

Session 3: Bid Protest Reform

# STATE BID PROTESTS

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FREE ONLINE SUMMER SERIES  
JULY 12-21, 2022





Welcome  
*Professor Christopher Yukins*  
*GW Law School*

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

# 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*

# #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\(a\)](#). These 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).

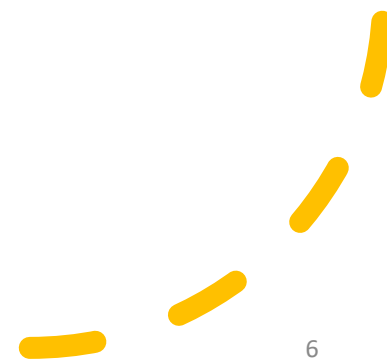
The contracts to support this year’s summer research programs at WCH are to be awarded



# Advocates for Mock Bid Protest – Session 4



Protester WCME	Agency WCH	Intervenor WE
Joseph Dobbert Jacob Green	Sareesh Rawat Joseph Tinger	Keith Montoya



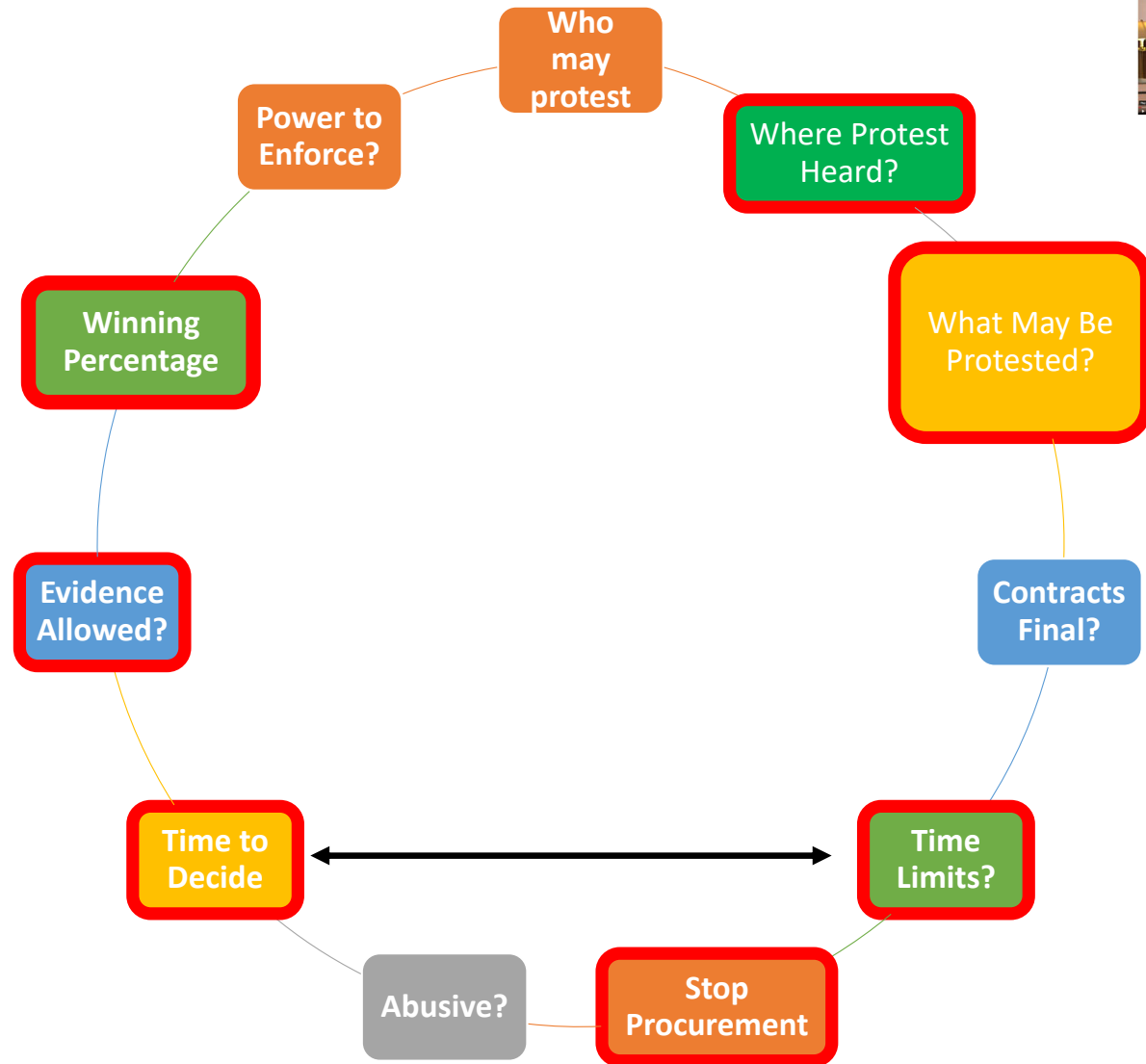
# Bid Protest Reform & the Model Procurement Code





Daniel Gordon

# Major Issues in Bid Protest System





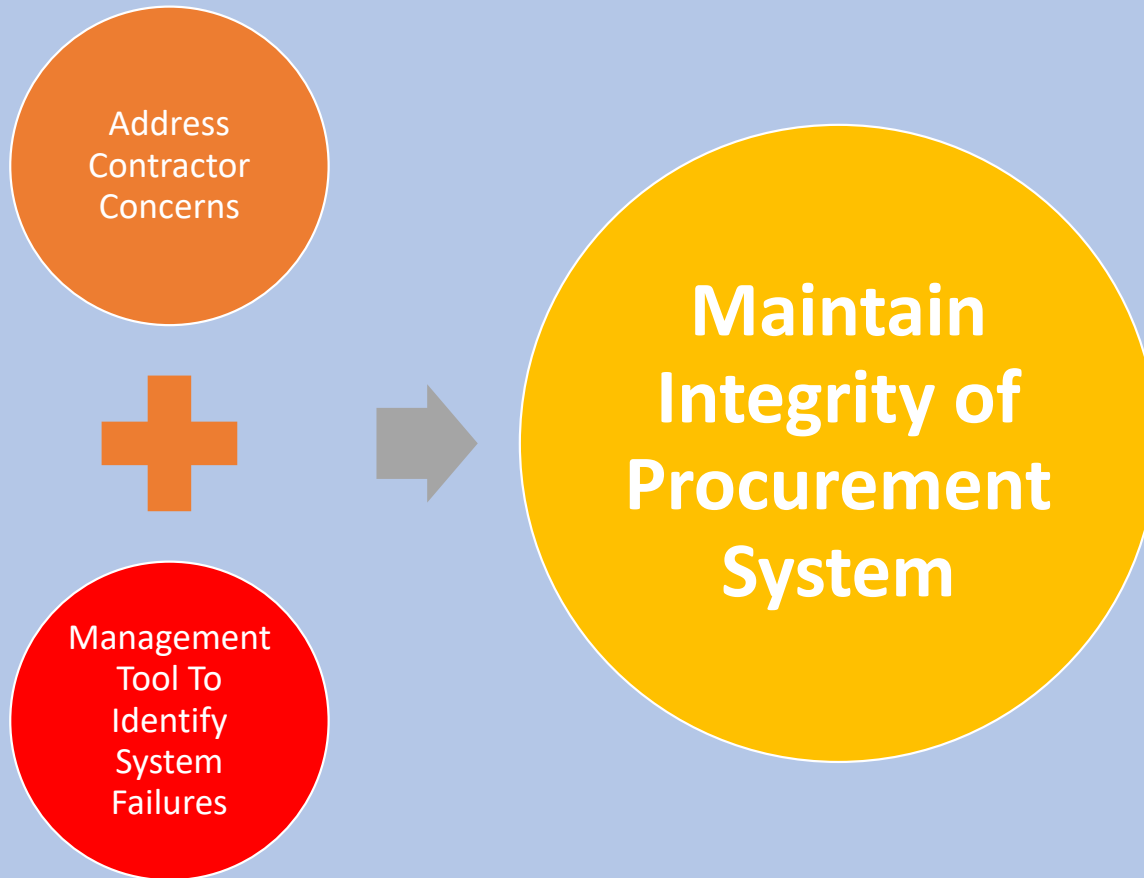


## Potential Bid Protest Mechanisms

Procuring  
Agency

Independent  
Administrative

Court



# Purposes of Bid Protest System



# Bid Protests Under the Model Procurement Code & Model Regulations

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# MPC: Who Can Protest?

Sec. 9-101



- Right to Protest. Any **actual or prospective bidder, offeror, or contractor** who is aggrieved in connection with the **solicitation or award of a contract** may protest to the **Chief Procurement Officer or the head of a Purchasing Agency**. The protest shall be submitted in writing within [14 days] after such aggrieved person knows or should have known of the facts giving rise thereto.

# Who Decides? MPC Sec. 9-101

- Authority to Resolve Protests. **The Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer** shall have the authority, **prior to the commencement of an action in court concerning the controversy, to settle and resolve** a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract. This authority shall be exercised in accordance with regulations promulgated by the [Policy Office] [Chief Procurement Officer].



# Form of Decision – MPC Sec. 9-101

- Decision. If the protest is not resolved by mutual agreement, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer shall **promptly issue a decision in writing**. The decision shall, (a) **state the reasons** for the action taken; and (b) **inform the protestant** of its right to **judicial \* or administrative \* review** as provided in this Article.





# Finality of Decision – MPC Sec 9-101



- Finality of Decision. A decision under Subsection (3) of this Section **shall be final and conclusive, unless fraudulent, or:**
  - (a) any person adversely affected by the decision **commences an action in court** in accordance with Section 9-401(1) (Waiver of Sovereign Immunity in Connection with Contracts, Solicitation and Award of Contracts); or
  - (b) \* any **person adversely affected by the decision appeals administratively to the Procurement Appeals Board** in accordance with Section 9-506 (Protest of Solicitations or Awards). \*

# Stay of Procurements During Protest

– MPC Sec. 9-101

- Stay of Procurements During Protests. In the event of a timely protest under Subsection (1) of this Section, under Section 9-401(1)(Waiver of Sovereign Immunity in Connection with Contracts, Solicitation and Award of Contracts), or under \* Section 9-505 (Jurisdiction of Procurement Appeals Board), \* **the [State] shall not proceed further with the solicitation or with the award of the contract until the Chief Procurement Officer**, after consultation with the head of the **Using Agency** or the **head of a Purchasing Agency**, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the [State].







## Entitlement to Costs – MPC Sec. 9-101

- Entitlement to Costs. In **addition to any other relief**, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror **shall be entitled to the reasonable costs** incurred in connection with the solicitation, including bid preparation costs other than attorney's fees.
  - Reporter's Note: The award of costs under Subsection (7) is intended to **compensate a party for reasonable expenses** incurred in connection with a solicitation for which that party was wrongfully denied a contract award. **No party can recover profits** which it anticipates would have been made if that party had been awarded the contract. **Attorney's fees associated with the filing and prosecution of the protest are not recoverable.**

# Remedies After Award – MPC Sec. 9-203 (Excerpt)

- Remedies After an Award. If **after an award it is determined that a solicitation or award of a contract is in violation of law**, then: (a) if the person awarded the contract has not acted fraudulently or in bad faith: (i) the **contract may be ratified and affirmed**, provided it is determined that doing so is in the best interests of the [State]; **or** (ii) the **contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.**





## Court Review of Protests – MPC Sec. 9-401 (excerpt)

- §9-401 Waiver of Sovereign Immunity in Connection with Contracts. (1) Solicitation and Award of Contracts. The **[designated court or courts of the State] shall have jurisdiction over an action between the [State] and a bidder, offeror, or contractor, prospective or actual, to determine whether a solicitation or award of a contract is in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation.** The [designated court or courts of the State] shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for monetary damages or for declaratory, injunctive, or other equitable relief.



# Court Actions – When Brought – MPC 9-402 (excerpt)

- §9-402 **Time Limitations** on Actions. (1) Protested Solicitations and Awards. Any action under Section 9- 401(1) (Waiver of Sovereign Immunity in Connection with Contracts, Solicitations and Award of Contracts) shall be initiated as follows: **(a) within [30] days after the aggrieved person knows or should have known of the facts giving rise to the action; or (b) within [14] days after receipt of a final administrative decision** pursuant to either Section 9-101(3) (Authority to Resolve Protested Solicitations and Awards, Decision) or \* Section 9- 506(3) (Protest of Solicitations or Awards, Decision), whichever is applicable. \*

# Protests to Procurement Appeals Board – MPC Sec. 9-505



Unless an action has been initiated previously in [the **designated court** or courts] for essentially the same cause of action, or unless within [15] days after the action is brought before the Procurement Appeals Board, written objection is made by either the aggrieved bidder, offeror, or contractor, prospective or actual, or the [Attorney General] [Chief Procurement Officer or head of a Purchasing Agency with the concurrence of the Attorney General], the **Board shall have jurisdiction to review and determine de novo:**

- (a) **any protest of a solicitation or award of a contract addressed to the Board** by an aggrieved actual or prospective bidder or offeror, or a contractor; and
- (b) **any appeal by an aggrieved party from a determination by the Chief Procurement Officer, the head of a Purchasing Agency, or a designee** of either officer which is authorized by: (i) Section 9-101 (Authority to Resolve Protested Solicitations and Awards) . . . .

# Procurement Appeals Board Protests – MPC Sec. 9-506



(3) Decision. On any **direct protest** under Subsection (1)(a) of this Section **or appeal** under Subsection (1)(b) of this Section, the Board **shall promptly decide** whether the solicitation or award was in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation. **The proceeding shall be de novo.** Any **prior determinations by administrative officials shall not be final or conclusive.**

(4) Standard of Review for Factual Issues. **A determination of an issue of fact by the Board under Subsection (3) of this Section shall be final and conclusive unless arbitrary, capricious, fraudulent, or clearly erroneous.**



BOARD OF  
Contract Appeals



# The Maryland State Board of Contract Appeals History and Description of Functions

Michael Carnahan, Board Member (comments in his personal capacity)

# BOARD OF Contract Appeals



## A Quick History

- The Beginning
- MDOT Board of Contract Appeals – 1978
- Maryland State Board of Contract Appeals – 1981



# BOARD OF Contract Appeals



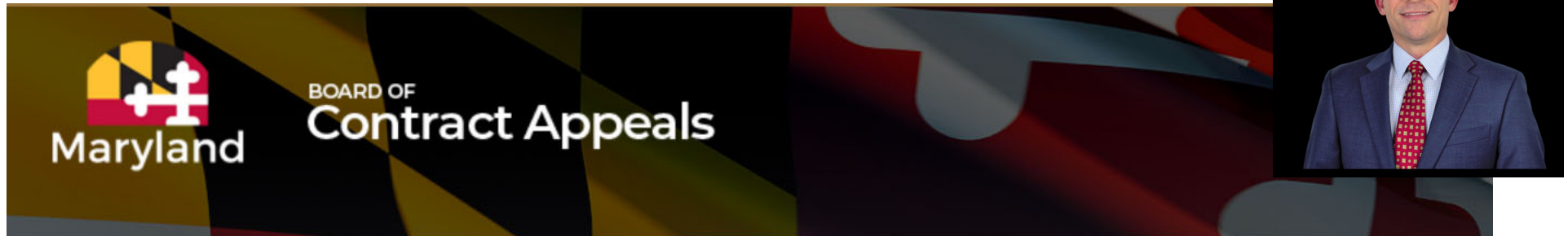
What We Do

- o Bid Protests
- o Contract Disputes



## An Independent Board

- Fairness and Robust Competition
- Encouraging Protests and Appeals
- Specialized – Expert Level Understanding
- Informal, Inexpensive, and Expeditious
- Precedent and Guidance



# Process Improvement

- Worst of the Worst – Many Protests are Resolved BEFORE Getting to the Board
- Examples of Fixing What’s Broken
  - COMAR Overhaul – Consistency and Accuracy
  - Delay and Awarding in the Face of the Protest (BPW)
  - Agency Report – Now Due in 15 Days
  - Preliminary Motions and Filing of Agency Report
  - Discovery – Notes of Evaluators
  - Discovery Disputes – Informal Video Conferences
  - New Areas of Jurisdiction – Licenses (Sports Wagering)
  - Fixing it on the Front End – SWARC
- We Learn as We Go – There’s Always Room for Improvement

# Selected California Protest Issues



Jennifer L. Dauer

*Diepenbrock Elkin  
Dauer McCandless*

July 19, 2022

# Obtaining Documents

- Purposes
  - **Transparency** and **Accountability**
- Public Records Act request (like FOIA)
  - **Concern:** 10 days to respond; may be extended
    - Protest deadline is often **less than 10 days**
      - *But* some statutes make bids available immediately
    - For RFPs, some agencies **refuse to disclose** until after award
    - Insufficient time to challenge refusal to disclose
    - **Solution:** Start protest timeline after documents are produced
  - **Concern:** “Confidential” records
    - Over-marking by some bidders, making it difficult for the agency
    - **Solution:** Clarity on what can be marked confidential (e.g. financial records)
- Scoring Records (generally, RFPs)
  - Usually, an Evaluation and Selection Report is not required
  - Many agencies **do not retain** scoring records
  - “**Creation**” of **rationale** only in response to a protest
  - **Solution:** Require scoring/evaluation report

# Issues With Bid Protest Process

- Concern: Decision by Department of General Services (DGS) to disallow reply briefs
  - DGS process (generally services contracts)
  - Precludes response to **false** or **misleading** statements
  - Precludes response to **new issues**
  - *But, expedites* process
  - **Solution**: Allow reply briefs with short response time
- Concern: Lack of specified process at some levels
  - May be **no formal process**, including no response
  - Often at agencies with less procurement experience
  - By the time of a Board or Council meeting, it is **difficult to change course**
  - **Solution**: Require basic protest process
- Potential Positive—Appeal Process
  - Rare, but may be available
  - Best where a **neutral** or **uninvolved** person/panel decides
  - Be sure to **exhaust remedies**



# Issues With Neutrality

- Lobbying Board or Council Members (Local)
  - **Constitutional** right to petition government
  - May be prohibited by the solicitation document
  - May be the only way to change an intended award
  - **Solution?**
  
- DGS' Alternative Protest Process
  - Describe
  - (Almost) only Office of Administrative Hearings employees or former employees
    - OAH is within DGS
  - Characterized as “arbitration,” but not subject to rules of arbitrator neutrality
  - Inability to challenge (no review)
  - **Solution:** Either allow judicial review *or* require application of standards for arbitrator neutrality



# Nebraska Bid Protest “Procedures”

A Non-MPC, Non-Judicial Review Jurisdiction

Thomas Kenny, Esq.  
Edward M Fox II, Esq.

**KUTAKROCK**

[kutakrock.com](http://kutakrock.com)



# Nebraska Bid Protest Procedures



- Nebraska's Bid Protest Procedures – Administrative Only
  - Written Protest Due Within Ten (10) Days to Materiel Administrator
  - Response “Typically” Provided Within Ten (10) Days after Receipt
  - If Not Satisfied, Written Request for a Meeting with Director of Department of Administrative Services
  - Response “Typically” Provided Within Ten (10) Days after Meeting
  - Note: No Discovery Rights; Protestors Must Rely on FOIA
  - Note: No Mechanism to Stay Execution of the Contract

**The End**

# The Lack of Judicial Review in Nebraska



- Nebraska Does Not Provide Any Statutory Right of Judicial Review for Bid Protest Decisions
- Nebraska Courts Have Held Disappointed Bidders Lack Standing to Challenge Bid Awards in the Courts
  - Rath/Day v. Beatrice
- The Primary Path to Challenge Contract Awards in Court is Through Taxpayer Standing, Alleging Illegal Expenditure of Tax Dollars
- The Standard for Reviewing Such Contracts, Even with Taxpayer Standing, is Extremely Narrow

# The Nebraska vs. Iowa Protest Systems



- Nebraska's Deficiencies Are More Obvious When Compared to Nebraska's Neighbor to the East (Iowa)
- Iowa Uses an Administrative Procedures Act Process for Bid Protests.
  - Written Notice of Appeal Within Five (5) Days of Notice of Award
  - Appeal Hearing Must be Held Within Sixty (60) Days of Receipt of Notice of Appeal by the Director
  - Forum to Seek Stay of Contract Award/Execution
  - Discovery, Depositions, Direct Witness Testimony, Exhibits All Permitted
  - Hearing Held with Proposed Decision by ALJ. Final Decision from Director.
  - Appeal Rights Governed by the APA – Judicial Review Available.

# Nebraska Legislative Reform Efforts



- Attempts to Reform the Nebraska Bid Protest Procedure
- LB 84 (2017)/LB 61 (2021) – Providing For Judicial Review in Nebraska
  - Prompted by Multiple Recent Procurement Failures
- LR 29 – Report to the Nebraska Legislature
  - [https://www.nebraskalegislature.gov/pdf/reports/committee/health/lr29\\_2021.pdf](https://www.nebraskalegislature.gov/pdf/reports/committee/health/lr29_2021.pdf)
- LB 1037 – Requires Nebraska DAS to Contract for Review of Nebraska Procurement Practices/Procedures
- Nebraska DAS Retained Ikaso Consulting to Conduct Study and Report by October 31, 2022.

## For Discussion



- Understanding Nebraska's resistance to reform
- Alternative of federal court due process-based challenges
- Potential drivers for reform: procurement failures, political pressures, tradition of judicial review, WTO Government Procurement Agreement membership
- Building bid protest fora in Nebraska: agency-based, independent agency review, judicial
- Key process issues: standing, record, timing and remedies
- Role of Model Procurement Code in channeling reform

CONCLUSION



# STATE BID PROTESTS

Video recording will be available on [PublicProcurementInternational.com](https://PublicProcurementInternational.com) and the  
GW Law Government Procurement Law Program YouTube Page

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