

# COLORADO PROCUREMENT MODERNIZATION

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## Draft Recommendations

November 2015



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**OVERVIEW**

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In early 2015, the Department of Personnel & Administration (DPA) began a review of the State’s procurement statutes, rules, and processes. The purpose of this review is to identify opportunities to modernize and improve the system to better serve State agencies, vendors, and most importantly, the public. The State Purchasing and Contracts Office is leading the effort which began with a working group comprised of purchasing and contracting professionals from various State agencies and institutions of higher education. The working group conducted an initial analysis of existing laws and process followed by a technical update to the Procurement Rules. The working group then conducted a comprehensive analysis of the Procurement Code and Rules and researched other public procurement systems. The working group developed a list of draft recommendations, included in this white paper, which should serve as a framework for discussion with members of the General Assembly, the vendor community, and other interested stakeholders. DPA is seeking stakeholder input and asks interested persons to comment on the recommendations contained in this white paper and to provide additional recommendations. DPA will use these recommendations and all stakeholder feedback to draft recommended legislative changes for the 2016 legislative session.

Individuals who wish to share feedback or get involved in the process, please visit DPA’s Procurement Modernization Initiative website: [colorado.gov/pacific/osc/PMI](http://colorado.gov/pacific/osc/PMI)

Emails can be sent to [SOC\\_Procurement@state.co.us](mailto:SOC_Procurement@state.co.us)

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## BACKGROUND

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The Colorado Procurement Code (Code) governs how most executive branch agencies<sup>1</sup> buy goods and services. The Code is overseen and administered by the DPA. The Code, established in January 1982, is based on the 1979 American Bar Association (ABA) Model Procurement Code and has not been reviewed in total in more than 33 years.

The Procurement Rules (Rules) are authorized by the Code and serve to define and clarify the procurement process. The Rules have seen minor changes over the years but also have not been reviewed in total since their establishment in 1993.

The Code exists to help keep the public trust, promote fair competition, make efficient use of taxpayer dollars, and allow the State to effectively do the people's business. This can be challenging, and procurement professionals must often balance competing demands.

The Code and Rules are based on six foundational purposes and policies<sup>2</sup> which are to:

- a) Simplify, clarify, and modernize the law governing procurement by the state of Colorado;
- b) Provide for increased public confidence in the procedures followed in public procurement;
- c) Ensure the fair and equitable treatment of all persons who deal with the procurement system of the state of Colorado;
- d) Provide increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds of the state of Colorado;
- e) Foster effective broad-based competition within the free enterprise system; and
- f) Provide safeguards for the maintenance of a procurement system of quality and integrity.

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## EXECUTIVE SUMMARY

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Colorado's procurement law is based on 36-year-old model legislation drafted by the ABA to be used as a guide for states. Unlike uniform laws drafted by the Uniform Law Commission which are intended to be adopted by states in their entirety and without amendment, model legislation is intended to be used as a general template to be amended as needed to conform to the needs of each state.

When adopting the ABA Model Procurement Code, the General Assembly adopted a substantial amount of the model legislation and did very little to tailor the bill to Colorado's statutes. There has been no comprehensive review of the Code since its adoption in 1982; amendments to the Code have mostly been narrow and often added inconsistent language and provisions that complicate the administration of State procurement. Though well intentioned, this approach led to several problems today:

1. The structure, form, and language of the Code are inconsistent compared to the rest of the Colorado Revised Statutes making it difficult to interpret the Code and causing confusion and disagreement about how to apply the Code.
2. Many of the terms used in the Code differ from those used in practice by procurement professionals or vendors. To understand and interpret the Code, one must translate the statute into common language. This is not only impractical, it is inconsistent with Colorado's plain language law which requires legislation

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<sup>1</sup> Institutions of higher education may opt out of the Code

<sup>2</sup> 24-101-102, C.R.S.

to be “written in plain, nontechnical language and in a clear and coherent manner using words with common and everyday meaning which are understandable to the average reader.”<sup>3</sup>

3. The world has changed significantly since 1982, but the State’s procurement process has not kept pace.

Updating the entire Code may be a daunting task to some, but doing so will substantially benefit State agencies, vendors that wish to do business with the State, and, most importantly, the public.

The Code states that its first purpose is to “simplify, clarify, and modernize the law governing procurement by the State of Colorado.” DPA recognizes the need to once again modernize the Code. Doing so will require the collaboration of State agencies, vendors, legislators, and other stakeholders. DPA sees the problems and challenges that currently exist in the State procurement process as a series of opportunities. After months of internal analysis and assistance from procurement professionals in other State agencies, DPA intends to propose legislation to modernize State procurement.

This white paper contains 11 sections on topics related to State procurement including training, ethics, application of the Code, grants, preferences, cooperative purchasing, market research, confidentiality, contracting, administrative remedies, as well as general and technical cleanup. Each section includes a brief discussion on problems or opportunities related to each topic and recommendations for legislative change. This white paper is intended to be a framework for discussion. It *is not* a final recommendation. DPA seeks review and comment from all interested parties. This feedback will be used to prepare a final recommendation.

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<sup>3</sup> 2-2-801, Colorado Revised Statutes

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## GENERAL UPDATES AND CLEAN-UP

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### Problem or Opportunity

The Code is based on based on the 1979 American Bar Association (ABA) Model Procurement Code. When the State adopted the model code, much of the terminology was adopted as drafted by the ABA, rather than conforming the language to the Colorado Revised Statutes. Though the intent behind adopting model legislation is to create consistency among states, the result has been confusion instead. Furthermore, many of the amendments made to the Code over the years used unique or inconsistent language, adding more confusion.

One of the simplest improvements that can be made to the Code would be to update definitions to be consistent with common use, update terminology throughout the Code for consistency and clarity, and reorganize provisions in the Code for ease of use. These steps would make the Code more user-friendly for State agencies and vendors.

Finally, the Code contains many reporting requirements that are difficult for the State to administer. This is often due to limited availability of reliable or accessible data and technological limitations.

- Recommendation 1.**      **Update definitions to be consistent with common use.**
- Recommendation 2.**      **Clean up terminology throughout the Code for consistency and clarity.**
- Recommendation 3.**      **Update days, dates, and timeframes related to processes and deadlines in the Code for consistency.**
- Recommendation 4.**      **Simplify reporting requirements.**
- Recommendation 5.**      **Reorganize provisions in the Code for ease of use.**

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## ETHICS

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### Problem or Opportunity

State procurement professionals follow the [Procurement Code of Ethics and Guidelines](#)<sup>4</sup> (Guidelines) which were established in 1991 by the Colorado Procurement Advisory Council. The Guidelines are based on the National Association of Purchasing Management and National Institute of Governmental Purchasing Code of Ethics.

The Guidelines are often interpreted to apply only to purchasing staff and not to others involved in the procurement process. In order to ensure the confidence of the public, the vendor community, State employees, and the General Assembly in the State's procurement process, it is vital that every person involved in the procurement process be held to established ethical standards.

- Recommendation 6.**      **Establish ethical standards in statute for all persons involved in the procurement process, whether directly or indirectly, including purchasing officials, end users, vendors/contractors, management, and interested third parties, and during all phases of the procurement process (pre-solicitation to post-award).**

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<sup>4</sup> "Procurement Code of Ethics and Guidelines" <https://www.colorado.gov/pacific/osc/procurement-resources>

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## PROCUREMENT TRAINING

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### Problem or Opportunity

Currently, the only formal training provided by the State Purchasing and Contracts Office is a two-day training course that provides a high-level overview of procurement in Colorado. Many of the difficulties and issues that arise in State procurement are often the result of a lack of training. For instance, training on solicitations and awards should result in fewer protests and appeals. Training on contract management should result in fewer contract disputes and better contract performance by vendors.

Establishing a permanent procurement training function for State employees and vendors would improve the process dramatically. In an effort to ensure a strong future for procurement professionals and the State's vendors, it is necessary to create a training curriculum, publish guidance, share best practices, support nationally-recognized procurement certifications for state employees, and improve overall communication. The trainings should be integrated across the State to include all purchasing and contracting activities across State public entities.

**Recommendation 7. Authorize the State to establish a permanent procurement training function to serve State agencies and vendors.**

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## APPLICATION OF THE CODE

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### Problem or Opportunity

The Code applies to nearly all purchases of goods and services by executive branch agencies, with some exceptions. Certain purchasing activities are exempt from the Code, such as bridge and highway construction, the awarding of grants to political subdivisions, and institutions of higher education that have formally opted out, among others. For those purchases where competition exists, the Code is followed for the selection of vendors to provide goods and services for the state. However, there are some goods and services where there is not a competitive environment and, in the best interest of the state, these purchases should not be constrained by the Code.

The current applicability statute in the Code is outdated, and some goods and services are impractical to purchase using the processes in the Code. The State can achieve additional efficiency by updating the applicability of the Code.

**Recommendation 8. Allow a purchasing entity to use a competitive process of procurement when competition exists for a good or service that is exempt from the Code.**

Some goods and services are impractical to purchase using a competitive procurement processes under the Code due to a general lack of competition. However, in cases where competition does exist for an exempt good or service, it is in the best interest of the State for the purchasing entity to use a competitive process.

**Recommendation 9. Exempt publicly regulated utilities including water, electricity, natural gas, and telecommunications.**

Current practice is to issue a sole source contract for publicly regulated utilities since no competition exists in most cases.

**Recommendation 10. Exempt fuel, including gasoline and propane.**

Current practice is to issue a sole source contract for gasoline, fuel, and propane since no competition exists in most cases, especially in remote areas. In addition, fuel pricing is volatile due to fragmented, regional markets and regulatory requirements, making it difficult to lock in pricing typically done with a competitive bidding process.

**Recommendation 11. Exempt the display, purchase, performance or use of copyrighted materials or works of art.**

Purchase of copyrighted materials and/or works of art do not fit into the competitive procurement process since, as a general rule, the copyright in a work is initially owned by the work's creator. This could apply to works of art, works of entertainment, literary works, library collections, museum collections, music, film, or other copyrighted materials. Examples of copyrighted materials include a library collection specific to a trade or profession such as specialized medical services or the display of a work of art.

**Recommendation 12. Exempt conferences including meeting rooms, audio/visual, catering, rooms, etc., at hotels/venues.**

It is difficult to organize a conference and purchase the necessary goods and services through a competitive process. Many vendors, such as hotels and venues, do not respond to formal solicitations.

**Recommendation 13. Exempt client-based medical services as specialized professional services.**

Client-based medical services are intended to serve the public, communities, or a specific group in need of the medical services. Medical services include, but are not limited to, emergency care, outpatient services, psychiatric treatment, and primary care. These services are extremely difficult to procure using formal competition due to the indefinite volume, lack of uniform requirements, lack of competition in some remote areas, and the urgency of the services needed. Many medical providers such as doctors, nurses, and medical specialists do not respond to formal solicitations.

**Recommendation 14. Exempt dues and memberships.**

It is not possible to "bid" dues and memberships.

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## GRANTS

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### **Problem or Opportunity**

Currently, the application of grants is inconsistent across State agencies. With the introduction of the Office of Management and Budget (OMB) Uniform Guidance, the State needs to provide clarification and direction for the State's processing and managing of grants. For example, there are many award levels, terms, processes, and requirements associated with grants that are not explained in the Code.

The State needs to address the application of grants to comply with Federal requirements. Doing so will dramatically improve the process for State agencies and grant applicants and recipients.

**Recommendation 15. Clarify and clean up language regarding grants in the Code. Create consistency for handling of grants in the Code including compliance with the OMB Uniform Guidance.**

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## CONTRACTS

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### **Multiyear Contracts**

#### **Problem or Opportunity**

Currently, the State may enter into a contract for any period of time as long as the contract term is included in the solicitation. In the event a contract term could exceed solicitation period, a new contract would be required.

The ability to use multiyear contracts is limited. While the procurement method may be addressed, the current interpretation doesn't allow for the existing contract to be extended. For example, it may be valid to continue services on a contract for an additional year beyond the solicitation period; however, the contract will expire, and a new contract would be required. Reasons to allow for a longer term of an existing contract when the longer term was not contemplated in the solicitation may include, but are not limited to, changes in the program, changes in legislation, funding sources, unforeseen changes in the industry, or changes in technology.

**Recommendation 16. Allow for a reasonable extension of an existing contract, if extenuating circumstances exist, with approval of the State Purchasing Director.**

## **Contract Management System**

### **Problem or Opportunity**

The centralized contract management system and related requirements for contract provisions, monitoring, and reporting were established for the purpose of improving the state's contracting process. The contract management system offers security access, contract records, tasks, tracking of key dates related to contracts, and attachments of images and files to contract records. The system database is useful and has become the central repository for all State personal services contracts. The contract provisions have been helpful in requiring performance measures, vendor accountability, and state monitoring. However, the implementation of state monitoring has not been effective and the reporting is cumbersome and outdated. Contract monitoring has focused on completing forms, certifications, and ratings rather than on determining which contractors are not meeting their obligations and addressing these situations with progressive steps to compel the contractor to perform per the contract. The State has not had adequate training of contract monitors to identify these situations earlier so that the State can take corrective action and receive all of the deliverables in the contract.

**Recommendation 17. Repeal outdated and ineffective to concentrate efforts on contract compliance rather than reporting.**

**Recommendation 18. Establish progressive remedies to include suspension or debarment for non-performing contractors.**

## **Terms and Conditions**

### **Problem or Opportunity**

The process required to negotiate vendor terms and conditions is often time consuming, and certain services require State employees to use online click-through provisions that often include terms that violate State law. The most common vendor terms and conditions that violate state law concern the requirements that the State indemnify the vendor (hold harmless provision) and that the contract be governed by the vendor's choice of law, rather than Colorado law. Indemnification is in violation of the State's constitution. With the choice of law other than Colorado, the State is at a disadvantage in a lawsuit in having to apply laws of another state and travel to a court in another State if there were a lawsuit.

**Recommendation 19. Prohibit indemnification of vendors by the State. Include a provision that even if the State agrees to indemnify as part of an online click through agreement, an indemnification provision is void and unenforceable.**

**Recommendation 20. Require that State contracts be governed by Colorado law.**

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## MARKET RESEARCH

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### Problem or Opportunity

The Request for Information (RFI) is a commonly used method for obtaining information about pending procurements and doing market research. Currently, RFIs are discussed in the Procurement Rules but not in the Procurement Code.

*R-24-103-203-01 Definitions, paragraph (e) "Request for Information (RFI)" is similar to an RFP, but is NOT a source selection method. An RFI is used to obtain preliminary information about a market, type of available service, or a product when there is not enough information readily available to write an adequate specification or work statement. An RFI may ask for vendor input to assist the State in preparing a specification or work statement for a subsequent solicitation and may ask for pricing information only with the provision that such information would be submitted voluntarily. The RFI must clearly state that no award will result.*

- Recommendation 21.**      **Establish the RFI process in the Code as a recognized market assessment and information gathering tool.**
- Recommendation 22.**      **Clarify appropriate methods to conduct market research.**

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## ADMINISTRATIVE REMEDIES

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### Problem or Opportunity

The inclusion of administrative remedies fulfill the underlying purposes of the Code, specifically providing for increased public confidence in the procedures followed in public procurement and ensuring the fair and equitable treatment of all persons who deal with the procurement system in the State.

In addition, administrative remedies provide informal, expeditious, and inexpensive procedures for the resolution of controversies. However, the Administrative Remedies section of the Code is difficult to interpret, both by procurement officials and vendors. The Code lacks specific guidance on multiple issues, and it should be simplified and clarified.

- Recommendation 23.**      **Establish a process for determinations on whether a protesting entity is appropriate as an aggrieved party in a solicitation or award. Limit protests and appeals to those entities who are involved in the procurement process as a bidder limiting frivolous protests.**
- Recommendation 24.**      **Establish that only "material" issues can be protested and appealed. This will avoid trivial protests and appeals so that the proper attention can be given to significant concerns.**
- Recommendation 25.**      **Require submission of an appeal bond if an aggrieved party wants to submit an appeal.**
- Recommendation 26.**      **Clarify what remedies are available when a protest or appeal is sustained and remove the distinction between remedies prior to and after the award of a contract.**
- Recommendation 27.**      **Allow an aggrieved party to move to the next step in the process if the State fails to respond within a defined timeframe.**

**Recommendation 28.** Add language to include a progressive approach to the suspension and debarment process. This will allow for more flexibility for the State and vendors when dealing with non-performance issues.

**Recommendation 29.** Limit appeals to the issues presented in the protest.

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## CONFIDENTIALITY AND CORA

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### Problem or Opportunity

Procurement records are public records, with some exceptions, under the Colorado Open Records Act. Procurement records, including bids and responses to Requests for Information, often contain information that is proprietary or confidential by the submitting entity. The Rules related to evaluation of bids requires a purchasing agent to determine whether information submitted by an entity is confidential or proprietary. This process is sometimes handled inconsistently, and additional statutory direction would simplify the process for purchasing officials and vendors.

It is in the best interests of the State to keep information submitted by vendors confidential to encourage responses.

**Recommendation 30.** Clarify the process for classifying confidential or proprietary information in procurement records.

**Recommendation 31.** Designate all responses to RFIs as confidential until after a solicitation is awarded or until it is determined that a solicitation will not be pursued by the State.

**Recommendation 32.** Clarify that entire proposals may not to be considered confidential/proprietary.

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## PREFERENCES AND SET ASIDES

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### Problem or Opportunity

There are many limitations on the ability of purchasing officials to successfully apply preferences to purchasing transactions due to lack of information and participation from vendors as well as a lack of reporting tools available. In addition, the statutory language for many preferences is inconsistent, making it difficult for vendors and purchasing officials to know how each preference should be applied.

Below is a list of current procurement preferences:

- Low Tie Bids. Applies to Invitations for Bid for goods. The resident bidder receives preference over a non-resident bidder.
- State purchases of recycled paper and recycled products. Whenever the price is competitive and the quality adequate for the purpose intended, recycled paper is to be purchased. Paper products include paper napkins, towels, corrugated and other cardboard, toilet tissue, high-grade office paper, newsprint, offset paper, bond paper, xerographic bond paper, mimeo paper, and duplicator paper. Authorizes purchase, when cost-efficient and economically feasible, of equipment that results in the reduction of paper usage.
- Preference for Environmentally Preferable Products. Applies to Invitations for Bid for goods. Preference of up to 5% permitted.

- Service-Disabled Veteran Owned Small Businesses (SDVOSB) Goal. Applies to all State contracts issued by principal departments of the executive branch and Higher Education under the Procurement Code. Goal of at least 3% of all State contracts, by dollar value, be awarded to SDVOSB. Allows a percentage preference, suggests not more than 5%.
- Set Asides for all Persons with Severe Disabilities. Applies to services that are periodically solicited. Allows for 15% above fair market value subject to appropriations.
- Reciprocal bidder preference. A resident bidder shall be allowed a preference against a nonresident bidder equal to the preference given or required by the state in which the nonresident bidder is a resident. Percentage preference given to resident bidders against a nonresident bidder equal to preference given in the state of the nonresident bidder.

**Recommendation 33. Clean up language and requirements related to preferences for consistency.**

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## COOPERATIVES

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### Problem or Opportunity

"Cooperative purchasing" means procurement conducted by, with, or on behalf of more than one public procurement entity or by a public procurement . Cooperative purchasing allows the State to increase its buying power by partnering with other entities. State agencies often look to use cooperative purchasing when doing so is determined to be in the best interest of the State or when doing so allows other agencies or political subdivisions to benefit. Cooperative purchasing practices have changed significantly, and the Code and Rules need to be updated to reflect modern practices. The Code is currently too restrictive, and providing more flexibility would allow the State to be more nimble, increase efficiencies, and maximize resources.

**Recommendation 34. Allow State public entities to participate and use solicitations issued by other State public entities.**

Cooperative purchasing broadens the opportunity for State and local governments to obtain volume discounts through joint purchasing and to lower the transaction costs of both purchasing agencies and vendors in completing such transactions.