GOVERNMENT PURCHASING AND RECESSIONS: HOW EXPANSIONARY LEGAL POLICIES CAN STIMULATE THE ECONOMY

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ABSTRACT

The traditional approaches to “cure” economic recessions are monetary and fiscal policies. Most economic crises are first addressed with monetary instruments, as the Federal Reserve’s extensive corporate bond purchasing program of March 24, 2020, has shown. However, when interest rates are zero or close to zero—referred to as the zero-lower bound (ZLB)—and the economic downturn is expected to be significant, governments often launch additional fiscal stimulus programs, such as the U.S. COVID-19 Stimulus Package in the amount of $2.2 trillion passed by Congress on March 27, 2020. But monetary and fiscal policies are not the only means of influencing an economy’s business cycle. A third and novel option is expansionary legal policies, also referred to as countercyclical regulation, which is the focus of this article.

Legal instruments have been used only to a limited degree to stimulate the economy. One of the first advocates of law and macroeconomics was Yair Listokin who promotes the use of legal policies and lawyers in macroeconomic policy. In this article, the author explains and applies the idea of expansionary legal policies to the field of public procurement law. Public procurement lends itself particularly well for expansionary legal policies. First, public contracts form a large part of the government’s expenditure side, amounting up to fifteen to twenty percent of global GDP, and can therefore be used to expand the money supply. Second, government contracting is governed by a set of complex, administrative rules that can be better designed to better reflect the business cycles.

This article will discuss the idea, design, application, and potential effects of expansionary legal policies by means of two procurement policies that were adopted in the United States and Switzerland in response to COVID-19 this March and compare it to Germany’s relaxation of procurement rules after the financial crisis in 2009. To protect taxpayers’ money and mitigate the risk of corruption, this article suggests legal safeguards for expansionary procurement policies. With the necessary measures in place, expansionary procurement policies will help procurement regulations to reflect economic realities more accurately and stimulate the economy by increasing and expediting spending through public projects in infrastructure, healthcare, and other sectors.

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1 See, e.g., Jeanna Smialek, The Fed Goes All In With Unlimited Bond-Buying Plan, NEW YORK TIMES, March 23, 2020.]
2 See Erica Werner, Senate Approves $2.2 Trillion Coronavirus Bill Aimed at Slowing Economic Free Fall, WASHINGTON POST, March 25, 2020.
3 See YAIR LISTOKIN, LAW AND MACROECONOMICS: LEGAL REMEDIES TO RECESSIONS (2019).
I. The Idea of Expansionary Legal Policies

The COVID-19 pandemic has had drastic impacts on the global economic landscape and exemplified the importance of government procurement. Before delving into the midst of public procurement policies, this article will first explain the novel idea of expansionary legal policies and contrast it to the traditional macroeconomic tools (Part I). It will then introduce three examples of expansionary procurement policies from the United States, Switzerland and Germany that have been applied to address the economic consequences of COVID-19 and the financial crisis (Part II). By means of these three examples, the article discusses the design of expansionary legal policies, including questions of using relaxed regulation versus enforcement, coordinated action and the optimal sector to target (Part III). The latter section addresses critical questions related to public infrastructure spending, green procurement investment and the potential of crisis-specific policies. Lastly, the article discusses potential conflicts between macroeconomic stability and traditional procurement goals, such as cost-efficiency, open competition, and transparency, suggesting legal safeguards to prevent against corruption. To conclude, the article outlines two key features of expansionary procurement policies to shield them from discretionary power: automatic stabilization and economic triggers (Part IV).

A. The Traditional Macroeconomic Tools and Their Limitations

To better understand the origin of expansionary legal policies, this article looks at the existing macroeconomic instruments—expansionary monetary and fiscal policies—and their limitations. When an economy is facing an economic downturn or is sliding into a recession, most jurisdictions have two tools in their toolkit to mitigate the negative economic consequences: monetary policies and fiscal stimuli. The first instrument is by far the most popular remedy to stimulate an economy. In charge of monetary policies are central banks, such
as the U.S. Federal Reserve Bank (the Fed) or the European Central Bank (ECB). As the recent health and subsequent economic crisis have shown, the first reaction to address the potential economic consequences of COVID-19 was to increase the money supply in the economy. This technique is known as expansionary monetary policy. The idea behind monetary policies is to give businesses and households more money that they can spend during an economic downturn, which in turn helps mitigate the contraction and liquidity trap\(^5\) in the economy. The central banks can achieve this goal by either lowering interest rates and making it more attractive to borrow and less attractive to save, or other more sophisticated measures, such as corporate bond purchasing programs. In March of 2020, the Fed extended its corporate bond purchasing program, where it buys debts from large employers to increase market liquidity.\(^6\)

The second tool in the toolkit of governments is fiscal stimulus programs, such as subsidies or tax cuts that are given to businesses and households. Expansionary fiscal policy is a policy where a government agency, for example the Small Business Administration (SBA) or the Internal Revenue Service (IRS), expands the money supply by using budgetary tools. A recent example is the loans to small businesses approved by Congress in April 2020,\(^7\) or the stimulus

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\(^5\) A liquidity trap is when monetary policy becomes ineffective due to very low interest rates combined with consumers who prefer to save rather than invest. It was first described by economist John Maynard Keynes. \textit{See} Maria A. Arias & Yi Wen, \textit{The Liquidity Trap: An Alternative Explanation for Today's Low Inflation}, 


checks paid to Americans. In most jurisdictions, fiscal policies are often the secondary choice to monetary policies. They come into play for political reasons or when the economy is facing a serious downturn that can no longer be handled by monetary policies alone.

But a hammer and a saw cannot fix every hole in the wall. Most policies are short-term only and limited at the zero-lower bound. The zero-lower bound or ZLB is a macroeconomic problem where the short-term nominal interest rate is at or near zero and can no longer be lowered. This causes a liquidity trap and limits the central bank’s capacity to increase money supply in the markets. The ZLB problem resurfaced after the financial crisis in 2008 with interest rates close to zero. Amongst others, economist Paul Krugman has criticized the view that monetary policy under the ZLB is effective in promoting economic growth. “Helicopter money,” as first suggested by Milton Friedman and supported by the former Chair of the Federal Reserve Ben Bernanke, as well as bond buying programs that are part of central banks’ quantitative easing (QE) programs, can cause other serious problems, such as hyperinflation or,
in the case of the Fed’s corporate bonds purchasing program, extensive involvement of the government in private business.

Expansionary fiscal policies suffer from different limitations. One of them is the long reaction time of the government to invest money. Spending bills and tax cuts, as initiated by the American Recovery and Reinvestment Act of 2009, need approval from Congress.\(^{13}\) Another major impediment to a more active fiscal policy is the government’s inertia and reluctance to spend money. The reluctance often originates from the fear of increasing government debt.\(^{14}\)

As a repose to the limitations of expansionary monetary and fiscal policies, this article suggests the application of expansionary legal polices.

**B. Expansionary Legal Policy Is More than Deregulation**

The idea of expansionary legal policies was outlined by Yair Listokin in 2016,\(^{15}\) followed by an article on countercyclical regulation by Jonathan Masur and Eric Posner.\(^{16}\) Expansionary legal policies stimulate aggregate demand through law and regulation.\(^{17}\) In other words, expansionary legal polices intend to adapt the laws to the business cycle and increase spending in times of economic crises. Different than monetary policies, legal means and regulations are not limited at the ZLB. On the contrary, they are most effective when monetary policies have reached their limits and interest rates cannot be lowered any further. Also, expansionary legal

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\(^{17}\) See LISTOKIN, at 130.
policies can help multiply the effects of fiscal stimulus programs by circumventing the spending inertia many governments face. Pre-approved countercyclical regulation that is triggered in an economic downturn can release new funds into the economy without the lengthy legal or budgetary approval process. Two examples illustrate the idea of expansionary legal policies.

The first example, suggested by Listokin, is business cycle-sensitive utility-rate regulation. Today, most utilities are natural monopolies. To avoid monopoly pricing, most governments regulate utility-rates. In the United States, utility-rate regulation shows an interesting pattern: when demand goes down, as in recessions, utilities often raise their prices to cover their costs. Listokin suggests countercyclical utility regulation where prices stay the same at the ZLB and should be lowered during a liquidity trap. The second example, suggested by Masur and Posner, is suspension of regulation, such as environmental regulation. They understand regulation as a corporate tax, and the suspension of regulation as a tax cut. For example, the U.S. Environmental Protection Agency (EPA) has suspended the emission requirements during the COVID-19 crisis with the intention to reduce compliance costs on companies. However, expansionary legal policies are more than just deregulation. Listokin points out that regulation is not in all cases equivalent to a tax: “[i]nstead, a considerable amount of regulation imposes spending mandates.” He describes the mandate as a hybrid between taxation and spending. For example, if the building standards for the Keystone Pipeline between

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18 See Ubide, at 279.
19 See Law and Economics of Recessions, supra note 15, at 852 n.185.
20 Id. at 833.
23 Listokin, at 137.
the United States and Canada were heightened (taxation), the State Department could have reduced environmental risks while at the same time increasing employment (spending).\textsuperscript{24}

This article analyzes expansionary legal policies in the context of public procurement regulation. The macroeconomic analysis of public procurement is particularly interesting for several reasons. First, other than the two previous examples, government contracting directly regulates the government’s expenditure side and has large potential to influence government spending. Public procurement makes up a significant part of total government spending—in the United States up to twenty-seven percent.\textsuperscript{25} As a boundary case between fiscal and legal policies, public procurement combines two important macroeconomic instruments into one. Second, public procurement forms part of economic regulation, same as taxation, antitrust or utility-rate regulation. Other than fields of law that are only loosely related to economic considerations, there is a stronger argument to be made for economic regulation to reflect the business cycle. Lastly, similar to utility and environmental regulation, public procurement forms part of administrative law, an often very dense and complex web of rules. Bringing such regulations closer to market reality and the business cycle may profit businesses, the government, and ultimately the society at large.

C. Different Economic Times Call for Different Regulations

Often regulations and laws are rather static in nature. Of course, statutes can be amended, or case law reversed, but this is often a lengthy process that takes years.\textsuperscript{26} Many

\begin{footnotesize}
\textsuperscript{24} See \textit{Law and Economics of Recessions}, supra note 15, at 798.
\textsuperscript{26} See generally Symposium, \textit{Agency Rulemaking and Political Transitions}, 105 NW. U. L. REV. 471 (2011) (describing the lengthy process of agency rulemaking).
\end{footnotesize}
changes in law happen independently from the overall macroeconomic situation and are often a reaction to specific events, such as the financial meltdown in 2008, rather than the overall macroeconomic situation. While the political situation can change and influence the law to a large extent, macroeconomic effects and business cycles have played a less prominent role in lawmaking. This rigidity of the law is often a good thing because it creates legal certainty and trust in the legal system. But sometimes the law’s rigidity can exacerbate economic problems. Consider the current economic contraction caused by COVID-19. Many could not go into work or were laid off; however, the Coronavirus Aid, Relief, and Economic Security (CARES) Act only temporarily paused evictions for renters in buildings with government backed loans, which was insufficient relief for those covered and left many without any protection. The only intervention, if any, came from the Executive, from state governors or from private landlords that showed leniency towards financially distressed renters.

Some laws, such as contract law, have clauses that liberate parties from their obligations in extraordinary circumstances—a concept known as “force majeure.” This concept usually applies to natural hazards like floods or earthquakes, and in some limited circumstances extends to events caused by human intervention, such as strikes. Administrative laws and regulations

28 See Nat’l Mining Ass’n v. Sec’y U.S. Dept. of Labor, 812 F.3d 843, 862 (11 Cir. 2016).
31 Damian McNair, Force Majeure Clauses—Revisited, DLA PIPER (June 2012),
do not know such clauses. They can be amended by way of the ordinary lawmaking process; in the United States this means going either through the approval of Congress (for statutes) or notice and comments procedures (for regulations). The last resort, the *ultima ratio* to change the law, is the President’s emergency powers. These are originally designed to apply to war situations. Since emergency powers are invoked without congressional involvement and on short notice, executive emergency powers often enjoy less democratic legitimacy and have less checks and balances in place to protect against abuse of power.

Another way the law can be changed is by the judiciary. Studies have analyzed how courts and judges have changed the law. Most of these studies are focused on political forces and partisan preferences of the highest courts (the political model). Only a few recent studies have analyzed how courts, in particular the U.S. Supreme Court, changed its decision-making on macroeconomic grounds. This observation may seem unusual, since fiscal and monetary policies are either the responsibility of the President or Congress. The U.S. Supreme Court,


however, often decides cases that impact the national economy.\textsuperscript{38} Studies conducted by law professors at Northwestern University found that the U.S. Supreme Court did not increase but rather decreased deference to the executive branch during recessions.\textsuperscript{39} One explanation is that the Court attributes recessions to the incompetency of the government and tries to take power away from the executive.\textsuperscript{40}

When the executive and the judiciary are changing the law based on different business cycles, why should the law itself not be able to reflect the macroeconomic situation? This idea is especially relevant for economic regulation, which is closely related to the business cycle. This article argues that certain economic regulations, especially the ones that are concerned with the expenditure side of the government, such as public procurement, should have expansionary legal policies in place that may be triggered when the economy is heading towards a recession. The specific design and application of such policies will be discussed in Parts III and IV.

\textbf{II. Three Recent Examples of Expansionary Legal Policies in Public Procurement}

The current health crisis has produced—for better or worse—new cases of expansionary legal policies. Governments have adopted legal policies in public procurement to respond to the negative economic consequences triggered by COVID-19. On March 20, 2020, the U.S. Office of Management and Budget (OMB) announced “emergency procurement flexibilities” for federal agencies as a response to COVID-19.\textsuperscript{41} On March 27, 2020, Switzerland, a European country strongly affected by COVID-19, adopted recommendations to mitigate the negative

\textsuperscript{38} See Brennan, et al., at 1505.
\textsuperscript{39} See id. at 1508; Brennan, et al., at 1192.
\textsuperscript{40} Brennan I, supra note 36, at 1508.
consequences of the crisis through government procurement. Yet, these two instances are not the first examples of expansionary policies adopted in public procurement. A prominent and early example is Germany’s relaxed procurement rules that were launched after the financial crisis in 2009. The analysis of the three policy examples allows for a twofold comparison: first, a comparison of COVID-19 measures between the United States and a European country; and second, a comparison of measures as a reaction to a health crisis and to a financial crisis.

Before critically analyzing the design, application and effects of these policies, this article will briefly describe the different policies, using the following framework: authority and power to issue the policy; timing and duration of the policy; targeted sectors; stated goals of the policy; suggested measures, both in regulation and enforcement; and quantitative and qualitative effects of the policy (where available).

A. U.S. Emergency Procurement Flexibilities Against COVID-19

In March 2020, the OMB issued a memorandum to federal agencies on Managing Federal Contract Performance Issues Associated with COVID-19 (OMB Memorandum). The emergency procurement flexibilities contained in the Memorandum are based on President Trump’s emergency declaration under section 501(b) of the Stafford Disaster Relief and Emergency Assistance Act. While the duration of the measures is not clearly specified in the

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42 See generally BESCHAFFUNGSKONFERENZ DES BUNDES (BKB), KBOB, Empfehlung zur Milderung der Auswirkungen des Coronavirus auf die schweizerische Volkswirtschaft aus Sicht von Baubeschaffungen (2020).
44 OMB Memorandum, supra note 41, at 1.
OMB Memorandum, contractors can track and report COVID-19-related tasks in the procurement system until July 2020.\textsuperscript{46}

The Memorandum was issued to all federal agencies and is not limited to a certain sector. But the Memorandum suggests that contracts, which address impending requirements, such as security or logistics, may be “retooled for pandemic response.”\textsuperscript{47} The OMB Memorandum aims at two goals: first, protection of the health and safety of all Americans, and second, continued contract performance by the effective leveraging of flexibilities, and minimizing work disruption. It states that the flexibilities should enable more rapid responses to pressing demands while agencies should exercise sound fiscal prudence to maximize value for taxpayers’ money.\textsuperscript{48}

To achieve these goals, the Memorandum lists the following measures:

i. Application of emergency procurement flexibilities in line with the Federal Acquisition Regulation (FAR) §18.202 “Defense or recovery form certain attacks,”\textsuperscript{49} including
   a. Increase of micro-purchase threshold from $10,000 to $20,000;
   b. Increase of simplified acquisition threshold from $250,000 to $750,000; and
   c. Increase of commercial items acquisition threshold to $13 million;\textsuperscript{50}

ii. Retooling of existing contracts for pandemic response;\textsuperscript{51} and

iii. Extension to performance dates.\textsuperscript{52}

The enforcement of these measures is voluntary for all federal agencies. However, the Memorandum stresses that “the acquisition workforce should feel fully empowered to use the

\begin{flushleft}
\textsuperscript{46} Id. at 7.
\textsuperscript{47} Id. at 1.
\textsuperscript{48} Id.
\textsuperscript{49} FAR 18.202; see also OMB Memorandum, supra note 41, at 6.
\textsuperscript{50} OMB Memorandum, supra note 41, at 5–6.
\textsuperscript{51} OMB COVID-19 Memorandum 1 (2020).
\textsuperscript{52} Id.
\end{flushleft}
acquisition flexibilities, as needed.

The Memorandum further clarifies that contracting officers are typically expected to give preferences to local firms during emergencies, but that this requirement does not apply during a nationwide pandemic.

B. Swiss Public Procurement Response to COVID-19

On March 27, 2020, the two strategic procurement committees—the Swiss Coordination Group for Construction and Property Services (KBOB) and the Federal Procurement Conference (BKB)—issued recommendations for “the mitigation of the effects [of COVID-19] on the Swiss economy from a public procurement perspective.” The Recommendations are based on the Federal Council’s emergency powers, and are in force for six months after the emergency ends. While the KBOB Recommendations target public sector construction, the BKB Recommendations target the procurement of supplies and services, with a focus on medical equipment, drugs, and IT services.

The Recommendations follow two goals: first, slowing down the spread of the virus, and second, limiting the negative economic consequences, including the risk of unemployment. These goals should be achieved through coordinated agency action and by simplifying the procurement process. To achieve these goals, the Recommendations suggest the following measures:

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54 Id. at 6.
55 KOORDINATIONSKONFERENZ DER BAU- UND LIEGENSCHAFTSORGANE DER ÖFFENTLICHEN BAUHERREN (KBOB), Swiss Coronavirus Recommendations for Construction Procurement (2020); BKB, Empfehlung zur Milderung der Auswirkungen auf die schweizerische Volkswirtschaft aus Sicht von Güter- und Dienstleistungsbeschaffungen (2020).
56 Verordnung 2 über Massnahmen zur Bekämpfung des Coronavirus (COVID-19) [COVID-19 Ordinance 2], Mar. 13, 2020, SR 818.101.24, art. 7 (Switz.).
57 See KBOB RECOMMENDATIONS, supra note 55, at 2.
58 See id. at 3.
59 BKB RECOMMENDATIONS, supra note 42, at 4.
60 KBOB RECOMMENDATIONS, supra note 55, at 6.
61 Id.
i. Exhaustion of existing procurement thresholds;

ii. Use of direct awards for unforeseeable and urgent events (urgency exemption in art. 13(1)(d) Public Procurement Ordinance); \(^{62}\)

iii. Expedited contract awards through faster offer evaluation (health exemption in art. 3(2) Public Procurement Act); \(^{63}\)

iv. Extension of contract duration and increase of quantities (health exemption in art. 3(2) Public Procurement Act);

v. Extension of offer deadlines; and

vi. Grant of additional funds for delays related to COVID-19. \(^{64}\)

The Swiss government also relaxed the enforcement of procurement contracts during the COVID-19 crisis. It asked contracting agencies to refrain from enforcing fines for non-compliance, and it introduced instant payment of contractors and electronic invoicing. \(^{65}\)

C. Germany’s Relaxed Procurement Rules after the Financial Crisis

As part of the Economic Stimulus Package II, the German government decided to relax public procurement rules (Vergaberechtserleichterungen) for works \(^{66}\) and for supplies and services \(^{67}\) from January 2009 until December 2010. The government’s goal was to bring public investments more quickly into the economy. \(^{68}\) The relaxed procurement rules were designed to

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\(^{62}\) Verordnung über das öffentliche Beschaffungswesen [VöB] [Public Procurement Ordinance] Dec. 11, 1995, SR 172.056.11, art. 13, para. 1 (Switz.).

\(^{63}\) Bundesgesetz über das öffentliche Beschaffungswesen [BöB] [Public Procurement Act] Dec. 16, 1994, SR 172.056.1, art. 3, para. 2 (Switz.).

\(^{64}\) See KBOB RECOMMENDATIONS, supra note 55, at 2–4.

\(^{65}\) See id. at 2.

\(^{66}\) BUNDESRECHNUNGSSTOFHOF, BERICH ET ÜBER DIE AUSWIRKUNGEN DER V GABEREICHTSERLEICHTERUNGEN DES KONJUNKTURPAKETS II AUF DIE BESCHAFFUNG VON BAULEISTUNGEN UND FREIERVERUFELICHEN LEISTUNGEN BEI DEN BAVORHABEN DES BUNDES [REPORT ON THE EFFECTS OF THE ECONOMIC STIMULUS PACKAGE II ON CONSTRUCTION PROCUREMENTS] 9, 24 (2012) [hereinafter AUDIT REPORT ON RELAXED CONSTRUCTION PROCUREMENT].


\(^{68}\) AUDIT REPORT ON RELAXED CONSTRUCTION PROCUREMENT, supra note 70, at 3.
fulfill three goals: (1) accelerating procurement and construction processes; (2) ensuring transparency and competition; and (3) procuring at economic prices. The government provided the procurement authorities with the following measures:

i. Increased thresholds allowing agencies to use limited auctions (up to €1 million) and direct awards (up to €100,000) instead of public tenders;

ii. Use of pre–qualified company lists to select contractors;

iii. Publication of contract data after the award (ex post transparency); and

iv. Shortened procurement deadlines for EU-wide tenders.

Other than the U.S. and Swiss policies, the German procurement policies have been evaluated for their effectiveness by the German Federal Audit Office in 2012 (the Audit Report). For that purpose, the Audit Office analyzed 16,000 public construction contracts awarded by four regional construction authorities and the Federal Office for Building and Regional Planning (BBR) and around 100 supplies contracts. In the Audit Report, the German Audit Office found that while regional and federal building authorities made extensive use of the relaxed procurement rules, road and other authorities did not rely on the relaxed rules. With the relaxed procurement rules, the non–public tenders increased from forty-nine to seventy-eight percent. However, the construction authorities only made use of the flexibilities in half of the cases. The two largest building authorities reported that the relaxed procurement rules have

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69 Id.
70 Id. at 9.
71 Id. at 3; see also Ausschreibungen, BUND.DE: VERWALTUNG ONLINE, https://www.service.bund.de/Content/DE/Ausschreibungen/Suche/Formular.html?nn=4641514 [https://perma.cc/TT9Z-2P5B] (last visited Aug. 16, 2020) (Germany’s public tender database).
72 See AUDIT REPORT ON RELAXED CONSTRUCTION PROCUREMENT, supra note 66, at 10.
73 Id. at 8.
74 See AUDIT REPORT ON RELAXED SUPPLY PROCUREMENT.
75 See AUDIT REPORT ON RELAXED CONSTRUCTION PROCUREMENT, supra note 66, at 10–11.
76 Id. at 11.
77 Id.
expedited the procurement and construction process by two and eight percent respectively.\textsuperscript{78} For supplies and services, the Audit Office reported time savings of two weeks.\textsuperscript{79} The Audit Office also found that the shift from public tenders to limited auctions led to increased government spending in building construction by thirteen percent or €50–70 million.\textsuperscript{80} Due to the shift from open tenders to limited auctions, the number of offers decreased by twelve percent in building construction.\textsuperscript{81} The Audit Office further observed that procuring agencies limited competition to regional suppliers.\textsuperscript{82} One construction authority reported that the distance of companies to the construction sites decreased by twenty-seven percent between 2009–2010 (i.e. projects became more local).\textsuperscript{83} In terms of \textit{ex post} transparency, building authorities did not publish all contracts as required. As a consequence, the Audit Office feared that corruption risks increased, however, without providing quantitative data.\textsuperscript{84} Overall, the Audit Office concluded that the goals of the relaxed procurement rules were not fully met and therefore recommended not extending the policies beyond 2010.\textsuperscript{85}

III. Design of Expansionary Legal Policies—by Means of Public Procurement Law

Expansionary legal polices come in many different shapes and forms. This Part discusses three important design choices: (1) whether “one policy fits all crises;” (2) whether suspension of regulation or enforcement is more effective; and (3) whether and to what extent policies should be coordinated. Following the questions of “how to buy,” this article will dwell into the question

\textsuperscript{78} \textit{Id.} at 12.
\textsuperscript{79} \textit{Audit Report on Relaxed Supply Procurement}, \textit{supra} note 67, at 7.
\textsuperscript{80} \textit{Audit Report on Relaxed Construction Procurement}, \textit{supra} note 66, at 6.
\textsuperscript{81} \textit{Id.} at 5.
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{See id.} at 17.
\textsuperscript{84} \textit{See id.} at 8.
\textsuperscript{85} \textit{Id.} at 4.
of “what to buy,” highlighting the link between fiscal and legal policies and the importance of the different procurement sectors for macroeconomic purposes.

A. Same Remedy for Different Crises?

The procurement policies in the United States, Switzerland, and Germany were triggered by different crises: the U.S. and Swiss policies are responses to the COVID-19 crisis, and the German policies were a reaction to the financial crisis in 2008. The distinct nature of the crises is reflected in the measures the governments have chosen. The U.S. and Swiss policies provide for measures that address the health effects, such as telework, and measures that address the economic consequences of the crisis, such as expediting and increasing government spending. The German procurement policies were mostly focused on mitigating the economic effects of the financial crisis.

While it is sensible to issue different crisis-specific measures, for example health-related measures to address the specific needs of a crisis, the economic consequences that flow from different crises are often the same and ask for similar economic measures. Whether a crisis is triggered by the bursting of a mortgage bubble (financial crisis) or a pandemic (COVID-19 crisis), crises slow down economic growth, decrease liquidity, and eventually lead to higher unemployment. For example, during the financial crisis the real GDP in the United States fell nearly $630 billion (4.3%), and the unemployment rate peaked at 10% in 2009. During the

current COVID-19 crisis, the real GDP of the United States was forecast to fall at 38% in the second quarter, and the unemployment rate reached its peak of 14.7% in April 2020.87

Because economic consequences of a crisis are often the same (albeit different in their magnitude), expansionary legal policies can and should be very similar in their design.

**B. Relaxed Regulation or Relaxed Enforcement?**

Countercyclical regulation, as referred to by Masur and Posner, can take different forms: the agency can (1) relax the regulation during a downturn; (2) maintain the regulation but suspend enforcement; or (3) refrain from issuing new regulations during the downturn.88

The three expansionary procurement policies discussed above are focused on the first category: the relaxation of existing regulation. With the exception of one measure—the extension of the offer deadline (in the U.S. and Switzerland policies)—all measures were targeted towards expediting spending. The higher tender thresholds in all three policies give agencies more flexibility to expedite and increase spending. The same holds true for the extension of contracts and quantities, the shortened tender deadlines, and the fast payment requirements, as adopted in the Swiss policies. As mentioned above, the EPA chose a similar approach and relaxed the emissions requirements for companies in March 2020 to increase companies’ spending power during COVID-19.89 The relaxation of existing rules is within the bounds of the agency’s standard rulemaking powers.90 However, because rulemaking takes time—in the U.S., up to four years—91 a new regulation will often come too late to stimulate the

89 Friedman, supra note 22.
91 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-205, FEDERAL RULEMAKING: IMPROVEMENTS
economy. One way to avoid this dilemma is to preventively adopt “automatic stabilizing provisions” that will be discussed in Part IV.B.

An alternative approach to the relaxation of rules is the suspension of enforcement, also known as regulatory forbearance.\textsuperscript{92} For the suspension of enforcement, no formal rulemaking is required and agencies can act within their ordinary authority.\textsuperscript{93} The Swiss procurement policies were the only ones among the three examples that have relaxed enforcement. The KBOB Recommendations allowed federal agencies to suspend the enforcement of fines for contractors’ non-compliance with regard to time, quantity, or quality.\textsuperscript{94} Similarly, the EPA decided not to issue fines for violations of emission standards during the COVID-19 crisis.\textsuperscript{95}

Relaxing enforcement is often the faster and more flexible way to impact the business cycle. Agencies do not need to go through a lengthy lawmaking process. However, suspending the enforcement of fines will only marginally increase spending. Since nothing speaks against combining the two measures, the author suggests that future expansionary procurement policies should make greater use of suspending enforcement but limit the suspension in time to avoid abuse.

C. Coordinated Action and Centralized Authority

The expansionary procurement policies in the United States, Switzerland, and Germany applied to all federal agencies and covered all sectors. To give agencies some guidance and

\textsuperscript{92} Masur & Posner, \textit{supra} note 16, at 20.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} See KBOB RECOMMENDATIONS, \textit{supra} note 55, at 2.
\textsuperscript{95} Friedman, \textit{supra} note 22.
ensure that the policies achieve their full potential, two elements are key: first, coordination among agencies; and second, macroeconomic expertise of the agency.

**Coordination** among agencies is key to ensure the effectiveness of expansionary legal policies. But coordination does not equal uniform application. For instance, in Germany only the building authorities made use of the relaxed rules, while the road authorities and other agencies made little to no use of the exceptions.\(^\text{96}\) This article argues that it should be left to the discretion of each agency whether to apply the expansionary legal policy. For example, while promoting the production of medical supplies is a sensible measure to deal with COVID-19, the relaxation of services procurement, such as consulting or legal services, will not help address health-related needs.

With freedom comes responsibility. When applying expansionary legal policies, the agencies have to respect some boundaries. First, when an agency decides to make use of the expansionary legal policy, the agency needs to treat all suppliers fairly and equally. Equal treatment of suppliers is one of the core principles of public procurement law.\(^\text{97}\) While differential treatment of suppliers between agencies may be justified due to different mandates, suppliers of the same agency should be treated equally. Second, when an agency decides not to apply the expansionary policy, it needs to give reasons. Making the agency’s decision transparent does not only inform the public about the use of public resources, but also reduces the risk of corruption. For instance, in Germany the road authorities stated that they did not make use of the relaxed rules because open tenders would secure better prices and protection

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against corruption.\textsuperscript{98} Third, even though agencies enjoy large degree of discretion, this does not exclude coordination among agencies. On the contrary, agency coordination is crucial.

The Swiss COVID-19 Redocumentations understand coordinated actions among federal agencies as a core goal and encourage the two strategic committees—KBOB and BKB—to coordinate their actions.\textsuperscript{99} In Germany, different ministries were responsible for the implementation of the procurement relaxations. While the Federal Ministry for the Interior, Building and Community (BMI) was responsible for implementing the procurement relaxations in the public construction sector, the Federal Ministry for Economic Affairs and Energy (BMWi) was responsible for implementing the relaxed rules for the procurement of supplies and services.\textsuperscript{100} The Audit Report revealed that the two ministries were not equally strict with the implementation of the relaxed rules. While the BMWi has properly evaluated and submitted an evaluation report at the end of the term,\textsuperscript{101} the BMI has failed to conduct the necessary analyses pre– (performance audit) and post– (evaluation report) introduction of the relaxed rules.\textsuperscript{102} Would the agencies have coordinated their efforts, shared their experiences and communicated with each other, results could have been improved.

**Expertise** in macroeconomic policy is another crucial element of the expansionary legal policies’ success. While most agencies have vast sector-related and procurement-related expertise, most agency officials are lawyers who have not been trained in economics. For that reason, Listokin has suggested the establishment of a centralized Office for Fiscal and

\textsuperscript{98} **AUDIT REPORT ON RELAXED CONSTRUCTION PROCUREMENT**, *supra* note 66, at 11.
\textsuperscript{99} *See KBOB RECOMMENDATIONS*, *supra* note 55, at 6.
\textsuperscript{100} **AUDIT REPORT ON RELAXED SUPPLY PROCUREMENT**, *supra* note 67, at 5.
\textsuperscript{101} **AUDIT REPORT ON RELAXED SUPPLY PROCUREMENT**, *supra* note 67, at 5.
\textsuperscript{102} *See AUDIT REPORT ON RELAXED CONSTRUCTION PROCUREMENT*, *supra* note 66, at 4.
Regulatory Affairs (OFRA) in the United States. The new Office should be staffed not only with lawyers and regulators, but also with economists. The Office would fulfill a similar oversight function as the Office of Information and Regulatory Affairs (OIRA). Instead of overseeing the costs and benefits of prospective regulations, OFRA would review the effects of regulations on macroeconomic stability. This effort would not be the first attempt in the United States. In 1974, President Ford required that major proposals for regulations must be accompanied by a statement certifying the inflationary impact of the proposal, so called “inflation impact statement.”

Similar offices could be established in other jurisdictions. For instance, in Switzerland an office of fiscal and macroeconomic policy could either be established within the Swiss State Secretariat for Economic Affairs (SECO), which is responsible for reviewing regulatory impact assessment, or within the Federal Chancellery. At the EU level, the office could be integrated into the European Commission either as a new Directorate-General, or as part of the Regulatory Scrutiny Board, an independent supervisory body that reviews regulatory impact assessments of EU regulations. The EU Impact Assessment Guidelines of 2009 already allow agencies to consider the impact of regulations on macroeconomic stability and employment.

Hence, a centralized office for fiscal and regulatory affairs will not only gather and share macroeconomic knowledge with all agencies and therewith improve enforcement and

103 LEGAL REMEDIES TO RECESSIONS, supra note 3, at 110.
106 EUROPEAN COMM’N, IMPACT ASSESSMENT GUIDELINES 34 (2009).
performance of expansionary legal and fiscal policies. It will also help coordinate agency actions to achieve a harmonized answer to a recession.

D. Which Sector to Target?

The previous sections and the expansionary procurement policies examples are mostly concerned with the issue of how to buy, focusing on the relaxation of procurement procedures. Other important questions are what to buy, and how much to buy. These questions are closely related to fiscal policies and highlight the hybrid nature of expansionary procurement policies that include both legal and fiscal policies. This section will elaborate on beneficial sectors for expansionary procurement policies to focus on, including the public infrastructure sector, the potential for green investments, and the healthcare sector.

1. The Connex Between Legal Policies and Fiscal Stimuli

Expansionary legal policies are often coupled with fiscal policies that address structural or immediate needs. For example, the German Economic Stimulus Package II not only relaxed procurement rules, but also approved a fiscal stimulus package of €16.9 billion to be spent on education and public infrastructure. This spending mandate provided guidance to procuring agencies on what to purchase, and explained why building authorities have made use of the relaxed rules, while other agencies were more reluctant. The procurement relaxations led to an increase in construction spending of thirteen percent or €50–70 million on average. The Audit Office estimated that the spending increase would have been double (€100–140 million) if road and other authorities made use of the relaxed rules as well.

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107 German Economic Stimulus Package II, supra note 47, at 417, art. 6, § 2 (Ger.).
108 GERMAN REPORT ON RELAXED CONSTRUCTION PROCUREMENT, supra note 66, at 6.
109 Id.
Similar to Germany’s position, the Swiss COVID-19 Recommendations recognize the importance of the public construction sector and encourage federal agencies to apply procurement flexibilities in the construction sector. The Recommendations stress that the construction sector is of unique importance to the Swiss economy.\footnote{KBOB RECOMMENDATIONS, supra note 55, at 5.} It amounts to fifteen percent of the national GDP,\footnote{Id.} and federal agencies procure construction projects in the amount of CHF 20 billion every year.\footnote{Id. at 3.} To ensure the continuance of existing construction projects, the KBOB Recommendations endorse that construction sites should not be closed during the crisis, respecting the necessary health precautions.\footnote{Id.} The BKB Recommendations on procurement flexibilities for supplies and services on the other hand, focus more on health-related needs. The recommendations encourage agencies to make use of the procurement flexibilities in sectors that help mitigate the consequences of the pandemic, such as medical supplies and drugs, and that ensure the continuance of the public administration, such as telework.\footnote{BKB RECOMMENDATIONS, supra note 42, at 4.}

The U.S. procurement policies follow a similar approach. The OMB Memorandum recommends federal agencies to assess “whether contracts that possess capabilities for addressing impending requirements such as security, logistics, or other function, may be retooled for pandemic response consistent with the scope of the contract.”\footnote{OMB Memorandum, supra note 41, at 1.} This recommendation goes in line with a fiscal stimulus package issued to hospitals in the amount of $100 billion,\footnote{See Emily Cochrane & Sheryl Gal Stolberg, $2 Trillion Coronavirus Stimulus Bill Is Signed into Law, N.Y. TIMES (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/us/politics/coronavirus-house-voting.html [https://perma.cc/Y82G-CH8R].} and is

Hence, to increase the effectiveness of expansionary legal policies, they should be coupled with fiscal stimuli that target sectors of structural importance, such as public infrastructure, or sectors that are directly affected by the crisis, such as the healthcare sector.

2. \textit{Why Invest in Public Infrastructure?}


Why are public infrastructure projects so popular to stimulate the economy? First, public construction is pro–cyclical, which means that public construction is cheapest when the economy

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is weak. Second, most countries are in need of renewing or building public infrastructure, like school buildings, bridges, or highways. For example, since many years the United States is in an infrastructure crisis and in urgent need of investments into public transportation, roads, and highways. Third, public construction makes up a large part of government spending and can exert a significant impact on the economy. Aside from its sheer size and importance, input-output tables of the U.S. Bureau of Economic Analysis (BEA) show that the construction sector is a central sector in the U.S. economy and highly interconnected with other sectors. The consequence is that stimuli to the construction sector also reach connected sectors, such as cement or wood, and exacerbate the fiscal stimulus effect. Researchers at the Massachusetts Institute of Technology (MIT) found that important and highly interconnected sectors, such as the construction sector, have possible “cascade effects’ whereby productivity shocks to a sector propagate not only to its immediate downstream customers, but also the rest of the economy.”

But investments into public infrastructure also faced criticism. For instance, the shovel-ready projects under the American Recovery Act often failed. One issue was that the projects

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125 See Tim Worstall, The Reason That Shovel Ready Stimulus Didn’t Work Is That There Wasn’t
were often not shovel-ready and launched with a delay. Under the Recovery Act, most shovel-ready projects were ready to start anywhere between six months to one year. Another issue was that money ended up unspent—an example is the road project of Northern Virginia outside Washington, D.C. The reasons for these delays or missed investments are that large infrastructure projects are very complex, involve different levels of government, and need a lot of preparation work and funding.

As one solution to these problems, the author suggests to purchase repair and maintenance projects instead of new infrastructure projects. In contrast to new construction projects, repair projects can be implemented more rapidly, without the same planning effort. For that same reason, the KBOB Recommendations suggest giving priority to maintenance projects over new construction projects. The OMB Memorandum specifically mentions repair works and recommends that they can be continued on a case-by-case basis even during a lockdown. Another advantage of maintenance projects is that tender thresholds for works,

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128 See Worstall, *supra* note 125.


130 Lew & Porcari, *supra* note 120.


including repair works, are higher than for supplies and services.\textsuperscript{133} This allows procuring agencies to use more flexible and expedited procurement procedures for maintenance projects.

Investing into public infrastructure is an investment into a core sector of most economies. Due to its unique properties, such as size and centrality, expansionary legal policies that address the construction sector, especially repair and maintenance projects, will have a large effect on stimulating the economy.

3. \textbf{The Case for Green Public Procurement}

More and more public infrastructure projects and stimulus programs are concerned with the reduction of emissions and the increase of energy-efficiency. The focus on sustainable infrastructure has wide-ranging environmental consequences because buildings make up a considerable share of energy consumption—\textit{in} the EU about forty percent.\textsuperscript{134} For example, the European Recovery Plan of 2008, which was launched to help European countries recover from the negative economic consequences of the financial crisis, initiated a European energy-efficient buildings initiative. The initiative funds research that fosters green technologies and energy-efficient systems and materials in new and renovated buildings to reduce their energy consumption and CO\textsubscript{2} emissions.\textsuperscript{135} Similarly, the German Economic Stimulus Package II funds construction projects that reduce CO\textsubscript{2} emissions and improve energy-efficiency.\textsuperscript{136}

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\textsuperscript{134} Communication from the Commission to the European Council: \textit{A European Economic Recovery Plan,} at 16 n.5, COM (2008), 800 final (Nov. 26, 2008) [hereinafter \textit{A European Economic Recovery Plan}].
\textsuperscript{135} See id. at 16.
\textsuperscript{136} German Economic Stimulus Package II, \textit{supra} note 43, at 423 (Ger.).
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In the context of government purchasing, the procurement of more sustainable products and works is known as Green Public Procurement, or GPP. Countries around the world have integrated the sustainability goal in their procurement laws. For instance, one of the FAR’s socioeconomic programs is the “Sustainable Acquisition Policy,” which encourages federal agencies to advance sustainable acquisition by ensuring that ninety-five percent of new contract actions for the supply of products, services, and construction are energy-efficient and environmentally preferable.\(^\text{137}\) Similarly, the EU Public Procurement Directive of 2014 promote that the most economically advantageous tender should also include environmental and social aspects.\(^\text{138}\)

However, none of the discussed expansionary policies has promoted the procurement of sustainable projects. This article argues that expansionary procurement policies should enable increased spending into sustainable construction projects and technologies. Sustainable projects are often disfavored in public procurement because their costs are usually higher than for traditional construction projects. For that reason, the EPA has relaxed emission standards and enforcement of fines during the COVID-19 pandemic.\(^\text{139}\) But, in the context of public procurement, increased environmental standards are not a cost borne by the companies; contractors are adequately compensated for the extra cost of sustainable projects by the government. In fact, the increase of spending is a major goal of expansionary legal policies. Therefore, investing public resources in green projects is a sensible use of taxpayers’ money and supports macroeconomic stability. For the same reasons, Listokin suggested that the Keystone

\(^{137}\) FAR 23.103(a).
\(^{139}\) Friedman, supra note 22.
pipeline could have heightened environmental building standards and therewith increased jobs and reduced environmental risks at the same time.\footnote{Law and Economics of Recessions, supra note 15, at 798.}

Hence, expansionary procurement policies should allow agencies to give preference to environmental-friendly projects during recessions, instead of relaxing environmental regulation.

4. **Room for Crisis-Specific Policies: The Healthcare Sector**

Despite the strong emphasis on public infrastructure, expansionary procurement policies should not be limited to this one sector. For instance, the current health crisis triggers different needs than a financial crisis. In its recommendations on mitigating the economic effects of COVID-19 on supplies and services procurement, the Swiss BKB recommends to procure medical supplies through expedited procurement procedures.\footnote{BKB RECOMMENDATIONS, supra note 42, at 4.} In the United States, the federal government has awarded dozens of government contracts for millions of dollars to procure medical supplies during the past weeks.\footnote{Emma Loop, The US Government Is Spending Millions of Dollars to Respond to the Coronavirus Crisis, BUZZFEED NEWS (Mar. 17, 2020), https://www.buzzfeednews.com/article/emmaloop/trump-federal-contracts-coronavirus-respirators-labs [https://perma.cc/2SSW-QQ3D].} A search on the U.S. government’s spending database with the keyword “Coronavirus” reveals that the HSS awarded contracts of $800 million in value as of June 2020.\footnote{Spending by Prime Award, USASPENDING.GOV, https://www.usaspending.gov/#/search/7e599b8fca9d0e155f31a3e9adadcf66 [https://perma.cc/22ND-4F89] (last visited Aug. 6, 2020).}

Hence, different crises require different stimuli. Limiting the expansionary procurement policies to specific sectors is not advisable. Depending on the type of crisis, government agencies should be free to decide from which sector to procure. While neither of the three policies has limited the scope of application, the U.S. and Swiss policies have encouraged...
agencies to either increase spending in the construction sector, or the healthcare sector. For example, the Swiss procurement policies recommend using flexible procurement measures for both construction and medical supplies as a response to COVID-19. Similarly, the OMB Memorandum stresses the option of federal agencies to retool contracts that concern logistics and security and encourages construction work to continue.

To guarantee some flexibility to government agencies in addressing the specific needs of each crisis, expansionary legal policies should not be limited to the construction sector. But to give agencies some guidance, expansionary legal policies can encourage investment into certain sectors that are in distress, such as the healthcare sector.

IV. Application of Expansionary Procurement Policies

Expansionary legal policies in public procurement bring many advantages, but they also face challenges. This Part addresses the most pressing counterarguments. First, it will address potential conflicts between the goal of macroeconomic stability and traditional procurement goals, such as efficient use of taxpayers’ money, free competition and prevention of corruption, and suggest possible safeguards to reduce those risks. Then it will address two distinctive features of expansionary legal policies that give them the unique advantage over traditional macroeconomic instruments: automatic stabilization provisions and economic triggers.

A. Conflicts Between Macroeconomic Stability and Procurement Goals and Possible Solutions

Most public procurement laws around the world have similar procurement goals, including efficient use of public resources, open and fair competition, and transparency. Over

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144 See generally KBOB RECOMMENDATIONS, supra note 55, at 4–5; see also BKB RECOMMENDATIONS, supra note 42, at 4.
145 OMB Memorandum, supra note 41, at 1.
the years, many procurement laws have created socioeconomic exceptions to these goals, including the promotion of small businesses, green procurement and national acquisitions. In this section, the article will address (1) the tension between macroeconomic stability and microeconomic efficiency; (2) the issue of limited competition; (3) the safeguards to increase transparency and prevent corruption; and (4) the mutually beneficial relationship between macroeconomic stability and socioeconomic programs.

1. Macroeconomic Stability Versus Microeconomic Efficiency

All three expansionary procurement policies have one goal in common: expediting and simplifying procurement processes to increase public spending. This goal is in line with the idea of fiscal policy, which aims at increasing government spending during economic downturns. The different procurement examples discussed here have implemented this goal by means of shortened procurement deadlines and increased tender thresholds. Increased thresholds allow procuring agencies to use more flexible and faster procurement methods, such as auctions with a limited number of participants (limited auctions), direct awards without call for competition, and other simplified acquisitions.

The U.S. and German procurement policies also mention the procurement goals of fiscal prudence and procurement at economic prices to maximize taxpayers’ money.146 This goal of cost-efficiency can conflict with the goal of macroeconomic stability. While the goal of cost-efficiency aims at reducing transaction costs and keeping prices low to save taxpayers’ money, the goal of macroeconomic stability is increasing and expediting public spending to stimulate the economy.147 The German Audit Office has struggled to balance these competing goals.

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146 Id. at 2; Audit Report on Relaxed Construction Procurement, supra note 66, at 3.
Ultimately, the Audit Office has given priority to the microeconomic goal of efficiency over the goal of macroeconomic stability and has recommended the discontinuance of the relaxed procurement rules.¹⁴⁸ This outcome is both comprehensible and surprising. It is comprehensible because the Audit Office’s mandate is to review government spending with a view to reduce spending and save taxpayers’ money. It is surprising from a macroeconomic perspective because the very idea of relaxing procurement rules was to expedite and increase spending through public purchases.

The question of which goal should prevail is a difficult one and falls ultimately under the discretion of the respective government agency. The author argues that this decision should be time dependent. In normal economic times, efficiency (and other goals) should continue to prevail. But during times of economic downturn and recession, agencies should be allowed to give preference to macroeconomic stability and compromise on cost-efficiency. Agencies should be able to increase spending for expansionary legal policies to employ their desired effects. However, following the goal of macroeconomic stability does not always mean an efficiency loss. While expedited procurement procedures may increase tender prices and lead to lost savings, they also shorten the tender process and thereby reduce transaction costs.¹⁴⁹ To be clear: the government should not increase spending by paying higher prices to contractors, but by purchasing more and faster. However, some efficiency losses along the way of increased and

¹⁴⁸ See AUDIT REPORT ON RELAXED CONSTRUCTION PROCUREMENT, supra note 66, at 27.
¹⁴⁹ See ORGANISATION FOR ECON. COOPERATION & DEVELOPMENT, PROGRESS MADE IN IMPLEMENTING THE OECD RECOMMENDATION ON ENHANCING INTEGRITY IN PUBLIC PROCUREMENT 16 (2012).
expedited spending can be justified with the goal of preventing the economy from falling into a recession, leading to millions of unemployed people.

For that reason, this article argues that a balancing test should be applied, and, when increased spending outweighs potential efficiency losses, priority should be given to the goal of macroeconomic stability. The German Audit Office reported that the relaxed procurement rules have led to increased construction spending of thirteen percent, mostly due to increased prices and reduced competition.150 This efficiency loss would need to be weighed against the acceleration and increase in public procurement spending due to the relaxed procurement rules, and the jobs gained through these flexibilities. Only when a net benefit results should preference be given to macroeconomic stability over microeconomic efficiency. This calculation can either be performed based on past data (ex post), as the German example, or be done prospectively (ex ante), similar to regulatory cost-benefit analyses performed by the OIRA.

2. Limited Competition: An Exception During Recessions

Another conflict between macroeconomic stability and traditional procurement goals is reduced competition. Less competition is often the result of more flexible procurement procedures such as limited auctions or direct awards. In Germany, the Audit Office found that, due to the relaxed procurement rules, the number of offers in building construction decreased by twelve percent.151 The average number of offers received by German building authorities in open tenders was double (eight offers) compared to limited auctions (four offers), and almost three times higher than for direct awards (three offers).152 To limit the negative consequences of decreased competition, German building authorities have increased the required minimum

150 See Audit Report on Relaxed Construction Procurement, supra note 66 at 6.
151 Id. at 5.
152 See id. at 32 (Anlange V).
number of bidders for limited auctions. The German Audit Office has recognized this measure but still, the number of offers in limited auctions will remain lower than in public tenders. Is this bad, and can this flaw be excused during economic crises?

It is known that in traditional competition generally yields higher prices, but to this general rule some limitations apply. McAfee and McMillan found that with many bidders, transaction costs can be high and reduce prices. In public tenders in the EU, the overall average number of bids is five-point-four. For the procurement of supplies and services, the German Audit found that on average agencies invited four and a half companies to submit a bid under standard procurement rules and four companies after the relaxation of procurement rules. This also explains why some procurement laws have set the required minimum number of participants for limited auctions at three (Switzerland) or five (EU). Also, data has shown that the lowest offer price often ends up being a higher final price than the second or third lowest offer price. The reason is that low bids are often unrealistic and need numerous change orders (ex post adaptations) during the course of the project.

153 See id. at 17.
156 AUDIT REPORT ON RELAXED SUPPLY PROCUREMENT, supra note 67, at 6.
157 Public Procurement Ordinance, supra note 62, art. 35, para. 2 (Switz.).
160 See id.
Even apart from these limitations, the benefits of free competition need to be balanced against the benefits of macroeconomic stability, increased growth, and lower unemployment. The cost of an increased tender price needs to be weighed against the benefit of prevented job losses. In the case of economic emergencies, when governments have to act fast and push money into the markets, some sacrifices, such as decreased competition, are often the better alternative than facing the long-term economic consequences of a recession.

3. Safeguards to Increase Transparency and Prevent Corruption

Expansionary legal policies can lead to less transparency and an increased risk of corruption and collusion. The German Audit Office has identified limited competition and prequalified bidder lists as a potential source of increased corruption and collusion risks.\textsuperscript{161} For limited auctions and direct awards, there is no call for competition—the agency invites suppliers directly. This eliminates \textit{ex ante} transparency. Prequalified bidder lists are lists of prospective bidders who are prequalified by the procuring agency as to material, equipment, or services and from which the agency can choose when applying negotiated procurement.\textsuperscript{162} The value and legitimacy of these lists is recognized and well known in the American procurement system.\textsuperscript{163} Prequalified bidder lists do not only expedite the process and save administrative costs; they also guarantee high-quality bidders. However, the German Audit Office saw an increased risk of corruption and collusion associated with these lists.\textsuperscript{164} The procuring officer selecting the companies for the list could favor some companies for private gain, or the publication of the list could motivate competitors to collude with listed companies.

\textsuperscript{161} \textit{Audit Report on Relaxed Construction Procurement}, supra note 70, at 20.
\textsuperscript{163} See, \textit{e.g.}, FAR 9.201.
\textsuperscript{164} See \textit{German Report on Relaxed Construction Procurement}, supra note 66, at 19.
To increase transparency and limit the risk of corruption, different precautionary measures exist. One is *ex post* transparency. Even though non-public tenders limit transparency before tendering, transparency *after* the contract award is still available. Under the German procurement relaxations, procurement agencies were required to publish the awarded contracts, disclosing the winning bidder and price in the public procurement data base.\(^{165}\) This *ex post* transparency brings two advantages. First, it creates pressure on the winning bidder to offer a similar price as when in a competitive setting.\(^{166}\) Second, *ex post* transparency allows the public and competitors to scrutinize and challenge a potentially corrupt outcome.

Other measures to limit the risk of corruption are *internal controls*. The first one is risk analysis. According to the German Directive on Corruption Prevention in the Federal Administration, agencies must perform a systematic analysis, assessing increased risks and weaknesses whenever administrative procedures change.\(^{167}\) The BMI was supposed to conduct a risk analysis before applying the relaxed procurement rules, but failed to do so.\(^{168}\) To avoid such failures, this article suggests a second layer of protection: *external controls*. The administrative measures should be regularly monitored and reviewed by an independent supervisory authority, such as the German Audit Office, or an institutionalized Office for Fiscal and Regulatory Affairs, as discussed in Part III.C.

Another internal control measure is double verification. The German Public Procurement Handbook requires that one procuring officer must select qualified firms, and a second officer

\(^{165}\) See id. at 3.

\(^{166}\) See id. at 18.


\(^{168}\) AUDIT REPORT ON RELAXED CONSTRUCTION PROCUREMENT, *supra* note 66, at 4.
must review and amend this selection. The German Audit Office found that agencies changed the list of selected companies in approximately thirty percent of the cases, and found this number to be insufficient. The author disagrees with the evaluation of the Audit Office: first, changing one third of the companies on the list seems like a decent effort, and second, it is not the percentage change of the list that prevents against corruption, but the verification through a second official. For that matter, this article recommends adopting the double verification system for expansionary procurement policies to safeguard against corruption during economic crises.

Lastly, to avoid collusion among companies, the prequalified bidder list could be for internal use only and not made public. To avoid opportunism, the list of companies could be regularly reported and reviewed by an oversight agency. For example, the BMI has asked federal construction authorities to present the list of selected companies every six months.

The combination of ex post transparency and internal and external controls should provide sufficient safeguards to reduce the risk of corruption and make up for the reduction of ex ante transparency in exchange for increased macroeconomic stability during recessions.

4. Macroeconomic Stability and Socioeconomic Programs

To reflect socioeconomic needs, most public procurement laws have created exceptions to the traditional procurement goals. Well known socioeconomic programs include small business programs, labor and safety standards, green procurement, and national acquisitions (in the United States known as “Buy American”). Labor and safety standards should not be

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170 See AUDIT REPORT ON RELAXED CONSTRUCTION PROCUREMENT, supra note 66, at 20.
171 Id.
compromised, not even during economic downturns. The discussed procurement policies in the United States and Switzerland have urged that work during COVID-19 should only be continued if health and safety of the workers can be ensured.\textsuperscript{172} In the previous section, this article discussed the potential of expansionary legal policies to foster sustainable projects. This section delves into the relationship between macroeconomic stability and the promotion of local and national businesses.

In most countries, small businesses play an important role in the economy. Small businesses employ about half of America’s non–government workers, and a wave of reductions or closures would quickly cascade through the national economy.\textsuperscript{173} To avoid the closure of small businesses, governments around the world have supported them with fiscal relief programs during the COVID-19 crisis. In March 2020, as part of the $2.2 trillion stimulus package, the U.S. Senate approved loans to small businesses in the amount of $504 billion.\textsuperscript{174} In April 2020, the Senate passed another $500 billion relief package for small businesses after the first package quickly ran out of funding,\textsuperscript{175} and extended it until early August 2020.\textsuperscript{176}

In addition to these fiscal reliefs, public procurement laws know set-asides for small businesses. For example, the FAR has set-asides for small businesses with the purpose “to

\textsuperscript{172} See OMB Memorandum, supra note 41, at 4; see also KBOB RECOMMENDATIONS, supra note 59, at 3.
\textsuperscript{175} Tankersley et al., supra note 7.
award certain acquisitions exclusively to small business concerns.”\textsuperscript{177} Similarly, the EU Public Procurement Directive of 2014 increased access for small businesses to the public procurement market by dividing contracts into lots and decreasing documentation requirements.\textsuperscript{178} These exceptions apply during normal economic times. For emergency acquisitions, procurement laws often increase the support of small businesses. For example, the FAR allows the government to award contracts to small businesses on a sole-source basis.\textsuperscript{179} When the President declares an emergency under the Stafford Act, the FAR also requires preference of local firms, either in the form of local area set asides or an evaluation preference.\textsuperscript{180} The OMB Memorandum specifically addresses the preference and set-aside of local firms.\textsuperscript{181} However, because the COVID-19 crisis is nationwide, there is no specific locally affected area, and therefore the OMB saw no action required to create preferences for local firms.\textsuperscript{182} In the German Audit Report, one construction agency reported that they were taking into consideration mostly local companies during the financial crisis, while another agency limited direct awards to companies within a radius of fifty kilometers.\textsuperscript{183} As a consequence, the average distance from the company to the construction site decreased by twenty-seven percent.\textsuperscript{184} The German Audit Office has criticized the increase of local acquisitions because it limits free competition.\textsuperscript{185}

\textsuperscript{177} FAR 19.501(a)(1); FAR 19.1401(b); FAR 19.1500(b); Small Business Act, 15 U.S.C. § 637(d) (2018).
\textsuperscript{179} FAR 18.114.
\textsuperscript{180} FAR 18.203.
\textsuperscript{181} OMB Memorandum, supra note 41, at 6–7.
\textsuperscript{182} Id.
\textsuperscript{183} AUDIT REPORT ON RELAXED CONSTRUCTION PROCUREMENT, supra note 66, at 17.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
However, fostering small businesses, even at the expense of limiting competition, can be justified during economic downturns. To avoid losing a large, productive part of the economy, agencies should be able to purchase from local firms more extensively during recessions. However, when the crisis is nationwide or even global, local set-asides are less justified. If there is a national crisis, agencies should not limit their acquisitions to local firms. Similarly, the small-business loan program was issued on a nationwide basis and was not limited to certain local areas.

National acquisitions limit acquisitions to domestic firms and exclude foreign suppliers from competition.186 This regulation goes against the international WTO-Government Procurement Agreement, signed in 1994 by the United States and EU member states. The WTO Agreement promotes free competition and non–discrimination of foreign suppliers.187 While the exclusion of foreign suppliers is concerning during normal economic times, there is a case to be made for national acquisitions during recessions and economic downturns. Expansionary monetary and fiscal policies are focused on stimulating the national economy. While the Fed is buying corporate bonds from American firms,188 the ECB is adjusting interest rates in the EU zone.189 To overcome the economic sequences of COVID-19, Congress approved a fiscal

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stimulus program of $2 trillion to support U.S. businesses and households,\(^{190}\) while the German government was providing fiscal stimuli to support the German education system and construction sector after the financial crisis.\(^{191}\)

Because fiscal policies are limited to the national economy, expansionary legal policies—which are a hybrid between fiscal and legal policies—follow a similar logic. While competition between countries should not be limited during normal economic times, the focus of expansionary procurement policies to national acquisitions and national interests is more justified during economic downturns.

**B. Automatic Stabilization Instead of Emergency Powers**

The three procurement policies discussed here are discretionary policies. In macroeconomics, discretionary policy is an economic policy that is based on the *ad hoc* judgement of policymakers, as compared to a policy that is set by predetermined rules.\(^{192}\)

The U.S. and Swiss procurement policies both rely on emergency powers. The emergency procurement flexibilities of the OMB Memorandum rely on the President’s emergency declaration under the Stafford Act.\(^{193}\) Similarly, the Swiss procurement policies rely on the COVID-19 Ordinance,\(^{194}\) which was issued by the Federal Council based on its emergency powers under the Epidemics Act.\(^{195}\) These emergency powers trigger exceptions


\(^{191}\) German Economic Stimulus Package II, *supra* note 43, at 417, art. 6, § 2 (Ger.).


\(^{194}\) COVID-19 Ordinance 2, *supra* note 60.

\(^{195}\) Epidemiengesetz [Epidemics Act], Sept. 28, 2012, SR 818.101, art. 7 (Switz.).
from the regular rules. For example, under “Emergency Acquisition Flexibilities,” the FAR allows for an increase in the simple acquisition threshold, similar as suggested in the OMB Memorandum.\textsuperscript{196} The Swiss Public Procurement Act allows for an exemption of the public procurement rules to protect human health and life,\textsuperscript{197} and for direct awards in case of unforeseeable and urgent events.\textsuperscript{198}

An alternative to give procuring agencies more discretion to react to economic crises is to include macroprudential stability into the procurement goals. One way to achieve this, is to extend the meaning of efficiency to also include macroeconomic efficiency. Efficiency in the context of public procurement is traditionally understood as microeconomic or cost-efficiency to save taxpayers’ money. This extension could either be done by the judiciary by interpreting the law or by the legislator. Another, cleaner approach would be to include macroprudential stability as a new procurement goal. This would allow procuring agencies to more flexibly react to economic crises by increasing and expediting spending, without the use of emergency powers. This addition would mean a change of law, going through the ordinary lawmaking process.

Because expansionary legal policies based on emergency powers and the goal of macroeconomic stability allow for much agency discretion, they can lead to increased risks of corruption. A response to limit government intervention is regulation that is automatically triggered by economic emergencies—hereinafter referred to as “automatic stabilization provisions.” Automatic stabilization provisions are a regulatory version of automatic stabilizers.\textsuperscript{199} In macroeconomic policy, automatic stabilizers are mechanisms that are triggered

\textsuperscript{196} FAR 18.201.

\textsuperscript{197} Public Procurement Act, \textit{supra} note 63, art. 3, para. 2 (Switz.).

\textsuperscript{198} Public Procurement Ordinance, \textit{supra} note 66, art. 13, para. 1 (Switz.).

\textsuperscript{199} Masur & Posner, \textit{supra} note 16 at 21.
without government intervention. The most prominent examples of automatic stabilizers are income taxes and unemployment benefits, which increase or decrease automatically depending on the economic situation.  

For automatic stabilization provisions, the author sees two potential uses in public procurement law: first, provisions that automatically double procurement thresholds, and second, provisions that cut procurement deadlines in half during economic crises. These two provisions are inspired by the procurement policies of the United States, Germany, and Switzerland, but exclude the discretionary element by adding an automatic trigger. Procurement thresholds have often been increased (see U.S. emergency procurement flexibilities), which gives agencies more discretion in applying more flexible procurement procedures. The second idea to cut procurement deadlines is borrowed from the German approach, which shortened procurement deadlines by a third.

Such automatic stabilization provisions have two major advantages: first, they are adopted through the agencies’ standard rulemaking process before the emergency situation occurs, respecting the democratic process, and second, they generate greater independence from government intervention, and are therefore less prone to corruption. For that matter, the author highly recommends the adoption of such automatic stabilization provisions into regular procurement laws, rather than including a new procurement goal.

C. Economic Triggers to Limit Agency Discretion

Timing is one of the most critical and difficult aspects of discretionary macroeconomic policies. If the regulator relaxes procurement rules too early, the government may face political

\[200\] Id. at 7–8.
\[201\] OMB Memorandum, supra note 41, at 2.
\[202\] See AUDIT REPORT ON RELAXED CONSTRUCTION PROCUREMENT, supra note 66, at 10.
pushback. If regulation is suspended too late when the economy has already recovered, the stimulus effect vanishes. Even central banks struggle with the timing of expansionary monetary policies.\textsuperscript{203} In Germany, the government decided to relax its procurement rules in January 2009. It acted shortly after the financial crisis started and when the Great Recession began. During the COVID-19 crisis, governments acted even faster, adopting policies in the midst of the crisis. The fast reaction of governments may render the COVID-19 policies even more effective than Germany’s policies. But the question of whether governments acted fast enough to prevent a viral recession remains and only the future will tell.\textsuperscript{204}

Another important aspect of expansionary legal policies is duration. In Germany, the relaxed procurement rules were in force for a period of two years until December 2010. The German Finance Ministry decided not to extend the rules beyond 2010 because the rules failed to achieve the set goals.\textsuperscript{205} The Swiss government decided to relax its rules for six months after the emergency situation ended.\textsuperscript{206} In the United States, the emergency procurement flexibilities were in force until July 2020.\textsuperscript{207} The trade-off is between limiting potential corruption on the government side and giving agencies enough time to implement the policies. According to the German Audit Office, the relaxation of the procurement rules for two years might have increased risks of corruption and collusion.\textsuperscript{208} At the other end of the spectrum are OMB’s emergency procurement flexibilities, which are only in force for approximately three months.\textsuperscript{209} A period of

\textsuperscript{203} See Masur & Posner, supra note 16, at 27.
\textsuperscript{205} AUDIT REPORT ON RELAXED CONSTRUCTION PROCUREMENT, supra note 66, at 27.
\textsuperscript{206} KBOB RECOMMENDATIONS, supra note 55, at 6.
\textsuperscript{207} OMB Memorandum, supra note 41, at 7.
\textsuperscript{208} See AUDIT REPORT ON RELAXED CONSTRUCTION PROCUREMENT, supra note 66, at 19.
\textsuperscript{209} OMB Memorandum, supra note 41, at 7.
three months seems rather short, especially in the context of government procurement where both the government and contractors need to adjust to the new situation. Furthermore, most public projects, even when using expedited procedures, will take at least two to three months until work can begin.\textsuperscript{210} Relying on past examples and considering the gravity of the current economic downturn, this article argues that expansionary procurement policies should be in force between six months (the Swiss example) to one year (not exceeding the German experience).

To create more independence from government action, expansionary legal polices can rely on “economic triggers.” The dependence of public procurement rules from economic values is not foreign. In many national procurement laws, different tender thresholds trigger different procurement procedures and legal instruments. Masur and Posner mentioned three economic triggers they saw apt for use of countercyclical regulation: (1) unemployment rate, (2) inflation rate, and (3) interest rate.\textsuperscript{211}

Relying on interest rates brings different advantages and drawbacks. First, interest rates are relatively easy to determine. Central banks publish them on a daily basis. In a world with continuous low interest rate, the attachment of regulation to a zero-interest rate would give procurement agencies a lot of leeway and time to apply expansionary legal policies. The risk is that this freedom may be abused by making use of these procurement flexibilities even during normal economic times. Another disadvantage is that even interest rates are set by the government, i.e. central banks, which again does not eliminate the discretionary element.

\textsuperscript{210} Estimations based on interviews with Swiss procurement officers: specification of government needs (two weeks); tendering of contract (two weeks); contract negotiations and specifications (two weeks); contract conclusion and project preparation (two weeks); start of project.
\textsuperscript{211} Masur & Posner, \textit{supra} note 16, at 27.
Relying on inflation rates would not be of much help either. While inflation rates were a good and solid indicator for the stability of an economy, this has changed over the past few years. Historically, low inflation rates often went along with high unemployment.\textsuperscript{212} This no longer holds true. The current economic situation after the financial crisis is characterized by deflation and high unemployment.

Relying on unemployment rates proves to be the best option. Other than interest rates, the unemployment rate is not set by policymakers, but is the result of the employment market. Currently, the unemployment rate is the most solid indicator for the economic situation. When unemployment is high, the economy is in a downturn or recession—depending on the level of unemployment. Because the unemployment rate has a large spectrum, the government can decide whether expansionary legal policies should be already triggered when the economy is in a downturn (e.g. seven percent unemployment rate), or only when the economy is in a recession (e.g. ten percent unemployment rate). To make sure that the unemployment rate reflects a sudden increase in unemployment, and not only the difference to the natural unemployment rate,\textsuperscript{213} the expansionary legal policy should be triggered when the unemployment rate is a multiple of the previous month.

During the COVID-19 crisis in the United States the unemployment rate has peaked in April with 14.7%\textsuperscript{214}—which is almost five times higher than in the previous month’s rate (4.4%)


\textsuperscript{213} When the economy is growing at a steady, sustainable pace, cyclical unemployment is zero and the unemployment rate is roughly equal to the sum of structural unemployment and frictional unemployment. See Lida R. Weinstock, Cong. Research Serv., IF10443, \textit{Introduction to U.S. Economy: Unemployment} (July 7, 2020).

\textsuperscript{214} Cong. Budget Office, \textit{supra} note 87, at 3.
in March 2020).\(^{215}\) For example, the procurement flexibilities—such as increased tender thresholds or shortened tender deadlines—could be triggered by an increase of the employment rate by three times, compared to the previous month. This economic trigger would eliminate the agencies’ discretion to a large degree of and thereby limit the risk for corruption.

V. **Conclusion**

Expansionary legal policies are an effective complement to the two traditional macroeconomic instruments of monetary and fiscal policy. Expansionary legal policies are particularly valuable during liquidity traps where interest rates are close to zero and monetary policy is less effective. Stimulating the economy by means of regulation is particularly sensible in fields that are highly regulated and have a considerable economic impact. Public procurement is one of these fields.

In this article, the author discusses three examples of expansionary procurement policies—two recent examples from the United States and Switzerland in response to COVID-19 and one example from Germany as a response to the financial crisis in 2008. While the three procurement policies helped specify and mark the contours of expansionary legal policies in the context of public procurement, none of them were perfect and all can learn from each other. The author has critically analyzed the design, application and, where possible, the effects of these policies and came to the following conclusions.

While the origins of economic crises differ—COVID-19 or mortgage bubble—, the expansionary legal response to “cure” recession can be applied universally, to any kind of future economic crisis. The reason is that, independent from the origin, the economic consequences are

often very similar. To target the policies to specific sectors, procurement agencies can expedite certain purchases, like medical supplies or public infrastructure, depending on the specific needs of the current crisis. But rather than limiting the policies to one sector, it should be left to the discretion of procuring agencies to determine in which sector to apply expansionary legal policies. An impactful sector that is often worthwhile investing is public infrastructure. This sector is not only in urgent need for improvements, but also has two unique features. First, public infrastructure is highly interconnected to other sectors, which allows stimuli to propagate across the economy, and second, public infrastructure allows the integration of environmental requirements. However, to the vast discretion of agencies two important limitations apply: agency coordination and macroeconomic expertise. To achieve more tuned and macroeconomically informed decisions, Listokin has suggested a centralized Office for Fiscal and Regulatory Affairs in the United States. Establishing such hubs of macroeconomic and legal experts who can transfer knowledge to different agencies would be equally beneficial in other jurisdictions that adopt countercyclical regulation.

To allow procurement agencies to better react to economic crises, this article discussed including the goal of macroeconomic stability into procurement laws. However, this goal conflicts with traditional procurement goals, such as cost-efficiency, free competition, and transparency. To decide which goal to preference during economic downturns, agencies should apply a balancing test, evaluating the cost and benefits of traditional procurement goals versus macroeconomic stability. In addition to this test, different measures can be put into place to limit the risk of corruption during economic downturns. Legal safeguards include the publication of awarded contracts in the public procurement data base (ex post transparency), double verification of prequalified bidder lists, internal risk analyses of procurement flexibilities, and external
controls through an independent supervisory authority. Yet, not all procurement goals are in conflict with macroeconomic stability. Many socioeconomic programs are compatible with macroeconomic policies. In times of economic crisis, there are set-asides for small businesses, and Buy American rules allow procuring agencies to concentrate on national purchases and relax rules for local and national businesses in distress—along with fiscal stimulus programs.

Aside from agency discretion, another difficult element of expansionary legal policies is timing. When and for how long expansionary policies should be in force is a prognostic and challenging task, even for central banks. Because governments often struggle with the optimal timing and face the risk of corruption, this article suggests the use of two features: automatic stabilization provisions and economic triggers. Examples of such automatic stabilization provisions are the automatic increase of tender thresholds or the cut of tender deadlines, depending on the economic situation. The major advantage of such provisions is that they are triggered independently from government intervention and rely solely on economic triggers. For countercyclical regulation, the author suggests relying on employment rates as economic trigger. Employment rates are not set by policymakers, but reliably reflect the economic situation. Hence, to eliminate the discretionary element of expansionary procurement policies, the flexibilities should be triggered when a multiple, for example three times, of the previous month’s unemployment rate is reached.