

COLORADO PROCUREMENT MODERNIZATION

**Department of Personnel & Administration
Recommendations pursuant to House Bill 16-1451**



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OVERVIEW

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 & Contracts Office led 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 recommendations intended to serve as a framework for discussion with members of the General Assembly, the vendor community, and other interested stakeholders. In December 2015, DPA released a white paper and began seeking stakeholder input on the working group's recommendations.

During the 2016 legislative session, DPA worked with members of the General Assembly to draft legislation based on the white paper framework. Due to the size and complexity of the Procurement Code, the drafting process carried into April. With only weeks remaining in the 2016 legislative session and insufficient time to allow proper stakeholder review and vetting, the General Assembly passed HB16-1451, which directed DPA to continue its stakeholder engagement and submit final recommendations to the General Assembly by December 31, 2016.

DPA invited more than 6,000 vendors registered in the State's vendor database, business organizations, nonprofits, labor organizations, taxpayer advocacy organizations, legal professionals, and State employees to participate in various meetings around the state and to provide feedback. The Department held its first meeting in Denver and broadcast the meeting over the Internet for stakeholders who could not attend in person. The Department hosted similar meetings in Grand Junction, Fort Collins, and Pueblo. DPA also participated in a forum hosted by the Denver Metro Chamber of Commerce. The Department asked for participants to provide feedback on its draft recommendations and to suggest additional recommendations.

This document contains the Department's final recommendations. DPA will continue to work with the General Assembly and stakeholders to craft bill language based on these recommendations.

BACKGROUND

The Colorado Procurement Code (Code) governs how most executive branch agencies¹ buy goods and services. The Code is overseen and administered by DPA. The Code, established in January 1982, is based on the 1979 American Bar Association (ABA) Model Procurement Code and has not been comprehensively reviewed and updated in more than 34 years.

The Procurement Rules (Rules) are required 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 comprehensively reviewed and updated 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 while performing their work.

¹ Institutions of higher education may opt out of the Code

The Code and Rules are based on six foundational purposes and policies² 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.

² 24-101-102, C.R.S.

GENERAL UPDATES AND CLEAN-UP

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 sometimes 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.**

PROCUREMENT RULES

Many sections of the Procurement Code require DPA to promulgate rules. Administrative rules can be a helpful tool to clarify statute and establish processes to ensure consistent application of the law. However, Administrative rules are not always necessary to implement statute. Many of the rules required by the Procurement Code add additional complexity to the Procurement Code, and replacing these requirements with permissive rule-making authority would allow DPA to repeal unnecessary rules and simplify the Procurement Rules.

- Recommendation 6. Replace mandatory rule-making provisions with permissive rule-making authority.**

ETHICS

State procurement professionals follow the [Procurement Code of Ethics and Guidelines](https://www.colorado.gov/pacific/osc/procurement-resources)³ (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 7. Establish ethical standards in statute for all persons involved in the procurement process, whether directly or indirectly, including purchasing officials, end users,**

³ "Procurement Code of Ethics and Guidelines" <https://www.colorado.gov/pacific/osc/procurement-resources>

vendors/contractors, management, and interested third parties, and during all phases of the procurement process (pre-solicitation to post-award).

TRAINING

Currently, the only formal training provided by the State Purchasing and Contracts Office is a two-day training course for State employees that provides a high-level overview of procurement in Colorado as well as a contract and statement of work drafting course.

The State should explore more specific training for vendors who want to do business with the State to include: responding to solicitations, sharing of best practices, and discussing areas of the State's procurement laws and rules that are specific to vendors. The State has a responsibility to ensure fair and equitable treatment of all persons who deal with the State's procurement system, and many vendors have asked for more guidance about the State's solicitation process. Vendor training would also encourage effective, broad-based competition.

Many of the difficulties and issues that arise in State procurement often result from a lack of training. For instance, training on solicitations and awards should result in fewer protests and appeals and an increased confidence by the public in the State's procurement process.

Training on contract management should result in fewer contract disputes and better contract performance by vendors. A consistent training program based on the State's procurement laws, rules and policies minimizes the risk to the State.

Establishing a permanent procurement training function for State employees and vendors would improve the overall process dramatically. Having an improved procurement process means improved procurement support for the programs of the State. The advantages of the State providing procurement training in lieu of seeking external procurement training are cost savings and relevance of the topics to the State's procurement laws, rules, and policies.

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 8. Authorize the State to establish a permanent procurement training function to serve State agencies and vendors.

APPLICATION OF THE CODE

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.

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. 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.

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

Recommendation 10. Exempt publicly regulated utilities including water, electricity, natural gas, and telecommunications.

Current practice is to issue a sole source contract for gasoline 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 fuel, including gasoline and propane.

Purchase of copyrighted materials and 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 the display, purchase, performance, or use of copyrighted materials or works of art.

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 conferences including meeting rooms, audio/visual, catering, etc., at hotels/venues.

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.

Recommendation 14. Exempt client-based medical services as specialized professional services.

In litigation and in the Department of Law's provision of other legal services, scientific, technical, or other specialized knowledge is often required. Procurement of these types of specialized services requires assessment and selection on a case-by-case basis taking into account various factors, including value, knowledge, skill, experience, training, licensing and education to ensure the interests of the State are protected. These services are extremely difficult to procure using formal competition due to the urgency of the services needed at times, the indeterminate volume, lack of competition in specialized areas, and the fact that many of the providers of these specialized services do not respond to formal solicitations.

Recommendation 15. Exempt specialized services approved by the Attorney General to support legal services provided to State agencies

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

Recommendation 16. Exempt dues and memberships.

GRANTS

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 17. 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.

CONTRACTS

Multiyear Contracts

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 would exceed the term included in the solicitation, 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 18. Allow for a reasonable extension of an existing contract, if extenuating circumstances exist, with approval of the State Purchasing Director.

Contract Management System

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 19. Repeal outdated and ineffective provisions to concentrate efforts on contract compliance rather than reporting.

Recommendation 20. Establish progressive remedies to include suspension or debarment for non-performing contractors.

Terms and Conditions

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 may 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), that binding arbitration is included as a remedy, that the vendor's liability is limited in violation of State fiscal rules, and that the contract be governed by the vendor's choice of law, rather than Colorado law. Indemnification and binding arbitration are 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 21. Prohibit indemnification of vendors by the State.

Recommendation 22. Prohibit binding arbitration as a remedy.

Recommendation 23. Prohibit vendor's limitation of liability for bodily injury, death, and damage to tangible personal property of the State.

Recommendation 24. Require that State contracts be governed by Colorado law.

MARKET RESEARCH

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 25.** **Establish the RFI process in the Code as a recognized market assessment and information gathering tool.**
- Recommendation 26.** **Clarify appropriate methods for conducting market research.**

ADMINISTRATIVE REMEDIES

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 27.** **Establish a process for determinations on whether a protesting entity is appropriate as an aggrieved party in a solicitation or award. Limit protests to bidders and prospective bidders.**
- Recommendation 28.** **Establish that only material issues can be protested and appealed. “Material” means an issue significant enough to have changed the outcome. This will avoid trivial protests and appeals so that the proper attention can be given to significant concerns.**
- Recommendation 29.** **Require submission of an appeal bond, in a reasonable amount, if an aggrieved party wants to submit an appeal.**
- Recommendation 30.** **Clarify when a stay of procurement applies to ensure fair treatment of bidders and prospective bidders.**
- Recommendation 31.** **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 32.** **Allow an aggrieved party to move to the next step in the process if the State fails to respond within a defined timeframe.**
- Recommendation 33.** **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 34.** **Limit appeals to the issues presented in the protest.**

CONFIDENTIALITY

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 35. Clarify the process for classifying confidential or proprietary information in procurement records.

Recommendation 36. 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 37. Clarify that entire proposals may not to be considered confidential/proprietary.

PREFERENCES AND GOALS

The General Assembly has established a variety of preferences and preference goals in the Procurement Code. Procurement preferences are intended to favor types of goods, environmentally friendly office products, for example, or businesses that meet certain criteria, such as hiring people with disabilities. Though procurement preferences are intended to influence important public policy goals, preferences are often very difficult to implement successfully.

Purchasing professionals seek to be good stewards of taxpayer dollars and must always seek to balance the competing goals of selecting the highest quality goods and services for the best price. Preferences add additional factors to purchasing decisions and sometimes add to the cost or reduce the quality of what the State buys.

Lack of information and participation from vendors as well as a lack of reporting tools also limits the ability of purchasing officials to successfully implement preferences to purchasing decisions. Often, the State does not have access to information or tools to identify vendors that meet preference criteria, and verifying vendor and product eligibility is a constant challenge.

Some well-intentioned preferences are designed with unachievable goals or impractical requirements. For example, the Service Disabled Veteran Owned Small Business Veterans preference goal directs the State to seek to purchase 3% of all goods and services from an extremely small list of qualifying businesses.

Finally, the statutory language for many current 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 38. The General Assembly should evaluate the effectiveness of current preferences and consider repealing or restructuring preferences that are not achieving their intended purpose.

Recommendation 39. Clean up language and requirements related to preferences for consistency.

COOPERATIVE PURCHASING

“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 buying power.

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.

Recommendation 40. Allow State public entities to participate and use solicitations issued by other State public entities.