

Modernizing Idaho Purchasing Law

Department of Administration
Division of Purchasing

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Division of Purchasing

- Idaho/Utah
- ABA Model Proc. Code
- Suggested Changes

Division of Purchasing conclusions:

Idaho law works well, but could work better with some minor changes

Creating taxpayer value through competition in the acquisition of goods and services

Idaho and Utah – Kent Beers discussion (Similarities/differences)

- Organization (per ABA Model Procurement Code)
 - Idaho – adopted the Office of the CPO
 - Utah – adopted the Procurement Policy Office (somewhat unique)
- Procurement types
 - Idaho acquires goods and services including IT
 - Utah excludes IT
- Construction/highways
 - Neither state's CPO manage
- Appeals/Protests (administrative)
 - Idaho manages through Director
 - Utah has an appeals board
- Staff – Idaho much smaller (25 vs. 9) and with IT

Idaho Law and the ABA Model Procurement Code

History with Idaho

- 2000 - Last major MPC change – language update for the electronic age
- 2002 - Idaho had revision to some Idaho Code, but primarily to Administrative rules
- 2007 – MPC for Public Infrastructure Procurement
- No major changes forthcoming – per Keith McCook (SC – ABA MPC co-chair)
- My opinion:
 - Idaho's procurement law generally follows the MPC
 - No major deviations
 - No sections that create gaps in Idaho Code

Recommend 1- Purchasing Code Usability

Purchasing should have its own code chapter

- Purchasing law is complicated
- Currently comingled with other DOA code
- Would increase usability for the state and our vendors

Consolidation (within code or rule)

• Certain like sections are scattered throughout code and rule without cross reference to sections where they apply:

- Exemptions/exceptions and powers to create Policy Directives
- Cooperative contracting and applicability to individual state agencies

Recommend 2- Contract Roles and Responsibilities

Contract administration and management roles should be defined

- Administrative procedures are currently silent on responsibilities (DOP vs. agencies)
- Add interagency agreements (contract level)
- DOP policy guide currently written to define responsibility – Contract Administration and Management Guide
- OPE – 2013 report on strengthening contract management

Recommend 3- Expansion of Procurement Training

Idaho should mandate training:

- Introduction to Idaho purchasing classes for those responsible for any property acquisition process
- Idaho should mandate a state certification process for employees exercising procurement responsibility where procurement is their full time job

Recommend 4- Multiple Awards 67-5718A

Clarify the definition and use of multiple awards

- Clarify - statute should only apply to the same procurement as determined to be in the best interest of the state
- Should not apply when awards are made by region/location
- “same or similar” – hard to determine how to apply
- Allow administrator to make determination (written) in the best interest of the state – define by rule

Recommend 5- Open Contracts

Open Contracts need definition clarity

- No definition currently exists in Idaho Code, but does in IDAPA
- Conflicting language in Idaho Code:
 - 67-5717 – mandatory use by all agencies under DOP purview
 - 67-5726 – mandatory use by “all” officers and employees – much broader than DOP purview per 67-5717
- Provides for only one exemption – not meeting “capabilities” – should be changed – to allow determination in the best interest of the state

Recommend 6- Printing requirements (60-101/103)

Revise or eliminate printing requirements

- Current statute primarily requires printing to be done in the state of Idaho and carries a 10% preference
- Statute should be eliminated/revised – when printing services are a minor portion of the procurement e.g. mixed services:
 - Electronic information transfer to secure environments
 - In-house services for
 - Printing/assembly
 - Mailing
 - Information Secure environments (storage and processing)

◦ 60-101-103 published in 1903

Recommend 7- Appeals Process

67-5733 should be redrafted for usability

- Separate by appeal types
- Allow for additional time for Director response
- Current process works well to protect the interests of our vendors and the state
- We don't support a general right to a judicial appeal

Recommend 8- Minor Modifications

Modify due to items outdated, unclear or inaccurate:

- Stocks on hand
- References to opening date vs. closing date in bid postings
- Missing ref. to informal RFQs in records retention addressing return of bid docs. when solicitation is cancelled

Recommend 9 – Legal modification suggestions by 3rd parties

DOP inclusion in discussion and drafting of new laws

- Understand that lobbyists will be suggesting changes – powers of the administrator, vendor communications, delegated purchasing authority, judicial review, others
- DOP needs to be part of the process (deep discussion and drafting) - complicated, practical applications, unintended consequences of change, best practices

Those are our suggested changes.

We thank the committee for the chance to present and request that the Division of Purchasing is given opportunity for discussion and drafting of changes to Idaho procurement laws that the committee considers through this process.



In-state Preferences

Introduction

Each year vendors are faced with a political reality, public procurement being used as a policy tool¹: state legislators considering legislation that give in-state preferences in response to local businesses lobbying for preferences in contract awards.

During these difficult economic times, state governments are often pressured to do more to assist their local suppliers. This assistance can include giving local suppliers special consideration in the procurement process. Historically, government procurement laws and policies existed for the purpose of providing a legal, ethical and predictable framework which balances the government's desire to get the best value for its dollars while ensuring that the process is fair and open to the maximum number of participants. Given the importance of transparency, fairness and competition in public procurement, and the volume of purchases public agencies bring to the economy, the issue of in-state preferences is an important, highly scrutinized topic, embraced by the citizens and others who are seeking to aid our local suppliers, but who may not understand the public procurement process and the importance of fair, open and transparent competition in the marketplace.

What is an In-State Preference?

An in-state (local) preference is an advantage given to bidders/proposers in response to a solicitation for products or services² which may be granted based on pre-established criteria. The criteria can include any one or more of the following: supplier's geographic location; residency requirements; or origination of the product or service.

The first question that arises when creating or implementing a local preference law is defining the criterion (or criteria) to

be used. In other words, one must define what an in-state or local business is? How will the entity determine the origin of the product or service? There are many definitions for these terms throughout the states, but no common definition or best practice. For example, one consideration may be where the principal place of business is located, and another might be the economic impact of the company by the taxes it pays within the state. State contractors (whether in-state or out-of-state) may employ state residents to state sub-contractors or may purchase goods or services from in-state businesses in connection with a state contract.³

After settling on the specific terms or definitions of the preference, (remembering that the definitions vary from state-to-state) one must exercise caution in implementation. Implementation of in-state preferences can lead to unintended consequences, adverse results and other unexpected impacts on the governmental entity's procurement process and your state's vendor community.

Implications

Local preference laws invite reciprocity. There has been an increase in retaliatory legislation when a local preference is implemented. In many states, the purchasing authority is prohibited from doing business with any firm located in a state that has local-preference laws or policies.

The costs of goods or services are increased for all taxpayers when a percentage differential is allowed; meaning that the state will not get the same value for the dollars spent. This increases the percentage of the entity's budget spent on procurement. This practice discourages firms that don't meet the preference from participating in the procurement process. These end up creating a much smaller market competing for the state's business. Experience has shown that when restricting a market, or implementing a preference, prices increase. Also, reciprocal preferences can crowd out

¹ Qiao, Y, Thai, K. & Cummings, G. (2009) State and Local Procurement Preferences: A Survey. *Journal of Public Procurement*, 9 (3&4): 371-410

² NASPO State and Local Government Procurement: A Practical Guide. (2008). Lexington, KY: Author

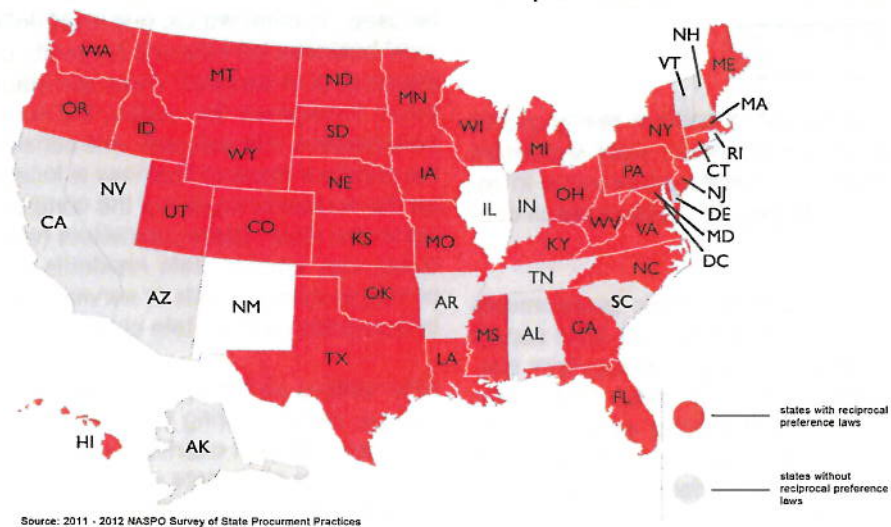
³ Report on In-State Preference Policy in State Procurement, Connecticut Department of Administrative Services January 1, 2012

small and minority businesses from competing for state government contracts outside their home state.

Arguments have been made to favor local preferences. State tax dollars are recycled into the state economy for the benefit of the taxpayer. Small local businesses may get opportunities that enable growth and stability.

Current Statistics

A 2011-2012 Survey of State Procurement Practices by the National Association of State Procurement Officials (NASPO) found that the majority of states have some type of local preference or reciprocal preference language in their statutes or Procurement Codes. Out of forty-eight states responding to the survey, thirty-five states have reciprocal preference laws as shown in the figure below:



According to the 2011-2012 survey twenty-five states provide a legal preference for in-state bidders or products, separate and apart from preferences for MWBEs, sheltered workshops and correctional industries. Table 1 shows the states with vendor-based price preferences and the type of preference provided.

Discussion

It is a common practice in some states to provide a preference for vendors and products manufactured within their borders, however many procurement officials oppose preference legislation and policies. The 2008 NASPO Practical Guide stresses the commitment of state procurement professionals to “maintaining the openness of the competitive process” and notes that socioeconomic programs such as

preferences adopted by legislatures “to achieve some social goal through public procurement run counter to that commitment”.⁴

One state procurement official responding to a 2005 NASPO Survey noted that while preferences for certain business classifications “provide some measure of competition” they are inhibitors to the “best value” solution. Others referred to preference laws as protectionist legislation, as the “political powers continue to be concerned with the economy inside their borders” and mentioned anecdotally that there is significant political pressure in some states to give business to in-state vendors, even when the state does not have such in-state preference other than for tie bids.

Historically NASPO has opposed preference purchasing policies, whether they are in-state preferences, “Buy American” preferences or similar state laws and passed resolu-

tions to that effect, with the most recent one being dated in 1992.

The National Institute of Governmental Purchasing, Inc. (NIGP) has also opposed all types of preference law and practices and views them “as impediments to the cost effective procurement of goods, services and construction in a free enterprise system”. Two NIGP Resolutions state that the practice of preference laws or regulations results in reduced competition and increased prices.

In summary, there are both critics and supporters of preference laws. This briefing paper is intended to shed a light on them and make procurement decision makers and legislators aware of the need to weigh both arguments when making a decision. Table 2 summarizes both advantages and disadvantages of local preferences to guide your decision.

⁴ NASPO State and Local Government Procurement: A Practical Guide, (2008). Lexington, KY: Author

NASPO believes that more research and cost-benefit analysis studies are warranted to gauge success rates and gains, if any, or failures of preference programs and policies, including whether any state has realized any direct or indirect cost benefit or loss as a result due to a specific preference.

Table 1. States that have vendor-based price preferences (not product-based such as environmental preferences) or set-asides.

Vendor-based price preference	State Count	Responding States
Women-owned business enterprise	4	FL,IA,MN,OR
Minority-owned business enterprise	6	FL,IA,MN,OH,OR,WI
Small business enterprise	11	AZ,CA,DC,HI,IA,IN,MA,MD,MN,OR,VA
Disabled-owned business enterprise	6	AK,DE,FL,IA,MN,OR
Sheltered workshop	18	AR,DE,GA,HI,IA,KS,LA,MA,ME,MI,MN,OH,OK,SD,TN,UT,VA,WI
Veteran-owned business enterprise	6	AK,AZ,DC,IA,MN,OR
Service-disabled veteran owned business	6	AK,CA,FL,IA,MI,NV
Correctional industries	17	AZ,FL,GA,HI,IA,KS,LA,MA,NE,OH,OR,SC,TN,UT,VA,WA,WI
HUBZone	1	OH
Other	5	DC,MD,MI,MN,ND

Source: 2011-2012 NASPO Survey of State Procurement Practices

Table 2. Advantages and Disadvantages of Local Preferences

Arguments in favor of Local Preferences/Advantages	Arguments against Local Preferences/Disadvantages
+ The extra cost to the preference is outweighed by the commitment to support local business and the gain to the local community	- Violate the open competition principle of free market
+ Additional dollars spent locally may generate economic activity in the form of additional sales, jobs and income beyond the value of the initial contract, even when assuming that the local contract implies higher costs (by a maximum of 5%) to the city ⁵	- States retaliate by enacting reciprocal preference laws that will limit businesses ability to compete in other states
+ State tax dollars are recycled into the state economy for the benefit of the taxpayer.	- Reduced competition by favoring vendors within a defined geographical area only
+ Local vendors activity may produce an overall indirect positive impact through the recycling of local spending ⁶ .	- Lead to higher prices paid by governments
+ Short term increases in costs to state and local agencies may be offset by increases in tax revenue and possible decrease in unemployment costs from hiring locals for public works projects. ⁷	- Higher costs to administer preference programs. Makes the purchaser's job more difficult.
	- Requires systems to determine eligibility for the preference programs for the implementation of such programs (by state-prescribed definitions or criteria, certification by the state or self-certification)
	- Defining a local business for the purpose of local preferences is difficult in terms of geographical location and ownership and management of the business.

5 Avalos, A & Birdyshaw, E. Assessing the Economic Impact of a Local Preference Ordinance in the City of Fresno. (2007) Center for Economic Research and Education of Central California Research Working Paper No. 2007-02. Retrieved from: <http://www.csufresno.edu/cerecc/documents/CERECC-2007-02.pdf>

6 The Economic Impacts of Buying Locally: SCF Arizona Case Study. (2010). Applied Economics. This is an economic benefit analysis of the operations of SCF Arizona, the largest provider of worker's compensation insurance in Arizona.

7 Fiscal Impact Report on Senate Bill 1, prepared by the Legislative Finance Committee for Standing Finance Committee of the New Mexico Legislature. Retrieved from <http://www.nmlegis.gov/Sessions/11%20Special/firs/SB0001.pdf>



State Procurement Small Business Socio-Economic Consideration

The fundamental purpose of state procurement is to acquire the goods and services needed for the operation of government. The objective is to acquire these items at the best value, price and other factors considered. In any procurement statute, many of the provisions are directed to this end. It is inevitable, however, that other state policies influence the procurement function. Frequently, the magnitude of state procurement provides leverage, which is used to achieve socio-economic objectives that do not directly pertain to the procurement of goods and services, and may contradict the basic policy to obtain the best value for goods and services. The purpose of this paper is to make several observations concerning this phenomenon and identify competing views as they relate to the small business socio-economic consideration.

Job Impact

There were about 6 million businesses in the United States with at least one employee, as of 2006. Businesses with 500 or fewer employees represent 99 percent of these 6 million.ⁱ The supportive view of small business is that, contrary to popular opinion, it is not jumbo corporations that run and dominate the economy, but small and mid-sized companies.

Small businesses are described as “job creators” and “the engine of our economy.” Like large businesses, they pay taxes, contribute to the local economy, and create jobs. Like large businesses, they employ friends, neighbors, and family. Politicians often advocate through their votes and say that small companies create two of every three jobs in a given year.

One view is that the impact of procurement spend to small businesses can have a far reaching effect on the economic and social well-being of local communities. The award or loss of contracts can affect the strength or decline of long-established communities. The effect of procurement spend

can generate some three times the amount through the multiplier effect of secondary and related consumer spending.

A more tempered view of small business economic job contribution is that the two-out-of-three job creation statement masks the fact that most small businesses eliminate more jobs than they create in a given year, either through layoffs, closings or bankruptcy. Further, many small companies tend to grow with the U.S. population, not faster, so they don't speed economic recovery the way an exploding new industry might.ⁱⁱ

In 2005, for instance, according to the Census Bureau more than 99 percent of the 2.5 million net new private-sector jobs in the U.S. came from small business startups... small businesses no more than 5 years old. The small businesses that have been around more than 5 years actually cut 0.5 percent more jobs than they added in a typical year. A survey by the National Federation of Independent Business identified that small businesses cut more workers than they hired in all but three months last year (2011), and contributed zero to job gains in January. By contrast, big businesses hired more workers than they cut... about 0.1 percent in a typical year.ⁱⁱⁱ

Some Strategies Involving Procurement

Small businesses are often challenged when competing in the procurement process with large businesses and often do not have the capacity or credit to compete head-to-head for business opportunities. To remedy this situation strategies are often applied to level the playing field and favor small businesses to ensure they receive a fair proportion of the procurement spend. The following are some of these strategies:

Set-Asides

A set-aside is a preference, which may be total or partial, where the procurement is set-aside for participation by small businesses only, excluding all other businesses from participating in the business opportunity. Only bids and proposals from small businesses are accepted and the award is made if the price is fair and reasonable.

Unbundling Contracts

Unbundling is splitting up large, leveraged contracts by making awards to multiple businesses. By unbundling contracts, small businesses that may not have the capacity to compete for the entire award may be able to compete for part of the award or for a particular region of a state.

Evaluation Points for Small Business

In negotiated procurements where award is based on evaluation factors – often a 100 point system – there is a factor and points devoted to small business (not to the goods or services being purchased), sometimes up to one-fifth of the points or more. This factor gives small businesses a scoring advantage during the negotiations and greater potential to receive the award.

Small Business Subcontracting Plan

When the Prime Vendor is not a small business another strategy to promote small business is to require the Prime to show their efforts to involve small business by submitting a plan with their bid or proposal. In Request-for-Proposals this plan can even be assigned an evaluation factor.

Percentage Preferences

A percentage preference establishes a set percentage reduction applied to small business bids that make their bids more competitive against large business bids when evaluating the bidding results and determining the award.

Do these Strategies Work

Is small business competitiveness improved?

In one view, analysis indicates strategies like those identified above do work to increase the success for small businesses. These strategies help to level the playing field because the state government subsidizes the small businesses. Small businesses otherwise may have a difficult time competing head-to-head with larger businesses or be relegated to subcontractor status.

The opposing view is, while these strategies may be successful in increasing participation of small businesses, are they the most cost effective and efficient way to achieve this objective? The strategies are viewed as counter to the basic tenet and touchstone of public procurement, which is full

and open competition, and these strategies can impact the quality of goods and services being procured. Participation of small business in the procurement process should be facilitated, but not by relegating such businesses to second class status by establishing artificial set-asides or “sheltered markets.” Many small businesses also conduct business with private sector businesses where they receive no favored treatment. Strategies that weaken the ability of the small business to compete in the open market make them increasingly dependent upon favored treatment to succeed in the public sector.^{iv}

Reduced Efficiency and Increased Costs

Strategies such as the above can be administratively cumbersome, costly, and susceptible to abuse.^v Some examples are small business set-asides, evaluation points for small business, and subcontracting plans.

In the first example, if procurement is set-aside for small business only, and the bids received are not “fair and reasonable,” the procurement has to be cancelled and recompeted unless an award is made at an excessive price. This results in the unnecessary expenditure of resources for both state government and small businesses. The process is cumbersome and costly and may actually harm small businesses by cycling them unnecessarily.

In the second example, if too significant a percentage of evaluation points is placed on the small business evaluation factor, the result may impact the source selection of the most qualified business and even affect the quality of the goods or services. The focus shifts from obtaining the best value for the taxpayer to meeting the small business socio-economic objective. Some say it is questionable whether a small business evaluation factor is even appropriate because it is not related to the goods or services being purchased.

In the third example, subcontracting plans can be a good tool, but only if compliance is monitored and administered. One downside is if vendors receive government interference and are pressured to use businesses they normally would not select to perform a project because of quality or other reasons, the government can assume some of the liability if the project is not successful and may face a vendor claim.

When meeting socio-economic objectives becomes the dominant goal over obtaining the best value for goods and services for the taxpayer, and small businesses receive favored treatment, the end result is usually higher costs. One state conducted a survey of prices paid to meet small business goals. The results were 5% to 40% higher prices paid for goods. The same state analyzed procurement data over a two year period to determine how much higher small business bids are compared to non-small business bids. The re-

sults of that analysis showed an average of over 20% higher bids.

One frequently expressed view is that it is acceptable to pay higher prices for the procurement of goods and services in order to award to small businesses and increase small business participation. The higher prices paid may be considered fair and reasonable to achieve a larger benefit to the economy from promoting small business.

Proponents of strategies that favor small businesses say that “large” businesses already receive favored treatment through state tax relief, direct grants, or other state methods to keep the businesses within the state. They question why small businesses, which make up most of the businesses, shouldn’t receive favored treatment as well.

A counter viewpoint is that state procurement professionals are fiduciary officers. Taxpayers expect goods and services to be procured at fair and reasonable prices. In their view the taxpayers did not ask state government to see how many contracts could be awarded at higher prices to allow more businesses to receive a contract. Awarding multiple smaller contracts is not always cost effective or administratively efficient; it dilutes leveraged buying power of the state and increases cost to the taxpayer.

Need to Increase Return-On-Investment Visibility

Advocates of social and economic programs executed through the procurement process need to be able to show the return-on-investment, whether it is jobs created, state revenue received, or other. While it may be extremely difficult, if not impossible, to measure precisely the value of certain social and economic programs in order to compare their value with their cost, the public wants to know how much they are paying and what they are getting for their money.

One view is that social and economic programs executed through procurement makes public procurement more costly and time consuming and masks its impact from the public eye. It is a legitimate question: How much of the extra costs and other burdens of the socioeconomic objective should be absorbed in the procurement process, and how much should be supported by more explicit means such as tax benefits or direct grants that are more publicly visible? Because the costs and additional time consuming resources required are hidden in the procurement process, all too often there is insufficient consideration of the real cost involved when public procurement is mobilized for some ancillary purpose. There is a great need to show the public the impact that social and

economic programs have on the procurement process, the individual and cumulative cost of such programs, and the effectiveness of using the procurement process as a means to promote such goals.^{vi}

Increasing Small Business Participation Without Sacrificing Competition and Efficiency

There are many ways in which participation in public business opportunities can be facilitated without sacrificing competition, impacting quality, and making the procurement process less efficient:^{vii}

- special efforts to identify small businesses and to encourage them to seek public business such as advertisement of opportunities in trade journals or small business audience newspapers and contact with local chamber of commerce offices;
- coordination with state business assistance offices and procurement technical assistance centers;
- use of technology to increase visibility of business opportunities, including mobile technology like business opportunity app(s);
- special training or introductory seminars and workshops and web-based computer training for firms, including firms without previous procurement experience;
- one-on-one counseling sessions by state procurement professionals, and;
- forums and expositions where small businesses can present their products and network with public sector procurement professionals.

Conclusion

Any jurisdiction choosing to use its market participation to pursue socio-economic goals – such as enhancing small business participation – must ask itself one key question: Dollar for dollar, is using the procurement process the most cost effective, efficient, publicly visible and government accountable way to use taxpayer dollars to achieve the desired goals or are more explicit methods, such as tax benefits, direct grants, and other means, outside the procurement process more appropriate?

i Small Business Administration, Office of Advocacy, Small Business Profile, October 2009
ii Article, “Why the big talk about small business is wrong,” Authors Bernard Condon, Matthew Craft, Feb 17, 2012
iii Ibid
iv Virginia Procurement Law Study Final Report, Nov 1, 1980, p. 5
v Ibid
vi Report of the Commission on Government Procurement, Vol 1, p. 122
vii Virginia Procurement Law Study Final Report, Nov 1, 1980, p. 5