Legal Aspects of Public Procurement: Revisited

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by

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K. Buffington and M. Flynn, *The Legal Aspects of Public Purchasing, 2d Ed.* (2007)

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Preface

This supplement was prepared for a one-hour workshop, *Legal Aspects of Public Procurement: Revisited*, facilitated at the 2017 NIGP Forum in Salt Lake City, Utah.

This supplement provides possible resources for attendees in the workshop to learn about recent legal developments, with the NIGP textbook, K. Buffington and M. Flynn's *Legal Aspects in Public Purchasing*, used as a framework. Content has been included, for example, about current legal issues in requests for proposals and cooperative procurement.

The supplement is organized according to the textbook chapters. The topics selected for inclusion in this supplement are considered of particular interest for public procurement practitioners and instructors in the *Legal Aspects* course.

One helpful, recent development has been the availability of published judicial opinions on-line. Online repositories of opinions include: findlaw.com; leagle.com; and law.justia.com. The style <collegiate athletes v. associated press> in an internet search often is adequate to find the full text of recent cases.

As I always advise in my teaching, nothing here is a substitute for legal advice. State laws differ, and this supplement (like the textbook) is not a complete survey of the law. The cases are intended to be examples that students and instructors might want to use to discuss concepts and even engage their counsel.

Any comments or questions regarding this supplement should be addressed to Richard Pennington, RPennington@NASPOValuePoint.org.

Chapter 1: Essential Principles and Structure of the United States Legal System

Statutory Law Governing Public Records (p. 9)

States' laws vary with respect to coverage under their open records or freedom of information statutes.

Approaches to exemptions from disclosure vary also. The Colorado Open Records Act is illustrative. It exempts from disclosure "trade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data."[1] Information is confidential under CORA if disclosure of financial information would be likely either to: (1) impair the government's future ability to gain necessary information; or (2) cause substantial harm to the competitive position of the person providing the information. Information is not per se unprotected simply because a bid is submitted. In Colorado, the second prong of the test applies to information submitted in connection with bids and proposals, and the contractor bears the burden of overcoming the presumption in favor of disclosure.[2]

Florida exempts trade secrets from disclosure, but a "private party cannot render public records exempt from disclosure merely by designating material it turns over to a governmental agency confidential."[3] In Florida, data that includes significant commercial/financial information, supplier lists, and customer lists may qualify as trade secrets.[4]

Montana has taken an expansive view, probably a minority view, regarding proposals submitted in a request for proposal. Under the state constitution, all records held by a public entity are presumed to be open for inspection to the public, including trade secrets that may have been provided to a government agency.[5] The reach of the presumption has been extended to proposals submitted in response to an RFP. "[W]e conclude that the proposals submitted by private vendors to the Department's screening and evaluation committee are documents of a public body or agency."[6]

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[1] C.R.S. § 27-72-204(3)(a)(IV). See Steven M. Masiello and Jennette C. Roberts, "Protecting Confidential Information Submitted in Procurements to Colorado State Agencies," 34 *Colo. Lawyer* 67 (January 2005) (providing an analysis of the risks posed by CORA and how companies doing business with Colorado should proceed to maximize protection of proprietary data).

[2] *International Broth. Of Elec. Workers Local 68 v. Denver Metropolitan Major League Baseball Stadium Dist.*, 880 P.2d 160 (Colo. App. 1994).

[3] *James, Hoyer, Newcomer, Smiljanich, & Yanchunis, P.A. v. Rodale, Inc*., 41 So. 3d 386, 387 (Fla. Dist. Ct. App. 2010) (affirming that compilations of information, including customer lists and purchasing data, qualify as trade secrets).

[4] *Id.*

[5] *Great Falls Tribune v. Montana Pub. Serv. Comm'n*, 82 P.3d 876 (Mont. 2003).

[6] *Great Falls Tribune Co. v. Day*, 959 P.2d 508 (Mont. 1998).

Chapter 2: The Fundamentals of Procurement Law and Procurement Authority

Sources of Public Contract Law (pp. 23, 30)

Public Works. Many states' procurement codes treat public works different from other goods and services procurements.[1] Colorado's Construction Contracts with Public Entities Act covers "public entities," defined as "this state or a county, city, city and county, town, or district, including any political subdivision thereof."[2] The statute limits terms and conditions in construction contracts. For example, "no damage for delay" clauses are declared void by the statute. The statute also requires progress payments of 95% of calculated value of completed work on public projects in excess of $150,000.[3]

Contractors cannot file liens on public property. In lieu of the availability of liens, statutes may require payment and performance bonds and prescribe a process for release of retained funds. These provisions often apply both to public works contracts by the state and local governments. Like Colorado, other states also prohibit no-damage-for-delay clauses.[4]

Preferences. There is a wide range of preferences in state and local government procurement: small business, disadvantaged or historically underutilized business, sustainable procurement practices, local content or Buy American, local business. So, it's impossible to generalize about the content of preferences generally.

Reciprocal preferences, on the other hand, are common among states. Reciprocal preferences mirror preferences given by other states to local bidders. When a contract for commodities or services is awarded, a resident bidder may be allowed a preference against a nonresident bidder equal to the preference given or required by the state in which the nonresident bidder resides.[5] In Colorado, when it is determined that compliance with residency requirements may cause denial of federal moneys, the residency provision may be suspended.[6]

Cooperative Procurement (pp. 31, 33, 36)

There are a variety of cooperative types, and the authority of a public entity to participate in a cooperative may be a function of the particular cooperative structure.

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[1] See, e.g., *Waste Management of Louisiana v. Consolidated Garbage Dist. No. l*, 113 So.3d 243 (La. Ct. App. 2013) (analyzing the definition of public works under Louisiana statutes). *See also Bldg. Materials Corp. of America v. Bd. Of Educ. of Baltimore Co.*, 53 A.3d 347 (Md. 2012) (analyzing state public works statutes and concluding that orders placed under a cooperative contract for roof repair were not public works requiring public bidding).

[2] C.R.S. § 24-91-102(3).

[3] C.R.S. § 24-91-103(1)(a).

[4] *See IPS Elec. Servs., LLC v. University of Toledo*, 2016-Ohio-361 (Ohio App. Feb. 2, 2016).

[5] For a list of national reciprocal preferences, see http://www.naspo.org/dnn/reciprocity1. The NASPO list of states is based on website listing maintained by the state of Oregon. *See Western Wyoming Constr. Co. v. Bd. Of County Comm'rs*, 351 P.3d 250 (Wyo. 2013) (court found county commissions award of construction contract unlawful where an undisclosed county residency requirement was applied.)

[6] C.R.S. § 8-18-101(2), renumbered as C.R.S. § 24-103-906 effective Aug. 9, 2017.

Types of State/Local Government Cooperatives

Some cooperatives involve an agreement by participating government entities to work together on requirements, with one of them leading the cooperative procurement under their law. NASPO ValuePoint is an example: it supports member-states of the National Association of State Procurement Officials – all 50 states and the United States territories – in their cooperative procurement alliance. States lead the procurements with multi-state sourcing teams, and the solicitation includes a list of states announcing their intent to participate.

The other end of the spectrum is "piggybacking." NIGP's *Global Best Practice* on use of cooperative contracts for public procurement[7] incorporates the NIGP *Dictionary of Procurement Terms* definition: piggybacking "is a form of intergovernmental cooperative purchasing in which an entity will be extended the same pricing and terms of a contract entered into by another entity. Generally, the originating entity will competitively award a contract that will include language allowing for other entities to utilize the contract, which may be to their advantage in terms of pricing, thereby gaining economies of scale that they would otherwise not receive if they competed on their own." A public entity's ability to piggyback on other entities' contracts is a function of its own law.

Every state has its own version of state contracts, themselves essentially cooperatives. Besides achieving more favorable pricing, a local government using its state's contracts typically satisfies statutory requirements prescribed for its procurements.

Cooperative Purchasing Authority

A threshold question is whether a public entity can participate in a cooperative solicitation and satisfies the formal requisites, e.g. execution of written agreements, to do so.[8] There is no generalized name for authority to conduct cooperative purchasing. States having adopted the ABA Model Procurement Code for State and Local Governments ("MPC")[9] have a comprehensive article on cooperative purchasing. Other state statutes treat cooperative purchasing under names such as joint powers acts and interlocal cooperation. Moreover, the authority sometimes resides in separate parts of statutes governing specific entities, for example, municipal and county governments and higher education.

The MPC was first published in the late 1970s. The 1979 MPC conferred cooperative purchasing authority on "public procurement units," defined as the state, municipalities,

[7] http://www.nigp.org/docs/default-source/New-Site/global-best-practices/cooperativecontracts.pdf?sfvrsn=4.

[8] Written cooperative agreements may not be required. See, e.g., *Alaska Structures, Inc. v. Department of General Serv.*, 979 A.2d 982 (Pa. Commw. Ct. 2009) (court rejected challenge to DGS's authority to use General Services Administration schedules, interpreting statutory language patterned after the ABA Model Procurement Code, reasoning that GSA's program satisfies requirement for a written agreement to the extent one is required, granting deference to DGS interpretation, rejecting claims that the GSA schedule was used to circumvent the competitive bidding statutes.

[9] Current and past versions of the Model Procurement Code, ordinances, and associated rules are available at http://apps.americanbar.org/dch/committee.cfm?com=PC500500.

counties, and other public procurement units.[10] This authority can be exercised in conjunction with external procurement activities, meaning any buying organization not located in the state which, if located in the state, would qualify as a public procurement unit. An agency of the United States is defined under the code as an external procurement activity.[11] The 1979 version of the MPC included some nonprofits in the definition of "local public procurement unit." The 2000 version of the MPC extended cooperative procurement authority to more not-for-profit entities.[12]

State attorney general opinions often are the best source for determining the legal requirements for cooperative procurements. The South Carolina Attorney General has written, for example, that under South Carolina's law (modeled after the MPC) whether an entity (in this instance a nonprofit corporation) would be a "public procurement entity" would be a decision made by appropriate officials in the Division of General Services.[13]

Legally Sufficient Solicitation Practices

The cooperative procurement authority granted to governments often requires the underlying contract to have been competitively awarded by a lead government entity in accordance with the participating government's law, including publication of the solicitation. The Colorado and South Carolina statutes, for example, pattern their provision regarding compliance with code requirements after that in the 1979 MPC:

> Where the Public Procurement Unit administering a Cooperative Purchase complies with the requirements of this Code, any Public Procurement Unit participating in such a purchase shall be deemed to have complied with this Code. Public Procurement Units may not enter into a Cooperative Purchasing agreement for the purpose of circumventing this Code.[14]

The 2000 MPC added a new provision regarding competition:

> All Cooperative Purchasing conducted under this Article shall be through contracts awarded through full and open competition, including use of source selection methods substantially equivalent to those specified in Article 3 (Source Selection and Contract Formation) of this Code.[15]

States who have adopted the "substantially equivalent" standard to measure compliance with competition requirements may have an easier time harmonizing cooperative procurements with their state law requirements.

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[10] MPC § 10-101 (1979).
[11] States differ in their authority to use schedules maintained by the General Services Administration (GSA). The Pennsylvania *Alaska Structures* case (n. 8) provides a rationale for ABA Model Procurement Code states to participate in the GSA schedule program.
[12] MPC § 10-101 (2000).
[13] Opinion the South Carolina Attorney General, No. 92-32 (June 26, 1992).
[14] MPC § 10-207. C.R.S.§ 24-110-207. S.C. Code § 11-35-4880.
[15] MPC § 10-201(2) (2000).

Later Participation and Cooperative Purchasing Authority

The vast majority of states authorize at least true cooperatives, that is, a joint procurement where requirements are established cooperatively and the parties each participate in the procurement. Statutes that authorize piggybacking may impose limitations. For example, South Dakota permits piggybacking on any governmental entity contract competitively awarded within 12 months, except for professional services.

For an article about whether the piggybacking entity can revise the scope of the original scope of work, see R. Pennington, Piggybacking on the Law (of Piggybacking), *American City & County* (Dec 2011).[16]

Federal Funding and The Uniform Guidance (p. 36)

In 2013, revisions were made to the governing policy documents in federally-funded programs. Known as Uniform Guidance, the intent was to streamline government by integrating a variety of Office of Management and Budget (OMB) Circulars and agency regulations known as the *Common Rule*. This supplement summarizes the requirements affecting procurements and contracts funded with federal funds.

Federal Funding Requirements as They Existed Before the Uniform Guidance

OMB circulars and federal regulations contained requirements imposed on public entities as grantees that affect solicitations. Key government-wide requirements for grants were contained in: OMB Circular A-102, Grants and Cooperative Agreements with State and Local Governments; OMB Circular A-110, Uniform Administrative Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations; and Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, otherwise known as the *Common Rule.* Individual federal agencies codified the *Common Rule* in their sections of the Code of Federal Regulations.

The Uniform Guidance

The Uniform guidance was described as consolidating the guidance "into a streamlined format that aims to improve both the clarity and accessibility" and "does not broaden the scope of applicability from existing government-wide requirements."[17] The Uniform Guidance in 2 C.F.R. Part 200 now integrates pre-award and post-award policies for federal agencies such as publication of award opportunities, cost principles, financial management and auditing.

The policy requirements for contracting under either grants or cooperative agreements are contained in Subpart D, Post Federal Award Requirements, and Appendix II, Contract Provisions for Non-Federal Entity Contracts Under Federal Awards. The Subpart D provisions include procurement standards[18] and rules governing tangible and intangible property[19] (including

[16] Available at http://americancityandcounty.com/cooperative-purchasing/piggybacking-law-piggybacking.
[17] Supersession, 2 C.F.R. § 200.104.
[18] 2 C.F.R. §§ 200.317-326.
[19] 2 C.F.R. § 200.315.

intellectual property). The Appendix II provisions identify minimum required contractual coverage that may not cover all the contractual flow-down language that may be required by federal agencies in their policies.

Procurement by States

When procuring property and services under a federal award, a state must follow the same policies and procedures it uses for procurements from its non-federal funds. The state must comply with §200.322 (Procurement of recovered materials) and ensure that every purchase order or other contract includes any clauses required by section §200.326 (contract provisions). All other non-federal entities, including subrecipients of a state, must follow §200.318 general procurement standards through §200.326 (required contract provisions).[20]

Micro-purchases and the Simplified Acquisition Threshold

Micro-purchase is a concept from the Federal Acquisition Regulations that previously had not been incorporated into OMB policies. A micro-purchase is defined as a purchase of supplies or services using simplified acquisition procedures, the aggregate amount of which does not exceed the micro-purchase threshold. Micro-purchase procedures comprise a subset of a non-federal entity's small purchase procedures. The micro-purchase threshold is set by the Federal Acquisition Regulation at 48 C.F.R. Subpart 2.1 (Definitions). It now is $3,500, and the threshold is periodically adjusted for inflation.[21] The Simplified Acquisition Threshold – akin to state and local government small purchase thresholds – is a dollar amount below which federal agencies use simplified quote procedures.[22]

Under the Uniform Guidance's procurement standards, procurements by micro-purchase do not require use of any prescribed process. However, the non-federal entity must consider the price to be reasonable, and "to the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers."[23] Procurements under the Simplified Acquisition Threshold (currently $150,000) and above the micro-purchase threshold can be conducted informally using price or rate quotations from an adequate number of qualified sources.[24]

Cost or Price Analysis

The Uniform Guidance requires a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold, including contract modifications. Moreover, profit must be negotiated as a separate element of price for each contract where there is no price competition. As had been the case before the Uniform Guidance, cost-plus-a-percentage-of-cost methods of contracting are prohibited.[25]

[20] 2 C.F.R. § 200.317.
[21] 2 C.F.R. § 200.67.
[22] 2 C.F.R. § 200.88.
[23] 2 C.F.R. § 200.320(a).
[24] 2 C.F.R. § 200.320(b).
[25] 2 C.F.R. § 200.323.

The procurement standards appear in a section not applicable to state procurement – that is governed by the state's normal policies and procedures. But they may be a useful reference when evaluating changes to small purchase procedures and other procurement policies.

Cost Principles

Costs under a federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-federal entity under Subpart E—Cost Principles of the Uniform Guidance. The cost principles of the Uniform Guidance are binding on the states and practically require use of cost reimbursement contract cost principles that comply with federal standards.

Preference Programs

The Uniform Guidance includes policy on preferences, including disadvantaged businesses and veterans, in a part of the regulation that is applicable to governments other than states. Nevertheless, preference programs like those in the U.S. Department of Transportation may be prescribed by other federal entities and apply to states as well.

Required Contract Provisions

State and local governments must comply with Appendix II to 2 C.F.R. 200 that requires certain language to be included in contracts. Notably, Appendix II refers to compliance with additional provisions that may be required by other federal agencies.

Individual Federal Agency Requirements

Federal agencies may prescribe additional policies and regulatory requirements in the Code of Federal Regulations. The Federal Transit Administration publishes a *Best Practices Procurement Manual*[26] to provide information on procurement requirements for grant recipients. Some funds under the auspices of the Federal Transit Administration come with Buy American Act requirements,[27] as do projects funded by the American Recovery and Reinvestment Act (ARRA). ARRA required that projects for construction, alteration, maintenance, or repair of a public building or public works use iron, steel, and manufactured goods produced in the United States.[28]

The Uniform Guidance expresses the policy that existing administrative requirements, program manuals, handbooks and other non-regulatory materials inconsistent with its guidance are superseded upon implementation by federal agencies.[29] The Uniform Guidance permits waivers and exceptions to its requirements upon application by federal agencies, however. U.S. Department of Transportation programs have received waivers. Their requirements in particular

[26] https://www.transit.dot.gov/funding/procurement/third-party-procurement/best-practices-procurement-manual.
[27] 49 C.F.R. Part 661.
[28] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §1605(a). *See, generally*, Kameron Hillstrom, *The American Recovery and Reinvestment Act: A Fitting Future for Recovery Legislation*, 44 PUBLIC CONTRACT LAW JOURNAL 285 (2015).
[29] Effect on other issuances, 2 C.F.R. § 200.105.

illustrate the importance of reviewing federal agency policies with regard to additional requirements for federally funded contracts.

Conclusion

The Uniform Guidance did not significantly change policy guidance regarding flow-down of provisions in State contracts. Prescription of price and cost analysis requirements is considered a significant change by local governments. The promulgation of the Uniform Guidance also has not changed the importance of reviewing individual federal agency requirements that may affect state procurements and contracts. Practitioners should review the relevant agency websites and the Code of Federal Regulations to see what additional procurement and contracting constraints are applicable.

Chapter 3: The Basic Components of a Common Law Contract

Privity of Contract (p. 41)

For a discussion and cases regarding privity of contracting, e.g. issues in working with subcontractors, see Richard Pennington and Eileen Youens, Privity and Third-Party Beneficiaries, *Government Procurement* (Dec. 2013).[1]

Offer and Acceptance (p. 42)

For a case involving enforceability of "browse wrap" agreements (as opposed to click wrap agreements that require an affirmative "agree" click), see *In re: Zappos.com, Inc.*, 893 F.Supp.2d 1058 (D. Nev. 2012) (holding that in an action to enforce a mandatory arbitration clause, the links to the agreements were inconspicuous and not binding).

Differentiating Between Private and Public Contracts (p. 52): Scope

Private parties can amend contracts any way they want. Governments, on the other hand, may be constrained by competition requirements where added work exceeds the "scope" of the contract. The issue of contract scope arises in two contexts under federal procurement law. A unilateral change directed by the government under a Changes clause may be outside of the "general scope" of the contract and a "cardinal change." That directed change may be considered a government breach of contract and discharge the obligation of the contractor to proceed with contract performance.

The other context of contract "scope" is whether an amendment to a contract is outside the scope of the contract and should have been treated as a new procurement and competed under applicable procurement laws, a well-known issue in federal government contracting.[2]

In Idaho, the supreme court faced this issue in a multiple-award communications network contract.[3] Two contractors received awards, and one month after the award, the agency issued blanket purchase orders that changed the work allocation. Applying the Idaho multiple-award statute, the court concluded that the state in effect changed the RFP after the bids had been opened, so the separate contracts no longer were "side-by-side, end-to-end competing contracts" and did not conform to the RFP's description of the property to be acquired. Focusing on the materiality of the change to the RFP specifications, and the short, one-month period after award in which the orders were issued, the court ordered the entire solicitation re-competed, rejecting pleas to just permit cancellation of the offending blanket purchase orders.

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[1] Available at http://americancityandcounty.com/government-procurement/privity-and-third-party-beneficiaries.

[2] *See, generally, Global Computer Enterprises, Inc. v. United States*, 88 Fed. Cl. 360 (2009) (explaining the two "scope" issues and finding that addition of audit services to a software engineering contract through amendment was a material change to the contract that reasonable offerors would not have anticipated; the court enjoined the performance as a violation of the federal Competition in Contracting Act). *See also Albert Elia Bldg. Co. v. New York State Urban Dev. Corp. v. New York State Urban Dev. Corp*., 54 A.D. 2d 337, 342 (N.Y. 1976) (holding a contract amendment out-of-scope and illegal under public bidding statutes where a convention construction contract was modified to add a tunnel that previously had been separately bid, considering but rejecting attempted justifications based on geographical proximity, avowed importance of single responsibility for construction and coordination of trades, and historical treatment of similar work on the project).

[3] *Syringa Networks, LLC v. Qwest Communications, LLC,* 367 P.3d 2018 (Idaho 2016).

The issue is relevant in cooperative procurements as well. Even where "piggybacking" is authorized, there can be issues of "scope" when entering the transaction.

A Florida court articulated judicial standards regarding the extent that the piggybacking contract can modify the piggybacked contract. In *Accela, Inc. v. Sarasota County*,[4] the county piggybacked on a contract awarded by the State of Wisconsin, meaning Wisconsin's vendor extended the pricing and terms of its Wisconsin contract to Sarasota, a Florida county. Sarasota County had learned that the vendor, CSDC Systems, Inc., offered a zoning and permitting tracking system that the county needed to replace its own system. After site visits to two local governments already using the system, the county decided that the best way to acquire it was to adopt a contract between the vendor and another governmental entity, permitted under the county's procurement code.

Accela was a competing vendor who learned of the contract. It filed a complaint against the county and CSDC, alleging violations of the procurement code and asking that the court declare the agreements void, enjoin their performance, and direct the county to use a competitive procurement process. The trial court denied the relief requested by Accela, and Accela appealed. The appellate court reversed.

The court rejected the county's argument that having eight software modules in common in the Wisconsin and county contracts satisfied the county's code. The court held that the contract must be substantially the same as the existing "piggybacked" contract. The court found that the county-CSDC contract represented a significant expansion beyond that of the Wisconsin-CSDC contract. The court held that the procurement code was violated.

Compare a 2011 New Jersey case known as *Autozone*.[5] The State of New Jersey Division of Purchase and Property utilized new statutory "piggyback" authority to execute a state contract for automobile parts based on a procurement conducted by the city of Charlotte, North Carolina.

The court spent considerable time discussing the underlying agreement in its opinion. The protestors complained that the New Jersey agreement automatically extended a 20% price discount, despite the fact that the statewide volume would only have triggered a 15% discount in the Charlotte contract. The free delivery terms also were more favorable. The court found that the Charlotte contract permitted different pricing in participating entity contracts, although there was a clause automatically extending those terms to U.S. Communities-participating public agencies on a "going forward basis." New Jersey's judicial precedent also permitted post-bid modifications even in sealed bidding when the public agency negotiated more favorable terms.

Ultimately the New Jersey court upheld the award, applying its deferential standard of review: whether the Director's decision was founded on "bad faith, corruption, fraud or gross abuse of discretion." The court held that it was not.

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[4] *Accela, Inc. v. Sarasota Co.*, 993 So.2d 1035 (Fla. Dist. Ct. App. 2008).
[5] *In re New Jersey State Contract A7188*, 28 A.3d 816 (N.J. Super. Ct. App. Div. 2011).

Chapter 4: The Uniform Commercial Code

State and local government contracts for goods are governed by their state's Uniform Commercial Code – Sales. Colorado's UCC, for example, is in title 4, article 2, Colorado Revised Statutes. All states except Louisiana have adopted the Uniform Commercial Code. Even Louisiana's provisions are closely parallel or identical to the UCC.

Contract Formation Issues (pp. 76-77)

Contracts can be formed by email exchanges, and the other "gap filling" provisions of the UCC apply. The Tenth Circuit Court of Appeals held that an email exchange constituted a contract for sale of medical goods where the words "offer" and "acceptance" were used in the email, and the challenging party did not deny the existence of the contract during the exchanges, even though a later execution of a purchase order was contemplated and some terms were expected to be negotiated.[1]

Requirements Contracts (pp. 77, 162, 170)

For a discussion of requirements contracts and other contract types, see Richard Pennington, Requirements Contracts: What's Your Obligation?, *Government Procurement* (October 2014).[2]

[1] *Republic Bank, Inc. v. West Penn Allegheny Health System, Inc.*, 475 Fed. Appx. 692 (10th Cir. 2012).
[2] http://americancityandcounty.com/purchasing-procurement/requirements-contracts-whats-your-obligation.

Chapter 5: The Legal Context of Formal Solicitations

Responsiveness of Bid and Proposals (p. 94)

In traditional competitive bidding, a public agency has a duty to reject those proposals that are not responsive, e.g., those that fail to comply with the invitation to bid in a material way. The rule promotes objectivity and fairness in the public bidding process, ensuring that vendors are competing on an equal footing. It further promotes a long-held policy of protecting against abuses such as fraud in connection with the awarding of contracts. As Buffington and Flynn describe in *Legal Aspects*, a vendor could learn during the public bid opening how its bid compared to competitors' bids and then try to revise or withdraw a bid considered improvidently submitted. The companion rules about waiver of minor informalities in bids and withdrawal of a bid for mistakes protect against these abuses.

In traditional competitive bidding, a public agency has a duty to reject those proposals that are not responsive, e.g., those that vary from the advertised specifications.[1] The traditional rule requiring competitive bidding for public contracts and conformity to specifications serves the purpose of divesting public officials of any discretion in the selection process and avoiding "such abuses as fraud, favoritism, extravagance, and improvidence in connection with the letting of contracts."[2]

But in a request for proposals, known under the ABA Model Procurement Code as competitive sealed proposals, the reasons for strict responsiveness rules are not as clear. For example, in a design-build contract, where design specifications generally are not used, the District of Columbia courts have held that the common law definition of "responsiveness" does not apply, and the agency has the discretion to determine responsiveness.[3] In many jurisdictions, there is an opportunity in requests for proposals for the government and offerors to communicate after submission of proposals. Proposal revisions may be invited by the government. The question then becomes, "what purpose does the responsiveness concept serve in a request for proposal?"

Unlike competitive sealed bidding, in RFPs the proposal contents are not disclosed at a public proposal "opening." As a result, withdrawals of proposals and anticompetitive behavior at opening seldom occur. Given the possibility that proposals may be discussed or even revised, should black-and-white concepts of responsiveness be applied the same way?

State judicial opinions vary in this regard. At one end of the spectrum, a New Jersey court proclaimed that a "non-conforming bid is no bid at all" in the context of a request for proposal for a statewide contract for furniture.[4]

In *Jasper*, the state solicited proposals for a state contract for nonmodular office furniture. The solicitation required firm pricing for 18 months. The RFP stated that "stickers"

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[1] *Sayer v. Minn. Dep't of Transp*., 769 N.W.2d 305 (Minn. Ct. App. 2009).
[2] *Id.* at 309.
[3] *See Urban Dev. Solutions, LLC v. District of Columbia*, 992 A.2d 1255 (D.C. 2010), citing *Centech Group, Inc. v. United States*, 554 F.3d 1029, 1037-38 (Fed. Cir. 2009) (agency did not abuse discretion in following General Accountability Office recommendation to invite proposal revisions to technically deficient proposal).
[4] *In re Jasper Seating Co., Inc.,* 967 A.2d 350 (N.J. 2009).

showing price increases on previously published price lists were not acceptable. According to the RFP, only the most recent preprinted price list was acceptable.

Jasper submitted a proposal on two furniture lines, but pricing deviated from the RFP instructions. The proposal included Jasper's pre-printed list price catalogs, normally used for its commercial customers, which had stickers on the covers indicating that prices would increase by four percent on a specified date during the performance period. The state rejected Jasper's proposal as nonconforming. Jasper protested, and when it received no administrative relief, Jasper sued.

The court upheld the agency's determination that the bid was nonresponsive. The court applied sealed bid precedent and a materiality test to the question of whether the proposal was responsive at the time of submission. The court concluded that material deficiencies existing at the time of proposal submission could not be cured through clarifications. The Jasper court tested materiality of the nonconformity at the time of proposal submission, similar to sealed bid analysis.

The Commonwealth of Pennsylvania, on the other hand, has taken a different approach – a more liberal one and one closer to the federal rule.[5] Under federal procurement law, for example, the technical tests for responsiveness in sealed bidding do not apply to negotiated procurements using RFPs.[6] In federal procurement, the term "acceptability" has been used to describe whether an offeror's proposal complies with the request for proposals, a standard that permits considerable discretion.

In *Language Line*, Pennsylvania's Department of General Services issued an RFP to procure statewide interpretation, translation, and language authentication services for Commonwealth executive agencies. Language Line submitted a proposal for the interpretation services.

The RFP stated that the state would limit discussions to offerors that "have submitted responsive proposals and . . . whose proposals the Issuing Office has determined to be reasonably susceptible of being selected for award. Language Line was not invited to submit a best and final offer (BAFO). Language Line protested and, when the protest was denied, filed suit.

One of Language Line's claims was that the successful awardee's proposal had not met several mandatory requirements. The court, however, upheld the state's competitive range process, found the competitive range determination to be a reasonable exercise of discretion, and approved the evaluation. With respect to the claim of nonresponsiveness, the court stated, "there were only two mandatory responsiveness requirements in the RFP at issue, timeliness of receipt and proper signature."

In Pennsylvania, the procurement code language is very close to that used in the American Bar Association's Model Procurement Code, that is patterned after federal

[5] *Language Line Servs., Inc. v. Dep't of Gen. Servs.,* 991 A.2d 383 (Pa. Commw. Ct. 2010).
[6] See, e.g., *Consolidated Controls Corp*., B-185979, Sept. 21, 1976, 76-2 CPD ¶ 261.

procurement practice.[7] Application of the federal analysis to these issues likely would have been closer to the Pennsylvania court rationale. Where an RFP contemplates proposal revisions, a proposal may be considered acceptable for proceeding to evaluation if the proposal would not require significant revision (e.g. a substantial rewrite) to meet requirements. Of course, the nature of the deficiencies could be considered in the evaluation and might preclude consideration of the proposal as one in the competitive range or inclusion on the "short list."

After resolving responsiveness issues, a request for proposals moves into information exchanges. There can be issues about whether those exchanges, and opportunities for proposal revisions, are fair.

Are Discussions Meaningful and Fair?

In general, the difference between sealed bidding and competitive sealed proposals is the basis for the award and the opportunity for information exchange after receipt of bids/proposals. Those exchanges can be called different things: clarifications, discussions, and negotiations are common terms used to describe them in RFPs. The 2012 Hawaii case, *Bombardier Transportation (Holdings) USA, Inc. v. Director, Department of Budget and Fiscal Services*,[8] illustrates the importance of fairness in discussions.

In *Bombardier*, the city and county of Honolulu issued a request for proposal for a large design-build-operate-maintain contract for the Honolulu transit corridor. The solicitation terms and conditions limited contractor liability, but the clause specifically exempted from the limitation any liability arising out of a contractor-indemnity-of-the-state provision in the contract.

In its proposal, Bombardier stated that it assumed that the indemnification exclusion from the limitation of liability cap was an inadvertent oversight, because the exclusion would defeat the purpose of the limitation of liability provision and essentially eliminate any cap on liability of the contractor. During discussions before award, Bombardier argued that the limitation of liability provision should be amended to eliminate the exception for indemnification liability.

The city orally warned Bombardier that a conditional proposal would be considered nonresponsive. The city issued a request for best and final offers (BAFO) and an RFP addendum, retaining the language excluding indemnification claims from the liability cap. Bombardier submitted a confidential question to the city, asking again that the terms of the limitation of liability provision be revised. The city declined to respond but issued a final RFP addendum stating that no changes would be made to the limitation of liability provision.

[7] Alaska's procurement code is also patterned after the ABA Model Procurement Code. The Alaska Supreme Court approved the Department of Administration's acceptance of a 15-page technical proposal, over the 10-page RFP limit as immaterial, where a word comparison showed the longer proposal had fewer words and there was no substantial advantage afforded to the longer proposal. *Silver Bow Constr. v. Alaska Department of Administration*, 330 P.3d 922 (Alaska 2014).

[8] *Bombardier Transportation (Holdings) USA, Inc. v. Director, Department of Budget and Fiscal Services*, 289 P.3d 1049 (Haw. Ct. App. 2012).

Bombardier then submitted its BAFO. Its final offer said that Bombardier was basing its proposal on the assumption that the indemnification exception would be deleted from the limitation of liability provision. The city notified Bombardier that it had submitted an impermissible, conditional proposal and awarded the contract to a competitor.

Bombardier protested the award, which was denied, and eventually filed a lawsuit against the city. Bombardier alleged that the city had failed to engage in "meaningful discussions," a term well known in federal procurement law. Hawaii's procurement code also is based on the ABA Model Procurement Code (itself modeled on federal procurement law). Hawaii's statutes permit "discussions" with responsible offerors. Despite differences in language between the Federal Acquisition Regulation (FAR) and the Hawaii procurement code, the court considered federal precedent regarding what constitutes "meaningful discussions."

Federal procurement law requires, once an agency elects to conduct discussions, that the agency ensure that discussions are "meaningful." That is, the agency is required to point out deficiencies or significant weaknesses in a proposal, or adverse past performance information, with enough specificity that the offeror is led into areas of its proposal which may require amplification or correction.[9]

The court held that even under a stringent federal standard, the city met its obligations regarding discussions. The court held also that the city was not required to conduct another round of BAFOs to permit Bombardier to revise its proposal to remove the conditional language. The court sustained the award.

The Hawaii case, federal cases, and other state cases rely heavily on the specific statutory or regulatory language that governs the request for proposals process. The *Bombardier* case is especially relevant to states and local governments that have adopted the ABA Model Procurement Code because Hawaii's statutes are based on that code. And while a state's statutory or regulatory language likely is different from that in Hawaii, the *Bombardier* case (and the Federal Acquisition Regulations) have guidelines regarding discussions that help make RFP processes fair to all vendors.

There is a distinction in many statutes and rules between clarifications and discussions. Clarifications are less comprehensive communications that generally address reasonable interpretations of the proposal and are not considered proposal revisions. Discussions under Hawaii's procurement law are more comprehensive exchanges "to promote understanding of a state agency's requirements." They may lead to proposal revisions. Discussions permit agencies to achieve better value and offerors to learn how to improve proposals.

Why is the distinction between clarifications and discussions important? Sometimes, a limited communication is needed to confirm an understanding of a proposal. In some less complex procurements, award can be made without discussions where only limited clarification exchanges are used. Likewise, where an agency's procedures permit "short listing"

[9] *Exchanges with offerors after receipt of proposals*, Section 15.306 of the Federal Acquisition Regulations (FAR), includes guidance on the scope of exchanges and limits on those exchanges. The FAR is codified at title 48 of the Code of Federal Regulations.

(establishment of a competitive range), limited clarifications may be needed that are not considered proposal revisions.

Once communications cross the line into proposal revisions, Hawaii's procurement code and federal regulations (FAR section 15.306) require all offerors in the competitive range to be given equal opportunity for discussions. Bombardier argued that the city's discussions with it were not meaningful. The court noted that a specific written demand by the city that Bombardier remove the objectionable proposal language might have been preferable. But the court concluded that the progression of RFP amendments, oral warnings about the conditional nature of the proposal, and Bombardier's own proposal language showed that Bombardier had fair notice about the seriousness of the issue with its proposal.

Post-Award Revisions to Proposals

A related issue is the use of post award revisions to proposals and solicitation language. The objection is: evaluating and awarding based on the final proposal language, and then engaging in substantive contract negotiations with the awardee to materially change the proposal language, makes the initial evaluation meaningless.

The Florida GTECH Case

In *GTECH*[10], at issue was a follow-on contract for computerized gaming services. The Florida Lottery issued the RFP in 1995, before the expiration of the existing contract, and awarded the contract to the incumbent, Automated Wagering International, Inc. (AWI). In 1996, GTECH filed a protest against the award, alleging material errors in the evaluation. In 1997, the Lottery adopted an administrative law judge's recommendation to reevaluate the proposals.

The Lottery awarded AWI the contract after the reevaluation. GTECH filed another court action challenging the award and claiming that the contract between the Lottery and AWI omitted or altered various material provisions required in the original RFP. The trial court sided with GTECH and declared the Lottery/AWI contract null and void.

The appellate court sustained the lower court's decision. The opinion accepted the trial court's finding of fact that "the negotiated contract was financially more favorable to AWI than was the proposal by which it became the winning bidder." The appellate court concluded that RFP language did not permit the Lottery to eliminate all but the most favorable bidder and then later privately negotiate the price and terms that bore "little resemblance to the proposal that earned AWI preferred provider status in the first instance."

[10] *Florida Department of Lottery v. GTECH*, 816 So.2d 648 (Fla. Dist. Ct. App. 2001) (characterizing RFP as "little more than a ranking tool to determine a preferred provider and then negotiate a contract with that provider with little or no concern for the original proposal"). *But see Fishbach and Moore, Inc. v. New York City Transit Authority*, 79 A.D. 2d 14, 435 N.Y.S.2d 984 (N.Y. App. Div. 1981) (agency could negotiate price reduction to accommodate controller objections to pricing).

New Jersey CFG Health Systems case

The *GTECH* opinion implied that the executed contract could not be materially different from the RFP and proposal as finally evaluated. In 2010, a New Jersey court plainly said so in *CFG Health Systems, LLC v. County of Hudson*.[11]

In *CFG*, the county issued a request for proposals before the expiration of a medical and mental health services contract for a county correction center. The RFP required a minimum of 1,653 hours of staffing per week.

CFG's proposed price was about 40 percent higher than the price of the incumbent. Both proposal amounts exceeded the county's budget expectations, and the county retained an expert to review the staffing requirements. Before the consultant had completed its report, the board of county commissions adopted a resolution approving the award to the incumbent (with the lower cost).

Eventually, after completion of the consultant's report, the staffing hours were reduced about 30 percent from the amounts specified in the RFP. The county commissioners approved a resolution approving the amendment to the contract with the incumbent.

CFG then filed an action in court challenging the resolution. The trial court invalidated the county resolution approving the contract, but did not order an award to CFG. Wanting a directed award, CFG appealed that decision.

The appellate court agreed with the trial court that the post-award revisions to RFP requirements were not "minor or inconsequential" and the kind of minor irregularities that could be waived. Moreover, the court rejected the county's reliance on precedent in construction contracts that permitted contract amendments where unanticipated subsurface conditions are found. The court also rejected the argument that an RFP clause reserving the right "to alter or change the procurement process" provided the authority to materially reduce the staffing requirements in the final contract.

Standard of Review of Agency Decisions

The Model Procurement Code provides for deference to agency discretion in a wide variety of determinations.[12] Determinations related to use of source selection methods, emergency and sole source procurements, responsibility, and award are among those that are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

Allegations of bad faith to overturn an agency decision require almost irrefragable proof amounting to clear and convincing evidence of specific intent or conspiracy.[13]

[11] *CFG Health Systems, LLC v. County of Hudson*, 994 A.2d 1045 (N.J. Super. Ct. App. Div. 2010).
[12] ABA Model Procurement Code § 3-701 (1979).
[13] *See, e.g., Urban Dev. Solutions, LLC v. District of Columbia,* n. 3, at 11.

Mistakes in Bids (p. 97)

Powder Horn Constructors v. City of Florence, 754 P.2d 356 (Colo. 1988), looked to federal law in cases of bid mistakes. In *Powder Horn*, the lower court had ordered (and the appellate court affirmed) forfeiture of a bid bond after the contractor refused to accept award of the city's water treatment plant construction contract.

When the bids were opened, Powder Horn had the lowest bid, at $699,500, and about $54,000 lower than the second lowest bidder. The city's consulting engineer contacted Powder Horn and informed it that one item in the bid appeared to be substantially low. Power Horn then informed the city that it had mistakenly omitted the sum of $66,660 from its bid, and advised that the bid was being withdrawn.

The city council voted to award the contract to Power Horn in any event. Powder Horn informed the city that Powder Horn would not accept the contract. The city awarded to the second lower bidder and filed a court action against Powder Horn and its bid bond surety.

The trial court found and the court of appeals held that, while under some circumstances relief may be afforded to mistaken bids, the bidder bore the burden of proving that it had exercised reasonable care in preparation of the bid. The Supreme Court considered authority from other states, as well as the commentary in the ABA Model Procurement Code, and held that exercise of reasonable care is not an element. A bidder for a public construction contract who submits a bid containing a mistake may rescind the bid prior to its acceptance if the bidder establishes by a preponderance of the evidence that the mistake is of a clerical or mathematical nature, that the mistake was made in good faith and relates to a material aspect of the bid, and that the public authority did not rely to its detriment on the mistaken bid.

Termination for Convenience (pp. 98-100)

A noteworthy 2016 New Mexico case bears mentioning here: *MB Oil Ltd., CO. v. The City of Albuquerque.*[14] The case involved the application of a termination for convenience clause, a common clause used both in federal and state procurement. The New Mexico court applied settled federal and state judicial precedent to give effect to a termination for convenience clause and limit breach of contract damages.

MB Oil was a wholesale fuel distributor that contracted with the city to be the primary supplier of certain fuels to the city's fleet management division. MB Oil promised to treat the city as a "preferred customer," agreeing to certain response times for delivering fuel. In exchange, the city agreed to make MB Oil its primary fuel provider, meaning it would satisfy requirements from MB Oil before going to alternate sources.

MB Oil had never bid on a government contract before. It was awarded the contract based on a bid that was one-sixth that of the second lowest bidder. After performance began, there were various occasions when MB Oil could not deliver on-time, or at all. The city was forced to go to alternate suppliers.

[14] MB Oil Ltd., CO. v. The City of Albuquerque, 382 P.3d 975 (N.M. App. 2016).

Several times the city informed MB Oil that it was not meeting fuel delivery obligations. One notice characterized MB Oil's performance as a default. The city finally terminated the contract both for default and convenience. MB Oil sued for breach of contract, alleging that the city misrepresented the amount and types of fuel that would be ordered. One misrepresentation allegation involved a type of fuel that MB Oil relied on for achieving its expected profit margin. The complaint also included a common allegation in these kinds of cases, that the city breached its "covenant of good faith and fair dealing" in how it solicited bids and administered the contract.

The trial court found for MB Oil and awarded over $4 million in damages that included anticipatory profits. The court concluded that the city wrongfully terminated the contract for default because MB Oil's untimely and sometimes failed deliveries did not in the trial court's judgment constitute substantial impairment of the city's benefits under the contract.

The contract included not only a termination for default clause, but also a termination for convenience clause that said: "The City may terminate [the Contract] . . . at any time by giving at least thirty (30) days' notice in writing of such termination to [Plaintiff]. In such event, [Plaintiff] shall be paid under the terms of the Contract for all goods/services provided to and accepted by the City, if ordered or accepted by the City prior to the effective date of termination."

As the appellate court explained, the termination for convenience clause permits termination without regard to whether there is a default or breach by the other party. The court noted that the clause is commonly used in contracts with the federal government and other states.

Courts have constructed an implicit limitation on exercise of the termination for convenience right. Governments may not act in bad faith, e.g. a contracting officer motivated by malice towards the contractor, a burden of proof that is difficult to meet. The appellate court found that MB Oil's failure to meet city demands justified use of the clause. The court held that the city's termination was not a breach of the contract or the obligation of good faith and fair dealing. The appellate court thus reversed the judgment of the trial court, eliminating the award of breach of contract damages.

There is one notable aspect of *MB Oil* that warrants a discussion between procurement practitioners and their counsel. The federal termination for default clauses specifically invoke the companion termination for convenience clause as a limitation of damages if a default is found to be unwarranted. The New Mexico appellate court effectively reached the same result, likely because the city cited both the default and convenience provisions as a basis for termination. Practitioners might want to discuss the case with their counsel and revisit their standard termination clause language.

Protests and Disputes (p. 102): Standing

For entities whose state statutes or ordinances do not explicitly grant judicial rights to challenge public procurement awards, a bidder must establish standing. Courts in many states hold, however, that the public bidding process is for the protection of the public, not the

bidders.[15] In some states, companies who can satisfy the taxpayer standing requirements may, however, be able to obtain relief if they allege sufficient injury or interest in a procurement award.[16]

Even where a bidder has standing to pursue a bid protest, though, failure to submit a responsive bid may preclude standing to challenge an award.[17] Moreover, a bidder whose contracts were terminated and who has been disqualified from future bidding may not have standing to contest a later award.[18]

Subcontractors have very limited rights with respect to challenging awards to prime contractors and the prime contractor's decision to award subcontracts. A 2010 Illinois decision comprehensively analyzed the question of whether a disadvantaged business could sue a prime contractor for circumventing city disadvantaged business subcontracting requirements by using fraudulently certified subcontractors. In Illinois, a contractor generally suffers a legally cognizable injury sufficient to support standing only when it shows that it bid for the contract and would have won the contract but for a violation of bidding procedures.[19]

In any event, a protestor faces a difficult path in seeking an injunction against a government. The six elements for a preliminary injunction in Colorado are representative: a reasonable probability of success on the merits; a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; no plain, speedy, and adequate remedy at law; granting of the preliminary injunction will not disserve the public interest; the balance of equities favors the injunction; and the injunction will preserve the status quo pending a trial on the merits.[20]

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[15] *Ewy v. Sturtevant*, 962 P.2d 991 (Colo. 1998); *see also Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013) (reaffirming holding that public bidder statutes are for the benefit of taxpayers, not bidders, in case alleging blackballing of a supplier in construction prequalification); *Laurel Constr. Co. v. Paintsville Util. Comm'n*, No. 2009-CA-000845-MR(KYCA), (Ky. App. May 28, 2010). (where procurement code does not apply, a disappointed bidder has no standing to judicially challenge the award absent fraud, collision, or dishonesty).

[16] *Pallas v. Johnson*, 68 P.2d 559 (Colo. 1937) (where the court found taxpayer standing but refused to grant injunctive relief where the state purchasing agent had made a discretionary determination of responsibility). *See also Sayer v. Minn. Dep't of Transp*., 769 N.W.2d 305 (Minn. Ct. App. 2009) (taxpayer had standing to challenge award of design-build contract to build I-35W bridge in Minneapolis); *Hotaling v. Hickenlooper*, 275 P.3d 723 (Colo. Ct. App. 2011) (Colorado provides for "broad taxpayer standing" but plaintiff challenging Department of Health and Human Services had not suffered injury-in-fact and had no standing).

[17] *See, e.g., CFG Health Sys., LLC v. County of Hudson*, 994 A.2d 1045 (N.J. Super. Ct. App. Div. 2010) (bidder was permitted to challenge the scope of a post-award amendment to the solicitation requirements); *accord Baird Tree Co., Inc. v. City of Oak Ridge*, 326 S.W.3d 156 (Tenn. Ct. App. 2010).

[18] *Gent Uniform Rental Corp. v. County of Suffolk Dept. of Labor*, 73 A.D.3d 771, N.Y.S.2d 301 (2010).

[19] *I.C.S. Illinois, Inc. v. Waste Mgmt. of Illinois, Inc.*, 913 N.E.2d 318 (Ill. App. Ct. 2010) (characterizing plaintiffs' claims as speculative, the court found that the potential subcontractors lacked standing to sue the prime contractor; the decision analyzes other jurisdictions' decisions). *But see Syringa Networks v. Idaho Dep't of Admin.*, 305 P.3d 499 (Idaho 2013) (holding that a subcontractor having a teaming agreement and expecting to perform the work on an RFP has standing to challenge post-award contract amendment materially changing the allocation of work among multiple awardees that adversely affected the subcontractor.)

[20] *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

Chapter 6: Ethics and Professionalism in Public Procurement

Organizational Conflicts of Interest

The federal Uniform Guidance prescribes certain procurement requirements for grantees, e.g. state and local governments receiving federal money under grants.[1] One of those requirements relates to the existence of "organizational conflicts of interest." These conflicts would arise, for example, when a company has access to solicitation information (or has assisted in RFP development) and then submits a proposal on the project. Subpart 9.5 of the Federal Acquisition Regulations (FAR)[2] has exhaustive coverage for federal contracting.

For an example of a case whether a court looked at federal precedent to analyze a municipality's application of organization of conflict rules, see *Rochester City Lines, Co. v. City of Rochester*.[3] In *Rochester*, the court evaluated but rejected the plaintiff's claims that the awardee had an organizational conflict of interest that rendered the entire process void. Under federal law, an organizational conflict of interest exists when, "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or the person has an unfair competitive advantage."[4] The court considered the FTA guidance that an organizational conflict of interest can arise when the bidding contractor (1) is unable to provide impartial or objective assistance to the agency; (2) has unequal access to nonpublic information; or (3) has been allowed to establish ground rules. Despite the existence of a conversation where a city official said he liked the awardee, the court found no organization conflict of interest. The awardee had never had another contract with the city, nor had the awardee assisted the city in developing the terms of the RFP.

[1] 2 C.F.R. §200.112.
[2] 48 C.F.R. Subpart 9.5, *Organizational and Consultant Conflicts of Interest.*
[3] *Rochester City Lines Co. v. City of Rochester*, 846 N.W.2d 655 (Minn. 2015) (considering federal precedent on standards for reviewing award decisions in best value procurement and Federal Transit Administration guidance in analyzing organizational conflicts of interest).
[4] 48 C.F.R. § 2.101.

Chapter 7: Legal Considerations for Software Licensing

Procurement in a "Cloud" Computing Environment

Chapter 7 deals with the traditional means of software procurement, ownership or licensing by the agency. The new method of software (and associated infrastructure) acquisition is "cloud computing," where typical ownership and licensing concerns do not apply. Cloud is a model for enabling convenient, on demand network access by browser to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released. The cloud model is composed of five essential characteristics, three service models, and four deployment models."[1]

Cloud environments are loosely categorized as public (accessible to the public and usually shared), private (restricted to a single enterprise), and hybrids of those categories. The procurement planning done by public procurement professionals applies equally in cloud computing solicitations. Most of the additional considerations highlighted here relate to public clouds in particular, where resources are shared. Public clouds are largely subscription-based, meaning that organizations can charge the expenses as operating expenses. Coupled with the advantages of cloud – on-demand capability, ease of scalability, and expected cost efficiencies because of the shared use of resources by many users – the solutions have become very popular.

There are three service models of cloud computing: Software as a Service (SaaS), Platform as a Service (PaaS), and Infrastructure as a Service (IaaS). Common office software suites and email are examples of SaaS.[2] Users worldwide can access office applications with a browser and without loading any other software on the client machine.

The real transformation in cloud is occurring in PaaS and IaaS. Platforms permit remote access to systems having integrated operating systems and development platforms for programmers. Users and developers can access tools for configuring other applications, creating workflow, and developing reports and databases. IaaS permits access to hardware, like storage capacity, servers, and disaster recovery resources.

Of course, access using a variety of devices – desktop computer, notebook computer, and smart phone technology – raises the specter of security breach and privacy compromise. The primary business risks associated with cloud computing have been identified as:

- Internal and external security risks;
- Performance issues, especially as users are added and the system scales to accommodate them, a risk mitigated through effective use of service level agreements (SLAs);

[1] National Institute of Standards and Technology, available at http://csrc.nist.gov/groups/SNS/cloud-computing/index.html.
[2] Janine Anthony Bowen, Esq., *Technology and Business Overview of Cloud Computing* (2014) and *Overview of Cloud Computing* (2010).

- Cloud outages, a risk avoided by being judicious about moving critical data/infrastructure to the cloud and using first-class vendors;

- Data protection and loss risks, including: location and ownership of data; safeguarding health and personal information; backup to protect against disasters; and the inability to recover or migrate data easily in a usable format;

- Vendor lock-in, meaning that the application and data are not easily integrated with or portable to other cloud applications, mitigated by using vendors who use service-oriented architecture (SOA) and accepted interoperability standards; and

- Vendor failure, mitigated through past experience evaluation and financial analysis.[3]

There is considerable emphasis on selecting the right vendor, one who: uses third-party-validated, best practices in security; is financially stable; has demonstrated experience and a solid portfolio of satisfied clients; and who uses well recognized standards to avoid integration and portability problems. IT departments must be part of the planning in these kinds of procurements.

In 2016, the State of Utah awarded multiple cloud solutions master agreements for the NASPO ValuePoint cooperative procurement program. To help sharpen requirements, Utah used an information technology advisory council consisting of representatives from 10 state information technology offices and the National Association of State Chief Information Officers. The sourcing team used the 2014 *Center for Digital Government* (CDG) model cloud terms and conditions—a collaboration between industry and government—as a baseline for the RFP terms and conditions, including liability limitation for data breaches. The use the *Center for Digital Government*'s consensus-developed terms and conditions mitigated the effect of a recurring irritant: inefficiencies driven by negotiation of liability allocation provisions like limitation of liability.

The master agreements provide a broad range of services: from cloud-based phone systems; unified communications; enterprise resource planning (ERP) modules; desktop as a service; programs to combat fraud, waste and abuse; data analytics; a full range of GIS services; health claims and management; security as a service; application development in PaaS and cloud hosting services; along with IaaS systems to deliver secure and reliable computing and storage infrastructure.

The RFP is publicly available and may be useful in seeing how the states handled the unique issues in cloud computing, including an innovative approach to data-breach limitation of liability.[4]

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[3] A good resource for an overall view of cloud computing is J. Hurwitz, R. Bloor, M. Kaufman and F. Halper, *Cloud Computing for Dummies* (New York: Wiley Publications, 2010). Another excellent source, especially in its treatment of vendor selection and discussion of service level agreements is Dr. Mark I. Williams, *A Quick Start Guide to Cloud Computing* (London: Kogan Page, 2010).

[4] Available at http://naspovaluepoint.org/ (search on <Cloud Solutions> to see the solicitation and agreements).

Chapter 8: Other Relevant Procurement Law

This summary highlights selected state/local government procurement decisions not otherwise covered in this supplement that touch significant issues in public procurement.

Waiver

For the most part, public contract disputes are resolved using judicial precedent applicable to commercial contracts. Waiver, for example, is the intentional relinquishment of a known right and conduct that is inconsistent with the intent to assert the right. By accepting late performance or performance known to be deficient, a party may have waived the right to exercise some contract remedies.[5]

A New Jersey appellate court refused to enforce the contractual requirement for a board-approved change order when a contractor (the surety in a protracted construction dispute) performed work directed by the architect, and the board apparently was aware that the work was being performed.[6]

For an article about the defense of waiver, see Richard Pennington, Unwitting Waivers of Delivery Dates, *Government Procurement* (April 2011).[7]

Construction Contract Breach

The relative rights and obligations of parties to a construction contract sometimes are complicated by the availability of progress payments and the role of third parties, e.g. the architect, in contract administration. In the Texas case, *Pelco Construction Co. v. Chambers County*, 495 S.W.3d 514 (Tex. App. 2016), the contractor had submitted three progress payments. The architect certified two, but more than 30-days after submission, and only certified 90% of the amount due. The contract authorized retainage on the final payment, not on individual progress payments. Pelco forwarded the third payment application with a letter terminating the contract.

The parties filed cross complaints alleging breach. There were multiple issues, but the court held for Petco on the issue of whether the 10% withhold by the county was a breach. The county maintained that the contract required that the architect certify the amount payable. The court rejected that defense, reasoning that the architect was the county's agent and the county was responsible for meeting contractual payment obligations. To the county's claim that the contract permitted reduction of the progress payment for defective work, the court held that the reduction was not available without providing the contractually specified notice – absent in this case.

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[5] *See, e.g., County of La Paz v. Yakima Compost Co., Inc*., 233 P.3d 1169 (Ariz. Ct. App. 2010); *Forsyth County v. Waterscape Serv., LLC*, 694 S.E.2d 102 (Ga. Ct. App. 2010) (in cases arising out of disputed change orders, contractor's termination of the contract for default could not be based on county's failure to satisfy permitting conditions in contract where the contractor had performed despite county's delay in the satisfying permitting conditions).

[6] *American Motorists Ins. Co. v. N. Plainfield Bd. of Educ*., A-4680-14T4 (N.J. Super. Ct. App. Div. Oct. 20, 2016).

[7] Available at http://americancityandcounty.com/contracts/unwitting-waivers-delivery-dates.

In a New Jersey construction dispute involving takeover agreements after the original contractor defaulted, the "substantial performance" doctrine was an issue in litigation lasting almost 15 years.[8] The board of education (owner) executed takeover agreements with the surety after default by the original contractor. On the two projects at issue, the architect had issued substantial completion certificates. Afterwards, the architect noted punch-list deficiencies and decertified the parking lot paving. The surety had executed payment bonds to cover the work completion, but the board learned that the United State Department of Treasury had terminated the surety's certificate of authority to quality as an acceptable surety on federal bonds. The board stopped all payments on the troubled project, and the surety withdrew from the site without completing punch-list items or delivering project documentation.

The court determined that there was "substantial completion." The issuance of the certificates and beneficial use of the schools established there was no material breach by the surety that would have entitled the board to stop paying. Once substantial performance is established, the contract permitted the board to reduce an amount for incomplete work. The owner, however, bears the burden of proof (not met in this case). Contrary to the board's argument, the contractor had not improperly abandoned performance; the board had stopped payment for some time with no legal justification. There was substantial completion.

[8] *American Motorists Ins. Co. v. N. Plainfield Bd. of Educ*., A-4680-14T4 (N.J. Super. Ct. App. Div. Oct. 20, 2016).