THE DANGERS OF MUNICIPAL CONCESSION CONTRACTS: A NEW VEHICLE TO IMPROVE ACCOUNTABILITY AND TRANSPARENCY

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I. INTRODUCTION: A CONCESSION CONTRACT BRINGS BIG PROBLEMS

In the fall of 2008, the City of Chicago faced a serious budget shortfall.[1] In a rush to balance the budget, the City Council passed a budget that included $150 million in anticipated revenue from a concession contract for its metered parking system in 2009.[2] City officials, however, had never before entered into such a contract.[3] Forced to realize $150 million in revenue before the end of the year, the City, quickly and some have said hastily, entered into the Chicago Metered Parking System Concession Agreement ("Chicago Concession Agreement") with Chicago Parking Meters, the concessionaire.[4] Chicago leased its metered parking system to Chicago Parking Meters for seventy-five years at a price of $1.157 billion.[5] In so doing, the City undervalued its metered parking system by about $1 billion.[6] Worse yet, in 2009 the City spent most of the proceeds from the Chicago Concession Agreement and faced further budget gaps in 2010.[7] Chicago parking meter rates, as prescribed by the Chicago Concession Agreement, have doubled throughout much of the City, and have even tripled and quadrupled in certain areas, angering many city residents.[8]

Unfortunately, Chicago's financial and contractual woes are not unique. Recently, depressed economies and falling tax revenues have resulted in budget shortfalls for local governments. These shortfalls have threatened local governments' abilities to deliver basic services to their citizens.[9] Many local

1. *See* Inspector Gen., City of Chi., Report of Inspector General's Findings and Recommendations: An Analysis of the Lease of the City's Parking Meters 2 (2009) [hereinafter IGO Report].

2. *See* Civic Fed'n, City of Chicago FY 2009 Budget Analysis and Recommendations 5, 18 (2008) [hereinafter Chicago FY 2009 Budget Analysis].

3. *Id.*

4. Chi., Ill., Authorization for Execution of Concession and Lease Agreement and Amendment of Titles 2, 3, 9 and 10 of Municipal Code of Chicago in Connection with Chicago Metered Parking System, at 21 (Dec. 4, 2008) [hereinafter Chicago Concession Agreement Ordinance], *available at* http://egov.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/Metered_Parking_System_Ordinance.pdf.

5. *Id.* at 49.

6. IGO Report, *supra* note 1, at 2.

7. Fran Spielman, *Daley's New Budget Will Drain Meter Sale Reserves*, Chi. Sun-Times (Dec. 3, 2009), http://www.suntimes.com/news/cityhall/1916517,budget-plan-approved-daley-120209.article.

8. *See generally* Chi., Ill., 9 Mun. Code 64-205 (2010), *available at* http://www.amlegal.com/library/il/chicago.shtml; Chicago Concession Agreement Ordinance, *supra* note 4, at 10–12. For example, starting in 2009 and ending in 2013, parking rates in downtown Chicago will increase from $3.50 per hour to $6.60 per hour. *See id.* at 10–12. Parking rates in residential areas outside of downtown increased from $0.25 per hour to $1.00 per hour by the February after the Chicago Concession Agreement was signed. *See* Dan Mihalopoulos, *First Parking Meter Rate Increases to Start Friday*, Chi. Trib. (Feb. 11, 2009, 3:55 PM), http://newsblogs.chicagotribune.com/clout_st/2009/02/first-parking-meter-rate-increases-to-start-friday.html.

9. Many states have passed ordinances prohibiting municipalities from becoming indebted. Illinois, for example, has outlawed "existing indebtedness in the aggregate exceeding 8.625% on the value of the taxable property" in any city. 65 Ill. Comp. Stat. Ann. 5/8-5-1 (West 2005). Illinois rules for larger municipalities are more relaxed. *Id.* 5/8-6-2.

governments have opted to enter into concession contracts, a type of public private partnership (PPP), to obtain upfront cash infusions, take advantage of private sector financing, and ensure the delivery of services.[10] Local governments around the country, however, are legally ill-equipped to enter into high-value, long-term concession contracts. Many municipalities do not have substantive ordinances or regulations ensuring political accountability and transparency in concession contract formation and administration. Municipalities contemplating the use of concession contracts should consider new ordinances and new contracting strategies to ensure transparency and accountability.

This Note will first describe the concession contract and the advantages it offers to municipalities. Using Chicago's Chicago Concession Agreement as a case study, this Note will then draw attention to inherent accountability and transparency problems that local governments face in forming and administering concession contracts. Finally, this Note will recommend that municipalities enact legislation affecting long-term concession contracts and employ a new contract vehicle in concession contracting to ensure transparency and accountability in contract formation and administration.

This Note proposes that municipalities enact ordinances mandating an independent review of the proposed concession contract, by an inspector general's office or other independent body. Scrutiny of the proposed concession contract by an independent reviewer ensures transparency in the contract formation process. Requiring municipal decision makers and concessionaire representatives to answer the independent review findings will ensure accountability. City councils also should mandate an adequate public comment period between the concessionaire selection and city council approval. This opportunity for public comment will give public and elected officials an opportunity to review the proposed concession contract and thus promote transparency and accountability.

This Note proposes that municipalities also should consider negotiating a "modified cost plus incentive fee contract" (modified CPIF contract) with a concessionaire as an alternative to a traditional concession contract. As this

10. *See* Civic Fed'n, Alternative Service Delivery: A Civic Federation Issue Brief 3–4, 7 (2006) [hereinafter Alternative Service Delivery]; *see also* Celeste Pagano, *Proceed with Caution: Avoiding Hazards in Toll Road Privatizations*, 83 St. John's L. Rev. 351, 363 (2009); Julia Paschal Davis, *Public Private Partnerships*, Procurement Law., Fall 2008, at 9. Though public private partnerships ("PPPs") have become popular in the United States in the past few decades, they are not a new phenomenon. *See* David L. Seader, Nat'l Council for Pub.-Private P'ships, The United States' Experience with Outsourcing, Privatization and Public-Private Partnerships 1 (2002), *available at* http://www.ncppp.org/resources/papers/seader_usexperience.pdf. In the nineteenth century, many railroads, canals, and water systems were constructed with PPPs. Early urban transit systems were also developed using PPPs. PPPs lost steam in the 1930s after many went bankrupt during the Great Depression. *See id*. For many years, the federal and state governments were seen as the preferable actor in constructing, procuring, and providing public facilities and services. This changed during and after the Reagan administration when policy and economic prerogatives encouraged privatization. PPPs began to pick up steam after the 1980s, or were at least seen as a viable alternative to government provision of facilities and services. *See id*.

Note demonstrates, the modified CPIF contract will ensure transparency because the concessionaire's costs of operation and maintenance, as well as its rate increases, would be subject to public review on an annual basis. The modified CPIF contract will also ensure accountability because contract incentives will encourage the concessionaire to operate a facility or piece of infrastructure in an efficient manner. Alternatively, the modified CPIF contract will ensure higher fees are paid to the municipality.

II. DEFINING A CONCESSION CONTRACT

A concession contract is just one of many PPP varietals. Concession contract provisions vary greatly depending on the length of the contract, the facility or piece of infrastructure that is subject to the concession contract, and the needs of the public and private partners. For the purposes of clarity, this section of the Note will introduce the concept of a PPP. It will then detail the provisions of a generic concession contract before reviewing the major benefits concession contracts offer to municipalities.

A. *A Brief Overview of PPPs*

A PPP is a contractual agreement between a public entity and a private party, formed to deliver a facility or service for general public use.[11] The public entity may be a municipality, county, state, or federal government and the private entity may be a for-profit or nonprofit corporation.[12] A PPP is not a partnership in a legal sense.[13] Rather a PPP is a contractual agreement negotiated and executed by and between a public entity and a private entity.[14]

Because a PPP is nothing more than a contractual agreement, it can take one of many forms.[15] One of the most basic PPP forms is a service contract. In service contracting, the public partner contracts with a private partner to fulfill responsibilities the public partner previously performed, such as gar-

11. Davis, *supra* note 10, at 9. For a history of PPPs in the United States, see Seader, *supra* note 10, at 1. For a discussion of the use of PPPs by the Federal Government, see U.S. Gen. Accounting Office, GAO/GGD-99-23, Public Private Partnerships: Key Elements of Federal Building and Facility Partnerships (1999) [hereinafter Key Elements]. For a discussion of public oversight of PPPs, see Richard Briffault et al., *Public Oversight of Public/Private Partnerships*, 28 Fordham Urb. L.J. 1357 (2001). For a valuable discussion on toll road concession contracts, see Pagano, *supra* note 10.

12. For example, the U.S. Department of Veterans Affairs and the Department of Energy are two federal agencies that have used PPPs. *See, e.g.*, U.S. Gov't Accountability Office, GAO-05-55, Capital Financing: Partnerships and Energy Savings Performance Contracts Raise Budgeting and Monitoring Concerns 76–98 (2004) [hereinafter Capital Financing]. The City of New York also has entered into a PPP with a nonprofit private partner for the maintenance of Central Park. *See About the Central Park Conservancy*, Cent. Park Conservancy, http://www.centralparknyc.org/about (last visited Dec. 1, 2010).

13. Davis, *supra* note 10, at 9.

14. *Id.*

15. Seader, *supra* note 10, at 4–7; Key Elements, *supra* note 11, at 57–58.

bage pickup or janitorial services.[16] A more complex type of PPP is a build-transfer-operate ("BTO") agreement.[17] In a BTO agreement, the private partner designs and builds a facility or piece of infrastructure for the public partner, and usually provides the financing for the project.[18] Upon completion the title for the new facility is transferred to the public partner, but pursuant to the contract, the private partner has the opportunity to operate the facility and recover its investment in the project over a set number of years.[19] A PPP can involve something as simple as contracting out maintenance services for a single building or something as complicated as the design, construction, and operation of a multimillion-dollar toll road.

B. *A Generic Concession Contract*

This Note will focus on a form of PPP known as a concession contract and will identify transparency and accountability problems in concession contracting. Under a concession contract, the public partner grants the private partner (often called the "concessionaire") exclusive rights to operate, maintain, and manage a facility or piece of infrastructure for an extended period of time.[20] The title to the facility or piece of infrastructure remains in public hands, but the private concessionaire, depending on the contract terms, often owns all of its improvements and extensions.[21]

In addition to receiving the rights to operate, maintain, and manage the facility or piece of infrastructure, the private firm will be subject to operating requirements as detailed in the concession contract.[22] For example, the agreement might detail the performance expectations to maintain the facility and infrastructure or mandatory improvements to be made to the facility or piece of infrastructure over the contract term.[23]

In consideration for operation and maintenance duties, the concessionaire collects proceeds or user fees from the facility or piece of infrastructure.[24] For example, the concessionaire would be able to collect tolls or parking fees. In some concession contracts, the concessionaire sets the rates of usage.[25] Alternatively the concession contract provisions might set rate increases over the life of the contract.[26]

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16. FAR 37.101(1)–(9).
17. David A. Levy, *BOT and Public Procurement: A Conceptual Framework*, 7 Ind. Int'l & Comp. L. Rev. 95, 102–04 (1996).
18. *Id*. at 102.
19. *Id*. For example, in a BTO agreement for construction of a toll road, the private partner would have the opportunity to collect tolls for a set number of years after construction.
20. Seader, *supra* note 10, at 7.
21. *Id*.
22. *Id*.
23. *Id*.
24. Arie Reich, *The New Text of the Agreement on Government Procurement: An Analysis and Assessment*, 12 J. Int'l Econ. L. 989, 1006–07 (2009).
25. *See* Seader, *supra* note 10, at 7.
26. *See id*.

Under many concession contracts, the private firm also is required to pay an initial and/or annual concession fee to the public partner and commit to certain levels of investment over the course of the concession period, in addition to operation and maintenance duties.[27] A concession contract term is often upwards of fifty or seventy-five years because the private party needs to collect years' worth of user fees to recover its upfront cash payment to the public partner and its investment in the facility or piece of infrastructure.[28]

A piece of infrastructure commonly subject to a concession agreement is a toll road. Under this model, the concessionaire would be responsible for maintaining and, perhaps, improving the toll road. The concessionaire also would be required to make an upfront or annual cash payment to the public partner. In accordance with the contract terms, the concessionaire would keep all tolls collected. These tolls would cover the concessionaire's operation costs and its payment to the public partner as well as serving as a means for profit. Concession contracts vary in detail but usually maintain the basic structure of private party operation of the facility, private party capture of user fees, and public party capture of cash payment.

C. *The Advantages of Concession Contracts*

In an era of budget shortfalls and reduced tax revenues, municipal governments find concession contracts attractive for many reasons. First, employing concession contracts can allow municipal governments to realize immediate cost savings.[29] Many experts believe that concessionaires are able to deliver facilities and pieces of infrastructure to the public more efficiently and at a lower cost than public partners.[30] Labor costs, in particular, are often much lower in the private sector.[31] Furthermore, entering a concession contract immediately relieves the public partner from upfront costs of maintaining and improving a facility or piece of infrastructure.

Second, employing concession contracts allows municipal governments to take advantage of private sector financing.[32] A private partner may have the ability to attract investment and the ability to finance infrastructure projects where large infusions of cash are required. In a credit-strapped economy, a concession contract can simultaneously provide a funding source for a needed infrastructure project and allow the public partner to allocate some financial risk to the private sector.[33]

Third, concession contracts usually result in an upfront or annual cash payment by the concessionaire to the public partner.[34] This cash payment is

27. *See* Pagano, *supra* note 10, at 370.
28. *Id.* at 363.
29. *Id.* at 364; *see* Davis, *supra* note 10, at 9–10; Alternative Service Delivery, *supra* note 10, at 4.
30. Pagano, *supra* note 10, at 64; Alternative Service Delivery, *supra* note 10, at 4.
31. Alternative Service Delivery, *supra* note 10, at 3–4.
32. Davis, *supra* note 10, at 10; Alternative Service Delivery, *supra* note 10, at 4.
33. Pagano, *supra* note 10, at 364; Alternative Service Delivery, *supra* note 10, at 3.
34. *See* Pagano, *supra* note 10, at 354; Seader, *supra* note 10, at 7.

invaluable for cities facing large budget shortfalls.[35] Municipalities today are struggling financially and a concession contract's combination of cost savings, private sector financing, and upfront cash infusion can help cities overcome these struggles.

III. THE DANGERS OF CONCESSION CONTRACTS

Although concession contracts can offer municipal governments cost savings, private financing, and upfront cash infusions, these benefits come at a cost. Concession contracting also creates transparency and accountability problems for municipalities. This section will first review transparency and accountability problems existing in any concession contract to which a municipal government is a party. Using the Chicago Concession Agreement as a case study, this section will then review transparency and accountability problems found in the contract formation and administration processes.

A. *Common Concession Contract Transparency Problems*

Transparent government contracting is highly valued in the United States.[36] Unfortunately, long-term concession contracts generally make the administration of public facilities or pieces of infrastructure less transparent.[37] Transparency is an "attribute of the conduct of a contract action (or any other government action) that permits the public to see how it was done and to ascertain whether it was conducted in compliance with law and regulation."[38] A transparent government contract system employs procedures that ensure the public that government procurement is conducted in an open manner.[39] Transparency is often "achieved by publishing information about contracting processes and results or by otherwise making the information available upon request and without undue delay."[40]

Long-term concession contracts are inherently nontransparent in that the Government cedes its rights to operate, manage, maintain, and gather proceeds from a public facility or piece of infrastructure for a long time. Where there once was a government to provide information about, for example, road repairs and toll rates, there is now a concessionaire. Citizens at large are, therefore, unable to see how the concessionaire is managing, repairing, and operating the public facility or piece of infrastructure. They are unable to

35. For example, Chicago closed a $150 million budget shortfall by signing the Chicago Concession Agreement and was able to secure funding for necessary improvements to the metered parking system. *See* IGO Report, *supra* note 1, at 25.

36. *See* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Pub. Procurement L. Rev. 103, 105–06 (2002).

37. The Federal Government does not permit contracts to run for more than five years without a specific authorizing statute. FAR 17.104(a). The Government does not allow this, in part, because the costs and benefits of multiyear contracts are difficult to predict. *See* FAR 17.105-1(b)(5).

38. Ralph C. Nash Jr. et al., The Government Contracts Reference Book 582 (2007).

39. Schooner, *supra* note 36, at 105.

40. Nash et al., *supra* note 38, at 582.

see whether the concessionaire is operating within the confines of the law. Furthermore, they are unable to see whether the concessionaire is operating within the scope of the concession contract absent some specific contract provision. Granted, the public partner may always contract for greater transparency in the form of reporting. The public, however, is still an additional step removed from the entity controlling a public facility or infrastructure.

Concession contracts also pose problems for transparency in the municipal, state, or federal budgeting process. PPPs in general, and concession contracts in particular, do not always disclose the public partner's long-term obligations to the private partner or the private partner's long-term obligations to the public partner during the year-to-year budgeting process.[41] Many PPPs do not involve cash consideration and therefore their values are not reflected in the budget process.[42] The Department of Veterans Affairs ("VA"), for example, entered into a PPP with the City of Vancouver's Housing Authority ("Housing Authority") in which the VA leased undeveloped land to the Housing Authority for the purposes of building an apartment complex.[43] In return, the Housing Authority agreed to give the VA preference for use of the units.[44] This transaction was not reflected in the VA's budget or the Housing Authority's budget because no cash was transferred.[45] Additionally, throughout and after the end of the lease term, VA liabilities remained unclear, creating a risk of unexpected expenses in the VA's budget after the end of the lease term.[46]

This transparency problem is reflected in municipal concession contracting as well. Noncash consideration is often exchanged in concession contracting, namely the rights to collect proceeds in exchange for the duty to maintain a facility or infrastructure. The long-term obligations of both the municipality and the concessionaire are not reflected in the year-to-year budgeting process.

Long-term concession contracts also threaten transparency in that they hide long-term costs.[47] Chicago, for example, saved money on upfront investment in its metered parking system but, according to an independent report, lost about $1 billion over the life of the Chicago Concession Agreement.[48] Thus, while Chicago receives cash in its pocket today, it loses out on future meter proceeds.

Under concession contracts, the Government outsources operations responsibility, obligates money outside the annual budgeting process, and en-

41. Capital Financing, *supra* note 12, at 20.
42. *Id*. at 89.
43. *See id*. at 88.
44. *Id*. at 88–89.
45. *Id*. at 89.
46. *Id*.
47. *Id*. at 26.
48. *See* IGO Report, *supra* note 1, at 2. While concession contracts do hide long-term costs, it is important to note that long-term contracts pose valuation difficulties. This is evidenced by the fact that the City of Chicago valued the parking meter system at around $1 billion while Chicago's inspector general valued it at around $2 billion. *Id*.

ters into long-term obligations that obscure long-term costs. These aspects of concession contracting pose transparency problems for municipalities.

B. *Common Concession Contract Accountability Problems*

Long-term concession contracts also pose political accountability problems for municipalities. Political accountability can be defined as the amenability of an action to monitoring and control through the political process.[49] A government service or facility is politically accountable if citizens or elected political officials can influence the way in which that service or facility is delivered and managed.[50]

When a public facility or infrastructure is managed by a concessionaire, citizens and elected officials have little influence over the way in which that facility or infrastructure is operated or managed. The concessionaire is beholden to the concession contract and not to the public at large or elected officials. One might argue that a concessionaire is politically accountable because it negotiates a contract with elected officials. Yet a concession contract running seventy-five years is immune, in many ways, to monitoring and control through the political process on a year-to-year or election-to-election basis.[51]

Concession contracts can be an extremely useful tool for municipalities, as they can offer cost savings, private sector financing, and upfront cash infusions. All long-term concession contracts, however, pose transparency and accountability problems.

C. *Chicago's Chicago Concession Agreement Dangers*

The problems Chicago has faced since entering into the Chicago Concession Agreement serve as a warning to municipalities considering concession contracting. These problems also amplify how serious transparency and accountability problems manifest themselves in concession contracting. This portion of the Note will review the transparency and accountability problems manifested in the Chicago Concession Agreement contracting process and in the Chicago Concession Agreement itself. It will first review the current concession contract regulatory framework in Chicago and determine whether Illinois laws and Chicago ordinances ensure transparency and accountability in concession contracting. It will then review the Chicago Concession Agreement contracting process as well as the Chicago Concession Agreement's key provisions while examining the key transparency and accountability problems in each.[52]

49. Briffault et al., *supra* note 11, at 1358.

50. *Id*. A piece of infrastructure, such as a local toll road, would be deemed "accountable" if citizens and elected officials have influence over the way it is managed and its rate structures.

51. *See generally id*. at 1357–61.

52. Prior to signing the Chicago Concession Agreement, the City of Chicago had relatively successful experiences with concession contracting. In 2004 the City entered into a long-term transportation concession contract. The City leased the "Chicago Skyway Toll Road" for

1. Transparency and Accountability Problems in Chicago's Current Regulatory Framework

A number of state laws and local ordinances affect concession contracting in Illinois in general, and the concession of Chicago's metered parking system in particular. While these laws and ordinances ensure adequate competition, they do not ensure transparency and accountability.

Illinois has enacted a statute that authorizes Chicago to privatize its metered parking system through a concession contract. The Local Government Facility Lease Act specifically authorizes municipalities with populations of greater than 500,000 people to enter into "facility property" lease agreements.[53] "Facility property" under the Local Government Facility Lease Act means property owned by a municipality "for the purpose of an airport, parking, or waste disposal or processing."[54] The term "lease" under the Act refers to the type of concession contract discussed in Part II of this Note. This statute was originally passed to authorize the concession of Chicago's Midway Airport, but it also authorizes Chicago's concession of its metered parking system.[55]

Illinois also has enacted competition requirements similar to those set forth in FAR Part 6.[56] These requirements mandate that cities of more than 500,000 people, when entering contracts involving amounts in excess of $10,000, conduct contracting by "free and open competitive bidding after advertisement."[57] Cities shall award contracts to "the lowest responsible bidder" or, in appropriate instances, such as concession contracting, "to the highest responsible bidder."[58] Municipal concession contracting, so long as it involves amounts over $10,000 in value, is subject to this statute.[59]

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ninety-nine years at a price of $1.8 billion. Under this agreement between a private joint venture and the City of Chicago, the joint venture operates and maintains the toll road (and keeps the toll proceeds) in consideration for an upfront cash payment to the City. This deal ensured that the City met its budget gap and that the Skyway would be properly maintained for the next century. The joint venture, meanwhile, is able to realize ninety-nine years of proceeds from Illinois drivers. While the privatization of the Skyway has meant profits for the City and lower administrative costs, Illinois drivers have seen toll rate increases. *See generally* Alternative Service Delivery, *supra* note 10, at 9–12. Furthermore, Chicago entered into a concession contract for the operation of its parking garages with Morgan Stanley. *See generally id*. at 12–13. Chicago also attempted to lease Midway Airport to Citigroup, but Citigroup could not obtain adequate financing and the agreement fell through. *See* Dan Mihalopoulos & Michael O'Neal, *Midway Airport Deal Falls Apart: Consortium Can't Borrow Cash Needed to Finance Deal*, Chi. Trib. (Apr. 21, 2009), http://articles.chicagotribune.com/2009-04-21/news/0904200580_1_midway-airport-deal-consortium.

53. 50 Ill. Comp. Stat. Ann. 615/5, 615/10 (West 2010). Illinois has enacted a number of other statutes that apply to PPPs but are not relevant for our purposes. *See* Michael E. Pikiel Jr. & Lillian Plata, *A Survey of PPP Legislation Across the United States*, Global Infrastructure, Spring 2008, at 57, *available at* http://www.fulbright.com/images/publications/girvol1.pdf.

54. 50 Ill. Comp. Stat. Ann. 615/5.

55. *Id.*

56. *See, e.g.*, 65 Ill. Comp. Stat. Ann. 5/4-5-11 (West 2005); FAR 6.101(a).

57. 65 Ill. Comp. Stat. Ann. 5/8-10-3 (West 2010).

58. *Id.*

59. *Id.* The statute notes that some contracts, by their nature, are not adapted to award by competitive bidding. Under limited circumstances, such as emergencies, these contracts may be

The City of Chicago also has enacted several municipal ordinances that regulate the City's entrance into concession contracts. When the City wishes to sign a contract of value in excess of $50,000, the contract must be submitted to the Committee on Finances and approved by the City Council.[60] In compliance with the Illinois statutes listed above, the chief procurement officer for the City must publish an invitation for proposals in a city newspaper before contracting.[61] Additionally, for each request for quotation ("RFQ") issued, the chief procurement officer designates an evaluation committee.[62] This committee evaluates responses to the RFQ in accordance with the criteria set forth in the RFQ and makes responsibility determinations.

By statute, Chicago holds the authority to create a metered parking system and privatize that metered system through a concession contract, subject to competitive bidding requirements. These competition requirements will help ensure that the City of Chicago receives the "best value in terms of price, quality, and contract terms and conditions" when contracting.[63] However, as Professor Steven Schooner points out, "maintaining a robust competitive regime requires more than a commitment to the marketplace."[64]

Despite the fact that Chicago and Illinois have a fairly sophisticated contracting regulatory scheme, this scheme does not ensure transparency and accountability in concession contracting. The current concession contract regulatory framework in Chicago does not ensure adequate contracting transparency. The framework does, however, inform both the contract bidders and the public of "rules to be applied" in contracting as well as "information on specific procurement opportunities," two key aspects of transparency.[65] The current regulatory framework does not, however, employ other regulations to ensure transparency. For example, Professor Schooner suggests that an important aspect of ensuring transparency is to "employ appropriate oversight, such as government Inspectors General," to audit government actions.[66]

The current concession contract regulatory framework in Chicago also does not ensure adequate accountability. The City of Chicago has passed an ordinance stating that contracts over $10,000 shall be approved by both the

conducted through single sourcing procedures. *Id.* 5/8-10-4. Interestingly, these Illinois regulations statutes also have responsibility findings, similar to those found in FAR Part 9. *See Id.* 5/8-10-11; FAR 9.1. Cities are to consider financial responsibility and past records of transactions with the City when making a responsibility determination. 65 Ill. Comp. Stat. Ann. 5/8-10-11. They also have requirements similar to those found in FAR 1.6, whereby heads of agencies must designate representatives or "purchasing agents" (similar to Contracting Officers) and determine how much authority they are to be given (similar to a Contracting Officer's warrant). *See id.* 5/3.1305; FAR 1.6.

60. Chi., Ill., 2 Mun. Code 92-260 (2010).

61. *Id.* 92-290.

62. *Id.* 92-350.

63. Schooner, *supra* note 36, at 104.

64. *Id.*

65. *Id.* at 105.

66. *Id.* at 106. Professor Schooner refers to post-contract auditing, whereas this Note calls for pre-contract auditing. *Id.*

Finance Committee and the City Council. This ordinance ensures accountability in that a plethora of elective representatives, as opposed to city bureaucrats or a single elected representative, such as the mayor, take part in approving a concession contract. Chicago ordinances and Illinois law, however, do nothing to combat the concession contracting accountability problems mentioned above. Any concessionaire in Chicago will be beholden only to the concession contract and not to the demands of voters or politicians. Thus, the current regulatory framework in Chicago does not ensure transparency and accountability in concession contracting.

2. Transparency Problems in the Chicago Concession Agreement Contracting Process

Transparency problems exist not only in the current regulatory framework in Chicago, but also in the Chicago Concession Agreement contracting process. The Chicago Concession Agreement was formed all too quickly, under pressure to close a budget shortfall. The public and city council members had only a brief opportunity to review the Chicago Concession Agreement provisions.[67] The contracting process did not permit "the public to see how it was done and to ascertain whether it was conducted in compliance with law and regulation."[68]

In 2008 the City Council passed a budget that included $150 million in revenue from an anticipated parking meter concession agreement.[69] This budget put the City in a very difficult position because it required the City to lease its metered parking system before the end of the fiscal year. The City's bargaining position, in many ways, can be compared to the Federal Government's bargaining position when it signs a letter contract.[70] In both scenarios the public limits its negotiating power by setting a short deadline for contract formation, therefore opening up the contract to the risk of excessive costs.[71] The City of Chicago also is subject to specific debt limitations, making the short deadline for contract formation even more urgent.[72]

Mayor Richard M. Daley held an open bid for the lease of Chicago's metered parking system, in compliance with Illinois laws and Chicago ordinances.[73] Mayor Daley enlisted the help of a consulting firm, William Blair &

67. *See* IGO Report, *supra* note 1, at 13–14; Chicago Concession Agreement Ordinance, *supra* note 4, at 1.

68. Nash et al., *supra* note 38, at 582.

69. Chicago FY 2009 Budget Analysis, *supra* note 2, at 5, 18.

70. *See* FAR 16.603.

71. *See* John Cibinic Jr. & Ralph C. Nash Jr., Formation of Government Contracts 1073–74 (1998) (describing the policy of restricting the use of letter contracts because they place the risk of excessive costs on the Government); *see also* Jervis B. Webb Co., B-211724 et al., 85-1 CPD ¶ 35, at 1, 8 (Comp. Gen. Jan. 14, 1985) (holding that a sole-source award of a letter contract was improper because the agency conducted inadequate acquisition planning).

72. 65 Ill. Comp. Stat. Ann 5/8-5-1, 5/8-6-2 (West 2005).

73. *See* William Blair & Co., Chicago Metered Parking System Transaction Summary and Valuation Analysis (2009), *available at* http://egov.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/TransactionSummaryandvaluationAnalysis.pdf.

Company, to analyze and valuate the proposals.[74] The City initially found eight of ten bidders responsible.[75] It then selected Chicago Parking Meters as the winning bidder.[76] Mayor Daley presented the negotiated Chicago Concession Agreement to the public and to the City Council's Finance Committee for the first time on December 2, 2008.[77]

When reviewing the Chicago Concession Agreement, the Finance Committee did not question or request the advice of a third-party financial analyst during its committee meetings.[78] In fact, the Committee questioned only one witness during its review of the Agreement.[79] With the exception of this one witness, the Finance Committee used only a ten-page PowerPoint presentation in reviewing the Chicago Concession Agreement.[80] Furthermore, there was no opportunity for public comment.[81] The Committee approved the Agreement and sent it to the City Council on December 4, 2008, just two days after the details of the Agreement were released.[82] The City Council, acting on limited information, held a special session and approved the Chicago Concession Agreement on the same day.[83]

As the inspector general's office for the City of Chicago noted in its evaluation of the Chicago Concession Agreement, the concession contracting process suffered from enormous transparency problems.[84] Most notably, there were transparency problems due to the extremely short period of contract formation. The mayor's office negotiated the contract in a very short period of time, the Finance Committee and the City Council had a limited time to review the Chicago Concession Agreement provisions, and the public had just two days to access the Chicago Concession Agreement before it was approved.[85] The public and city council members, then, were unable to see how the Chicago Concession Agreement was formed or whether it was formed in compliance with law and regulation.[86] Transparency is often achieved by publishing information about contracting processes and results; this information was published only *two days* before the contract was approved.[87]

Additionally, there was no opportunity for an independent analysis of the Chicago Concession Agreement prior to the City approval. The U.S.

74. *See id.*
75. IGO Report, *supra* note 1, at 13.
76. *See id.*
77. *See id.*
78. *See id.*
79. *See id.*
80. *See id.*
81. *See id.* at 14.
82. *See id.*
83. *Id.* at 13–14; Chicago Concession Agreement Ordinance, *supra* note 4, at 1.
84. IGO Report, *supra* note 1, at 32.
85. *See id.* at 12–14. Interestingly, the "time between public announcement and City Council approval of the Skyway lease, the lease of the City's parking garages in 2006, and the Midway lease in 2008, was 12, 19, and 9 respectively." *Id.* at 32.
86. *See* Nash et al., *supra* note 38, at 582.
87. *Id.*

Government Accountability Office (GAO), among other actors, has stressed that long-term concession contracts require a rigorous analysis to ensure transparent and diligent contract formation.[88] Such rigorous analysis can best come from an inspector general's or other independent body's office.

3. Accountability Problems in the Chicago Concession Agreement

While the Chicago Concession Agreement contracting process suffered from transparency problems, the Chicago Concession Agreement itself creates many accountability problems for the City of Chicago.

The Chicago Concession Agreement provides that the City lease its metered parking system to Chicago Parking Meters for seventy-five years.[89] Under the Agreement, the City received an upfront payment of $1.157 billion. The City also received a promise from Chicago Parking Meters to maintain the meters.[90] In return, Chicago Parking Meters would receive future profits from meter deposits.[91]

The Chicago Concession Agreement also provides that parking rates will increase dramatically from 2008 until 2013, doubling and tripling in some areas, and even quadrupling in others.[92] After 2013, Chicago's metered parking rates will increase with the rate of inflation.[93]

About six months after the City of Chicago signed the Chicago Concession Agreement with Chicago Parking Meters, the inspector general of the City of Chicago released a report stating that the City would have realized profits of over $2 billion had it operated the parking meters on its own according to the terms of the lease.[94] The inspector general also proposed several city ordinances that would restrict Chicago's ability to enter into future PPPs.[95] Mayor Daley and the City have received much criticism from the public for the Agreement.[96] Furthermore, Chicago Parking Meters was unequipped to maintain the metered parking system. Soon after the contract was signed, the City of Chicago had to give technical assistance to Chicago Parking Meters to upgrade the metered parking system successfully.[97]

Despite adequate competition in contract formation, the Chicago Concession Agreement terms create accountability problems for Chicago.

88. U.S. Gov't Accountability Office, GAO-08-44, Highway Public-Private Partnerships: More Rigorous Up-front Analysis Could Better Secure Potential Benefits and Protect the Public Interest 72 (2008).
89. Chicago Concession Agreement Ordinance, *supra* note 4, at 49.
90. *See id.*
91. *See id.*
92. *See id.* at 10–11.
93. *See id.*
94. *See* IGO Report, *supra* note 1, at 3.
95. *See id.* at 34–37.
96. Jon Hilkevitch, *Chicago Parking Meters: Changes Leave Drivers Angry, Confused—Transition to Private Management Causing Problems Across City*, Chi. Trib. (Mar. 20, 2009), http://articles.chicagotribune.com/2009-03-20/news/0903190872_1_parking-meter-daley-administration-drivers.
97. *Id.*

A private company would own and operate the Chicago metered parking system over the next seventy-five years. Chicago Parking Meters, however, is not accountable to public or political pressure. It is only accountable to the terms of the Chicago Concession Agreement, which limits its obligations to maintenance and operation of the metered parking system.[98]

The public and elected political officials will have no control over parking meter rates. Rates are set to increase significantly from 2008 to 2013 and will then increase at the rate of inflation for the remainder of the lease term.[99] Additionally the public and elected officials will have no control over maintenance of the metered parking system, a source of many citizen complaints.[100] The metered parking system is not subject to public or political influence over the way in which it is delivered and managed.[101]

4. A Call for Solutions

There is little doubt that the City of Chicago followed applicable state laws and city ordinances regulating concession contracting when it entered into the Chicago Concession Agreement. Despite the City's reputation for handing out no-bid contracts, competition appears to have been adequate here.[102] The City held an open, advertized competition for the Concession Agreement, pursuant to Illinois law.[103] Furthermore, the City complied with all of the relevant ordinances, and the Chicago Concession Agreement was reviewed by both the Finance Committee and City Council.[104] Yet both the contracting process and the Concession Contract itself are riddled with transparency and accountability problems.[105] Municipalities like Chicago should ensure transparency and accountability in concession contracting.

IV. SOLUTIONS: NEW ORDINANCES AND A NEW CONTRACT VEHICLE

This portion of the Note recommends that municipalities take the following actions to ensure transparency and accountability in long-term concession contracting. First, municipalities should pass an ordinance mandating a review

98. It is important to note that, while Chicago Parking Meters cannot be held politically accountable for its actions, it does carry all of the price risk in operating the metered parking system.

99. *See* Chicago Concession Agreement Ordinance, *supra* note 4, at 10–12.

100. Hilkevitch, *supra* note 96.

101. *See* Briffault et al., *supra* note 11, at 1358.

102. In November 2009, the *Chicago Sun-Times* reported that Mayor Daley had given $80 million in no-bid contracts over the previous twenty years. *See* Fran Spielman, *$3.7 Mil. to Study O'Hare Terminal Airlines Don't Want*, Chi. Sun-Times, Nov. 4, 2009, http://www.suntimes.com/news/cityhall/1863366,CST-NWS-ohare04.article.

103. The City issued a request for quotation (RFQ). It received ten bids and found eight of those bidders responsible. *See* IGO Report, *supra* note 1, at 12–13.

104. *See id.* at 13–14.

105. *See id.* at 32–33.

of a proposed concession contract by an independent body. Such an ordinance would ensure transparency because the proposed concession contract would be subject to scrutiny by a body not directly involved in the contract formation process. Furthermore, this ordinance will ensure accountability because it would force municipal decision makers and concessionaire representatives to answer to the findings of an independent review.

City councils also should pass an ordinance mandating an adequate period of public comment between the selection of a winning concessionaire and approval of the proposed concession contract. This would ensure transparency because the public and elected officials would have the opportunity to review and understand the proposed concession contract adequately. It also would ensure accountability because the public would have a chance to contact representatives with comments on the proposed concession contract.

As a second means to ensure transparency and accountability, municipalities should consider negotiating a "modified CPIF contract," with a concessionaire as an alternative to a traditional concession contract.[106] A modified CPIF contract would ensure transparency because the concessionaire's costs of operation and maintenance as well as its rate increases would be subject to public viewing on an annual basis. The modified CPIF contract also will ensure accountability because contract incentives will either encourage the concessionaire to operate a facility or piece of infrastructure in an efficient manner or ensure higher fees are paid to the municipality.

A. *Proposed Ordinances*

Municipalities should pass the following ordinances to ensure transparency and accountability in the formation and administration of concession contracts. First, municipalities should pass an ordinance requiring an independent review of proposed long-term concession contracts.[107] This proposed ordinance could include an independent review, valuation, and analysis by an inspector general's office.[108] The independent review would ensure transparency because the proposed concession contract would be subject to public scrutiny by a major body not directly involved in contract formation or

106. A possible solution to Chicago's concession contracting problems is to issue an ordinance stating that the City Council shall not pass a budget contingent on profits from a future concession contract. This ordinance would shift the bargaining power back to the City and, perhaps, make the contracting process less rushed and more transparent. This ordinance, however, also might eliminate Chicago's need for concession contracts.

107. *See* IGO Report, *supra* note 1, at 36.

108. One might argue that employing such an individual to review a concession contract decreases accountability because an unelected inspector general is not accountable to the public or to politicians. However, inspector generals are often appointed by elected officials. *See* Nash et al., *supra* note 38, at 329. Further, employing an inspector general to review a concession contract would prove consistent with the inspector general's duties of eliminating "corruption, waste, and mismanagement, while promoting effectiveness and efficiency" in the City. *See What We Do*, Chi. Office of Inspector Gen., http://www.chicagoinspectorgeneral.org/office.html (last visited Dec. 1, 2010). This office would highlight deficiencies in concession contracting that citizens and politicians might not realize.

administration. Elected officials as well as the public would have access to an outside, nonbiased opinion on the terms of the concession contract. This proposed ordinance also would increase accountability because the municipal decision makers, as well as the private partner representatives, would be forced to answer to the findings of an independent body not promoting the concession contract.[109]

City councils also should pass an ordinance mandating a period of public comment before entering into long-term concession contracts. Alternatively, the ordinance could require that the city council delay vote on approval of the concession contract (if subject to legislative approval) for a certain period of time after the executive body has proposed a winning bidder and contract. The ordinance also might require a public hearing regarding the contract provisions. This comment period would provide transparency because the public and city council members would have a full opportunity to review and fully understand the proposed concession contract. City council members, in particular, would be able to vote on a proposed concession contract with adequate information. This public comment period would improve accountability by providing the public with an opportunity to review the proposed concession contract and respond to representatives with comments. Thus, these two proposed ordinances would ensure transparency and accountability in the concession contract formation process.

B. *Modified CPIF Contracting: A New Contract Vehicle to Improve Transparency and Accountability*

While the ordinances proposed above would increase transparency and accountability in concession contract formation, the transparency and accountability problems existing throughout concession contract administration would remain. Some experts believe that responsible and careful contract drafting, as opposed to regulation, is the best way to ensure transparent and accountable concession contracting.[110] A carefully drafted modified CPIF contract, as opposed to a traditional concession contract, would ensure transparency and accountability. This section will first review the mechanism of a traditional CPIF contract as used in federal government contracting and next explain the attributes and advantages of a modified CPIF contract.

1. CPIF Contracts

A CPIF contract is a type of cost reimbursement contract.[111] As is policy in cost reimbursement contracting, CPIF contracts "are suitable only when the

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109. The Federal Government regularly employs independent bodies to ensure transparency and accountability in delivery of services. For example, the GAO regularly reported on the American Recovery and Reinvestment Act. *See* U.S. Gov't Accountability Office, GAO-09-515T, American Recovery and Reinvestment Act: GAO's Role in Helping to Ensure Accountability and Transparency for Science Funding 1 (2009).

110. *See* Briffault et al., *supra* note 11, at 1370–71.

111. FAR 16.405-1(a).

cost of the work to be done cannot be estimated with sufficient accuracy to use fixed-price contracts."[112] In CPIF contracting, as in cost reimbursement contracting, the Government agrees to reimburse the contractor for all of its performance expenses.[113] The Government and the contractor also negotiate a target cost for completion of the contract, representing the predicted costs of contract performance.[114]

Unlike in traditional cost reimbursement contracting, however, there is no set contractor fee, whereby a contractor's fee is fixed regardless of how the contractor performs or whether the desired outcomes of contract performance are achieved.[115] In CPIF contracting, the Government and the contractor negotiate a target fee, maximum fee, minimum fee, and a fee adjustment formula.[116] The contractor is guaranteed to receive a fee no lower than the minimum fee and no higher than the maximum fee.[117] The fee adjustment formula, then, is used to increase or decrease the contractor's fee depending on how well it performs (or, in the alternative, whether it successfully performs desired contract outcomes) pursuant to pre-negotiated metrics.[118]

CPIF contracts have mixed results. An example of a successful CPIF contract is the Department of Defense (DoD) contract for the Patriot Advanced Capability-3 missile where DoD incentivized the contractor to keep performance costs low.[119] In return for reducing costs by $42 million for the initial production contract, DoD increased the contractor's fee.[120] An example of an unsuccessful CPIF contract is the Army's chemical demilitarization contracts where the Army attempted to accelerate the destruction of chemical weapons stockpiles after the events of September 11, 2001, through the use of incentive fees.[121] These incentives, however, did not keep the contract on schedule.[122] The contractor missed the target completion date due to "unforeseen technical difficulties."[123] The essence of a CPIF contract, therefore, "is that

112. U.S. Gov't Accountability Office, GAO-09-921, Extent of Federal Spending Under Cost-Reimbursement Contracts Unclear and Key Controls Not Always Used 1 (2009) [hereinafter Federal Spending Under Cost-Reimbursement Contracts].

113. *See* FAR 16.301-1, 16.405-1(a).

114. FAR 16.405-1(a).

115. FAR 16.306(a), 16.405-1(a).

116. FAR 16.405-1(a).

117. Cibinic & Nash, *supra* note 71, at 1121–22.

118. *Id.* at 1121–23; *see* FAR 16.402-1, 16.402-2. In 2005 GAO released a report criticizing the DoD's use of cost plus incentive fee (CPIF) contracts because incentive fees were not directly tied to acquisition outcomes. *See* U.S. Gov't Accountability Office, GAO-06-66, DoD Has Paid Billions in Award and Incentive Fees Regardless of Acquisition Outcomes 3–6 (2005) [hereinafter DoD Incentive Fees]. Recently, the FAR Council promulgated rules limiting the use of incentive contracts and some have predicted the end of CPIF contracting. *See* Vernon J. Edwards, *The End of a Love Affair: New Policies About Incentive Contracts*, 23 Nash & Cibinic Rep. ¶ 63, Dec. 2009, at 177, 179.

119. DoD Incentive Fees, *supra* note 118, at 30.

120. *Id.*

121. *Id.* at 29.

122. *Id.*

123. *See id.*

the contractor's actual fee *varies inversely* with the amount of costs incurred" or with other predetermined measurable standards such as performance acceleration or environmental impact.[124] Consequently, the key to forming a successful CPIF contract is to structure and implement incentives in a way that effectively motivates contractors to improve performance, achieve acquisition outcomes or program goals, and improve cost control behavior.[125]

2. Modified CPIF Contracts

Clearly, CPIF contracts are fundamentally different from concession contracts. The most obvious difference is that under CPIF contracts, the Government reimburses the contractor for its costs while under concession contracts the concessionaire pays the municipality an upfront fee, notwithstanding the fact that it covers performance costs. Despite such differences, a concession contract can be modified to include certain characteristics of a CPIF contract.

Under a modified CPIF contract, the municipality and the concessionaire would negotiate a target cost for completion of the contract. In the case of Chicago's metered parking system, this cost estimate would represent the estimated cost of maintenance and improvement to the metered parking system over seventy-five years.

The municipality and the private partner also would negotiate an annual target fee, paid by the private partner to the municipality. This target fee would serve as a substitute for a set upfront or annual payment normally paid by the concessionaire to the municipality. In the case of Chicago's metered parking system, this fee would need to be negotiated such that the City is compensated for the lost income from meter fees and to cover any risk to Chicago Parking Meters.

This target fee, paid annually to the municipality, would be subject to and vary with pre-negotiated, performance-based metrics. Metrics could include anything from maintenance cost reduction to reducing user fees. In short, the concessionaire's annual fee to the municipality would increase if it performed poorly under those metrics while the fee to the municipality would decrease if it performed well under those metrics.

The municipality could include several incentives, or performance-based metrics, in the modified CPIF contract. A logical performance incentive would be maintenance and operation costs. In normal CPIF contracts, the Government is responsible for reimbursing all of the contractor's costs. Here, however, the private partner would be responsible for maintenance and operation costs. Therefore, if the private partner's operation and maintenance costs increase, the fee paid to the municipality should decrease. While this metric might provide the private partner an incentive to increase its opera-

124. Cibinic & Nash, *supra* note 71, at 1117.

125. *See* DoD Incentive Fees, *supra* note 118, at 14–15; Federal Spending Under Cost-Reimbursement Contracts, *supra* note 112, at 4–5.

tion and maintenance costs, the municipality could include contract provisions ensuring that these costs are actually used to improve the facility or piece of infrastructure. As is the case with traditional CPIF contracts, under a modified CPIF contract the municipality must "ensure that the contractor is performing efficiently and effectively and that the government pays only for allowable, allocable, and reasonable costs applicable to the contract."[126]

A municipality also could include facility rates as a performance incentive. If rates increase, the fee paid to the municipality should increase. In the case of Chicago's metered parking system, Chicago Parking Meters would pay Chicago a higher annual fee if it increased parking rates. This mechanism would incentivize the private partner to keep rates low. In the alternative, this mechanism would translate to increased public partner profits.

A municipality also might consider including facility use rate as an incentive to protect the concessionaire. Under this incentive, the more the public uses the facility, the greater the fees to the municipality. Conversely, if citizens use the facility infrequently, the fee to the municipality decreases. This incentive would protect the concessionaire because even if the public uses the facility only minimally, the concessionaire can offset the loss with a smaller fee payment to the municipality. This incentive is especially useful in a long-term metered parking system concession contract given the likelihood that car usage rates will significantly decrease in the future.

The modified CPIF contract also might include a fee ceiling and fee floor. The fee ceiling would protect the concessionaire, guaranteeing compensation to the private party for maintaining and operating the facility or infrastructure over the contract term. The fee floor would protect the municipality by ensuring a year-to-year revenue stream.[127]

The modified CPIF contract also could include a rate ceiling. This would require the concessionaire to request approval from the municipality for a rate increase above a certain point. If the municipality does not approve of this rate increase, the private partner would be able to walk away from the modified CPIF contract and return the public asset to public partner ownership.

3. Transparency and Accountability in Modified CPIF Contracts

Employing a modified CPIF contract would increase transparency and accountability in concession contracting. The modified CPIF contract would ensure transparency because the private partner's costs of operation and

126. Federal Spending Under Cost-Reimbursement Contracts, *supra* note 112, at 28. As GAO has stated in reference to CPIF contracts, procurement personnel are "supposed to reconcile the invoices to the work requests to ensure that the government only pays for the completed work authorized by the work requests." *Id*. Under a modified CPIF contract, the fee to the municipality would decrease if bona fide costs increased, but the fee would remain the same or increase if discretionary spending increased.

127. This fee ceiling and floor would operate similarly to a maximum fee and minimum fee in a traditional CPIF contract. *See* FAR 16.405-1(a).

maintenance as well as rate increases would be subject to public review on an annual basis. Under a traditional concession contract, the public and elected representatives are unable to ascertain how the concessionaire is managing, repairing, and operating the public facility or piece of infrastructure; consequently the public and representatives are unable to determine whether the concessionaire is operating within the confines of the law or concession contract.

Under a modified CPIF contract, however, the municipality and the concessionaire would meet each year to determine the annual fee. During this determination period, the concessionaire's cost and rate scheme would be open to public review. This annual meeting will ensure transparency in the maintenance and operation of the publicly owned facility.

The modified CPIF contract also would ensure accountability. Under a traditional concession contract, the operation and maintenance of a public facility or piece of infrastructure and setting of user fees are not amenable to monitoring and control through the political process. Rather, either the concessionaire or the contract itself sets operation, maintenance, and user fees. Complaints about operation, maintenance, and user fees from the public or political representatives will remain ineffectual under a traditional concession contract.

Under a modified CPIF contract, however, usage rate hikes and poor infrastructure maintenance and operation would likely mean a fee increase for the municipality. For example if the annual fee to the municipality were adjustable by user fees, increased user fees would translate to a larger annual fee to the municipality. Likewise, if the annual fee to the municipality were adjustable by operation and maintenance costs, decreased operation costs would translate to a larger annual fee for the municipality. The municipality, then, could use this increased annual fee to respond to public complaints. Because a modified CPIF contract is inherently more flexible than a traditional concession contract, it also allows for more transparent and accountable contracting.

C. *Overcoming Drawbacks to the Proposed Solutions*

In employing the two solutions suggested in this Note, municipalities will experience a more transparent and accountable concession contract formation process and a more transparent and accountable concession contract administration process. These solutions result several drawbacks. However, these drawbacks can be overcome by careful contract formation.

1. High Administrative Costs

As stated above, municipalities often enter concession contracts to take advantage of cost savings. Although private partners are thought to manage facilities and pieces of infrastructure most efficiently, the administrative costs of managing a modified CPIF contract would be higher than administering a traditional concession contract. Any CPIF contract involves "additional administrative costs" due to the need for government monitoring.[128] The municipality and private partner would have to determine the fee on a year-to-year basis. These high administrative costs might undercut some of the advantages incurred by cost saving. These increased administrative costs, however, could be offset by the modified CPIF contract incentives. These incentives would ensure either cost benefits from better performance from the concessionaire or increased annual fees to the municipality.[129]

2. Lack of Political Will

One advantage to municipalities by entering traditional concession contracts is that rate increases are often set by contract for the foreseeable future, compared to rate setting on a yearly basis by municipal officials. This contractual mechanism may not be the most politically accountable mechanism for increasing rates, but it does ensure that rates will slowly increase over time. Therefore, municipal representatives do not concern themselves with political or public opposition to necessary rate increases.[130] When instituting a modified CPIF contract, the rate ceiling might eliminate this advantage for municipalities because increased rates would be discouraged through contract incentives. Ideally though, a municipality would be able to structure a modified CPIF contract so that a balance is struck between maintaining modest rates and ensuring adequate income for the concessionaire.

3. Lack of Proper Incentives for the Private Partner

Employing a modified CPIF contract might not adequately incentivize a concessionaire to enter into a long-term concession contract. A concessionaire takes a big risk when entering into a long-term, high-value concession contract because the concessionaire normally makes a large upfront cash payment to a municipality and also spends millions on facility maintenance and operations. Concession contract terms are often upwards of fifty or seventy-five years in length to guarantee that the concessionaire recovers the investment.[131] If a municipality employed a modified CPIF contract, the concessionaire might also have to pay a higher fee over the term of the contract, putting the concessionaire's recovery of investment at risk. Under a modified contract, however,

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128. Federal Spending Under Cost-Reimbursement Contracts, *supra* note 112, at 6.

129. It is important for a municipality to have a well-trained, competent workforce capable of administering a long-term concession contract. Professor Steven Schooner has noted that a reduction in the acquisition workforce has "unduly burdened, over-extended, and exhausted the government's buyers." Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 651 (2001). The Office of Federal Procurement Policy has created a strategic plan to guide the growth and capability of the federal acquisition workforce. *See* Memorandum from Lesley A. Field, Deputy Admin. of the Office of Mgmt. & Budget, to Chief Acquisition Officers et al., Acquisition Workforce Development Strategic Plan for Civilian Agencies: FY 2010–2014, at 1 (Oct. 27, 2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/procurement_workforce/AWF_Plan_10272009.pdf. Municipalities would be wise to do the same when considering modified CPIF contracts.

130. *See* Pagano, *supra* note 10, at 379.

131. *Id.* at 363.

the concessionaire would have two distinct financial opportunities not available under a traditional concession contract. First, the concessionaire would not have to make a large upfront cash payment to the municipality because it could make this payment in increments, on an annual basis. Second, the concessionaire would have the opportunity to pay a reduced aggregate fee over the contract term for successful contract performance.

4. Lack of Proper Incentives for the Municipality

From the municipality's perspective, employing a modified CPIF contract also might eliminate some of the traditional benefits of entering into concession contracts. Under a modified CPIF contract, the municipality would not receive a large, upfront cash infusion. Additionally the year-to-year fee might be extremely low, depending on the way in which the concessionaire performs. These aspects of a modified CPIF contract, however, are the price a municipality must pay for transparency and accountability. Each municipality must choose which contracting goals are most important to it.[132]

V. CONCLUSION: A NEW WAY FORWARD

Concession contracting is a very useful tool. Municipalities that employ concession contracts are able to take advantage of cost savings, upfront or yearly cash infusions, and private sector financing. In Chicago's case, were it not for concession contracting, the City would have been forced to cut crucial services to its citizens in 2009. Indeed, today some public works projects would not be feasible without concession contracting. Despite these advantages, concession contracts pose serious transparency and accountability problems. Municipalities can circumvent these issues by passing the ordinances proposed above and employing a modified CPIF contract.

Municipalities should enact ordinances mandating a review of a proposed concession contract by an independent body. This review will ensure transparency because the proposed concession contract would be subject to scrutiny by a body not involved directly in the contract formation process. Further, it will ensure accountability because municipal decision makers and concessionaire representatives would be forced to answer to the findings of the review. City councils also should pass an ordinance mandating a public comment period. This period will ensure transparency because the public and elected officials will have the opportunity to review and understand fully the proposed concession contract. It also will ensure accountability because the public will have a chance to contact representatives with comments on the proposed concession contract.

Employing a modified CPIF contract will ensure transparency because the concessionaire's costs of operation and maintenance as well as its rate increases

132. *See* Schooner, *supra* note 36, at 110.

would be subject to public viewing on an annual basis. The modified CPIF contract also will ensure accountability by incentivizing the concessionaire to operate a facility or piece of infrastructure efficiently to ensure higher fees are paid to the municipality.

Today, municipalities face budget shortfalls and decreasing tax revenues. Concession contracting is an attractive solution to the problems posed by shortfalls and decreased revenues. Enacting the ordinances proposed above and employing modified CPIF contracts will ensure that transparency and accountability are not lost.