

Session 2: How to Avoid Bid Protests

STATE BID PROTESTS

FREE ONLINE SUMMER SERIES
JULY 12-21, 2022





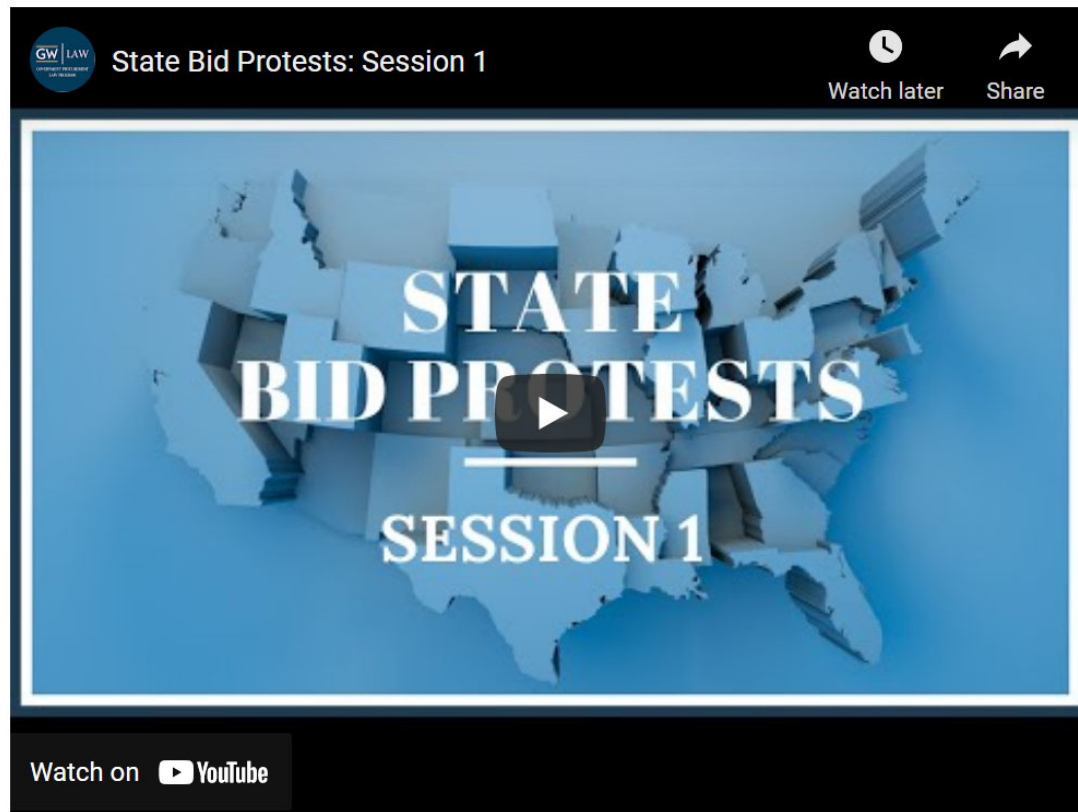
Welcome
Professor Christopher Yukins
GW Law School

- Recording and materials at www.publicprocurementinternational.com
- Questions – please use chat (not Q&A)
- All panelists' statements are in their personal capacities

Carol N. Park- Conroy



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- BA, University of Wisconsin (Madison)
 - JD, GW Law School
 - Clerked for US Dist. Judge Joseph Waddy
 - Private practice and U.S. Justice Department
 - Retired judge, Armed Services Board of Contract Appeals
 - Former chair, ABA Public Contract Law Section
 - Leader in U.S. alternative dispute resolution
 - Passed away on July 7, 2022



Recording of Session 1 – also available at [GW Law Government Procurement Law Program YouTube Page](#)

A photograph of the Eiffel Tower at night, illuminated with blue lights. The tower is the central focus, with a bright light at the top. The sky is dark, and there are several large, colorful fireworks exploding around the tower, in shades of blue, purple, and red. The fireworks create a festive atmosphere. The text "Bonne fête nationale!" is overlaid in white, centered on the image.

Bonne fête nationale!

Welcome



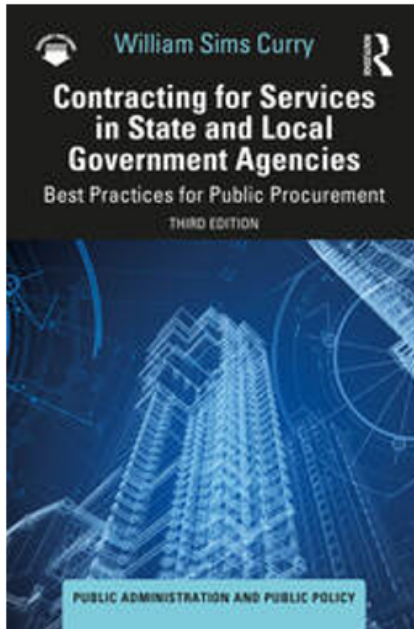
- Introductions – Elizabeth Leavy, Lydia Hoover, William Curry & Robert Metzger
- Schedule:
 1. Tuesday, July 12, 6-8 pm ET: *Introduction to State Bid Protests*
 2. Thursday, July 14, 6-8 pm ET: *How to Avoid Bid Protests*
 3. Tuesday, July 19, 6-8 pm ET: *Improving Bid Protests*
 4. Thursday, July 21, 6-8 pm ET: *Mock Bid Protest*

2. How to Avoid Bid Protests: Common Problems in Procurement
(Thursday, July 14, 6 pm Eastern) — Contracts professionals and attorneys will discuss common reasons for state bid protests, and how to avoid — or mitigate — those problems. Special guest William Curry will discuss a **chapter on bid protests** from his award-winning book, *Contracting for Services in State and Local Government Agencies: Best Practices for Public Procurement* (Routledge 3d ed. Sept. 2022) (also available from Amazon and Barnes & Noble).



Panelists: Elizabeth Leavy, Lydia Hoover, William Curry & Robert Metzger

#2



Note: This is an unedited chapter from William Sims Curry, [*Contracting for Services in State and Local Government Agencies: Best Practices for Public Procurement*](#) (Routledge 3d ed., forthcoming Sept. 2022) (also available for pre-order from [Amazon](#) and [Barnes & Noble](#))

Chapter 6

Protests



#3

3. Improving Bid Protests — and the Procurement Process (Tuesday, July 19, 6 pm Eastern) — A discussion of reform efforts to make protests a more effective (and less disruptive) way to reduce failures in public procurement. Special focus: potential reforms to the American Bar Association (ABA) Model Procurement Code (MPC), which is under review and available online.



Panelists: Jennifer Dauer, Thomas Kenny, Edward M. Fox II, Michael Carnahan

4. **Practicum: How a Protest Works** (Thursday, July 21, 6 pm Eastern) – Students will present a mock bid protest, argued before live judges over videoconference, illustrating “do’s and don’ts” of common bid challenges.



Justin Kaufman



Sarah Hilderbrand



Mike Bevis



William Fiske



Fay Tan

Judges/Panelists for Session 4: Mock Bid Protest

#4

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State Bid Protest “Summer Series”

July 12-21, 2022

Mock Bid Protest Exercise for Session 4: July 21

This protest is set in the fictional state of West Carolina. West Carolina has adopted the 2000 version of the ABA [Model Procurement Code](#) (MPC) into the “West Carolina Procurement Code,” and also has adopted the MPC’s [model implementing regulations](#) (the “West Carolina Procurement Regulations”).

West Carolina’s leading public health facility, West Carolina Hospital (WCH), regularly uses federal grants funding to run summer research programs that assess the effects of industrial pollution on workers in West Carolina. The grants to the WCH are covered by federal agency regulations which follow the Office of Management and Budget (OMB) [Uniform Guidance](#), including Sections [200.316](#) through [200.322](#) on procurement using federal grants funding, and specifically Sections [200.316\(c\)](#) and [200.319\(b\)](#) on organizational conflicts of interest.

Partly to ensure that institutions such as the WCH meet federal grants requirements in accordance with Section 11-301 of the West Carolina Procurement Code, and because the West Carolina Procurement Regulations do not cover organizational conflicts of interest beyond a passing

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reference in Section B4.202.01.2 (per the competition requirements in Article 4 of the MPC), the West Carolina legislature has considered passing a statutory provision which mirrors Minnesota’s organizational conflict of interest statute, Minnesota Statutes 2021, section [16C.04, subdivision 3](#), including the definitional provision at section [16C.01, subdivision 10\(a\)](#). Those Minnesota provisions broadly track federal organizational conflict of interest provisions at [EAB Statute 9.5](#), which are discussed in detail in Daniel I. Gorden, [Organizational Conflicts of Interest: A Growing Antitrust Challenge](#) (February 8, 2005).

The contracts to support this year’s summer research programs at WCH are to be awarded

Advocates for Mock Bid Protest – Session 4

- Joseph Dobbert
- Jacob Green
- William Bonilla
- Sareesh Rawat
- Joseph Tinger
- Keith Montoya



If you would like to present, please email
Professor Yukins: cyukins@law.gwu.edu

Common Issues in Bid Protests – And How To Address Them





Questions for a State Procurement Attorney: Lydia Hoover

- Under Maryland law, the Maryland State Board of Contract Appeals has jurisdiction over any final action by a unit on a protest, or on claim by a contractor or procuring unit regarding (i) breach; (ii) performance; (iii) modification; or (iv) termination of a contract. Does “mixed” jurisdiction like this work well?
- Maryland law says that protests and claims must be made first to a procurement officer – why this exhaustion requirement?
- Maryland law calls for an appeal to the Board of Contract Appeals within 10 days for a protest, and within 30 days for a claim. Must the triggering decision be in writing, or can it be an obvious decision *not* to act by the agency?
- Maryland law calls for the Board of Contract Appeals to give priority to appeal of any protest, over appeal over a claim. How does that work in practice?
- Maryland law allow discovery of any “relevant” administrative record? Is additional discovery ever allowed?
- Maryland law allows only *costs* in protests, not attorney fees, but Section 15.221.2 allows *attorney fees* as well if the “Board finds that the conduct of unit personnel in processing a contract claim is in bad faith or without substantial justification.” Is that common?
- Could you discuss some of the issues raised by (1) Minority Business Enterprise (MBE) submissions; (2) assistance with preparing a specification disqualifying a bidder/offeror; and (3) the unique nature of the Maryland Board of Public Works (BPW) (Governor, Comptroller, and Treasurer) in approving procurement contracts and modifications over a certain dollar threshold?



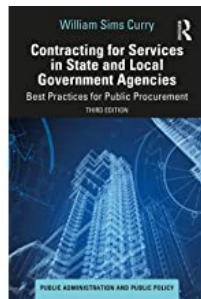
Responding to Protests That Were Not Avoided

Comments on Avoiding Protests

- Transparency
- Manage Pre-Proposal Communications
- Numerical Criterion Weights
- Process for Evaluating Proposals
- Formulas for Weighing Proposal Evaluation Scores

Responding to Protests that were Not Avoided

- Read the protest and begin drafting q's for Proposal Evaluation Team (PET) members
- Read the solicitation
- Read the PET instructions
- Review the source selection policy and procedures
- Review the proposal evaluation record
- Finalize the questions for PET members
- Interview PET members
- Synthesize the Information gathered to form a determination



Common Issues in State Bid Protests

-- Elizabeth Leavy, Reed Smith -- the Bidders' View

Tips and Tricks for Avoiding State Level Bid Protests:

- Address every requirement in the solicitation
 - Bidders can be eliminated for failing to respond to even minor requirements or technicalities (i.e. page limits, font size)
 - Have a B-Team to review solicitation and proposal
 - Incumbent contractors need to be particularly aware of responding to new requirements, rather than current SOW
- Explain the “HOW”
 - Bidders are frequently eliminated for merely restating requirements without demonstrating the resources, tools, or methods they will use to successfully carry out requirements
 - Read and understand the evaluation criteria to understand what evaluators will be looking to see
- Explain reliance on corporate parent or affiliates
 - If using past performance of a corporate parent or affiliated entity, must explain how that entity will be involved in the performance of the contract
 - If relying on resources, provide services agreement with affiliate or parent for use of back end support or other resources
- Know the state-level politics
 - Have government affairs professionals that understand the state-level politics at play – particularly in larger procurements
 - For example, in DC – larger contracts must be approved by the DC Council, and therefore there is a legislative approval process that can affect contract awards.
- Consider implications of bidding on one or more regions within a state
 - In larger states, procurements are sometimes broken into regions, and offerors have to compete for various regions concurrently
 - If a bidder must challenge exclusion from various regions, there are politics involved with upsetting the agency that may now be the bidder's customer in other regions



Common Issues in State Bid Protests

-- Elizabeth Leavy, Reed Smith -- the Bidders' View



Other common issues in state level protests:

- Lack of useful precedent – unlike the GAO or COFC-
 - States are always interested in what the GAO has to say on a topic.
 - Arguments must be tailored to the procurement requirements rather than kitchen sink GAO protests
- Agency Report requirements vary by jurisdiction
 - Not every state requires the production of agency evaluation documents – some expressly preclude the disclosure as deliberative process
 - Timing considerations:
 - Protest likely due before you have access to agency report
 - Need to preserve right to amend or supplement your protest after receipt of Agency Report - based on the local jurisdiction's rules
 - Many states require a FOIA request to obtain the documents
 - Can result in two concurrent cases pending – the protest and the FOIA dispute



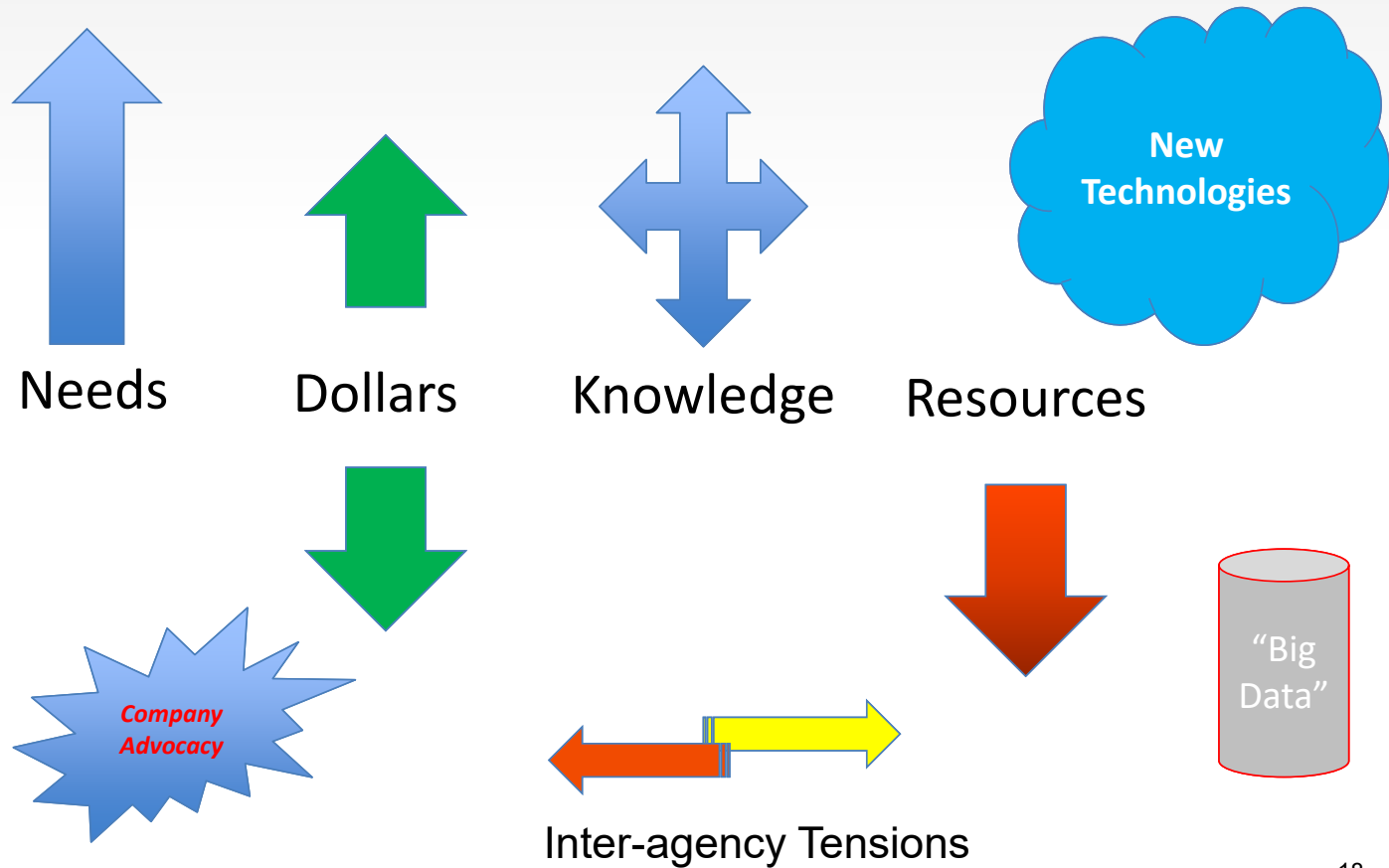
The Acquisition Challenge

Robert Metzger - Rogers Joseph O'Donnell

ROGERS JOSEPH O'DONNELL

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Factors & Forces at Work





Why State IT Procurement is ~~Important~~ so Difficult

IT services and supplies are crucial to the functions of state and local governments.

- Many legacy systems must be replaced.
- Leveraged solutions succeed “stovepipes.”
- Enterprise Resource Planning (ERP) solutions reach across agencies.
- States need operating efficiencies.
- Citizen expectations are increasing.
- Changing interfaces – web, mobile devices.
- “BYOD” workplace
- New methods of solution delivery: shift to selection and management of services
- Changes ahead are “transformative” – if not “disruptive” – rather than incremental.

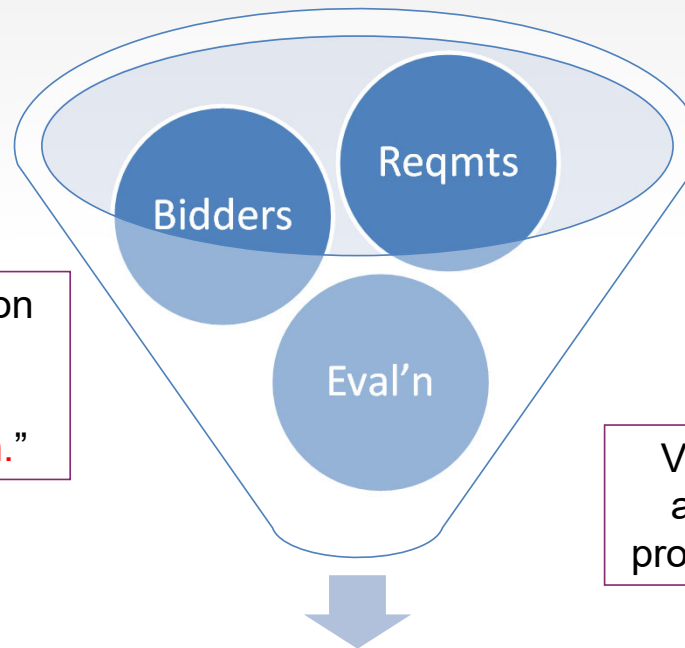
STATE CIO TOP 10 PRIORITIES
2022 Strategies, Policy Issues and Management Processes

- 1 Cybersecurity and Risk Management:** governance; budget and resource requirements; security frameworks; data protection; training and awareness; insider threats; third party risk
- 2 Digital Government / Digital Services:** framework for digital services; portal; improving and digitizing citizen experience; accessibility; identity management; digital assistants; privacy
- 3 Broadband / Wireless Connectivity:** strengthening statewide connectivity; implementing rural broadband expansion; 5G deployment
- 4 Cloud Services:** cloud strategy; selection of service and deployment models; scalable and elastic services; governance; service management; security; privacy; procurement
- 5 Legacy Modernization:** enhancing, renovating, replacing, legacy platforms and applications; business process improvement
- 6 Identity and Access Management:** supporting citizen digital services; workforce access; access control; authentication; credentialing; digital standards
- 7 Workforce:** preparing for the future workforce and reimagining the government workforce; transformation of knowledge, skills and experience; more defined roles for IT asset management; business relationship management skills; service integration
- 8 Enterprise Architecture:** governance; formulating, refining or implementing an EA strategy; business architecture; business process modeling; statewide EA program management; federal reference models; whole-government enterprise architecture
- 9 Data and Information Management:** data governance; data architecture; master data management; open data; sustained access to government data; data portals; enhancing the role of data; information & intelligence, knowledge management; data integration; data management strategy; roles and responsibilities; dataops
- 10 Consolidation/Optimization:** centralizing; consolidating services; operations; resources; infrastructure; data centers; communications and marketing “enterprise” thinking



The “Acquisition Process” as “Q&A”

Through the acquisition process the State presents its business needs – the “**question.**”



Vendors, through the acquisition process, propose their “**answers.**”

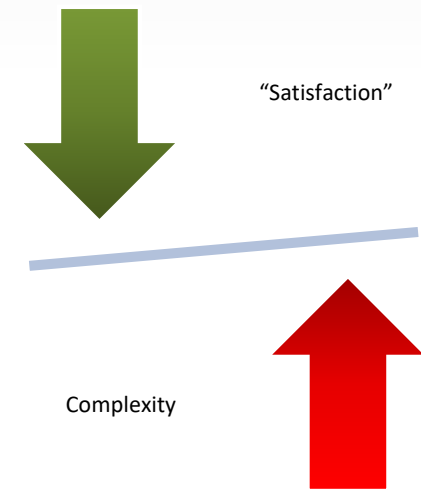
Selection & Award

Where states do not permit competitive negotiations, this process is more likely to fail.



Flaws in the Process

- Acquisition process is often too rigid.
- Knowledge asymmetry puts Buyer at disadvantage.
- Price emphasis may defeat best value
- Poor communications between Buyer & Seller.
 - Objectives & capabilities imperfectly understood.
- Proposals may “answer” the “wrong” question.
- Potentially capable competitors excluded.
- “No Bid” or “Few Bid” outcomes.
- Process both slow and expensive.
- Vendors discouraged by cost & inflexibility.
- Some acquisitions “fail” to produce award.
- *Poor ability to accommodate new technologies.*



Success in complex projects is not likely to follow a flawed acquisition process.

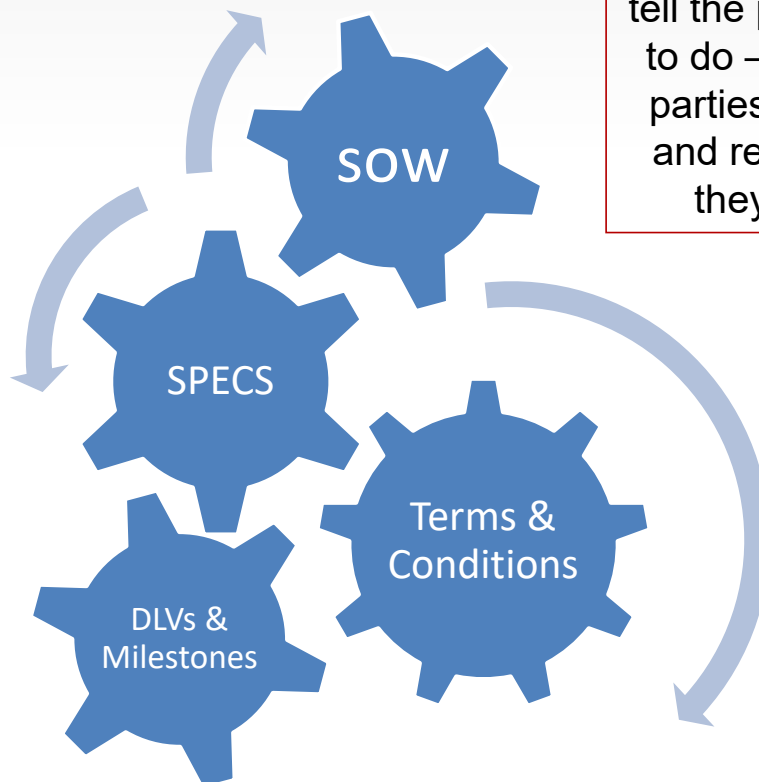


Where Terms & Conditions Figure in the Equation Risk Allocation, Duties & Liabilities

ROGERS JOSEPH O'DONNELL



The Contract Implements the Agreement Between the State And The Contractor



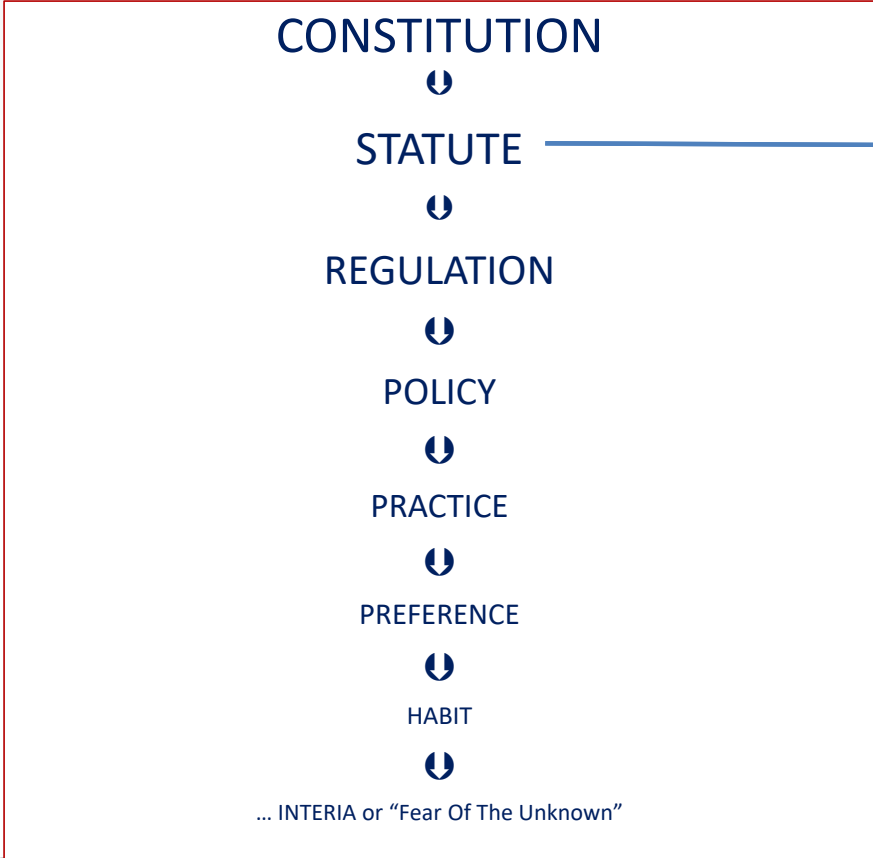
Terms and Conditions do not tell the parties what they are to do – but they inform the parties of their legal rights and responsibilities – and they define the risks.

Clarity is essential.

“Contract terms and conditions must be carefully negotiated ... so that risks are clearly articulated and the contract reflects clear intent to transfer. Any risk shifting has tradeoff and cost considerations, and risks under the direct control of the state cannot be legally transferred to the contractor.”

*“Procurement: Avoiding Risky Business,”
NASCIO (September 2013) (emph added)*

Constrained Environment: State-Specific Considerations



The ABA's "Model Procurement Code" has been adopted by > 15 states

"NEGOTIATIONS" are not available to all states as there will be outcome-determinative differences in local state law, regulation, policy, practice etc.

Some states have legislation on the books that allows for negotiations; others may not.



Thinking about Terms & Conditions: Do They Promote Success or Invite Failure?

- T&Cs should facilitate competition and accommodate competitors.
- T&Cs should enable excellence and innovation.
- T&Cs should allow least cost, best value solutions.
- T&Cs should protect critical state interests but not impose costs disproportionate to benefit.
- T&Cs should “do no harm.”
- T&Cs rarely should be *selection-determinative*.

How does a state's terms and conditions measure up against these 6 principles?

Some states do not publish “standard” terms and conditions. This should be encouraged.



Recurring Problems Experienced by Industry with State Terms & Conditions

- State requirements often differ greatly from commercial norms
- To take exception to “standard” terms risks disqualification
- Unwillingness of some States to negotiate
 - Or, willingness to negotiate only *after* selection – a risky “bet” for the “winner”
- Certain contract terms and contracting practices pose serious risks
 - Excessive, even unlimited financial exposure
 - Jeopardy to enterprise-critical intellectual property
 - Excessive and unreasonable exposure in the event of termination
 - Absence of mutuality can produce contentious performance environment
- Results are unintended and undesirable:
 - Excess or unbounded risk may exclude “best in class” solution providers
 - Bidding companies likely to reflect risks in price
 - Procurements may be “gamed” and the process can be slow and contentious



Industry's Case For *Reform* of T&Cs

It is mutually advantageous for states and industry to employ T&Cs that “converge” on commercial norms.

Using terms aligned with commercial experience will open state procurement to more and better firms.

Responsible allocation of risk will promote best value solutions and avoid costly risk premiums.

State procurement will go faster, be less frustrating and produce fewer protests and post-award disputes.

Aligning the practices of different state and local governments with “best practices” will improve competition & value.

A better “fit” between commercial norms and state requirements will reduce the need for competitive negotiations and ease the burden on state legal resources.



Terms & Conditions of Greatest Concern

Limitation of Liability:	<i>Companies will not accept enterprise risk</i>
Limitation of Damages:	<i>Risk of intangible or consequential liabilities</i>
Indemnity:	<i>Potentially uninsurable obligations</i>
Intellectual Property:	<i>Risk to ownership of contractor IP</i>
IP Indemnification:	<i>Limit to controllable risks; constrain exposure</i>
Warranty:	<i>Obligations reasonable in scope & duration</i>
Mutuality:	<i>State should be responsible for its actions</i>
Data Breach:	<i>Who is responsible for Privacy and other impacts?</i>

CONCLUSION



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