

## CHAPTER 2

### Cooperative Purchasing: A US Perspective

BY

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#### *1. Introduction to cooperative purchasing*

The 2000 American Bar Association (ABA) Model Procurement Code defines cooperative purchasing (known generally in the European Union as 'Joint and Collaborative Procurement') as a "procurement conducted by, or on behalf of, one or more Public Procurement Units".(1) How it comes to be, and how it is evaluated, contracted for, and made available to governmental entities are some of the broader questions that surround cooperative purchasing today. Suffice it to say, cooperative purchasing is on the rise(2) and utilized at nearly every level of government, from the federal government to the smallest of local entities. Thus, it becomes important to understand why governmental entities use cooperative purchasing, to what benefit, and at what expense. In order to do so, it is necessary to examine the principles underlining cooperative purchasing, its legal basis, the types of cooperatives in existence today in the United States, the structure and processes that exist within those cooperatives, and the issues, concerns, and practicalities that are associated with cooperative purchasing. It should be noted that discussion herein focuses on the U.S. experience of cooperative purchasing as it exists primarily between U.S. States and does not address transnational procurement or collaboration.

The fundamental principles surrounding cooperative purchasing do not differ from the fundamentals surrounding public procurement in general; or rather, they should not. The requirements to ensure fair and open competition, transparency, and accountability must be met whether one is leading or participating in cooperative purchasing. However, while these principles or requirements are nearly universal in public procurement, their meanings

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(1) American Bar Association (ABA), *The Model Procurement Code for State and Local Governments*, Art. 10, Part A, Definitions, §§ 10-101(1), 2000, p. 79.

(2) National Association of State Procurement Officials (NASPO), "Strength in Numbers – An Introduction to Cooperative Procurements", February, 2006.

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change depending upon the applicable legal requirements and policies. As well, what may seem fair and open to one entity at the city level may not look fair and open to a counterpart at the State level, and vice versa.

### 1.1. Fair and Open Competition, Transparency, and Accountability

Fair and open competition is a key principle underlying the integrity of public procurement and public trust.<sup>(3)</sup> In basic terms, fair and open competition means that the government entity treats everyone fairly and conducts the procurement in a transparent manner. This concept of fair and open competition applies throughout the procurement process, from the drafting of the solicitation to its issuance, the evaluation of responses, and the resulting contracts.

To ensure fair and equal treatment and access in the procurement process, thereby adhering to the principles of fair and open competition, procurement professionals must provide each of the following in a timely manner:<sup>(4)</sup>

- advance public notice of State business opportunities;
- advance disclosure of all mandatory requirements and selection criteria;
- identical information to all interested vendors, presented at the same time;
- a selection of vendors based solely on defined criteria and process; and
- appropriate oversight to prevent organizational conflicts of interest.<sup>(5)</sup>

Each of these requirements presents unique challenges in public procurement, recognizing that each of these unique challenges magnifies when engaging in cooperative purchasing that involves multiple government entities.<sup>(6)</sup> For the latter, participation in the process by governmental entities allows each entity to ensure that its own requirements for fair and open competition and transparency are met. It is essential for any participating government entity to verify that the cooperative purchasing entity has met those said requirements before it engages in cooperative purchasing.

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(3) E. HAYES, “An Introduction to Cooperative Purchasing”, presented periodically to Seminar Class at The George Washington University Law School by Elizabeth Hayes and Justin Kaufman.

(4) *Ibid.*, p. 3.

(5) For additional information on organizational conflicts of interest, see National Association of State Procurement Officials, *State and Local Government Procurement, A Practical Guide*, 2<sup>nd</sup> ed., 2015, p. 242.

(6) For additional information on public procurement in the United States, see D.M. CONWAY, “State and Local Government Procurement”, *American Bar Association Section of State and Local Government Law*, 2012.

## 1.2. The Case for Cooperative Purchasing

A strong justification for participation in cooperative purchasing lies in the notion that buying in large volumes (leveraged spend) leads to several benefits, to include, among others, lower per unit costs, the ability to insist on better terms of service, and overall better value.<sup>(7)</sup> In addition to price competition, there are other efficiencies to be gained through cooperative purchasing. Governmental entities are continually asked to do more with less, *i.e.*, with budget reductions leading to an increased workload and declining resources. Therefore, the ability to engage in cooperative purchasing permits one governmental entity to provide resources and experts, the benefit of which can be enjoyed by all of the entities that are involved. This allows governmental entities with fewer resources to engage in procurements and contracts that may otherwise be cost or resource prohibitive, while giving the government entity that provides the resources and expertise the opportunity to take advantage of its increased purchasing power. Therefore, through cooperative purchasing, these entities are able to share their varied expertise, pool their resources, distribute their workloads, and work as a shared unit.

Another common interest for government entities in cooperative purchasing is the advancement of social interests, where the increased purchasing power provides an ability or potential to steer the market to meet the governments' needs. For example, imagine the impact of a large number of U.S. States requiring all photocopiers to meet federal accessibility requirements in order to be eligible for a contract under a cooperative purchasing effort.<sup>(8)</sup> Would that be sufficient to move the marketplace toward developing and manufacturing more accessible photocopiers? This idea and the veracity of the assumptions that surround it are addressed later from a more rounded perspective. For now, let us continue by examining the legal authority to lead and participate in cooperative purchasing, from a U.S. perspective.

## 2. The Legal Basis

A common theme in public procurement is the notion that in the private sector you can do anything that is not prohibited, whereas in the public sector you can only do what is authorized.<sup>(9)</sup> While perhaps an over-generalization, what this means in practicality is that each State must have the authority to

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(7) National Association of State Procurement Officials, *State and Local Government Procurement: Practical Guide*, *op. cit.*, p. 189.

(8) Federal Acquisition Regulation (FAR), Section 508 of the Rehabilitation Act, 36 CFR Part 1194 (2000) (accessibility requirements).

(9) See J.E. ARNOLD, *Anyone Who Can Be Fired Needs a Fallback Position: Preparing a Contingency Plan for the Worst Case Scenario*, Topeka, Exurba Publishing, 2003, p. 42.

participate in cooperative purchasing set forth within its statutory framework, rather than a mere absence of a prohibition to do so.

To that end, not all States or jurisdictions allow the participation of governmental entities in cooperative purchasing. Some States are permitted to engage in cooperative purchasing but restrict or regulate its scope. The 2009 survey conducted by the National Association of State Procurement Officials (NASPO) found that:(10)

- 40 U.S. States had the authority to enter into cooperative purchasing with local governments within their State;
- 44 U.S. States had the authority to enter into cooperative purchasing with other States (each also chose to enter into cooperative purchasing with other States) – NASPO’s 2018 Survey of State Procurement Practices showed an increase to 48 States having authority to enter into cooperative purchasing with other States (out of 48 States that responded to the survey);(11)
- 37 U.S. States had the authority to engage in cooperative purchasing with the federal government;
- 6 U.S. States had the authority to engage in cooperative purchasing with other countries;
- 14 U.S. States had the authority to do cooperative purchasing with not-for-profit associations; and
- 1 U.S. State did not have the authority to enter into cooperative purchasing.

In the 2015 NASPO survey, 44 U.S. States indicated the extent of their legal authority to enter into cooperative purchasing.(12) The 2015 NASPO survey further delineated the said authority, and addressed the specific actions that the U.S. States must take to meet the requirements for fair and open competition, and transparency. For example:

- 21 of 44 States reported that they must be named as a potential participant in the cooperative’s solicitation;
- 19 of 44 States reported that they must advertise the original solicitation;
- 6 of 44 States reported that they must participate in the evaluation or award decision;
- 9 of 44 States reported that they must review and approve the final contract;
- 17 of 44 States reported that there were ‘other’ requirements; and

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(10) NASPO, *2009 Survey of State Government Purchasing Practices*, 2009.

(11) NASPO, *2018 Survey of State Procurement Practices, Summary Report*, April 2018.

(12) NASPO, *2015 Survey of State Procurement Practices, Summary Report*, September, 2015.

- 10 of 44 States reported that there was no such obligation prior to participation.(13)

The data provided in the 2015 survey is important not only to an understanding of the landscape among the U.S. States, but to identifying the factors that are necessary to ensure fair and open competition, transparency, and accountability. Whether expressly required by law or not, the survey suggests that “being named as a potential participant, advertising the solicitation in their states, participating in the evaluation process, and reviewing and approving the final contract” are some of the best practices for cooperative purchasing. That said, State laws vary dramatically on the requirements and safeguards necessary, including the need for publication and competition, prior to engaging in cooperative purchasing.(14)

## 2.1. ABA Model Procurement Code

To date, the American Bar Association’s (ABA) Model Procurement Code (MPC) has been adopted (either the 1979 or 2000 version) by 26 U.S. States, with complete adoption in only three States.(15) In addition, hundreds of local jurisdictions across the U.S. have adopted some sections of the MPC in their procurement codes or regulations.(16) The ABA 2000 Model Procurement Code contains language not only authorizing Public Procurement Units to engage in cooperative purchasing, but also encouraging such participation.(17) Definitional changes were also made in the ABA 2000 MPC which expanded the term ‘Public Procurement Unit’ to include “local governments, other State governments, local governments in other States, federal agencies of the United States”, and certain not-for-profit entities.(18)

Section § 10-201(1) of the code authorizes cooperative purchasing, stating in part:

“Any Public Procurement Unit may either participate in, sponsor, conduct, or administer a Cooperative Purchasing agreement for the procurement of any supplies, services, or construction with one or more Public Procurement Units in accordance with an agreement entered into between the participants [...]”.(19)

(13) *Ibid.*, p. 12.

(14) For a more complete analysis, see E.P. ROBERSON, “No Compete Contracting in Cooperative Purchasing? Proposed Solutions to Resolve Gaps in Competition, Transparency, and Socioeconomic Policy at the State and Local Level”, *Pub. Cont. L.J.*, 2017, p. 753.

(15) NASPO, *2018 Survey of State Procurement Practices, Summary Report*, *op. cit.*, p. 11.

(16) NASPO, *2016 Survey of State Procurement Practices, Summary Report*, September, 2016.

(17) *Ibid.*, p. 16.

(18) *Ibid.*

(19) *Ibid.*, pp. 16, 80 and ff.

Section §10-201(2) clarifies, as a requirement, that “[a]ll 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”.(20) Not surprisingly, the sourcing requirements in the model code are aligned with the restrictions that are identified in the 2015 NASPO survey, including the requirements for fair and open competition discussed above.

## 2.2. A State Example: Minnesota Law

The State of Minnesota traces back its authority for the ‘joint exercise of powers’ to an act that was introduced and approved by the Minnesota legislature in 1943.(21) Under the current Minnesota law, the authority to conduct and participate in cooperative purchasing is contained in a tapestry of statutes. The State of Minnesota derives its general authority to conduct its own cooperative purchasing program from two sources:

(1) Minnesota Statutes § 16C.03, which provides the authority “to enter into a cooperative purchasing agreement for the provision of goods, services, construction, and utilities,” and sets forth a list of entities that are authorized by law to enter into cooperative agreements with Minnesota;(22) and

(2) Minnesota Statutes § 471.59, which provides a broad authority for the State to participate in cooperative purchasing, stating in part that “[t]wo or more governmental units, by agreement entered into through action of their governing bodies, may jointly or cooperatively exercise any power common to the contracting parties or any similar powers, including those which are the same except for the territorial limits within which they may be exercised. The agreement may provide for the exercise of such powers by one or more of the participating governmental units on behalf of the other participating units”.(23)

Through this authority, Minnesota may forgo its own competitive process when it utilizes a cooperative agreement that is provided by another governmental entity.(24) It is worth noting that Minnesota Statutes §§ 16C.03 and

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(20) *Ibid.*, p. 19.

(21) Minnesota Statutes, § 471.59, created in 1943 under Chapter 557, House File 721, Approved 22 April 1943.

(22) Minnesota Statutes, § 16C.03, Subd. 10.

(23) Minnesota Statutes, § 471.59, aforesaid, p. 21.

(24) Minnesota Statutes, § 16C.10, Subd. 4, which states: “The solicitation process described in this chapter is not required for cooperative agreements. The commissioner may enter into contracts or accept prices effective for sales to any governmental unit as defined in section 471.59, through a cooperative agreement as defined in section 471.59”.

471.59 not only authorize Minnesota to participate in cooperative purchasing, but also provide the State with the authority to create its own cooperative purchasing program, which is currently known as the “Cooperative Purchasing Venture (CPV)” program. Aside from the benefits of an aggregated spend for the State of Minnesota, the CPV program is also established for the benefit of local governments, and must be at least considered for use by local governments under certain circumstances. For example, pursuant to the Minnesota Statutes § 471.345, Subd. 15, “[f]or a contract estimated to exceed \$25,000, a municipality (*a type of local government*) must consider the availability, price and quality of supplies, materials, or equipment available through the State’s cooperative purchasing venture before purchasing through another source”.(25)

### 3. Common Types of Cooperatives

Cooperative purchasing entities (a group of governmental entities engaged in cooperative purchasing) often attempt to distinguish themselves based on their core participants, the products and services offered, and their alignment with other organizations. While these are all quantifiable characteristics to be considered, the cooperatives also differentiate themselves on the basis of a number of characteristics unique to cooperative purchasing, *i.e.*, labels or categories that governments colloquially, if not formally, assign to cooperative ventures. To that end, cooperative purchasing is commonly divided into three categories: formal cooperatives, piggyback contracts, and third-party aggregators.(26)

#### 3.1. Formal Cooperatives

Formal Cooperatives (sometimes called ‘true’ or ‘pure’ cooperatives) involve public sector organizations that work together from the inception of an idea through the processes of solicitation, evaluation and award. There is typically a formality to the organization, including the creation of a board, membership, voting rights, bylaws, and other means and measures of documenting the cooperative.(27)

The key hallmark of a ‘true’ or ‘pure’ cooperative is collaboration by the participating governmental entities. With a formal cooperative, one governmental entity typically serves as the “lead” entity, which issues the solicitation

(25) Minnesota Statutes, § 471.345, Subd. 15 (emphasis added).

(26) C. MUSE, CPPO, Director, Department of Purchasing and Supply Management, County of Fairfax Virginia, “Incorporating Cooperative Purchasing into Your Agency”, National Institute for Government Purchasing (NIGP) webinar.

(27) *Ibid.*, p. 26.



for bids or proposals in accordance with its own procurement laws.(28) This does not occur in a vacuum, but in collaboration with other members and participants which provide guidance and ensure that their own procurement laws are also being met in the solicitation.

Formal cooperatives are generally rule-driven entities, in which members' individual legal requirements, typically set forth in statute, must be met in order for the members to participate in the cooperative, and the cooperatives' processes accordingly are designed to ensure fair and open competition and transparency.(29) Formal cooperatives therefore generally require a high level of participation by their members, significant documentation to ensure transparency, and solicitation and evaluation processes designed to meet the needs of a wide range of governmental entities. While formal cooperatives entail a high level of effort and process on the part of those participating in cooperative purchasing, they also provide for the greatest deference to the key principles of public procurement, transparency and competition.

### 3.2. Piggybacking

Piggybacking occurs when one or more organizations issue a solicitation, and another unplanned governmental entity elects to 'piggyback' or uses the resulting procurement process as a shortcut to meeting its own requirements.(30) The piggybacking governmental entity may rely on a previously issued solicitation by another entity, and may issue its own purchase order, establish its own separate contract, or join a cooperative contract as a means of accessing the contract after the procurement is completed. The piggybacking entity determines its own ability to piggyback, and is responsible for verifying that its procurement laws have been followed by the lead entity, and that it has the authority to piggyback on the contract. The vendors under a contract to sell goods or services to the lead governmental entity are unlikely to refuse a request from a piggybacking entity. Further, a lead entity may not be aware of the piggybacking, or may be aware but have little ability to control the actions of another governmental (piggybacking) entity. While piggybacking offers convenience for governmental entities, it also poses risks to the requirements for fair and open competition by both the piggybacking entity and the lead entity.(31) As a lead governmental entity may have little ability to control the piggybacking, or may wish to permit piggybacking only to take advan-

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(28) National Association of State Procurement Officials, *State and Local Government Procurement: Practical Guide*, *op. cit.*, pp. 7, 195.

(29) *Ibid.*, pp. 7, 189.

(30) C. MUSE, "Incorporating Cooperative Purchasing into Your Agency", *op. cit.*, p. 26.

(31) For example, *see* D. HINDMAN and R. PARKER, "Piggyback Contracts: The Benefits and the Limits of Shared Purchasing", *PSG Proc. L.*, Spring 2014, p. 16.



tage of the combined purchasing power, a lead entity's solicitation may use general language notifying vendors of the potential for piggybacking under a subsequent contract.

### 3.3. Third-Party Aggregators

Third-Party Aggregators are organizations that create and market cooperative contract opportunities to governmental entities, with contracts that may have been competitively solicited or directly negotiated without regard to fair and open competition, in the strictest sense.<sup>(32)</sup> Third Party Aggregators often bring together multiple organizations to represent their requirements, and manage the resulting contracts or contractors. While in formal cooperatives and piggybacking arrangements the original solicitation is for the benefit of the lead governmental entity, this may not be the case with a third-party aggregator.

## 4. From Types to Characteristics

While the terms 'formal', 'piggybacking', and 'third-party aggregation' provide us with a general framework for understanding the cooperatives that are currently present in the marketplace, these defining terms can also be used on a spectrum as factors to better understand the nature of cooperatives and how they operate. Consider the notion of a cooperative as formal or informal, piggy-backing on a range of permissibility, and aggregation in the sense of whether the resulting contract is intended primarily for the use of the lead or for its members.

### 4.1. Formality as a factor

While a formal cooperative may entail agreements between the members, a board of directors, and other formalities, an informal cooperative may be (for example) a simple agreement between two schools to combine their resources to make a purchase. In this instance there may simply be a collaboration to obtain a low bid for some larger amount of product, with the two schools combining their demand for solicitation and bidding on a solicitation that will ultimately result in two independent purchases. Formality as a factor is a matter of identifying the organizational structure behind the cooperative purchasing, and determining if a formal cooperative exists or if the arrangement is just a simple agreement to collaborate.

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(32) C. MUSE, "Incorporating Cooperative Purchasing into Your Agency", *op. cit.*, p. 26.

## 4.2. Piggy-backing as a factor

In the context of cooperative purchasing, nothing seems to draw concern quite like the invocation of the term ‘piggybacking’. Nonetheless, piggybacking occurs, at some level, in nearly every formal cooperative. We know of at least 21 U.S. States that permit the participation of other States in a cooperative, even if those participating States were not listed as participants when the original solicitation was issued.<sup>(33)</sup> To take this one step further, local governmental units that are able to access a State-led cooperative via their respective State agreements are typically not listed as participants, because listing every local government as potentially eligible would be impractical. The question then become the extent to which the solicitation and its resulting contract will be structured to accommodate piggybacking, and the efforts that will be made by the cooperative purchasing entity (the customer) to balance the ready availability of this option with legal requirements for fair and open competition. In other words, will the lead contract support piggy-backing, and will a customer agency not abuse piggy-backing to avoid normal requirements for transparency and competition.

## 4.3. Third-Party Aggregation as a Factor

Another way to organize this taxonomy is to look to the purpose of the master agreement underlying the cooperative: is the primary purpose of the cooperative for the use by the lead entity, or is it intended for the use of its members? The arrangement is more of a ‘formal’ cooperative when the lead entity intends to use the contract, but acknowledges that it will obtain an advantage by allowing piggybacking. Conversely, when the lead entity has little or no need for the contract, but executes the contract primarily for the benefit of its members rather than its own use, then it is more likely that we have what is known as ‘third-party aggregation’.

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In the following sections, we will begin introducing a number of U.S. cooperatives, and discuss the unique nature and structure of each. Each of these cooperatives sits on a spectrum of formality, piggybacking, and third-party aggregation.

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(33) NASPO, *2015 Survey of State Procurement Practices, Summary Report, op. cit.*, p. 12.

## **5. A Sample of U.S. Federal and State Cooperatives**

The list of existing U.S. cooperatives is extensive, from the federal General Services Administration's Multiple Award Schedule (MAS) contracts, to State-led cooperatives, to those arrangements led and managed by cities, counties, schools, and cooperative authorities. These cooperatives often work from the top down. For example, cities may use State-led cooperatives, or cities and States may use federal price schedules, but it is less likely that the federal government would use State-led or city-led cooperatives. Use tends to flow down-stream (lower-level governmental entities) or cross-stream (similarly situated government entities) from the cooperative, with less use up-stream (higher-level governmental entities). This may be due to the more stringent requirements for fair and open competition that exist at the State and federal levels – requirements which may simply not be met by contracting arrangements launched at a local level. For the purpose of comparison, we will focus on the federal MAS contracts, and on two large State-led cooperatives, NASPO ValuePoint and the Minnesota Multistate Contracting Alliance for Pharmacy (MMCAP).

### **5.1. Federal Cooperative Purchasing Program and State Equivalents**

The General Services Administration (GSA) within the U.S. federal government “establishes long-term government wide contracts” (known as ‘Multiple Award Schedule’ or ‘MAS’ contracts) “with commercial firms to provide access to millions of commercial products and services at volume discount pricing”.<sup>(34)</sup> Certain of those MAS contracts (for information technology, for example) are made available to State, local and tribal governments, among others, under what is referred to as the Cooperative Purchasing Program. These MAS contracts are entered into under standard federal requirements for purchasing supplies and services.<sup>(35)</sup> Under these contracts, State and local governments have access to a wide array of products and services, including information technology<sup>(36)</sup> and law enforcement equipment.<sup>(37)</sup> However, purchases under GSA contracts (specifically Schedules 70 and 84) were only made available to State and local governments in 2002, following a study that showed inconclusive results on whether use of the GSA schedules would impact

<sup>(34)</sup> Government Services Administration Schedules, last reviewed February 14, 2017.

<sup>(35)</sup> See Federal Acquisition Regulation (FAR), Subpart 8.4, available at [www.acquisition.gov/far/html/Subpart%208\\_4.html](http://www.acquisition.gov/far/html/Subpart%208_4.html), and FAR, Part 38.

<sup>(36)</sup> Government Services Administration, Schedule 70.

<sup>(37)</sup> Government Services Administration, Schedule 84.

small businesses' ability to compete for contracts.(38) This question will be addressed later in the general framework of the impact cooperative purchasing presents to small businesses and social interests.

Despite concerns related to small business impact, the use of the GSA contracts appears common at the State and local levels because the contracts are relatively easy to use and their use is generally permitted by law. For example, in the State of Minnesota, pursuant to statute the State may "instead of soliciting bids, contract for purchases with suppliers who have published schedules of prices effective for sales to any federal agency of the United States".(39) These contracts may be used, regardless of the amount of the purchase price, so long as the use of the MAS contract is deemed advantageous and the prices do not exceed those set forth in the federal schedule.(40) However, it should be noted that when using GSA's Cooperative Purchasing Program, the State of Minnesota uses only the price schedule, not the underlying federal contract, and enters into negotiations with the federal supplier for a direct contract using the federal prices. (Notably, while States have access to the federal GSA contracts, it does not appear at this time that the federal government is availing itself of the use of any State or local cooperative agreements.)

As previously described, the use of the GSA contracts and their price schedules is a relatively 'informal' process, and strictly voluntary.(41) Their use generally is limited only by the legal restrictions of the customer State and local entities. Unlike some 'formal' cooperatives, there is no organization to join, no membership applications to complete or annual meetings to attend, and, certainly, there are no boards of directors. Furthermore, the GSA contracts and price schedules are sourced by the federal government, and available for use if permitted by the purchasing entity and allowed by the vendor under the terms of its federal contract.(42)

The GSA Cooperative Purchasing Program resists ready categorization, in part because it is a relatively small part of federal MAS contracting overall. While it seems inappropriate to characterize cooperative use of the GSA MAS contracts as 'third-party aggregation', since the federal government remains the primary user of the GSA contracts available under the Cooperative Purchasing Program, it is less clear whether we should characterize the use of the GSA MAS contracts by other governmental entities as

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(38) "State and Local Governments: Ditch the GSA Schedule and Do It Yourself", *Pub. Cont. L.J.*, 2015, pp. 573, 581-582.

(39) Minnesota Statutes, § 16C.10, Subd. 3.

(40) Minnesota Statutes, § 16C.10, *op. cit.*, p. 39.

(41) Government Services Administration, "Cooperative Purchasing FAQs".

(42) *Ibid.*, p. 41.

‘piggybacking’. For the sake of argument, consider for a moment whether a solicitation that is issued by the federal government and advertised as available for use by all States and local entities is sufficient to alleviate the concerns normally associated with piggybacking (*i.e.*, extent of its use and the need for fair and open competition). This question remains unanswered for now.

### 5.2. Federal – State Equivalents

A number of States manage programs very similar to the federal MAS Cooperative Purchasing Program for use by their local governmental units. For example, the Minnesota Cooperative Purchasing Venture (CPV) program makes many of the contracts held by the State of Minnesota available for the use of local governments in Minnesota, as well as non-Minnesota local governments, and other States. However, Minnesota’s CPV process is slightly more formal than the federal program. While there are no annual meetings and no board of directors, there is a basic membership application, and an agreement which requires the entities utilizing the program to generally hold the State harmless in the event that the use of the contract leads to any injury. The agreement also sets forth a handful of other legal terms and conditions, such as a limitation of liability, intellectual property rights, warranties and disclaimers, termination for convenience, and requirements for performance bonds.<sup>(43)</sup> There are more than 800 Minnesota State contracts that are available, including contracts for computer hardware and software, cleaning supplies, vehicles, cell phones, copiers, furniture, fuel, paint, paper, road salt, hazardous waste recycling, digital imaging, translation, IT services, and more.<sup>(44)</sup>

### 5.3. NASPO ValuePoint

Unlike the Minnesota CPV arrangements, the cooperative purchasing arrangements sponsored by the National Association of State Procurement Officials (NASPO) are more formal. NASPO was founded in 1947 at a meeting of State purchasing officials held in Chicago.<sup>(45)</sup> Originally, the meeting was held to discuss how States could secure surplus war property from the federal government. One attendee, George J. Cronin, from Massachusetts, “urged the

(43) R. PENNINGTON, “Comparative Review of State IT Procurement Practices”, prepared for the NASPO IT Procurement Work Group, 2010.

(44) Welcome to Minnesota’s Office of State Procurement Cooperative Purchasing Opportunities, [www.mmd.admin.state.mn.us/coop.htm](http://www.mmd.admin.state.mn.us/coop.htm). For additional examples of State-led cooperatives, *see also* [comptroller.texas.gov/purchasing/programs/co-op/](http://comptroller.texas.gov/purchasing/programs/co-op/).

(45) *History of the Cronin Awards*. <https://www.naspo.org/NASPO-Awards/Cronin-Award-for-Procurement-Excellence>.

formation of an ongoing, formal organization of State purchasing officials as an effective vehicle to address specific public procurement issues and provide a network for resolving problems". The other participants agreed, and elected Cronin to be the president of the new organization.(46)

Seventy years later, NASPO identifies itself as "a non-profit association dedicated to advancing public procurement through leadership, excellence, and integrity".(47) NASPO's leadership is comprised of the directors of the central purchasing offices from each of its members, which include the 50 U.S. States, the District of Columbia, and the territories of the United States.(48)

In 1993, a group of 15 States came together to form the Western States Contracting Alliance (WSCA)(49) to function as a cooperative purchasing program under the banner of the National Association of State Procurement Officials (NASPO). While other regional cooperative purchasing programs were formed under NASPO, none were as prevalent or prolific as WSCA. In 2006, NASPO merged the Eastern, Southern, and Midwest regional cooperatives into the new NASPO Cooperative. Finally, in 2013, as WSCA became more successful and cooperative efforts grew, NASPO consolidated its two remaining cooperatives (WSCA and the NASPO Cooperative) under a non-profit, limited liability company named 'NASPO ValuePoint'.(50)

The NASPO ValuePoint Cooperative Purchasing Organization LLC is a nonprofit, wholly owned subsidiary of the National Association of State Procurement Officials (NASPO).(51) It is led by a 21-member Management Board comprised of State procurement officials appointed by NASPO, its parent organization. Each board member represents one of four original geographic regions that were established by NASPO for cooperative purchasing (e.g., the Western States and the Western States Contracting Alliance).(52) The NASPO ValuePoint Board oversees the strategic direction, operations, and activities of the organization, and does so with the assistance of a contractor hired to facilitate and support the entity and its programs.(53) In fact, NASPO ValuePoint itself awards no contracts, but rather assists States in their collaboration on solicitations and resulting contracts, using a 'Lead State' model.

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(46) *History of the Cronin Awards, op. cit.*, p. 45.

(47) "Who We Are", [www.naspo.org](http://www.naspo.org).

(48) "NASPO Membership", [www.naspo.org](http://www.naspo.org).

(49) For a more complete history of WSCA, see J.E. NELSON and J.A. LoBosco, "Understanding the WSCA-NASPO Cooperative Purchasing Organization: It's Time to Invite the Elephant Out of the Corner", 44 *Public Contract L.J.*, 2014, p. 113.

(50) "Who We Are", aforesaid, p. 47.

(51) *Ibid.*

(52) *Ibid.*

(53) "How NASPO ValuePoint Works", [www.naspovaluepoint.org/about](http://www.naspovaluepoint.org/about).

When determining which contracts to pursue as part of the NASPO ValuePoint cooperative, ideas begin at the State level among its members. The ideas are then presented to the NASPO ValuePoint board, which may elect to move the idea forward into a solicitation, to decline the idea, or in some cases, to issue a survey to better understand the needs of the cooperative's members as they relate to the proposed new contract.<sup>(54)</sup> Once a need is identified, a Lead State is selected (or volunteers), and the lead State begins the process of preparing for the issuance of a solicitation.<sup>(55)</sup> The lead State will first gather its own staff and experts, and then create a sourcing team composed of subject matter experts from other States. In the lead State model, one State leads the procurement, issues the solicitation, and awards the master contract based on that State's legal and policy requirements. The lead State relies heavily on sourcing teams to provide the needed guidance and to identify customer demand to ensure a successful new cooperative contract(s). Together with the sourcing team, the lead State develops the solicitation for publication, which includes the requirements and evaluation criteria, and then publishes that solicitation in accordance with its own rules, but also taking into account other States' requirements (for longer periods of publication, for example), to make it possible for other States to participate in the resulting contract.<sup>(56)</sup> Significant effort goes into this process, which is supported by NASPO ValuePoint's general counsel.<sup>(57)</sup>

Once responses are received from eligible vendors, the sourcing team continues to work with the lead State, in most cases, to evaluate those responses, and ultimately to select the vendors that will be awarded a Master Contract.<sup>(58)</sup> The Master Contract will be held by the lead State, and serves as the overarching contractual document for all purchases arising from the solicitation.<sup>(59)</sup> Each State that wishes to participate in the Master Contract, including the lead State, will then issue a Participating Addendum (PA) that will, if agreed to by the awardee Contractors, bind the joining Contractors to each State's specific requirements. The Participating Addendum is a direct agreement between the Contractor and a participating governmental entity that incorporates the terms and conditions included in the original solicitation, the terms and conditions in the Master Contract, and any other additional specific language or other requirements of that

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(54) NASPO, *State and Local Government Procurement: Practical Guide*, *op. cit.*, pp. 7, 195-196 and ff.

(55) *Ibid.*, p. 54.

(56) *Ibid.*

(57) Richard Pennington has served as the General Counsel of NASPO since 2003, and has been instrumental in working to align legal terms and create boilerplate language for use by all lead States.

(58) NASPO, *State and Local Government Procurement: Practical Guide*, *op. cit.*, pp. 54, 195 and ff.

(59) *Ibid.*, p. 58.



State or local entity (a participating entity), generally including an order of precedence.(60) It should also be noted that the participating entities have the flexibility of negotiating additional terms and conditions to meet the unique needs of their States. The results of the negotiations – the special terms – that are incorporated in a Participating Addendum are between the participating entity and the contractor, and do not impact the terms of the Master Contract.

A main purpose of a Participating Addendum is to create privity of contract between each participating entity and each vendor, thereby creating protections in the event of performance issues or should legal liabilities occur. It is worth noting that a Master Contract is signed by the lead State with each vendor under the program; and a Participating Addendum is signed by each State (and some local entities) with one or more vendors under the program. For example, in NASPO's contract for computer equipment, peripherals, and related services, where the Master Contract is held by the State of Minnesota, there was a single solicitation that resulted in the issuance of a Master Contract to 30 vendors, and resulted in over 600 Participating Addenda between the vendors and participating governmental entities.(61) In most cases, a Participating Addendum on the part of a U.S. State is approved by the State's Chief Procurement Officer, or equivalent, at which point the officer may determine that the Participating Addendum is only eligible for State use, or may permit the participation by all eligible local entities within the State. Where the State has not entered into a Participating Addendum, the local entities may enter into their own Participating Addenda, but may (in the case of NASPO ValuePoint) need a prior approval from the State's Chief Procurement Officer.

NASPO ValuePoint currently maintains 67 Contract Portfolios (contracts covering 67 areas) ranging from Auto Parts to Computer Equipment, to infant formula, to Wireless Communication & Equipment.(62) These contract portfolios translate to master contracts with 358 contractors to provide the goods and services.(63) The contracts are established for the use and benefit of the State members and the lead State, and not for the purpose of third-party aggregation. From the standpoint of piggy-backing, these contracts (like the GSA MAS contracts) can be made available to local entities which were not involved in the solicitation and award of the master contracts, but which were broadly identified as potential downstream users.

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(60) "How NASPO ValuePoint Works", aforesaid, p. 53.

(61) "Computer Equipment, Peripherals & Related Services 2015-2020", [www.naspovaluepoint.org/portfolios](http://www.naspovaluepoint.org/portfolios).

(62) "Contract Portfolios", [www.naspovaluepoint.org/portfolios](http://www.naspovaluepoint.org/portfolios).

(63) "Current Portfolios, Contractors", [www.naspovaluepoint.org/contractors](http://www.naspovaluepoint.org/contractors).

To fund its operation, NASPO ValuePoint does not currently charge membership fees.<sup>(64)</sup> Rather, it collects an administrative fee from its contractors when they make a sale through the cooperative's contract. These fees, set by the NASPO ValuePoint Board, fund NASPO ValuePoint and National Association of State Procurement Officials (NASPO) operations, are used to reimburse approved costs of the State leading the cooperative procurement, and provide for training and education of NASPO members.<sup>(65)</sup> The contractor collects the administrative fee at the point of sale, and remits it to NASPO ValuePoint, and not to the lead State.<sup>(66)</sup> Generally the administrative fee paid by the contractors is *de minimis* and has little impact on the pricing that is charged to the purchasing organization. In December 18, 2014 the State of Utah's Office of the Legislative Auditor General reported, "[t]he WSCA-NASPO administrative fee included on most of the organization's contracts does not appear to affect the final price of goods".<sup>(67)</sup>

#### 5.4. Minnesota Multistate Contracting Alliance for Pharmacy (MMCAP Infuse)

The Minnesota Multistate Contracting Alliance for Pharmacy (MMCAP, pronounced 'em-cap') recently re-branded as "MMCAP Infuse", was established in 1985 as a cooperative between the States of Minnesota and Wisconsin. While eligible as a Group Purchasing Organization (GPO) under the federal safe harbor provisions,<sup>(68)</sup> MMCAP is not a non-profit organization, but rather a purchasing cooperative within the State of Minnesota's Office of State Procurement.

MMCAP is a free and voluntary cooperative, with a membership that includes 49 States, and serves thousands of counties, cities, school districts, correctional facilities, and public higher education facilities in all 50 US States.<sup>(69)</sup> While similar to NASPO ValuePoint in many ways, MMCAP is a government program and does not have a management board in the same manner as NASPO ValuePoint. Rather, MMCAP is managed under the purview of the State's chief procurement officer and an advisory board that consists of a chairperson and eight other member representatives from among its members.<sup>(70)</sup> Four representatives are State purchasing agents and the

(64) "How NASPO ValuePoint Works", aforesaid, p. 53.

(65) *Ibid.*

(66) *A Review of Allegations Concerning Utah's Purchasing Interaction with WSCA-NASPO*, Report to the Utah Legislature, No. 2014-11, December 2014.

(67) *A Review of Allegations Concerning Utah's Purchasing Interaction with WSCA-NASPO*, *op. cit.*, p. 66.

(68) 42 CFR, § 1001, "Program Integrity – Medicare and State Health Care Programs".

(69) "What is MMCAP?", [www.infuse-mn.gov/about](http://www.infuse-mn.gov/about).

(70) *Ibid.*, p. 69.

remaining four representatives are pharmacists selected from the main practice areas participating in MMCAP.(71) The Advisory Board is elected by MMCAP members, and meets monthly to provide recommendations to MMCAP on the strategic direction of the program.(72)

Upon joining MMCAP, each State designates its contacts (one purchasing representative and one pharmacy representative) who are responsible to:

- act as liaisons between MMCAP and its members;
- provide their State a voice in MMCAP operations;
- review the membership applications and eligibility;
- assist with the solicitation strategy, content, evaluation and response (e.g., pharmaceuticals, wholesalers, and other products and programs);
- manage the State participation requirements (e.g., RFP notifications, contract awards, etc.); and
- evaluate the pharmaceutical proposals for contract awards at a National Member Conference.(73)

Unlike NASPO ValuePoint, MMCAP maintains a staff of roughly thirty individuals, including procurement experts, pharmacists, medical supply specialists, specialists in other subject matter areas, and additional staff to support its outreach and marketing efforts. All solicitations and sourcing events issued by MMCAP are pursuant to requirements under Minnesota law, but MMCAP staff work with its members to address the issues that may be unique to or required by a member in order to participate. Similar to NASPO, MMCAP uses the lead State and sourcing team models, with the State of Minnesota always serving as the lead State.

While NASPO ValuePoint is an association with State members, MMCAP is part of the State of Minnesota and formalizes its relationships with its Member States via a joint powers agreement, under the authority of Minnesota Statutes §471.59, which sets forth the nature of the obligations of the parties. Unlike the NASPO ValuePoint model where the States establish their own direct contracts with suppliers, a single contract is held by MMCAP with each vendor (wholesalers, manufacturers, and other providers) under the MMCAP model. Each MMCAP master contract is then modified to add the needed State member requirements, similar to those that might have been added to a Participating Addendum under the NASPO model.(74) The practicality of this model means fewer variations and a simpler process for vendors, but increased

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(71) *Ibid.*

(72) "Advisory Board", [www.infuse-mn.gov/networks/advisory-board](http://www.infuse-mn.gov/networks/advisory-board).

(73) "MMCAP Government Serving Government presentation" (November 2014), [www.infuse-mn.gov](http://www.infuse-mn.gov).

(74) "Membership Application", [www.infuse-mn.gov/membershipapp](http://www.infuse-mn.gov/membershipapp).

work for the cooperative entity. This model is successful largely because of the MMCAP's staff hands-on management of the contracts, which allows for the needed level of interaction and oversight.

Finally, in order to comply with federal safe harbor provisions, something unique to the pharmaceutical industry, MMCAP requires each facility that purchases from its contracts to complete an application and enter into a member participation agreement (MPA), which among other items, notifies the facilities of the administrative fee funding model used by MMCAP.<sup>(75)</sup>

To fund its operation, MMCAP does not receive funding directly from the State of Minnesota or from any government source and does not collect a membership fee. Rather, MMCAP collects an administrative fee from the manufacturers and wholesalers that provide the products to their members, in much the same manner as NASPO ValuePoint.<sup>(76)</sup> However, as a governmental entity, MMCAP uses the collected administrative fees to fund its operations, and returns unused vendor fees to its members' facilities, on a proportional basis to the amount spent by each, in the form of a wholesaler credit.<sup>(77)</sup>

### 5.5. Common Characteristics and Ranges

There are a number of common characteristics among the previously discussed cooperatives. First, the participation in these cooperatives is voluntary; that is, the participating entities may choose to purchase from an available cooperative contract, elect to purchase from their own contracts or conduct their own solicitations, or may seek to purchase from another cooperative. They have the ability to look to multiple contracts for the best pricing and terms, a choice sometimes called 'cherry-picking'.

Second, each cooperative presents a model where time and resources are traded for the benefit of consolidated buying power, taxpayer savings, and simplicity for down-stream entities. For example, in the lead State model presented by NASPO ValuePoint, there is less effort on the part of the participants (entering into a participating agreement) and significant work for the lead State (solicitation, evaluation, contracting and a participating *addendum*). Each of these cooperatives also sits on the spectrum of formality, piggy-backing, and third-party aggregation, as discussed above. If we look at each of these factors on a spectrum, as a means of comparison, we find that the GSA Cooperative Purchasing Program placed low on the spectrum for formality, while the MMCAP and NASPO models both placed relatively high on the same formality spectrum.

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(75) Safe Harbor Regulations, 42 CFR, § 1001.952, 2011.

(76) "MMCAP Government Serving Government presentation", aforesaid, p. 73.

(77) *Ibid.*

While formality is relatively easy to quantify and chart, piggy-backing and third-party aggregation are more difficult to quantify. We can analyze piggy-backing on the basis of whether it is permissible, permissible but limited, silent, or prohibited. The difficulty, however, is in determining which level of transparency, advertising, and solicitation notice is sufficient to qualify in each category. Third-party aggregation is more binary, turning on the basis of whether the contracts are for primary use by the contracting party, or primarily for the use of the members of the cooperative; that said, some grey area may exist, and some cooperative arrangements that are nominally ‘formal’ or ‘pure’ in practice may be heavily used by third parties.

### ***6. Deciding to Participate in Cooperative Purchasing***

In a 2016 survey, NASPO reported an across-the-board increase in the use of cooperative contracting, as compared to its use in 2015,(78) e.g., the number of States actively using a NASPO ValuePoint contract increased during this time period from 33 to 46, and GSA MAS contract use increased from 19 States to 29 States).(79) The 2018 NASPO Survey showed that cooperative purchasing is becoming ‘increasingly popular’ (*i.e.*, the number of participating States actively using NASPO ValuePoint contracts were increased to 48, including Member States and the District of Columbia) with an overwhelming increase on the use of NASPO ValuePoint Cooperative contracts (100%), MMCAP (23%), and other cooperative purchasing organization contracts such as the National Joint Powers Alliance (NJPA) (1%) and U.S. Communities (10%) compared to the 2016 result.(80) Interestingly, however, the same is not true on the State use of GSA schedules (*i.e.*, with a 10% decrease on State use from 79% in 2016 to 69% in 2018).(81) Nonetheless, these advances appear to speak to the staying power of and increased reliance on cooperative purchasing. While cooperative purchasing continues to grow, at nearly all levels of government, it does so with an increased visibility, which may also lead to an increased criticism.

Ease of use is a primary appeal for cooperative purchasing at all levels of government and is often cited as a reason for using a contract available through a cooperative. In addition to ease of use, cooperative purchasing participants also value fair and open competition, contract monitoring, aggressive negotiations, ability to participate in the process, and the capacity to include their specific legal terms and conditions. Public entities also look to the pooling of

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(78) NASPO, *2016 Survey of State Procurement Practices*, *op. cit.*, p. 14.

(79) *Ibid.*

(80) NASPO, *2018 Survey of State Procurement Practices, Executive Summary*, *op. cit.*, p. 11.

(81) *Ibid.*

resources, avoidance of redundancy, and improved services to contract users. Conversely, there is a concern raised by some that cooperatives cannot be used effectively for indefinite quantity contracts, and are too permissive of piggy-backing, which may allow users to bypass best practices on fair and open competition and transparency. This is by no means a complete list of the pros and cons of cooperative purchasing, but merely a starting point for discussion.

### 6.1. Moving forward with cooperative purchasing

A meaningful consideration of the benefits and detriments of cooperative purchasing is necessary for any governmental entity prior to engagement; this process should occur before a need arises to access a cooperative contract, so as to not blur the criticality of the need with the judgment of whether to proceed. Indeed, a number of aspects should be evaluated in considering whether cooperative purchasing is the proper path for a governmental entity.

#### 6.1.1. Quantity and pricing considerations

In the realm of public procurement, there are things that we solicit for use based on a more immediate need, and things we solicit based on a future need. A procurement office may solicit for supplies, knowing the typical need and identifying a date range for ordering and delivery for what is, at the time of contract award, a still indefinite quantity of supplies. These are known as ‘framework agreements’ or ‘catalogue contracts’ internationally. The U.S. federal government refers to these as indefinite delivery/indefinite quantity (IDIQ) contracts.<sup>(82)</sup> In this instance, the procuring entity may not know the quantity of goods or service that it may need, or when they are likely to be needed, nonetheless, it establishes a master contract to ensure the availability of a contracting vehicle for purchase once the need is identified.

Problematically, as any seller of goods and services will tell you, “one in the hand is worth two in the bush”. In practice, this means that pricing of an item for sale, when based on an actual sale, arguably will result in better pricing than that provided in response to an IDIQ solicitation with no promise of purchase. This issue can be mitigated by providing in the solicitation typical spend volumes for the participating entities. However, this does not take into account piggy-backing, which may drive up the overall volume, and which may be difficult for the seller to account for in setting prices. Conversely, as the use of a cooperative vehicle is typically voluntary and governmental entities are free to cherry-pick (select to purchase goods from a number of sources depending on which provided the best price for each product line),

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(82) Federal Acquisition Regulation (FAR), 48 CFR, § 16.504(a).

vendors may be hesitant to rely on past volumes as an indication of future opportunity.

Nonetheless, governmental entities, particularly those leading the cooperative vehicle for the goods or services at issue, have the ability to conduct objective price comparisons, comparing (on either a product-specific or an overall offering basis) what is otherwise available in the marketplace. Users can at the very least conduct a comparison to determine whether the pricing is competitive, whatever the basis is for that pricing. In this same vein, lead States are able to standardize product lines, driving spend to a particular product or manufacturer as opposed to providing options and watering down volume. For example, purchasing 100 widgets from one manufacturer is apt to result in better pricing than that offered by one of four manufacturers each selling 25 widgets.

#### 6.1.2. Meeting fair and open competition requirements

The procurement process as a whole is often viewed with skepticism, in part because the public sees only the solicitation and then the result, but not the process under which the decisions are reached. To that end, and as a means of quelling public skepticism within its borders, a governmental entity's participation in the cooperative purchasing process, specifically in the solicitation and evaluation process, is the best assurance. In the absence of that participation, and in order to ensure that its own legal requirements for fair and open competition are met, the governmental entity that plans to use a cooperative vehicle must evaluate how broadly the solicitation was posted and advertised, and whether that entity's other legal requirements are met. It should also be noted, from a transparency and accountability perspective, that nearly all data collected (including solicitations, vendor responses, cost, and evaluations) should become public no later than the time of contract award, to allow those that would wish to challenge the outcome to do so. Another question then to be resolved is whether the transparency practices of the lead entity are sufficient to meet the requirements of the participating entity.

As discussed earlier, potential participating governmental entities ideally should be named in the solicitation, the solicitation should be published in their States, they should participate in the evaluation process, and they should (if possible) review and approve the final contract. The absence of one or more of these safeguards, without regard for whether they are legally required, is a common concern among those critical of cooperative purchasing and the widespread use of permitted piggy-backing. As each State has its own set of requirements, the perceived lack of transparency and fair and open competition when



engaging in piggy-backing can lead to procurement protests and legal challenges to the governmental entity's legal authority.<sup>(83)</sup>

### 6.1.3. Legal compliance

Among the numerous complexities related to procurement and contracting endeavors involving multiple States and local government,<sup>(84)</sup> one of the most significant issues stems from the differences found in the procurement laws of the participating entities. These differences cut across not only geographic State boundaries, but are found among the various levels of government within each State. Suffice it to say, the publication and notice requirements may vary greatly, not only on a state-by-state basis, but also between State and local governments. For example, in the State of Minnesota, while the State must competitively bid all contracts over \$5,000, this is not the case at the city level where competitive bidding typically is not required unless the contract exceeds \$100,000.<sup>(85)</sup> This raises a potential concern regarding whether the procurement requirements of one governmental entity are sufficient for use by another governmental entity, particularly between governmental entities at different levels, in the context of cooperative purchasing. While the lead State in a cooperative purchase works diligently to ensure that the needs of those identified for participation are met, the entities that will later join via piggy-backing are not necessarily represented, and cannot be guaranteed that the cooperative contract meets their legal and procurement requirements absent adequate due diligence.

These variations create complexity not only at the time of sourcing, but also when contracting and managing contracts. The difficulty in managing cooperative contracts can be seen through the differing approaches of NASPO ValuePoint and MMCAP, as discussed prior. The complexity in each variation turns on the number of governmental entities involved, the diversity and sheer number of vendors, and the terms that apply uniquely to each vendor and governmental entity through a participating addendum or amendment to the master contract. While formality of process, proper support, and communication are some of the keys to address this challenge, still, the larger the cooperative and the more entities are involved, the greater the challenge.

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(83) For an example, see "In Re New Jersey State Contract", 28 A.3d 816, 2011.

(84) For an example, see P. THOMPSON, "Municipal Cooperative Purchasing Arrangements in Home Rule States: The Maine Example", American Bar Association, 54-Fall Procurement Law, 8, 2018. (Home rule, *i.e.*, the degree of autonomy municipalities, has been granted by the State constitution or the legislature to enact laws and policies to govern their local affairs, has made it more difficult for the nearly 500 municipalities and towns in the State of Maine to implement cooperative purchasing to control the cost of local government services.)

(85) League of Minnesota Cities, "Information Memo on Competitive Bidding Requirements in Cities", 2015.

#### 6.1.4. Equality and sustainability – A case for balance

How a government chooses to spend its money often takes into account more considerations than need, want, and cost. The ability of a government to promote social objectives, e.g., small business, minority-owned business opportunities, environmental considerations, and accessibility, is often done through public procurement, with the spending of the governmental entity ostensibly used to promote social change. When leveraging social interests, (e.g. environmental sustainability in a cooperative purchasing solicitation and resulting contracts), the impact felt reaches far beyond that of the lead State. Particularly, where the governmental entity leading the procurement alone has insufficient power to move the market to meet its goals, its leadership in a cooperative's solicitation permits that entity to speak for the buying power of the cooperative as a whole. This is likely to continue, as we see an increasing trend in sustainability in State contracts, green purchasing policies, and executive orders mandating sustainability initiatives.<sup>(86)</sup>

While we can look at the positive attributes of aligning social goals, leveraging buying power, and other benefits that stem from cooperative purchasing, we should also look at its potential costs. One primary cost is cooperative purchasing's potential negative impact on local vendors and markets, which can be at odds with requirements for local and small business participation, including (among others) the participation of minority, women, persons with disabilities, and veteran-owned businesses. Those engaged in cooperative purchasing must balance their interests in social outcomes and local businesses, against the need for low prices and efficiency. Conversely, however, cooperative purchasing also can make it possible to purchase sustainable products directly, from a more diverse vendor base.

### 6.2. Keys to success

With the balancing of interests in mind, successful cooperative purchasing begins with the selection of an appropriate commodity or service.<sup>(87)</sup> The subject of the solicitation must have a wide geographic availability and an adequate distribution channels to meet the needs of the members of the cooperative. The selection of goods or services that are too specific or lack proper distribution channels results in lower use and diminishing returns from the cooperative contract. This is where the cooperative entity must listen and pay heed to its members, and give them a meaningful voice to ensure that the cooperative reflects the needs and requirements of its members.

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(86) NASPO, *2018 Survey of State Procurement Practices, Summary Report*, *op. cit.*, p. 11.

(87) E. HAYES, "An Introduction to Cooperative Purchasing", *op. cit.*, p. 3.

Assuming that an appropriate commodity or service is selected by the cooperative entity, the next step is ensuring that the lead entity can allocate sufficient resources to the program, both in terms of labor force and expertise.<sup>(88)</sup> This ties back to one of the requirements in the selection of the goods or services; that is, whatever is selected as the subject of the contracts, it is necessary that the team that is assigned to implement the contract has the proper expertise on the nature of the goods or services to be procured, and the most advantageous means of soliciting, evaluating, and contracting for those goods or services. Assuming that the proper resources and expertise have been committed, a critical next step for those resources is obtaining vendor acquiescence to the proposed acquisition strategy.<sup>(89)</sup> This is often challenging in the context of fair and open competition, as procurement professionals must avoid any appearance of preference or collusion when discussing their needs with vendors in a pre-solicitation context. However, a solicitation which deters vendors from replying, or a situation in which potential vendors do not understand the nature of the cooperative, may result in a poor outcome for all involved; arguably, less competition results in a decreased ability to obtain competitive pricing and terms.

Finally, once the contract is in place, proactive and aggressive contract management, not only by the lead State but also by the participating entities, is critical.<sup>(90)</sup> The failure to manage a large cooperative contract(s) and to provide the needed levels of oversight give the vendors a burden to self-regulate. Without suggesting any negative or malicious intent, the vendors should not be allowed in a public procurement arena to act without the proper oversight by those responsible for the expenditure of public funds. To assist the participating entities in this needed oversight, the process for contracting and contracting management must be simplified to the greatest extent possible. There must be a direct access by each participating entity to manage its day-to-day interactions with the vendor, in concert with the ability of the lead State to step in and escalate at a master contract level when needed.

### 6.3. Additional considerations

Cooperative purchasing presents a complex tapestry of issues, from legal compliance to fair and open competition, from pricing to piggy-backing, and from local to federal levels. Again, we return to the notions of fair and open competition, transparency, and accountability. Acknowledging the concerns related to local vendors and cooperative purchasing, buyers within the

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(88) *Ibid.*

(89) *Ibid.*

(90) *Ibid.*

governmental entity purchasing from a cooperative contract must evaluate the prevalence of local and regional vendors and their ability to compete with cooperative vendors to meet the needs of the purchasing entity. One suggestion that has been put forward is the issuance of a secondary solicitation as a means of promoting fair and open competition within a cooperative purchasing context.<sup>(91)</sup> This type of issuance could result in the creation of additional competition at the time of purchasing. This idea can also be broadened by opening the secondary solicitation to quotes from non-cooperative contracts, regional and local vendors, and others, with the purpose of establishing best value (or perhaps low cost). This would allow the governmental entity to make its purchase knowing that it has achieved the best value or lowest cost available at that point in time, be it from the cooperative vehicle or elsewhere. A secondary solicitation could also alleviate many of the concerns related to local and small businesses, Indefinite Delivery, Indefinite Quantity (IDIQ)<sup>(92)</sup> contracts and their lack of competitive pricing, and bolster transparency in the purchasing process. However, the issuance of a secondary solicitation, with all of the benefits, adds time, expense, and complexity to the process of purchasing from a Master Contract, which are the very things a cooperative purchasing Master Contract seeks to reduce for the purchasing entity. How then should we navigate these competing interests to achieve the proverbial best of both worlds?

An often uncited, unrecognized key to fair and open competition is the nature and composition of the public procurement staff. Where dedication to fair and open competition and transparency in the process is part of the cultural landscape, and supported by leadership despite political considerations, public procurement thrives. That is to say, when the right people do the right things, the process works. Problematically, when a key factor is discretion, there is also a great opportunity for things to go astray. There is no magic to the decision of whether or not to engage a secondary solicitation. The first step, however, is to examine the extent to which price negotiations were conducted, and prices were determined to be competitive in the marketplace. When in doubt, a secondary solicitation (which adds a layer of competition) may provide for greater confidence. In the absence of a secondary solicitation, publication of the governmental entity's desire to purchase from a cooperative contract may, at the least, provide for greater transparency. The application of these strategies must be considered and evaluated in the context of the overall needs and resources of the governmental entity.

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(91) J.E. NELSON and J.A. LoBosco, "Understanding the WSCA-NASPO Cooperative Purchasing Organization: It's Time to Invite the Elephant Out of the Corner", *op. cit.*, p. 49.

(92) General Services Administration, "Indefinite Delivery, Indefinite Quantity Contracts", in [www.gsa.gov](http://www.gsa.gov).

## ***7. Conclusion***

Cooperative purchasing provides opportunities for federal, State, and local governments, from the very large to the very small, to consolidate spend, and reduce the overall effort, which should result in enormous benefits not only for the government but also for its selected vendors. At the same time, the governmental entities that are engaged in cooperative purchasing must balance their interests with those of the public and the broader vendor communities. This is a tall order that the cooperative purchasing entities must not take lightly. When done well, cooperative purchasing provides for an efficient, considerate, and legally defensible means of purchasing goods and services. As a caveat, with the use of cooperative purchasing continuing to grow, dedication to the principles of fair and open competition, transparency, and accountability will be increasingly critical not only to its degree of success, but also to its literal survival.