrate the point allocation in a way where each additional point represents the marginal benefit the government receives from that point.¹⁵³ This implies that when designing a point-based system, the government should ideally be able to quantify and compare the benefits of an additional point, and if this is not possible then it is unlikely that the system will award the most economically advantageous or most efficient bid.¹⁵⁴

Finally, some studies suggest that while both set-asides and price preferences, when properly designed, can generate benefits, price preferences are generally more efficient than set-asides. This

where the buyer can adjust the price preference based on their knowledge on the number of potential bidders and their cost distributions).

149. Ayres & Cramton, *supra* note 22, at 765, 770–75.

150. *Id.* at 801–04.

151. Corns & Schotter, *supra* note 124, at 291.

152. *Id.* at 298–300.

153. Dini, Pacini & Valletti, *supra* note 147, at 296–300.

154. *See id.*

proposition makes sense given that price preferences are less restrictive of competition than set-asides.

4. Contractual Performance Specifications

Since the inception of Executive Order 11,246, a key requirement for contractors that work with the federal government is for those contractors to add an “Equal Opportunity Clause” to their contracts. Such clauses prohibit discriminatory practices in the contractor’s employment decisions and propose following self-mandated goals in terms of affirmative actions towards their workforce composition.¹⁵⁵ Similar measures have been adopted on the state and municipal levels.¹⁵⁶

One study found that the primary beneficiaries of contractual performance specifications are Black and Native American women and men, measured in terms of an increased within-firm shares of employment from 1973 to 2003.¹⁵⁷ By examining variation in the workforce composition over time, it has been shown that the effects of the policies on minorities are usually established within the first four years of contracting with the government.¹⁵⁸

Furthermore, increases in the share of Black employees have been shown to be sustainable over time, even after the policies have been repealed.¹⁵⁹ The traditional explanation is that these policies gave incentives to minorities to make better and more conscientious investments in their skills and education that lead to additional benefits down the line.¹⁶⁰ Prior to the implementation of these policies, the lack of access to opportunity led to the perception by minorities that additional investments in the development of skills and education was a waste of time and money.¹⁶¹

155. 2 GOLDBERG, SMITH, & STEIGER, *supra* note 55, at ¶ 10.13.

156. Chatterji, Chay, & Fairlie, *supra* note 139, at 510–15.

157. Fidan Ana Kurtulus, *The Impact of Affirmative Action on the Employment of Minorities and Women: A Longitudinal Analysis Using Three Decades of EEO-1 Filings*, 35 J. POL’Y ANALYSIS & MGMT. 34, 63 (2016).

158. *Id.*

159. Conrad Miller, *The Persistent Effect of Temporary Affirmative Action*, 9 AM. ECON. J. APPLIED ECON. 152, 182–83 (2017).

160. *Id.* at 27.

161. *Id.*

There is also an argument that affirmative action policies create persistent benefits because employers are incentivized to improve their human resource capabilities.¹⁶² Better screening procedures could produce sustainable long-run benefits for minority workers who now find greater access to better jobs since companies have improved processes to identify the top candidates.¹⁶³

C. Cost-Benefit Analysis

Governments face the challenge of using their procurement systems to meet socioeconomic objectives while promoting efficient purchasing. Policy implementation to achieve these objectives generate different costs and benefits depending on the policy tool used and the objective pursued. The final question becomes how to put everything together.¹⁶⁴ To this end, first consider the job of the procurement officer, who faces the decision of how to design their procurement procedure, and how to implement the socioeconomic policies using the tools at their disposal. They face considerable budgetary and temporal constraints, and their decisions ultimately involve a balancing of procurement efficiency with every other objective.¹⁶⁵

In his article, *The Legal Theory of Competitive Bidding for Government Contracts*, Omer Dekel poses the question: Who should have the discretion to decide procurement decisions regarding bids that must balance competing policy objectives?¹⁶⁶ A choice must be made between the contracting officer, the agency, Congress, or the courts, but it is not always clear who is best equipped to make this decision. This inquiry leads to his proposal that the contracting officer, due mainly to the timing of their intervention and their expertise, is the only one who

162. Miller, *supra* note 118, at 28–29 (naming these investments “screening capital investments,” which include “training and employment of personnel specialists, the developments of job tests, harnessing referral networks, utilization and relationship with intermediaries (employment agencies, schools), and learning through practice and experimentation”).

163. *See id.* at 29.

164. *See* Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 PUB. CONT. L.J. 63, 68–75 (2010).

165. *See* Pachter, *supra* note 8, at 709–10.

166. Dekel, *supra* note 9, at 259–65 (questioning who the appropriate decision-maker is when bids are flawed in a way that makes one question the integrity or fairness of the procedure).

could make the decision; yet given the risk of and the difficulties in proving corruption, the burden should be placed on procurement officers to show that the efficiency benefits are greater than the other considerations.¹⁶⁷

Extending this concept further to decisions involving the application of conflicting socioeconomic policies, we contend that a similar presumption should be made. In addition to the timeliness of the contracting officer's intervention and their expertise, they may also be the best equipped to make the decision because they are relatively neutral regarding competing socioeconomic policies.¹⁶⁸ By this we mean that in a case where multiple policies may be pursued, the officer is the only government official who does not have a vested interest in one policy over another and may be a superior arbiter. Moreover, the officer is the only person at that point who is interested in protecting the procurement policy itself.

The difference here is that while it is reasonable to assume that the officer is best suited to assess the most economically efficient bids or procedures, this presupposes, to some extent, that the efficiency benefits related to the policy objectives are already calculated. In other words, if we require the procurement officer to weigh the efficiencies of a procedure, their expertise extends only to the procurement outcomes. The contracting officer will usually not be knowledgeable on how to quantify the benefits of a socioeconomic policy, and giving them that responsibility would not only infringe upon other agency's mandates, but also afford the officer the possibility to manipulate the evaluation.

To solve this problem, when initially designing the policy, the burden of proving socioeconomic costs and benefits should be placed on the agency in charge of the overarching policy. This analysis would provide a benchmark, fixed or variable, that could be used by the procurement officer when faced with the final decision. While this

167. *Id.* at 265–66. Dekel advocates for an approach he terms as “disqualification presumption,” where he proposes that the default should be to presume in favor of equality and fairness, with the contracting officer receiving the burden of showing that efficiency benefits outweigh the costs. *Id.*

168. We assume the contracting officer's underlying goal is to promote efficiency. Therefore, in evaluating competing socioeconomic policies he or she would have no vested interest in either and any decision would be based on the policies' effects on efficiency.

approach may appear to place greater responsibility on the agencies in charge of socioeconomic policies, it is not meant to discourage the use of procurement for these goals. Throughout this paper we have also advocated for a broader understanding of the benefits of using procurement to this end, but we do believe that this may help governments design socioeconomic policies that are coherent with public procurement.

VI. CONCLUSION

As citizens continue to demand more from their governments in all aspects of life, governments will continue turning to their procurement systems to achieve a broad range of socioeconomic goals. This reliance on public procurement leads us to question how to reconcile the pursuit of socioeconomic goals through a system that is not designed for that purpose, but instead seeks to achieve goals more closely related to efficiency, particularly when there is mixed evidence of their effectiveness.

We argue that with efficiency being the central goal of procurement, governments must provide better information to enable the procurement system to achieve the desired policy objectives in an optimal manner when considering all the costs on the system. We provide a description of different costs and benefits that have been suggested for a common set of policy tools and provide thoughts on how to balance these considerations. We propose shifting the burden of the cost-benefit analysis of the implementation of a socioeconomic policy to the proponent of the policy. In this scenario, the procurement officer would remain the ultimate decision-maker regarding a specific procurement, but, when equipped with better information, he or she would be able to make better decisions.

Our goal is to advocate for policy and law makers to make optimal use of the procurement system when pursuing socioeconomic objectives. To that end, understanding the effects of policy implementation on the procurement system will aid in designing policy solutions. In this way, governments can achieve important outcomes in policy areas as far-ranging as social justice, economic development, protection of labor standards, affirmative action, and environmental protection.