



# NASPO

National Association of State Procurement Officials



## COOPERATION & COLLABORATION

in STATE HIGHER EDUCATION PROCUREMENT

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## FORWARD

The National Association of State Procurement Officials, Inc. (NASPO) is a non-profit association dedicated to strengthening the procurement community through education, research, and communication. Established in 1947, NASPO is made up of the directors of the central purchasing offices in each of the 50 states, the District of Columbia and the territories of the United States. NASPO is an organization through which the member purchasing officials provide leadership in professional public procurement, improve the quality of procurement, exchange information and cooperate to attain greater efficiency, economy, and customer satisfaction.

In 2010, the American Association of State Colleges and Universities (AASCU) and the National Association of Educational Procurement (NAEP) issued a study of the institutional practices at colleges and universities, the state regulatory environment, and the impact of both on higher education procurement. The study concludes with eight specific recommendations for states and eight recommendations for systems and institutions.

NASPO applauds the efforts of AASCU and NAEP to raise awareness regarding the importance of sound public procurement policy and the need to continuously examine the state regulatory environment for needed improvements and savings. However, NASPO views the report as one promoting autonomy, not effectiveness and efficiency in public procurement. The AASCU/NAEP study offers multiple recommendations that, if widely adopted, would fundamentally alter the landscape of U.S. state-level public procurement. The study recommends that:

1. Public colleges and universities should have greater autonomy from state statutes, regulations, and policies governing procurement;
2. Public colleges and universities should operate with substantial independence from state central purchasing offices;
3. Public institutions of higher learning should participate in state cooperative purchasing contracts only at their option; and
4. Public colleges and universities should have unrestrained authority to participate in group purchasing consortia.

Given the opportunities for improvement and the importance of these recommendations, NASPO has prepared a detailed analysis and response. NASPO offers this position statement to provide policy makers with information it believes is necessary to properly evaluate these recommendations. NASPO also offers this report in hopes that it will foster greater collaboration between higher education officials and state procurement officials. The inefficiencies resulting from the state regulatory environment can best be resolved by working together.

It should be noted that two sections of the American Bar Association, the Section of Public Contract Law and the Section of State and Local Government Law, recently issued their own response to the AASCU/NAEP study. In large measure, NASPO concurs with that response. A copy of the ABA letters is attached to this paper in the Appendix.

Greg Smith  
President  
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## EXECUTIVE SUMMARY

In 2010, the American Association of State Colleges and Universities (AASCU) and the National Association of Educational Procurement (NAEP) issued a study regarding the impact of the state regulatory environment on higher education procurement.

NASPO applauds the efforts of AASCU and NAEP to raise awareness regarding the importance of sound public procurement policy. State procurement directors and central procurement organizations have continuously attempted to work with state institutions of higher education to review procurement laws, policies and regulations to accommodate the specific needs of higher education while promoting sound public procurement policy. In order to maximize the benefit to taxpayers, NASPO believes it is necessary for all state entities to work together for the good of the whole enterprise.

*NASPO believes it is necessary for all state entities to work together for the good of the whole enterprise.*

NASPO agrees with a number of the study's specific recommendations for change. For example, NASPO agrees that individual institutions should have substantial authority to conduct their own procurements, but such authority must be commensurate with an institution's expertise, resources, internal procurement operations, and history of compliance with applicable procurement rules. NASPO also agrees with the recommendation to review and increase small purchase thresholds as appropriate. In addition, NASPO agrees with the recommendation regarding the use of reverse auctions as a procurement tool, provided they are used appropriately. And, NASPO strongly agrees with the recommendation that all system and institutional procurement officers receive adequate and ongoing training.

On a number of other points, however, NASPO fundamentally disagrees. NASPO views the study's objective as primarily supporting institutional autonomy. The few recommendations that address efficiency and effectiveness can be implemented largely through continuing dialogue between institutions of higher education and the state's central procurement authority.

*Exempting public colleges and universities from state procurement law is completely inconsistent with sound public policy and sound business practices.*

NASPO does not agree that public colleges and universities should act with total independence. Exempting public colleges and universities from state procurement laws is completely inconsistent with sound public policy and sound business practices. The fundamental objective of a public procurement system is "to give all persons equal right to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition."\* Meeting these objectives requires a set of rules that

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\* *United States v. Brookridge Farm, Inc.*, 111 F.2d 461, 463 (10th Cir. 1940).

define and mandate the use of selection processes that are competitive, efficient, transparent, open, and impartial. Granting higher education an exception from these rules undermines the very purpose of having them. NASPO firmly believes that sound public procurement principles must prevail.

Participation in a competitive process (public or private) often involves a significant financial investment; an investment that is recouped only when business is secured. The business community's willingness to risk that investment depends on its confidence in the fairness of a competitive process that stems largely from a well developed set of rules. Eliminating the rule book, which may offer short term benefits, ultimately undermines that confidence and the willingness to participate in government contracts.

Allowing public colleges and universities to operate under separate procurement rules also creates problems. At best, separate rules imply two different sets of rules. At worst, it contemplates different procurement rules for every college and university in a state. Each additional set of rules undermines the integrity, efficiency, and effectiveness of the state's procurement system by needlessly increasing its complexity. Many states have statutory internal controls review and certification requirements – oversight obligations that have received much more emphasis even in public institutions since the passage of Sarbanes-Oxley – and further segmentation of public institutions frustrates the objectives of public accountability. The American Bar Association has properly highlighted this issue by questioning the narrow view taken by higher education about the nature of public funds. For both the public and private sector participants, the confusion and resulting inefficiencies are obvious.

Even if all public entities are operating under one set of procurement laws, a strong central procurement office is necessary for a state's procurement system to be efficient and effective. When functioning properly, a central procurement program reduces the cost of government by:

- Eliminating inconsistent practices and procedures that confuse vendors and discourage them from competing.†
- Reducing the need for duplicative resources by developing capability and expertise that most other agencies cannot afford to develop.
- Inspiring public confidence in government by placing someone in charge of a system that spends vast amounts of public funds.
- Serving as the government's meaningful link to the business community.

*Central purchasing programs can generate substantial savings for all of a state's public entities by reducing administrative costs and lowering prices.*

Another major benefit of a strong central procurement program – the ability to consolidate the state's needs – exposes a flaw in another of the study's recommendations: that college and university participation in state purchasing contracts should be optional. Central purchasing programs

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† AASCU / NAEP expressly acknowledge the efficiency lost when policy is inconsistently applied. AASCU / NAEP Survey, at p. 28 ("Opportunities to contain costs may be lost as a result of differing understanding of state policy.")

can generate substantial savings for all of a state's public entities by reducing administrative costs and lowering prices. Costs are lowered by leveraging the consolidated needs of all state public entities and allowing industry to benefit from the accompanying economies of scale. Administrative costs are lowered by reducing the number of competitive processes conducted. The savings that result should substantially exceed what any individual entity could achieve, but success depends both on an agency's commitment to use these contracts and on active participation in their development. Colleges and universities represent a major portion of every state's annual expenditures. Without their participation in these contracts, state and local public entities will pay more.

Rather than encouraging colleges and universities to participate in and improve statewide purchasing contracts, the report suggests colleges and universities have unrestrained access to group purchasing consortia. While both involve cooperative purchasing, group purchasing consortia, as referenced here, usually involves cooperative purchasing with out-of-state entities, which may or may not be regional or national in scope. While NASPO fully embraces the responsible use of cooperative purchasing, it does not support its unrestrained use. Like categorical exemptions from state procurement laws, unrestrained participation in cooperative purchasing is inconsistent with sound public policy because it ignores the necessity of rules that define and mandate the use of competitive, efficient, transparent, open, and impartial selection processes. Simply put, cooperative purchasing should not be used to circumvent a state's procurement policy or negatively impact in-state, small, or disadvantaged businesses. Cooperative purchasing contracts, particularly those involving multiple states, can be so large that in-state vendors, women and minority business enterprises (WBEs/MBEs), and small businesses may be incapable of handling the combined requirements of multiple governments or multiple states, and thus, unable to participate.

AASCU and NAEP offer several recommendations that – if widely adopted – would fundamentally alter the landscape of state-level public procurement in this country. Unfortunately, the study offers few facts and little analysis to establish that the suggestions offered will realize the benefits claimed. Instead, the report offers the following observation as a starting point.

At a time when federal and state lawmakers are calling on higher education leaders to do more with less, however, attention must also be paid to the role that state regulatory reform can play in reducing costs and improving efficiency. Such reform in the multi-billiondollar higher education procurement enterprise offers great opportunity for individual campuses and university systems to streamline purchasing operations to save time and money, increase product and service quality, and most importantly, redirect critical resources toward universities' core missions of teaching and learning.

This starting point accepts the premise that procurement rules are not designed to achieve efficiencies. Reduction in efforts to achieve competition and to pursue sound procurement practices has become a linchpin of a strategy to reallocate higher education institutions' resources away from processes designed to promote public accountability. While the fiscal pressures cited in the report are real, they are not unique to public colleges and universities. Nevertheless, the report offers no explanation of why such pressures do not justify applying its suggestions for deregulation to all state agencies. By repeatedly distinguishing between “state-appropriated taxpayer monies and students’

tuition dollars," the study suggests that a decrease in state appropriated dollars justifies different treatment for colleges and universities and increased independence from the procurement rules governing other public entities. Any such justification must be expressly rejected. By every meaningful measure, these institutions remain public. As long as they remain public, the policies underpinning the procurement system apply.

*While the fiscal pressures cited in the report are real, they are not unique to public colleges and universities.*

NASPO believes that the path forward is built on cooperation and active engagement. The best way to facilitate such cooperation is to provide a common foundation. NASPO believes that the proper foundation of any public procurement system is a comprehensive procurement law based on the American Bar Association's Model Procurement Code<sup>‡</sup> that provides parameters, authorizes the exercise of professional discretion, covers all agencies and institutions, covers all types of procurements, and places centralized management in the hands of an executive at a high level within state government. With this foundation, a chief procurement officer can delegate substantial procurement functions to institutions based on each institution's expertise, resources, internal procurement operations, and history of compliance with applicable procurement rules. From this common foundation, all the stakeholders – industry, state government, the legislature, and higher education – can work together to identify and implement opportunities for improvement.

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<sup>‡</sup> *While not all states have adopted the Model Procurement Code, the Code's statements regarding effectiveness, efficiency, and equity in public procurement are principles adopted by NASPO and its membership. Moreover, the centralization and transparency principles advocated in this paper and by the ABA are more consistent with international procurement principles aimed at promoting competitiveness of American businesses.*

## GENERAL RESPONSE

NASPO believes that state government policy makers should not rely on the AASCU/NAEP study to guide their decisions regarding state procurement reform for the following reasons:

1. The study makes a number of recommendations for "deregulation"<sup>1</sup> of procurement; however, little evidence is offered for these recommendations. Rather, the ultimate foundation for these recommendations rests solely on a narrow survey.

a. The survey responses do not provide a meaningful overview or a representative sample of state procurement practices. The study states that "*[d]ue to the relatively small sample of procurement officials who responded to the survey, these findings may not reflect the overall state of university procurement operations" and that "caution must be made in generalizing from these findings."*<sup>2</sup>

b. The survey was limited to fourteen (14) questions that do not provide the ability for proper analysis and conclusions. For example, question eleven is subjective and not fact based.

11. In thinking about your institution's efforts to contain costs, are current state procurement statutes, regulations and policies:

- Extremely detrimental to your efforts to contain costs?
- Somewhat detrimental to your efforts to contain costs?
- Neutral/have no impact on your efforts to contain costs?
- Somewhat helpful in your efforts to contain costs?
- Very helpful in your efforts to contain costs?

c. The results of the survey are not published. Accordingly, a meaningful analysis of the responses is not possible.<sup>3</sup>

2. The report presents limited and incomplete information based on questions and minimum participation.

a. To illustrate opportunities to reform access to group consortia, the study states that "[i]n South Carolina...public universities are not allowed to utilize consortium contracts ...."<sup>4</sup> In fact, the State of South Carolina actively participates in a number of cooperative purchasing contracts, including each of the following multiple-award contracts:

- Minnesota Multistate Contracting Alliance for Pharmacy contracts
  - flu vaccine contracts
  - Pharmaceutical items & pharmaceutical distribution contracts
- National Association of State Purchasing Officials
  - Training services contracts
  - Laboratory equipment, chemicals and supplies contracts
- Western States Contracting Alliance
  - Personal computers

- United States General Services Administration
  - 1122 Counterdrug Program contracts
  - Disaster recovery and relief contracts

Likewise, the study states that "[i]n...Utah, public universities are not allowed to utilize consortium contracts ... In fact, the State of Utah actively participates in a number of cooperative purchasing contracts, including each of the following multiple-award contracts.

- Western States Contracting Alliance
  - Body Armor
  - Breast Pumps
  - Data Communications Equipment(\*)
  - Fuel Cell Power Units
  - Industrial Supplies
  - Janitorial Supplies
  - Mailing Equipment
  - Nationwide Vehicle Rental
  - Public Safety Communications Equipment
  - Purchase Card Services
  - Satellite Phones (\*)
  - Small Package Delivery (\*)
  - Tires, Tubes, Services (\*)
  - Vehicle Lifts
  - WIC Infant Formula
  - Wireless Communications & Equipment

For the contracts identified above with an asterisk, Utah not only participates, but the State serves as the lead state.

b. To illustrate opportunities to reform the role of centralized purchasing, the study states that "[i]n South Carolina, all contracts for information technology services must go through the state..." In fact, most of South Carolina's largest colleges and universities have been delegated direct procurement authority well above the statutory base of \$50,000. Of the state's three research universities, two have standing authority to make information technology acquisitions of \$1,000,000 per commitment with no involvement of the state's central purchasing office.<sup>5</sup>

c. The State of Colorado is highlighted in the study as an example of "how states have made progress in reforming procurement regulations affecting public colleges and universities, in order to provide cost savings, increased flexibility, improved purchasing power, and better quality of products and services."<sup>6</sup> The inference is that the movement by higher education away from the state procurement system promoted improvements in procurement effectiveness and effectiveness. However, Colorado had already implemented improvements that mirror the recommendations in the AASCU/ NAEP study.

3. In the foreword, the study notes the need for "maintaining transparency and accountability."<sup>7</sup> Likewise, the introduction observes that "[s]tate regulatory reform does not absolve public institutions from accountability in their purchasing operations" and that "[f]ull transparency must be maintained."<sup>8</sup> Later, in the recommendations, the study notes that greater autonomy must be "combined with appropriate accountability measures."<sup>9</sup> After conceding the imperative of these principles, the study concludes that its recommendations are consistent with accountability and transparency. However, the study offers no analysis to justify this conclusion.<sup>10</sup> Moreover, the study never identifies the measures that will be taken to insure transparency and accountability. Rather, the report indicates that efficiency and cost savings always justify increased flexibility; an approach which often results in decreased transparency and accountability.

4. The study's fundamental proposition is that procurement is an "area rich for reform and cost-saving opportunities" and that "considerable cost savings may be realized in the reform of current procurement practices."<sup>11</sup> States are offered eight recommendations that, the study contends, will allow institutions to take advantage of this "great opportunity ... to save time and money, increase product and service quality, and most importantly, redirect critical resources toward universities' core missions of teaching and learning."<sup>12</sup> Unfortunately, the study is incomplete and provides no analysis to prove these points. For example, in recommending increased use of group purchasing consortia contracts, the study offers no comparison pricing to substantiate the claims of cost reduction or increased efficiency. Likewise, in recommending increased small purchase limits, the study offers no cost-benefit analysis regarding the threshold at which the lower administrative costs of reduced competition exceeds the savings that result from competing contracts for lower pricing. While NASPO agrees that opportunities exist for improvement in this area, the study fails to provide a sufficient factual or analytical basis for the reforms it suggests.

*While NASPO agrees that opportunities exist for improvement in this area, the study fails to provide a sufficient factual or analytical basis for the reforms it suggests.*

5. Every procurement system involves a set of highly structured rules that carefully balance a number of competing goals, e.g., cost savings, efficiency, transparency, and accountability. The study does not address the impact of its recommendations on these competing goals. Rather, the study assumes that costs savings on individual procurements outweigh any other considerations. A simple examination of the procurement process reveals the defect in this approach. Consider the late bid rule. It is axiomatic that late bids are rejected, even though a bid received minutes late may be much lower than the lowest bid. This rule elevates the objectives of fair play and the business community's long term faith in the system over the short run economic costs. As soon as one bidder is allowed to benefit from submitting a late bid -- after all the other bidders have been identified and their bid prices exposed -- all bidders will be motivated to submit untimely bids, thus undermining the very process and integrity of competitive sealed bidding.

## NOTE

NASPO's point-by-point response to the AASCU/NAEP references several documents as noted below.

- References to the “Practical Guide” are to a book entitled *State and Local Government Procurement: A Practical Guide*, which NASPO has published in various forms since 1975.
- References to the “Model Procurement Code” are to the *2000 Model Procurement Code for State and Local Governments*, which is published by the American Bar Association's Section of Public Contract Law and Section of State and Local Government Law.

Many of the policy positions stated in this response are more fully articulated in the Practical Guide, the Model Procurement Code, or both.

## POINT-BY-POINT RESPONSE

### AASCU / NAEP Recommendation #1

*Provide greater autonomy to systems and institutions regarding procurement policy.*

#### NASPO Response

a. Exemptions from Procurement Laws

This report recommends greater autonomy regarding procurement policy, which as the report explains, means "[g]reater autonomy from state statutes, regulations and policies" governing procurement.<sup>13</sup> Granting colleges and universities autonomy from state laws governing procurement necessarily implies either that colleges and universities will not be covered by state laws governing procurement or colleges and universities will be governed by a different set of procurement laws.

*Exempting public colleges and universities from state procurement laws is completely inconsistent with sound public policy.*

Exempting public colleges and universities from state procurement laws is completely inconsistent with sound public policy. The fundamental objective of a public procurement system is "to give all persons equal right to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition."<sup>§</sup> In order to meet these objectives, enforceable laws must dictate the rules governing the public procurement process; laws that define and mandate the use of selection processes that are competitive, efficient, transparent, open, and impartial; laws to which the government may be held accountable by its public. Experience proves that a procurement system not governed by enforceable laws is a procurement system ripe for fraud, corruption, and misuse. Granting higher education an exception from the very rules that create a state's procurement system and provide its integrity undermines the very purpose of having these rules.

If granting colleges and universities autonomy from state procurement laws does not involve exempting these institutions from any laws, then – at best – it necessarily implies two different sets of rules. At worst, it contemplates different procurement rules for each college and university. Each additional set of rules undermines the integrity, efficiency, and effectiveness of the state's procurement system by needlessly increasing its complexity. A procurement system involves numerous stakeholders: the business community (potential contractors), full time public procurement officials, auditors (that review agencies for compliance with procurement rules), and policy makers (internal or external; legislative, executive, or judicial) that must establish, evaluate, and revise procurement policy. When different agencies have different procurement rules, each of these stakeholders must limit itself to one agency or learn multiple sets of rules. The resulting confusion and inefficiencies are obvious.

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<sup>§</sup> *United States v. Brookridge Farm, Inc.*, 111 F.2d 461, 463 (10th Cir. 1940).

b. Independence from Central Purchasing Office / Decentralization

Read in conjunction with the study's second recommendation (decreased state approval), the recommendation for greater autonomy regarding procurement policy also implies that colleges and universities should operate independent of the state's central purchasing office. This independence from the central purchasing office would extend to both its responsibility to establish state procurement policy and its responsibility to process, oversee and/or approve purchases above a certain dollar threshold. NASPO recommends the appropriate delegation of procurement authority to individual institutions, but only in conjunction with a centralized procurement office exercising plenary authority over procurement policy and authority (see response to question #2 below).

Clearly, government can achieve certain economies of scale by having all procurements funneled to the same place for processing. A centralized procurement office can:

- Develop expertise that most other agencies cannot afford to develop.
- Facilitate integrity in the procurement process by providing oversight of agency purchases by insulating state officials from pressures to favor particular vendors.
- Consolidate the needs of all state agencies – including those of the higher education system -- and leverage total state spend to establish statewide contracts that provide lower pricing than individual entities can achieve alone.

Recent advances in technology highlight these points. Efficiency and cost effectiveness clearly favor establishing one central electronic procurement system rather than each state agency and institution establish their own system and duplicating the development, implementation, and maintenance costs involved. For example, one state Auditor of Public Accounts reported that within a five year period the state agencies and institutions budgeted or actually spent over \$556 million dollars to replace or implement new independent financial systems.<sup>14</sup>

The concept of conducting procurements as close to the point of need as possible has validity, particularly with smaller purchases and acquisitions truly unique to a single agency. Unfortunately, the centralization debate offers a false choice between centralization and decentralization. This fallacy ignores the fact that the best of both worlds is easily possible -- central management, coupled with the delegation of procurement authority under a thoughtful set of delegation standards, with adequate training and authoritative monitoring.

*An effective central procurement program reduces the cost of government in several important ways.*

An effective central procurement program reduces the cost of government in several important ways:

- It eliminates inconsistent practices and procedures that confuse vendors and discourage them from competing.<sup>15</sup>
- It facilitates compliance with international trade agreements when those agreements include participation by institutions of higher education.<sup>16</sup>
- It reduces the need for duplicative processes and resources in higher education institutions

- It inspires public confidence in government because it places someone in charge of the management of the system through which the public entity spends a significant amount of its budget
- It is the government's meaningful link to the business community.
- It promotes honesty and integrity throughout governmental operations by providing, among other things, support for the procurement officials in agencies with delegated procurement authority.

It is, indeed, a function that a government jurisdiction can ill-afford to undervalue or compromise.

The foundation for building a strategic procurement organization is leadership backed by a comprehensive procurement law that provides parameters and authorizes the exercise of professional discretion. The ideal organizational structure is a comprehensive procurement law covering all agencies, institutions, and types of procurements, with centralized management placed in the hands of an executive-level Chief Procurement Officer. The law must, in whatever form is appropriate:

- Make the Chief Procurement Officer responsible for and authorize that official to institute and maintain an effective program for all procurement of commodities, services, and construction within state government.
- Assign the Chief Procurement Officer and the central procurement office the responsibility for policymaking as well as for the implementation and oversight of the full spectrum of procurement functions.
- Designate the Chief Procurement Officer with the sole authority to delegate procurement authority and to determine the conditions for doing so.
- Authorize the Chief Procurement Officer to promulgate rules or regulations and policies to implement the procurement law.

## AASCU / NAEP Recommendation #2

*Review, and if warranted, increase the minimum dollar threshold for purchases requiring state approval and adjust minimum thresholds involving formal competitive (sealed) bids.*

### NASPO Response

This recommendation has two parts. One regards the threshold above which institutions must seek approval from some central state office, procurement or otherwise. The other regards the small purchase threshold.<sup>17</sup> Because each point raises different policy considerations, NASPO responds to them separately.

#### a. Central State Approval Threshold

#### *NASPO agrees that procurement thresholds should be reviewed*

All states have a central procurement office, but the authority of those offices varies widely. In many states, acquisitions above a certain dollar threshold must be procured by these offices or approved by some central state authority, or both. Regarding approval by a central state authority, e.g., a capital expenditure approval process or an information technology approval process, NASPO offers no comment. However, NASPO agrees that procurement thresholds should be reviewed and, if warranted, increased – subject to the following basic principles and recommendations:

- States establish a central procurement office and a chief procurement officer
- States transfer all rights and powers relating to procurement from all state institutions to the chief procurement officer
- Chief procurement officers delegate procurement functions to institutions that can be logically, effectively, and efficiently performed by those institutions
- Procurement authority delegations should be in writing; and,
- The scope of the delegation should be commensurate with the expertise and resources of the institution or person to whom the delegation is to be made.

In addition, NASPO recommends that the conditions, manner and documentation by which a chief procurement officer may delegate procurement authority to institutions should be prescribed by statute and administrative rules. However, NASPO recommends against blanket statutory delegations of authority because each institution's procurement authority should be commensurate with its expertise, resources, internal procurement operations, and history of compliance with applicable procurement rules.

Georgia and South Carolina have created models that illustrate this approach.<sup>18</sup> In both states, colleges and universities have direct purchasing authority for acquisitions that use the small purchase procedures. In addition, each state's central procurement office has delegated colleges and universities additional

*NASPO recommends against blanket statutory delegations of authority*

authority. In Georgia, colleges and universities, with a few exceptions, have authority to conduct competitive sealed proposals (RFPs) up to \$250,000 and unlimited dollar delegation for quotations (RFQs). In South Carolina, delegations are usually tied to an acquisition type, e.g., construction or goods and services.

South Carolina's central purchasing office has delegated two of its research universities authority to procure goods and services valued up to \$1,500,000 per commitment. In both states, these delegations were based on an institution's favorable audit findings, commitment to professional development, and quality of work in addition to the institution's active participation in centralized training and certification programs. In large measure, the very reason for these programs is to facilitate increased agency procurement authority.

#### b. Small Purchase Threshold

Below a certain dollar threshold, most procurement systems provide for a simplified acquisition process. These small purchase procedures are less formal than processes used for higher value contracts and may not involve public advertising. For example, many states provide for small purchases to be conducted by acquiring three written quotes. Small purchase thresholds are a recognition that below a certain dollar amount, the benefits of a formal competitive process (e.g., greater transparency, accountability, and competition) are outweighed by the relatively larger delay and administrative cost involved in a formal competition.

The report recommends a review, and if warranted, an adjustment to the small purchase threshold.<sup>19</sup> NASPO agrees.

In its Model Procurement Code, the American Bar Association recommends several types of small purchase procedures and suggests a maximum value for small purchases of \$100,000 for construction and \$25,000 for supplies and services.<sup>20</sup> NASPO does not recommend any specific thresholds. Rather, NASPO recommends that states consider the appropriate balance between speed and efficiency on one hand and competition, pricing, accountability, and transparency on the other.

## AASCU / NAEP Recommendation #3

*Eliminate state mandates requiring institutions to accept the lowest responsive bids in the awarding of contracts.*

### NASPO Response

Two basic source selection methods provide full and open competition. The first is competitive sealed bidding, which involves award to the lowest responsive (i.e., bidder offered what was requested) and responsible (i.e., capable of performing) bidder. The second is competitive sealed proposals, which involves award to the most advantageous responsible offeror, taking into consideration both price and non-price factors.

*State procurement laws should authorize the use of criteria in addition to price in evaluation and award*

While a cursory review of the report may suggest a rejection of competitive sealed bidding, a careful review reveals otherwise. Rather than being critical of competitive sealed bidding,<sup>21</sup> the report recommends that institutions also be allowed to use competitive sealed proposals as an additional source selection method. NASPO agrees. State procurement laws should authorize the use of criteria in addition to price in evaluation and award when the criteria are identified in the solicitation document.

Sound approaches for authorizing competitive sealed proposals are outlined in both the Practical Guide and the Model Procurement Code.

## AASCU / NAEP Recommendation #4

*Make participation in state purchasing contracts voluntary; institutions may opt into these contracts when it is advantageous to do so, but opt out of them when better options can be identified.*

### NASPO Response

State Purchasing contracts aim to provide an efficient and cost effective vehicle for the common commodities and services purchased by state agencies and higher education institutions as well as local political subdivisions. The strongest and most beneficial of these contracts result from true cooperative solicitation and contracting processes with a foundation of participation and collaboration among the using state agencies and higher education institutions to develop and implement these cooperative agreements. Aggregation of spend can be accomplished to obtain the best prices as well as beneficial terms. The key is building an environment for participation and collaboration. This takes both the central procurement office and higher education institution purchasing offices working together for the benefit of all. When this occurs, the needs of participating entities are most likely to be met and significant cost savings realized with an efficient utilization of purchasing entity resources.

*Aggregation of spend can be accomplished to obtain the best prices as well as beneficial terms.*

Voluntary utilization of central procurement office contracts defeats the objectives and benefits that have been explained above. Volume cannot be counted in the statewide aggregated volume if use of the contracts is optional and extremely variable. Moreover, when participation is optional, institutions lack any incentive to participate in the development of requirements and specifications. The obvious result are statewide cooperative contracts that may be less useful to the universities than they could be.

Collectively, colleges and universities are among the largest state consumers of many supplies and services. Without their participation and utilization, the remaining state agencies will realize diminished cost-savings opportunities and less advantageous terms and conditions. One state analysis shows a loss of five to 20 percent through higher prices due to the non-participation of higher education on statewide contracts.

There will be some instances where mandatory state contracts cannot deliver adequately and accommodation can be made by the CPO with a straightforward waiver justification. This enables agencies and institutions of higher education to best meet their needs and it informs the CPO as to where there are areas for improvement or new opportunities for state contracts.

In 2006, the Virginia General Assembly passed legislation enabling private institutions of higher education to purchase from state contracts. While certain public institutions pushed to be exempt from mandatory state contracts, private higher educational institutions lobbied the General Assembly because they wanted to be able to buy from state contracts --the very institutions the university study cites as having achieved great gains in procurement productivity, quality and cost savings.

*Allowing institutions to opt out of statewide contracts not only reduces the states' leveraged buying power...it creates two different sets of specifications.*

Allowing institutions to opt out of statewide contracts not only reduces the states' leveraged buying power and results in higher pricing but it potentially creates two different sets of specifications and/or statement of needs. This results in having multiple contracts (statewide and institutional) with different requirements, sometimes with the same contractor. Inevitably, this leads to confusion and contract compliance issues that add additional burdens on contractors. Contractor sales teams must manage which items and services are on which contracts in order to know which items an agency can purchase versus what

items an institution can purchase. Additionally, the contractor's billing department must also manage the different billing requirements by contract. For example, an institution might require billing bi-monthly whereas the statewide contract requires monthly billing.

The more states allow for institutions to break from using statewide contracts the more diluted standards will become, resulting in more expense and additional certifications needed in order for state and institution employees to maintain certain pieces of equipment.

State legislatures and state executive officials should review their state's ability to aggregate spend and to leverage buying power in order to obtain the best prices for goods and services. This approach has proven to generate the most savings when all state agencies, institutions of higher education, and local governments aggregate their spend with a cooperative and collaborative approach. Based on one state's analysis the aggregation of state enterprise spend can result in a savings difference between five and 20 percent.

## AASCU / NAEP Recommendation #5

*Allow institutions to participate in group-purchasing consortia.*

### NASPO Response

The AASCU/NAEP report recommends that states allow participation in group-purchasing consortia, more commonly known as cooperative purchasing.<sup>22</sup> In addition, the report also raises concerns with any obstacle that might inhibit participation in cooperative purchasing.<sup>23</sup> A full reading of the report strongly suggests that both AASCU and NAEP are recommending unrestrained participation in group purchasing.<sup>24</sup> NASPO fully embraces the responsible use of cooperative purchasing, but does not support its unrestrained use. While NASPO recommends that all states authorize participation in cooperative purchasing, NASPO also recommends that states consider the following inter-related policy issues:

#### □ Use of Cooperative Purchasing to Circumvent State Rules

If public entities can participate in cooperative purchasing efforts with any other public entities – regardless of how the lead entity conducts the procurement, they may be tempted to pick a lead entity with the least restrictive procurement rules. Such unrestricted flexibility facilitates the use of cooperative purchasing to circumvent a state's rules.

The obvious solution is to allow public entities to participate in cooperative purchase efforts only when the lead entity's process substantially reflects the processes required by the procurement laws of every participating entity. In theory, this approach works by forcing public entities to cooperate in advance of conducting a procurement in order to develop a procurement process that satisfies the procurement rules of all participating jurisdictions. The original version of the American Bar Association's Model Procurement Code for State and Local Government took this approach. In practice, this approach has apparently proven unmanageable, either because of the variation in rules among the states or because of the pressures to join cooperatives after-the-fact, i.e., piggybacking. The ABA revised the Model Procurement Code in 2000 with the express purpose of liberalizing cooperative purchasing. Even as revised, the Model Procurement Code limits an entity's participation to cooperative purchases in which the lead entity has used source selection methods substantially equivalent to the participating entity's laws and awarded the contract through full and open competition. As with the initial version, the Model Procurement Code continues to provide that public entities may not participate in a cooperative purchase for the purpose of circumventing its procurement laws.

#### □ Piggybacking

"Piggybacking" occurs when a public entity joins a cooperative purchasing contract after the competitive process is complete and a contract awarded. When an entity joins after the fact, the consequences of that entity's participation (e.g., added volume and increased distribution costs) are not

factored into the competitive process or the resulting contract. Cost savings may be minimal, since participation and usage cannot be predicted for the solicitation. When an entity joins after the fact, contract users do not get the benefits and leverage of the full volume, resulting in minimal discounts for public entities and windfall profits for vendors. Local vendors may view piggyback contracts as unfair because they did not have an opportunity to compete for a contract that was competed in another community.

□ Cherry picking

"Cherry picking" is the practice of shopping among the numerous available cooperative purchasing contracts to find one with a preferred supplier or a preferred "brand name" product. This practice circumvents the fundamental requirements of full and open competition. Piggybacking enables cherry picking.

□ Pricing

Although most cooperative contracts generate considerable cost savings for governments, not all cooperative contracts achieve best value. Contractors may offer a higher price because many of the cooperative members are small or located in remote areas. If estimates are inaccurate, price may be based on much lower than actual usage. As noted above, pricing is much more likely to be unfavorable in piggyback contracts because usage is difficult to estimate beforehand. Contractors may price the contract high because of high administrative costs associated with the cooperative, including collection of cooperative fees.

□ Unlimited Multiple Award

Unlimited multiple awards is the practice of awarding contracts for the same commodities or services to many more vendors than the needs of the public entity would appear to demand. It removes any consideration of need and price from the purchasing decision by offering agencies a veritable smorgasbord of products and services that do essentially the same thing. Additionally, it presents a potential nightmare for jurisdiction-wide standardization of the types of items used and hinders management of government assets by, for instance, necessitating a wide variety of maintenance agreements due to myriad brands of equipment in place. NASPO opposes the use of unlimited multiple award contracts.

□ Most-Favored Customer Clauses

NASPO opposes the use of most-favored customer pricing clauses. These clauses set an artificial floor on prices by requiring a vendor to always give the particular public entity using the clause the price it gives its "most favored customer." The clause restricts the pricing that other jurisdictions are able to obtain by committing firms to a national price when in fact conditions in different localities reasonably dictate varying pricing strategies.

- Limiting Participation for In-State Businesses, Minority Business Enterprise, and Small Businesses

Cooperative purchasing contracts, particularly those involving multiple states, can be very large. Local in-state vendors, women and minority business enterprises (WBEs/MBEs), and small businesses alike may be able to handle business for a single public entity but may be incapable of handling the combined requirements of multiple governments or multiple states. Accordingly, cooperative purchasing can deter or inhibit participation by such businesses. Encouraging local delivery and service networks and utilization of small business subcontractors can be used to ameliorate these effects by providing opportunities for such businesses to continue to serve the cooperative members.

A business case should be developed for use of a cooperative that weighs the cost benefit against the impact on in-state businesses. Although better pricing may be achievable through a cooperative the impact on in-state businesses that provide jobs and pay taxes may negate any such savings.

- Scope of Cooperative Purchasing

In making decisions, state policy makers need to be informed about the breadth of cooperative purchasing activity. NASPO is unaware of any estimates regarding the value of cooperative purchases, but some indication is provided by looking at two of the larger examples:

- MMCAP's pharmaceutical contracts recorded total sales for 2008-2009 of \$1.2 billion
- WSCA personal computer contracts recorded total sales for calendar year 2008 of \$2.76 billion

The scope of cooperative purchasing is also illustrated by the following partial lists of cooperative purchasing efforts, most of which involved numerous contracts.<sup>25</sup>

- Baltimore Regional Cooperative Purchasing Committee
- Capitol Region Purchasing Council (CRPC)
- Educational & Institutional Cooperative Service, Inc. (E&I)
- Houston-Galveston Area Council Cooperative Purchasing Program
- Kansas City Regional Purchasing Cooperative (KCRPC)
- Midwest Higher Education Compact (MHEC)
- Minnesota Multi-state Contracting Alliance for Pharmacy (MMCAP)
- National Intergovernmental Purchasing Alliance Company (National IPA)
- National Joint Powers Alliance (NJPA)
- New England Board of Higher Education (NEBHE)
- Public Sourcing Solutions (PSS)
- Southern Regional Education Board (SREB)
- U.S. Communities Government Purchasing Alliance (U.S. Communities)
- U.S. General Services Administration
- Washington School Information Processing Cooperative (WSIPC)
- Western Interstate Commission for Higher Education (WICHE)
- Western States Contracting Alliance (WSCA)

As this information reflects, cooperative purchasing is widespread. Efforts are led by every level of state and local government. The breadth of cooperative purchasing efforts is mirrored by the variety of different procurement laws used to conduct these procurements. Allowing unrestrained participating in group purchasing consortia is tantamount to endorsing participation in all such entities irrespective of their procurement rules.

□ Summary

Cooperative purchasing is a very effective tool that procurement managers can use to obtain effective, best-value solutions for the state and the taxpayer. Aggregated volume creates significant price breaks, sometimes in double-digit percentages. Partnering with a lead entity can reduce time, administrative overhead, and other costs, while leveraging the experience and expertise of those with specialized knowledge in a sector.

*Cooperative purchasing is a very effective tool that procurement managers can use to obtain effective, best-value solutions for the state and the taxpayer.*

As with any other procurement decision, it is vital for procurement and public officials to understand best practices and make informed decisions about cooperative purchasing. There must be a careful legal framework, starting with authority and law and extending to agreement among the entities outlining the terms of the cooperation. Key procurement values such as award through a competitive process must be maintained, and consideration must be given to the impact on the economy and local and in-state businesses, most of which are voters and, if impacted, will involve the legislature.

## AASCU / NAEP Recommendation #6

*Allow institutions to conduct negotiations with suppliers subsequent to the competitive bidding process.*

### NASPO Response

With appropriate protections, NASPO agrees, but not in the context of competitive sealed bidding.

Two basic source selection methods provide full and open competition: competitive sealed bidding, which involves award to the lowest responsive and responsible bidder (i.e., low bid contracting), and competitive sealed proposals, which takes into consideration both price and non-price factors. The essential difference between these two source selection methods is that the competitive sealed proposals method permits negotiations with offerors and revisions of their proposals, with contract award based on a variety of factors, including price. Competitive sealed bidding does not.

*State procurement laws should authorize the use of negotiations as long as appropriate practices are required.*

Negotiations are not appropriate when using a low bid process. In competitive sealed bidding, the government requires all bidders to bid on the exact same work and on the same terms and conditions. Because the winning bid will be determined by price alone, intense price competition is fostered. Because negotiations after bidding would eliminate the motivation to offer best pricing, negotiations are fundamentally inconsistent with competitive sealed bidding.

To the extent the report recommends negotiations after competitive bidding, NASPO disagrees.<sup>26</sup> To the extent the report recommends that states authorize the use of negotiations when the competitive sealed proposals method is used, NASPO agrees. State procurement laws should authorize the use of negotiations as long as appropriate practices are required. For example, the opportunity to conduct negotiations should be presented to all offerors whose proposals are found to be reasonably likely to be selected for award under the terms of the RFP; the process of negotiations should not reveal to offerors information about the proposals of other offerors; auction practices and transfers of technical information should be prohibited; and after negotiations are complete, offerors whose proposals are found to be reasonably likely to be selected for award may be invited to submit a “best and final offer” in writing. Both the Practical Guide and the Model Procurement Code offer more complete guidance on the appropriate process for conducting negotiations in the context of public procurement.

## **AASCU / NAEP Recommendation #7**

*Review, and where warranted, relax state preferences or mandates involving the awarding of certain contracts.*

### **NASPO Response**

NASPO opposes local preference laws on the basis that they interfere with free trade, discourage open competition and increase the cost of government. These laws are complex, confuse vendors, and substantially increase the cost of administering a state's procurement system. In addition, many states apply other states' preferences laws against that state's vendors – a reciprocal or reverse preference policy. This may harm the very in-state businesses on whose behalf a preference law may have been established.

*NASPO opposes local preference laws on the basis that they interfere with free trade, discourage open competition, and increase the cost of government.*

Many states have mandatory sources stipulated by the legislature for certain programs, for instance, those supporting inmate rehabilitation or physically challenged individuals. The universities are asking to be relieved of these programs in the interest of efficiency and cost savings. If relief from these programs for universities is deemed to be beneficial then the same relief should be provided to state agencies.

## AASCU / NAEP Recommendation #8

*Enable institutions to participate in reverse auctions, whereby vendors compete to obtain business as opposed to the traditional method of buyers soliciting competitive bids for the purchase of goods/services.*

### NASPO Response

The authority to conduct reverse auctions is already widely available. According to the NASPO 2009 Survey of State Government Purchasing Practices, 38 of the 45 responding states have the authority to conduct reverse auctions. Illinois and Kentucky have recently passed legislation to enable the use of reverse auctions, which means that 80 percent of the states now have the ability to use this tool.

NASPO supports the use of reverse auctions as a procurement tool. Appropriately used, reverse auctions can enable buyers to obtain best pricing. However, when overused or used improperly, reverse auctions can drive vendor pricing below a point that is reasonable, creating negative consequences during contract administration or in later procurements. NASPO finds Minnesota's extensive experience with this source selection method instructive.

*Appropriately used, reverse auctions can enable buyers to obtain best pricing.*

In 2001, Minnesota held its first reverse auction. Encouraged by some initial successes, Minnesota aggressively increased its use of reverse auctions. Between September 2003 and December 2005, reverse auctions actually became the default technique for procuring commodities.

By the end of that year, Minnesota had awarded 183 contracts using the reverse auction approach. Of those, 169 were contracts for goods and fourteen were for computer consulting. The projected savings from these contracts exceeded \$5 million.

Despite this record of initial success, Minnesota has moved away from the use of reverse auctions. In its final year, the state conducted only five reverse auctions. A number of reasons account for this change in Minnesota's procurement strategy:

- (1) Identifying which savings are directly attributable to the reverse auction process proved difficult, in part because market conditions and other unrelated factors explain much of the savings.
- (2) Reverse auctions do not always elicit the lowest bid. When Minnesota conducted its two-track approach, the state recorded numerous instances where the paper bid actually came in lower.
- (3) Vendor participation was sporadic at best and fell off over time. Minnesota recorded more than 100 auctions that were cancelled because an insufficient number of vendors were willing to participate.

(4) Vendor satisfaction was marginal, even among those vendors willing to participate. Due to the rapid-fire and emotional nature of on-line bidding, vendors sometimes got caught up in the desire to "win." Sometimes the result was "bidders' remorse." Over time, the state reached the conclusion that reverse auctions can potentially be damaging to trusting and productive relationships with the vendor community.

(5) Minnesota experienced a number of contract defaults by vendors that were unable to honor the bid commitments they made through the on-line process.

(6) Auction results were hard to predict. In fact, five auctions account for more than 60% of the state's estimated savings.

## **AASCU / NAEP Recommendation #8 (for Systems and Institutions)**

*Ensure that system and institutional procurement officers receive adequate training and ongoing guidance regarding current state procurement statutes, regulations and policies.*

### **NASPO Response**

The study states, “Survey data revealed in some cases respondents interpreted existing state policy differently. Opportunities to contain costs may be lost as a result of differing understanding of state policy. From an accountability standpoint, institutions should ensure that state policies affecting purchasing decisions and protocols are being appropriately followed. Likewise, procurement officers should receive adequate initial training and continued professional development to ensure that they are aware of state procurement policies, especially in an era when changes are occurring in this policy domain.”

NASPO strongly supports this recommendation. State agencies, including colleges and universities, spend billions of dollars each year. Adding in the value of contracts awarded by local government makes the number substantially higher. Not only are the totals large, but individual contracts can involve tens or hundreds of millions of dollars; contracts that can be very sophisticated. Procurement is complex and requires professional procurement officers well trained in diverse fields such as state policy and regulations, law, finance, economics, and business. The ability of these officers to efficiently and effectively perform their jobs is directly related to the savings they can generate and the costs they can avoid. On ongoing program of professional training is necessary to enable their success.

*Procurement is complex and requires professional procurement officers well trained in diverse fields such as state policy and regulations, law finance, economics and business.*

## NASPO RECOMMENDATION –Cooperation and Collaboration

NASPO applauds the efforts and recommendations of AASCU and NAEP to raise awareness regarding the importance of sound public procurement policy and the need to continue to examine the state regulatory environment.

NASPO believes that the path forward is built on cooperation and active engagement.<sup>27</sup> The best way to facilitate such cooperation is to provide a common foundation. NASPO believes that the proper foundation of any public procurement system is a comprehensive procurement law based on the American Bar Association’s Model Procurement Code that provides parameters, authorizes the exercise of professional discretion, covers all agencies and institutions, covers all types of procurements, and places centralized management in the hands of an executive at a high level within state government. With this foundation, a chief procurement officer can delegate substantial procurement functions to institutions based on each institution's expertise, resources, internal procurement operations, and history of compliance with applicable procurement rules. From this common foundation, all the stakeholders – industry, central state government, the legislature, and higher education – can work together to identify and implement opportunities for improvement. Ultimately, consideration of autonomy may prevail over considerations of improvements to a system designed to promote cost savings, efficiencies and effectiveness. This whitepaper explicitly identifies the considerations in a principled reexamination of procurement and opportunities for constructive reform as opposed to organization realignments aimed primarily at optimizing a portion of a state’s overall mission.

*NASPO believes the path forward is built on cooperation and active engagement.*

It is our hope that NASPO’s information and analysis will lead to a clear perspective of all viewpoints and a more cooperative and collaborative environment between state procurement apparatus and the higher education community.

## ENDNOTES

<sup>1</sup> AASCU / NAEP Survey, at p. 31 (characterizing procurement reform in Virginia as "deregulation").

<sup>2</sup> AASCU / NAEP Survey, at p. 6 (*italics added for emphasis*).

<sup>3</sup> While release of the survey results are necessary for a complete critique of the AASCU / NAEP survey, NASPO agrees with AASCU / NAEP's decision to keep any institutional identification associated with the survey confidential. See, AASCU / NAEP Survey, at p. 37, end note.

<sup>4</sup> AASCU / NAEP Study, at p. 11.

<sup>5</sup> Information taken from the Active Alphabetical Listing Of Certified Agencies As Of April 6, 2010, available on the Audit and Certification page of the web site for the South Carolina Materials Management Office, [www.mmo.sc.gov](http://www.mmo.sc.gov)

<sup>6</sup> AASCU/NAEP Survey, at p. 29.

<sup>7</sup> AASCU / NAEP Survey, at p. 5.

<sup>8</sup> AASCU / NAEP Survey, at p. 12.

<sup>9</sup> AASCU / NAEP Survey, at p. 25.

<sup>10</sup> To the contrary, in Colorado Higher Education institutions, the procurement rules published by the institutions substantially mirror those published by the central procurement authority, the Department of Personnel & Administration, with one notable difference. By opting out of the procurement code, institutions have eliminated one final accountability check. Vendors no longer have the right to appeal an adverse bid protest decision administratively to an office outside of the institution. This was a fundamental requirement in the ABA Model Procurement Code.

<sup>11</sup> AASCU / NAEP Survey, at p. 6.

<sup>12</sup> AASCU / NAEP Survey, at p. 5.

<sup>13</sup> AASCU / NAEP Study, at p. 25. The report all but recommends "complete autonomy" for colleges and universities.

<sup>14</sup> Virginia Auditor of Public Accounts Report, "Review of Financial Systems Implementations, dated November 28, 2001.

<sup>15</sup> AASCU / NAEP expressly acknowledge the efficiency lost when policy is inconsistently applied. AASCU / NAEP Survey, at p. 28 ("Opportunities to contain costs may be lost as a result of differing understanding of state policy.")

<sup>16</sup> The United States is a member of the World Trade Organization (WTO), Government Procurement Agreement (GPA). The U.S. has signed various reciprocal free trade agreements with individual countries. Certain states have elected to participate in the GPA and the bilateral agreements. The United States includes government procurement obligations in its free trade agreements (FTAs) with the aim of ensuring that U.S. goods, services and suppliers will be given fair and non-discriminatory opportunities to compete in the government procurement of U.S. trading partners. These agreements establish thresholds and levels of procurement participation agreed to by the states. Where a state has agreed to be covered by the GPA or FTAs, the state is responsible for ensuring compliance by the entities that it covers under the agreements. State implementation of these agreements is often managed and monitored at the state level by the central purchasing organization. If states do not live up to their agreements it could adversely impact both government and the private sector. If states sign up and do not live up to the terms of the agreement, a country could close some or all of its government procurement market to U.S. com-

panies. Countries can submit complaints to the U.S. Government if they believe that these agreements are not being followed. A number of states have made their institutions of higher education subject to the World Trade Agreement Government Procurement Agreement (GPA) and Free Trade Agreements (FTAs). 75 Fed. Reg. 14323 (March 25, 2010). The states that have agreed to coverage under the GPA or FTAs are obligated to comply with the GPA treaty obligations, including procurement procedures, when they conduct procurement covered by the agreements. More important, the GPA and FTAs represent a modern view of public procurement objectives aimed at improving competitiveness in a global economy; many of the principles mirror those in the ABA Model Procurement Code. The GPA, for example, states. "Each Party shall encourage entities to indicate the terms and conditions... under which tenders will be entertained from suppliers situated in countries not Parties to this Agreement but which, with a view to creating transparency in their own contract awards... publish the procurement notices... and are willing to ensure that their procurement regulations shall not normally change during a procurement..." GPA Article XVII, Transparency, para. 1. Further "{e}ach Party shall promptly publish any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses) regarding government procurement covered by this Agreement. . . Each Party shall be prepared, upon request, to explain to any other Party its government procurement procedures." GPA Article XIX, Information and Review as Regards Obligations of Parties, para. 1. Parties also must provide a challenge process (domestic review process) under which are heard "by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. A review body which is not a court shall either be subject to judicial review or shall have procedures which provide [for notice and an opportunity to be heard]." GPA Article XX, Challenge Procedures, para. 6. Decentralizing procurement policy within a state makes it difficult for states to comply with these international agreements. If every institution of higher education is given their own procurement authority the state enterprise will have to depend on each to monitor compliance with the state's international obligations under the GPA and FTAs.

<sup>17</sup> AASCU / NAEP Survey, at p. 6 ("About half of the respondents indicated that purchases over a minimum threshold must be made through or with approval of the state and/or that some types of contracts or purchased items must be handled through the state."), at p. 14 ("In order to gain clarity regarding the general authority exercised by states over institutional procurement decisions, survey responses were grouped and examined by state. All respondents from 10 of the 37 states represented in the survey indicated that their institutions have complete and independent autonomy from the state regarding procurement.(see Figure 1). At the other extreme, responses from two states indicated that all purchases must be made through or with the approval of a state central office or agency. Twenty-five states fell somewhere between, with respondents specifying that purchases over a minimum dollar threshold must be handled through or with the approval of the state (15 states) and/or that some types of contracts or purchased items must be made through or with approval of the state (20 states). Thresholds requiring state approval for purchasing contracts were commonly cited in the areas of professional services, information technology/software and capital construction.").

<sup>18</sup> NASPO offers no comment on the specific thresholds. Appropriate levels for a particular agency could be much higher or much lower. As noted above, the scope of a delegation should be commensurate with the expertise and resources of the institution, or person to whom the delegation is to be made, not on the type of institution.

<sup>19</sup> The report recommends a review, and if warranted, an adjustment to the "minimum thresholds involving formal competitive (sealed) bids." AASCU / NAEP Study, at p. 25. On this point, the study provides the following observation: "A common area of concern was bid thresholds that are too low. The perception is that this imposes excessive work, creates delays in purchasing, and produces no real benefit. Bid thresholds as low as \$1,000 were cited." AASCU / NAEP Study, at p. 18.

<sup>20</sup> The ABA's 2000 Model Procurement Code for State and Local Governments was accompanied by the 2002 ABA Model Procurement Regulations. The suggested thresholds appear in Regulations 3-204.01 to 3-204.05.

<sup>21</sup> AASCU / NAEP Survey, at p. 7 ("The mandated use of state contracts and requirements to accept the lowest bids for contracts (thus ruling out consideration of nonmonetary factors such as product/service quality and servicing) were also reported as barriers to more effective procurement spending."), at p. 15 ("Thirty-two percent indicated that the state mandates the acceptance of the lowest responsive bid in the awarding of contracts and that nonmonetary factors cannot be considered—a policy that decreases their options."), and at p. 25 ("Most institutions surveyed (77 percent) report that nonmonetary considerations can be taken into account. However, a significant proportion of institutions could improve cost savings over longer durations by considering other factors, such as the quality of products/services and servicing.").

<sup>22</sup> Dictionary of Purchasing Terms 21 (The National Institute for Governmental Purchasing, Inc., 5th ed. 2006) ("cooperative purchasing 1: procurement conducted on behalf of two or more public procurement units 2: the combining of requirements of two or more public procurement units in order to obtain the benefits of volume purchases and/or reduction in administrative expenses").

<sup>23</sup> AASCU / NAEP Survey, at p. 26 ("A full four in ten (41 percent) of institutions surveyed indicated the presence of state policies that restrict or inhibit their ability to participate in voluntary (non-state) cooperative purchasing agreements. Actively leveraging institutional purchasing power through such consortia has been shown to generate significant cost savings.").

<sup>24</sup> AASCU / NAEP Survey, at p. 26 ("A full four in ten (41 percent) of institutions surveyed indicated the presence of state policies that restrict or inhibit their ability to participate in voluntary (non-state) cooperative purchasing agreements. Actively leveraging institutional purchasing power through such consortia has been shown to generate significant cost savings."), at p. 27 ("[S]eek to fully utilize group-purchasing consortia. . . . Stakeholders in institutional procurement should consistently and proactively pursue savings using consortia to purchase an ever-broadening range of products and services.").

<sup>25</sup> This list is compiled, in part, from a review of websites and is offered solely to illustrate the breadth of sponsoring entities. The degree to which some of these entities are active has not been researched. NASPO makes no representation regarding the quality of these institutions.

<sup>26</sup> AASCU / NAEP Study, at p. 26 ("Over half (55 percent) of institutions surveyed indicated state restrictions on their ability to engage in post-bid negotiations. Removal of this constraint would increase institutions' ability to tailor prospective purchases to better meet key cost, quality, and servicing objectives. Universities that develop customized business processes tailored to their unique requirements have obtained significant savings beyond traditional contracting techniques. Committed strategic supplier partnerships require significant dialogue between the parties, sophisticated negotiation techniques and careful monitoring over time.").

<sup>27</sup> In addition to the areas identified in the AASCU/NAEP study, NASPO believes grant-funded procurement may be an area for collaboration. Research universities rely heavily on grants to fund their research work. In developing their grant proposals, researchers routinely identify specific vendors, equipment, and materials to be used in accomplishing their research. Even when the grant application is silent, researchers often have specific vendors, equipment, and materials in mind. Unrestrained authority to select vendors, equipment, and materials is contrary to the fundamental purposes of a public procurement system, one of which is to maximize taxpayer funds. However, the ability to conduct successful research can often depend on having the right support and materials. NASPO believes that collaboration on solutions to these competing interests could provide benefits for all.

2010-2011

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**Re: AASCU/NAEP Public College and University Procurement  
A Survey of the State Regulatory Environment, Institutional  
Procurement Practices and Efforts Toward Cost Containment**

Dear Mr. Votruba, Ms. Howard, Mr. Riley, and Ms. Murner:

On behalf of the Sections of Public Contract Law and State and Local Government Law (the "Sections") of the American Bar Association (the "Association"), we are submitting comments on the above-referenced matter.

**I. Introduction**

Our Sections consist of attorneys and associated professionals in private practice, industry, and government service. Our Sections' governing Councils and substantive committees have members representing these three segments, to ensure that all points of view are considered. In this manner, both Sections have sponsored the Model Procurement Code Project for over thirty years, and seek to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are based on the following two documents: (1) The ABA 2000 Model Procurement Code for State and Local Governments (Model Procurement Code) and implementing regulations, which offer recommended state and local government procurement policies and practices. The Code was approved by the policymaking body of the American Bar Association, its House of Delegates, on July 11, 2000, and represents official ABA policy in this area of the law. (2) The policies contained in a set of Principles of Competition in Public Procurements, which are set out in full in Attachment 1 hereto. In 1998, the ABA's House of Delegates approved a resolution urging that any public acquisition at the federal, state, local, and territorial level adhere to these Principle of Competition in obtaining supplies, services, and construction

## **II. Background on the ABA 2000 Model Procurement Code**

The ABA Model Procurement Code project began in the mid-1970s and focused on bringing transparency, common practices and procedures, and competitiveness to state and local procurement transactions. The original project was the recipient of major grant funding from the Law Enforcement Assistance Administration (LEAA), which provided the sponsoring ABA Sections with a multi-year project office in Washington, DC. After years of extensive work by the Sections and nineteen other national organizations interested in state and local procurement, the 1979 edition of the Model Procurement Code was adopted by the House of Delegates of the ABA. Since 1979, the Model Procurement Code has been adopted in full by sixteen states; in part, by several more; and by hundreds of local jurisdictions. The 1979 edition of the Model Procurement Code helped hundreds of state and local jurisdictions create transparent, competitive, and reliable processes by which they have expended billions of dollars through contracts with private sector businesses.

The Model Procurement Code has had a profound and favorable impact on the conduct of public procurement throughout the United States. For example, in implementing the provisions of the Clean Water Act, which included \$70 billion in federal grants for wastewater treatment plants across the United States, the Environmental Protection Agency (EPA) regulations provided that grantees who could demonstrate that they had adopted fair procurement processes and procedures (a grant requirement) would receive different, less intrusive, and more expeditious review of their grant applications. LEAA and EPA jointly funded the adaptation of the 1979 Model Procurement Code into a Model Procurement Ordinance. EPA regulations provided that grantees could put their applications into the streamlined review track by adopting the ABA Model Procurement Ordinance, and hundreds of local jurisdictions did so.

The 1979 Model Procurement Code offered states and local jurisdictions, for the first time and in one place, a basic formulation of the fundamental principles upon which durable procurement systems rest.

1. Competition
2. Ethics
3. Predictability (stability, advanced publication, accountability)
4. Clear Statements of Procurement Needs
5. Equal Treatment of Bidders/Offerors
6. Methods of Source Selection
7. Clear Statement of Bid/Proposal Evaluation Factors
8. Reduction in Transaction Costs for Public and Private Sector Entities
9. Procurement of Construction Related Services
10. Remedies
11. Facilitation of Intergovernmental Transactions (Cooperative Procurements)

Between 1997 and 2000, the Sections conducted a revision project to improve and update the 1979 Model Procurement Code. The purpose of the project was to update the Model Procurement Code to fit the requirements and needs of state and local governments and their contractors in the year 2000 and beyond. The goals of the revision project were simple, yet profound:

1. Reduce transaction costs for all governmental entities at the state and local levels;
2. Reduce transaction costs to private sector suppliers of goods and services;
3. Substantially increase available levels and ranges of competition through modern methods of electronic communications; and
4. Encourage the competitive use of new technologies, new methods of performing, and new forms of project delivery in public procurement, particularly in the construction area.

Broad participation in the revision project was essential to its success. To achieve this goal, the project was conducted on the World Wide Web through the Massachusetts Institute of Technology (MIT). The project solicited and encouraged full participation by members of the sponsoring Sections, interested associations, individual procurement officials, and agencies throughout the country.

The 2000 revision to the Model Procurement Code was accomplished in cooperation with the National Association of State Procurement Officials, comprising the heads of state procurement in each of the fifty states. In addition, extensive comments and suggestions were received by leading procurement organizations, including the National Institute of Governmental Purchasing, the Design Build Institute of America, the Construction Industry Roundtable (CIRT), the American Consulting Engineers Council, the Engineers Joint Contract Documents Committee, and the Council on Federal Procurement of Architectural & Engineering Services.

The project was launched with seed funding provided by the Sections. Major grant funding for the project was provided by Lockheed Martin; MIT's Civil and Environmental Engineering Department; Public Technology, Inc., and the National Institute of Governmental Purchasing, with financial support from the American Consulting Engineers Council, the Engineers Joint Contract Documents Committee, and the Council on Federal Procurement of Architectural & Engineering Services.

### **III. AASCU/NAEP Report**

Earlier this year, AASCU/NAEP issued a report regarding its Survey of the State Regulatory Environment, Institutional Procurement Practices and Efforts Toward Cost Containment. The Sections generally commend AASCU/NAEP for their efforts to identify areas for improvement in state and institutional procurement practice and policy. We have comments, however, in a number of areas, each of which is addressed below.

#### **A. Basic procurement policy must be provided by law.**

AASCU/NAEP recommends that states "[p]rovide greater autonomy to systems and institutions regarding procurement policy." (Study, p. 8) According to the study, greater autonomy involves "[g]reater autonomy from state statutes, regulations and policies" that control procurement. (Study, p. 25) This recommendation directly conflicts with the basic principles underlying the 2000 Model Procurement Code, that the fundamental rules of a public procurement system must be defined by law.<sup>1</sup> If a public body cannot be compelled to comply with the rules that govern its expenditure of public funds, the integrity of the procurement system is totally undermined. Unlike institutional policy, laws can be enforced. Adopting this recommendation would divorce the procurement process from all statutory and regulatory requirements (including those pertaining to oversight, accountability and transparency) and constitute, in our view, a radical departure from long established norms in public procurement such as those reflected in the Model Procurement Code. Should states choose to adopt this recommendation, it would appear that the analysis in doing so should, at a minimum, include an express determination that the State intends to abandon its own public procurement policies and procedures, as they are expressed in the States' procurement code.

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<sup>1</sup> Model Procurement Code § 1-101 cmt. (2000) (explaining that the purposes and policies appearing in Section 1-101 "outline the general rationale for the promulgation of this Code"). *See, also* Model Procurement Code, Drafting Concepts, at xiii ("The 2000 Code remains a short statute that provides the fundamentals of sound procurement that should be implemented by regulations consistent with the statutory framework.").

**B. State procurement systems require strong central leadership.**

As noted above, AASCU/NAEP recommends that states provide greater autonomy to systems and institutions regarding central state procurement policy. AASCU/NAEP also recommends that states consider increasing the minimum dollar threshold for purchases requiring approval of the state's central procurement office. (Study, pp. 6, 8)

The effective operation of a state procurement system requires central leadership to provide direction and cohesion.<sup>2</sup> Likewise, in order to provide sound, consistent, and coherent procurement policy, the authority to promulgate regulations and establish procurement policy must be centralized.<sup>3</sup> Accordingly, the Model Procurement Code recommends that states assign plenary authority over their procurement systems to a single chief procurement official.<sup>4</sup> This plenary authority expressly includes all authority over the solicitation and award of public contracts.<sup>5</sup>

Despite this centralization of authority, the Model Procurement Code does not contemplate that all procurements will be conducted by a centralized office. Rather, the Model Procurement Code expressly contemplates that the chief procurement official will freely delegate procurement authority to individual agencies after consideration of the following factors:

- (a) the expertise of the potential delegate in terms of procurement knowledge and any specialized knowledge pertinent to the authority to be delegated;
- (b) the past experience of the potential delegate in exercising similar authority;
- (c) the degree of economy and efficiency to be achieved in meeting the [State's] requirements if authority is delegated;

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<sup>2</sup> *Id.* § 2-301, cmt. ("State and local public procurement systems are the means through which critical and strategic services, supplies and construction are purchased to support essential public functions. To operate effectively, it is imperative in those systems that there be central leadership to provide direction and cohesion.").

<sup>3</sup> *Id.* §§ 2-101, 2-102, 2-201, 2-204(4), and 2-301.

<sup>4</sup> *Id.* § 2-201, cmt. ("[S]tatutes assigning those duties should ensure that any official to whom such duties are assigned has plenary authority over the State's procurement system, including or similar to the duties and authorities set forth in this Part for the Chief Procurement Officer."), and § 2-204(3) (listing powers and duties of a chief procurement officer).

<sup>5</sup> *Id.* § 2-301 ("Except as otherwise provided in this Part, all rights, powers, duties, and authority relating to the procurement of supplies, services, and construction, and the management, control, warehousing, sale, and disposal of supplies, services, and construction now vested in, or exercised by, any [State] governmental body under the several statutes relating thereto are hereby transferred to the Policy Office or the Chief Procurement Officer, as provided in this Code.").

(d) the available resources of the Office of the Chief Procurement Officer to exercise the authority if it is not delegated, and the consistency of delegation under similar circumstances.<sup>6</sup>

As these factors reflect, the degree to which procurement authority should be delegated to a particular agency is highly dependent on that agency's expertise, appropriate staffing, track record of compliance, and the degree to which economy and efficiency are served by centralization. Consistent with this position, the Sections support the continued review and adjustment of the thresholds at which procurements must be conducted by a central purchasing office. Nevertheless, these thresholds are not appropriate for statute or regulation because they should be tied to circumstances that are subject to rapid change and unique to individual agencies.

**C. Procurement laws should govern all public funds, regardless of the source.**

Reduced state funding (*i.e.*, appropriated money) is a key justification for recommending greater autonomy for colleges and universities.<sup>7</sup> In this context, the study repeatedly distinguishes between "state-appropriated taxpayer monies and students' tuition dollars,"<sup>8</sup> clearly suggesting that different rules should apply based on the source of funding.

With regard to sound public procurement policy, no distinction should be made between taxpayer and tuition dollars. To the contrary, procurement laws should apply "to every expenditure of public funds irrespective of their source."<sup>9</sup>

Not only do these institutions use public funds; they are – at their core – public institutions. In large measure, they are governed by elected officials or by officials appointed by elected officials; they operate on land and within buildings owned and paid for by the public; they are subsidized by common state programs, such as state supported self-insurance pools for health, property, and liability; and some have the power to seize private property (eminent domain). Public institutions of higher education were created

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<sup>6</sup> *Id.* § 2-301, cmt.

<sup>7</sup> Study, p.6 ("Recession-induced state cutbacks in funding for public colleges and universities, combined with a surge in student enrollments, have made it imperative for these institutions to further scrutinize current spending and implement new reforms and practices that fully leverage every taxpayer and tuition dollar expended, while continuing to ensure accountability.").

<sup>8</sup> Study, p.25. *Also, see*, Study, p.6 ("taxpayer and tuition dollar"), p.10 ("taxpayer and tuition dollar"), p.12 ("state tax dollars for operating support (appropriations) and students' tuition dollars").

<sup>9</sup> Model Procurement Code § 1-104(2) ("This Code shall apply to every expenditure of public funds irrespective of their source, including federal assistance monies . . ."). *See, also*, § 5-101(5) cmt. (reflecting the Model Procurement Code's applicability to all types of public funds, including publicly imposed user charges, fares, or tolls).

by the public to serve the public. They charge fees (tuition) to use public assets, to pay for operating public assets, and to repay loans authorized by the public. In addition, even if the amounts are diminishing, they spend money collected by both state and federal government through taxation. These are public entities and all their monies are public funds, which should be expended using the same rules applicable to all public institutions.

**D. Small purchase thresholds should be periodically reviewed.**

AASCU/NAEP recommends that states "[r]eview, and if warranted, . . . adjust minimum thresholds involving formal competitive (sealed) bids." (Study, p. 25) This recommendation is consistent with the approach recommended in the Model Procurement Code.

States should use full and open competition to the maximum extent practicable. Nevertheless, below a certain dollar threshold, public purchases do not justify the administrative time and expense necessary for the conduct of full and open competitive processes. For such purchases, streamlined procedures can make small purchases administratively simpler to complete while ensuring an appropriate measure of competition.<sup>10</sup>

The appropriate dollar threshold for the use of these procedures is a matter of policy.<sup>11</sup> Because small purchase procedures are an exception to the fundamental policy of full and open competition, such procedures should be allowed only when the value of the efficiencies gained exceed the value lost from reduced competition.<sup>12</sup> The threshold for using such procedures should be established accordingly.

The 2000 Model Procurement Code suggests a small purchase threshold of \$25,000 for supplies and services and a small purchase threshold of \$100,000 for construction.<sup>13</sup>

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<sup>10</sup> *Id.* § 3-204, cmt.

<sup>11</sup> *Id.* § 3-204, cmt. ("The appropriate dollar limitations for the use of these procedures are left to regulation within each enacting jurisdiction"). *See, also* Model Procurement Code, Mechanics of Drafting, at xii.

<sup>12</sup> *Id.* § 3-201, cmt. (The Model Code "permits less formal competitive procedures where the amount of the contract does not warrant the expense and time otherwise involved."). *Also*, Principles of Competition No. 1.

<sup>13</sup> 2002 Model Procurement Regulations § R3-204.01 ("In accordance with Section 3-204 (Small Purchases) of the [State] Procurement Code, this Regulation establishes [\$25,000] as the amount for supplies or services and [\$100,000] as the amount for construction below which small purchase procedures may be used for procurements.")

**E. Available source selection methods should include competitive sealed proposals.**

AASCU/NAEP raises concerns with states "ruling out consideration of nonmonetary factors" (Study, p. 7) and recommends that states "[e]liminate state mandates requiring institutions to accept the lowest responsive bids in the awarding of contracts." (Study, p. 25)

The Model Procurement Code expressly endorses the use of competitive sealed bidding as a source selection method, and the Sections recommend against its elimination. Bidding, however, should not be the only available source selection method.<sup>14</sup> The Model Procurement Code also endorses the competitive sealed proposals source selection method, which involves the consideration of factors other than price. Both of these methods should be available, as appropriate.<sup>15</sup>

**F. Cooperative purchasing contracts (i.e., "group-purchasing consortia") should be awarded through full and open competition using a source selection process substantially similar to those specified in Article 3 of the Model Procurement Code.**

AASCU/NAEP recommends that institutions be allowed to participate in group-purchasing consortia, which the Model Procurement Code calls cooperative purchasing.<sup>16</sup> Both government and industry can recognize substantial benefits from cooperative purchasing. Industry gains from increased economies of scale. Government gains from greater volume discounts and reduced administrative expense.<sup>17</sup> Accordingly, the ABA endorses the generous use of cooperative purchasing,<sup>18</sup> but only if the contracts used are awarded through full and open competition, including use of source selection processes substantially similar to those specified in Article 3 of the Model Procurement Code.<sup>19</sup>

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<sup>14</sup> Model Procurement Code § 3-201.

<sup>15</sup> *Id.* § 3-203(1) cmt. (1) ("The competitive sealed proposal method (similar to competitive negotiation) is available for use when competitive sealed bidding is either not practicable or not advantageous. The competitive sealed proposal method is mandated for the project delivery methods described in Article 5: design-build, design-build-operate-maintain, and design-build-finance-operate-maintain.").

<sup>16</sup> *Id.* § 10-101(1) ("Cooperative Purchasing means procurement conducted by, or on behalf of, one or more Public Procurement Units, as defined in this Code.").

<sup>17</sup> *Id.*, at xvi ("The intent of these changes is to broaden the opportunity for state and local governments to obtain volume discounts through joint purchasing and to lower the transaction costs of both purchasing agencies and vendors in completing such transactions.").

<sup>18</sup> *Id.*, at xvi (Under the Model Code, "Public Procurement Units are freely authorized and encouraged to enter into cooperative purchasing arrangements with one another.").

<sup>19</sup> *Id.* § 10-201(2) ("All 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.").

Fair and open competition is a basic tenet of public procurement. Such competition reduces the opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically.<sup>20</sup> The benefits of competition can be circumvented by allowing public entities to participate in cooperative procurements conducted by entities with less restrictive procurement processes, *i.e.*, venue shopping. Allowing such action can lead to the proverbial race to the bottom.

Likewise, full and open competition can be circumvented by allowing public entities to choose among available cooperative contracts in order to acquire their preferred products or suppliers. Like artificially dividing a procurement in order to use the small purchase procedures, using cooperative purchasing to pick a favored supplier or preferred product is an improper use of an otherwise proper procurement method. It simply avoids full and open competition.<sup>21</sup>

Lastly, full and open competition can be circumvented by allowing public entities to join a cooperative contract after the contract has been awarded, a practice known as "piggybacking." This practice is of particular concern when an added public entity materially increases the volume or value of sales originally competed. To maximize economies of scale, jurisdictions are encouraged to identify as many participants in a particular cooperative purchase at the outset.<sup>22</sup>

In order to insure that cooperative contracts are awarded through full and open competition, and to guard against misuse, states must prohibit the use of cooperative purchasing for the purpose of circumventing a state's procurement rules.<sup>23</sup>

**G. Negotiation is an appropriate practice to use with the competitive sealed proposals process, but not in competitive sealed bidding.**

AASCU/NAEP recommends that institutions be allowed "to conduct negotiations with suppliers subsequent to the competitive bidding process." (Study, p. 26) To allow bargaining with one or more bidders after bid opening is fundamentally flawed. In bidding, all bidders offer on the same scope of work, with award "made on a purely objective basis to the lowest responsive and responsible bidder."<sup>24</sup> Because the award decision can depend on slight differences in price, and because slight changes in the

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<sup>20</sup> *Id.* § 3-201, cmt. (3).

<sup>21</sup> *See, generally*, Principles of Competition ("5. Use reasonable methods to publicize requirements and timely provide solicitation documents (including amendments, clarifications and changes in requirements).").

<sup>22</sup> Model Procurement Code § 10-203, cmt. ("Conversely, to maximize economies of scale, jurisdictions are encouraged to identify as many participants in a particular cooperative purchase at the outset.").

<sup>23</sup> *Id.* § 10-207 ("Public Procurement Units may not enter into a Cooperative Purchasing agreement for the purpose of circumventing this Code.").

<sup>24</sup> *Id.* § 3-203(1), cmt. (3)(a).

scope of work can change a bidder's price, negotiating even small changes to the scope of work can materially alter the outcome of the competitive process. A separate problem arises from the fact that such negotiations would take place after bid prices have been exposed. Negotiating after prices have been exposed undermines the viability of competitive sealed bidding by reducing the pressure for bidders to offer competitive prices in the first instance, pressure that exists because only one opportunity is provided to offer best price. For at least these two reasons, negotiations are fundamentally inconsistent with competitive sealed bidding and should not be allowed.<sup>25</sup> In contrast, negotiations should be allowed in competitive sealed proposals,<sup>26</sup> provided the law provides for appropriate safeguards.<sup>27</sup>

**H. Reverse auctions may be best suited for easily identifiable, commodity-type items or simple services, where there are few if any distinguishing characteristics and where price is the determining factor.**

AASCU/NAEP recommends that states "[e]nable institutions to participate in reverse auctions . . . ." (Study, p. 26) The Sections believe that reverse auctions can be used effectively for easily identifiable, commodity-type items or simple services, where the items being procured have few if any distinguishing characteristics and where price is the determining factor. Nevertheless, because reverse auctions are new and evolving, there are justifiable concerns about their potential impact on the integrity of the procurement process. Use of reverse-auction techniques in procurements involving goods or services other than simple commodities, where requirements or specifications are unique or more complex, and where procurement officers must exercise judgment in the selection process through price/technical tradeoffs or best-value analysis, may require more detailed, specific guidance.<sup>28</sup>

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<sup>25</sup> *Id.* § 3-202(1), cmt. ("Competitive sealed bidding does not include negotiations with bidders after the receipt and opening of bids. Award is to be made based strictly on the criteria set forth in the Invitation for Bids."), and § 3-203(1), cmt. (3)(b) ("[U]nder competitive sealed bidding, no change in bids is allowed once they have been opened, except for correction of errors in limited circumstances."). *See, also*, 2002 Model Procurement Regulations § R3-101.01.4.

<sup>26</sup> Model Procurement Code § 3-203(1), cmt. (3)(b) ("The competitive sealed proposal method, on the other hand, permits discussions after proposals have been opened to allow clarification and changes in proposals provided that adequate precautions are taken to treat each offeror fairly and to ensure that information gleaned from competing proposals is not disclosed to other offerors.").

<sup>27</sup> *Id.* § 3-203(6), cmt. (2) ("Safeguards against abuse in the conduct of negotiations must be strictly observed to maintain the essential integrity of the process. Procedures should be specified *in regulations* in order to achieve these objectives.") (emphasis added).

<sup>28</sup> The following publications may provide a useful discussion of additional policy considerations involved in reverse auctions: *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21<sup>st</sup> Century* (Sue Arrowsmith ed., Thomson Reuters/West 2009) (Chapters 11 to 14 address the regulation of electronic reverse auctions in public procurement law), and Daniel B. Volk, *A Principles-Oriented Approach To Regulating Reverse Auctions*, 37 Public Contract Law Journal 127 (2007). Citation to these publications is not a suggestion that they represent or reflect ABA policy.

When reverse-auction techniques will be utilized, the solicitation must provide adequate notice to potential offerors regarding the procedures to be used for the reverse auction, including a detailed discussion of the logistics, timing, and communication requirements for the event.

While the Model Code provides specific guidance on bid mistakes and the available relief,<sup>29</sup> it is not clear that mistakes in reverse auctions fit neatly within this scheme. In particular, proof of an "intended" bid could be problematic.

Some states impose in-state vendor preferences that require the application of a pricing differential to some offers. Current technology permits these mandatory pricing differentials to be factored into prices in real-time during a reverse auction through instantaneous application of an algorithm, so that all offerors see the adjusted or evaluated prices in real-time. This could materially distort the competitive pricing process. If such preferences are applied to procurements involving reverse auctions, the manner in which this issue is to be handled should be addressed in the law authorizing reverse auctions in order to avoid lack of uniformity among the agencies and possible confusion among bidders.

Lastly, the potential for unrealistically low prices should be considered. Bidders can find that, in the heat of an open competitive auction, they have gone too far in attempting to secure or retain the buyer's business. The Model Procurement Code does not prohibit underbidding a contract. In fact, many contractors routinely reduce their margins or bid at a loss for sound business reasons. The Sections do not believe that this practice should be limited or discouraged. Nevertheless, in light of the potential for this "winner's curse" and the unintended difficulties that it may engender for both contractors and the government, it may be appropriate for any enabling legislation to address the concept of fair and reasonable prices in the context of reverse auctions.

**I. Adequate professional training is essential for a functional procurement system.**

AASCU/NAEP recommends that "procurement officers receive adequate training and ongoing guidance regarding current state procurement statutes, regulations and policies." (Study, p. 28). In making this recommendation, the Study offers the following observations:

The survey data revealed that in some cases, respondents from the same state interpreted existing state procurement policy differently. Opportunities to contain costs may be lost as a result of differing understanding of state policy. From an accountability standpoint,

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<sup>29</sup> Model Procurement Code § 3-202(6), cmt.

institutions should ensure that state policies affecting purchasing decisions and protocols are being appropriately followed. Likewise, procurement officers should receive adequate initial training and continued professional development to ensure that they are aware of state procurement policies, especially in an era when changes are occurring in this policy domain.

The Sections agree with this recommendation and these observations. Procurement is a complex process that experience has shown can only be adequately learned over a period of time. Moreover, training in procurement is vital for those without prior experience in the field. Adequate and ongoing training is essential to the successful operation of a state's procurement system. The Model Procurement Code recommends that each state establish a state-level procurement training system.<sup>30</sup>

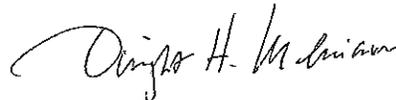
#### IV. Conclusion

The Sections are available to provide additional information or assistance as you may require.

Sincerely,



Donald G. Featherstun, Chair  
Section of Public Contract Law



Dwight H. Merriam, Chair  
Section of State and Local Government Law

cc: National Association of State Purchasing Officials  
National Institute of Governmental Purchasing  
National Conference of State Legislatures  
National Association of College and University Attorneys  
Section of State and Local Government Law, Council & Officers  
Section of Public Contract Law, Council & Officers  
Co-Chairs of the Model Procurement Code Committee

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<sup>30</sup> *Id.* § 2-503.

## **Principles of Competition in Public Procurements**

RESOLVED, that the American Bar Association urges that any public acquisition at the federal, state, local, and territorial level adhere to the following principles of competition in obtaining supplies, services, and construction:

1. Use full and open competition to the maximum extent practicable.
2. Permit acquisitions without competition only when authorized by law.
3. Restrict competition only when necessary to satisfy a reasonable public requirement.
4. Provide clear, adequate, and sufficiently definite information about public needs to allow offerors to enter the public acquisition on an equal basis.
5. Use reasonable methods to publicize requirements and timely provide solicitation documents (including amendments, clarifications and changes in requirements).
6. State in solicitations the bases to be used for evaluating bids and proposals and for making award.
7. Evaluate bids and proposals and make award based solely on the criteria in the solicitation and applicable law.
8. Grant maximum public access to procurement information consistent with the protection of trade secrets, proprietary or confidential source selection information, and personal privacy rights.
9. Insure that all parties involved in the acquisition process must participate fairly, honestly, and in good faith.
10. Recognize that adherence to the principles of competition is essential to maintenance of the integrity of the acquisition system.

Approved in 1998 by the  
American Bar Association  
House of Delegates