Contracting With State and Local Governments – Navigating the Patchwork Quilt of Rules and Regulations

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Substantive Topics:

- Challenges to Agency Proposals and Awards (Bid Protests)
- Procurement Integrity
- Selected Contract Terms and Conditions
- Claims Against State and Local Governments
Challenges to Agency Proposals and Awards

Bid Protests
Differences from Federal Procurements

• Greater use of competitive sealed bidding.
• In some states, greater role for lobbyists and political involvement.
• In some states, more frequent limits on communications with agency procurement personnel.
• May have more stringent rules on joint ventures and teaming.
• Frequently harder to find the governing rules.
• May have less access to relevant information, even in a bid protest.
• No uniform set of procedures.
• Often cannot rely on federal procurement principles.
Lack of Uniformity

- State
- Local
- Independent multi-jurisdiction bodies
- Multi-state consortium
- Cooperative Agreements
- Any of the above with federal funding or involvement
Identifying the Governing Rules

- State or local statutes or regulations
- Vendor or procurement manuals
- Solicitation provisions
- Potential conflicts between federal, state or local rules
- State courts vary on use of federal bid protest decisions
Lack of Uniformity in the Protest Process

• Some states/localities have a developed/robust system with precedent, where others have basic/limited procedures/case law in place as a guide.

• Some states provide as much as or even more process than the federal level and some states provide virtually no protest rights.

• The degree of meaningful protest relief varies among the jurisdictions.

• Some state/local protest processes are not provided in the solicitation or are hard to find/decipher.

• Within a state, sometimes a protest process does not apply to certain acquisitions (like universities).
### State and Local Protests: Spectrum of Procedures

| No Formal Protest Process | Agency Level Protests and Judicial Review | State Procurement Board | Model Procurement Code |

- Who decides protest?
- Who decides on stay?
- What type of review?
- What access to records by protester?
- Are there appeal rights?
Protest Timing Issues

- Sharply divergent state practices regarding protest time limits.
- Significant protest issues and rights can easily be waived at the state level or there can be no effective remedy.
Pre-Award Protests: Federal v. State

• Federal level: protesters can file pre-award challenges to the terms of a solicitation; protests must be filed before the proposal due date or they are forfeited.

• Much broader uncertainty at state and local level; wide variety of approaches.

• Some states do not provide any formal process for protest against the terms of the solicitation.
State and Local Pre-Award Protest Time Periods

- A number of states have express and formal bid protest procedures for protest challenging the award of a contract but no specific laws or rules governing pre-award protest.

- In those cases, any protester who is concerned about the terms of the solicitation should file an informal protest to the state official as soon as possible after the solicitation is issued.

- Some states require protest against the terms of the solicitation be made within a certain amount of time or they are waived.

- Other states allow protests regarding issues with the terms of the solicitation to be raised either before or after award and still other states have no process in place to address protests against the terms of the solicitation.

- A fair number of states do not have specific rules governing pre-award protests. Until case law develops in those states, it is unclear whether a pre-award protest will be dismissed as premature or unjudiciable and whether a post-award protest raising solicitation issues will be dismissed as untimely or based on waiver.
Sample State Pre-Award Time Periods

- Protest based on alleged improprieties or ambiguities in a solicitation must be filed at least 10 days before the due date for receipt of bid or proposals unless RFP provides a different date.
- 72 hours before the filing deadline for the solicitation response.
- 2 business days before the bid closing or proposal due date.
- 10 working days before bid date.
- 7 calendar days after the publication of the solicitation.
- Protest must be filed with 10 days of the action.
- Protest must be filed within 2 calendar days after aggrieved contractor knew/should have known.
Pre-Award Protest Time Periods

- Some states bid protest procedures address a specific time deadline for filing a protest after notice of award, but are silent on pre-award protests. Some examples:
  - "Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the notice of decision or intended decision."
  - Protest must be received by the State not more than 5 business days after the contract award date.
  - "Aggrieved persons have to file a protest in writing with the Director of the Bureau of General Services within 15 days of the notification of contract award."
• Can use FOIA or Public Record Act to obtain access to information needed for protest
• States vary widely on what information is available under FOIA and whether that information can timely be used in a bid protest
• May not extend protest deadlines
• Procedures, timeliness for production and level of access vary significantly
• Some states may automatically release proposal data
• Some states require that the requester be a citizen of the state
Lack of Uniformity: Remedies Vary or May Be Limited

- No lost profits
- Modification of solicitation (pre-award)
- Extension of solicitation closing date/time
- Cancellation of solicitation
- Revision/cancellation of award
- Re-evaluation or re-solicitation
- Award of the contract
- Bid and proposal costs, especially in situations where contract performance is underway
Special Issues: Organizational Conflicts of Interest and Ethics Related Protests

- At the federal level, OCI and ethics issues may be raised through the protest process at GAO or the Court of Federal Claims if timely raised. In some cases, the issues may need to be raised before proposals are due.

- There is a serious question whether these types of issues can be raised through a state bid protest process and there are even greater issues concerning timing.
Special Issues: Organizational Conflicts of Interest

- Approximately 34 states have some regulation or procedure prohibiting a contractor's ability to submit a bid or proposal where a contractor has assisted in preparing a solicitation, statement of work or specification (biased ground rules).
- States vary on other types of OCIs (unequal access, impaired objectivity).
- OCI rules may be codified in state procurement or administrative codes.
- OCI rules may be adopted by state departments or agencies.
- OCI rules may be included in standard state contracts terms and conditions.
- Where federal grant money is used, federal regulations may require that the state grantee address OCI issues before making award.
Special Issues: Post-Protest Action Against Protester

- A few states require protest bonds.
- Awardee may pursue tort claims against protester where protest has been denied:

False Claim Actions

- Protester may pursue claims against the awardee under State False Claim Act independent of any bid protest.
Procurement Integrity

Lobbying & Regulation
Procurement Lobbying: Federal

- Procurement lobbying - An attempt to influence a government contracting or purchasing decision.

- Lobbying contact - any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to—
  - (i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);
  - (ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;
  - (iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or
  - (iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

• Lobbying registration requirements differ between states; some localities have their own lobbying laws

• State Law Examples of "Lobbyists":
  - Georgia: Any natural person who, for compensation, either individually or as an employee of another person, is hired specifically to undertake influencing a public officer or state agency in the selection of a vendor to supply any goods or services to any state agency. Ga. Code Ann. § 21-5-70
  - Maryland: any person who is compensated to influence executive action on a procurement contract that exceeds $100,000. MD Gen. Provis. § 5-702
  - New York: any attempt to influence any determination "by a public official, or by a person or entity working in cooperation with a public official related to a governmental procurement." N.Y. Legis. Law § 1-c(v)
Florida 'Cone of Silence'

- Cone of Silence: prohibits certain oral communications regarding RFP, RFQ or bid during period Cone is in effect

- Examples:
  - Section 1-266, Broward County Code of Ordinances: after the advertisement of the bid solicitation, potential vendors and their representatives are substantially restricted from communicating regarding the Quote/Bid with the County Administrator, Deputy County Administrator, Assistant County Administrator, Assistants to the County Administrator, their respective support staff, or any or any staff person that is to evaluate or recommend selection in this quote/bid process.
  - Sec. 18-74, City of Miami Procurement Ordinance: applicable only to contracts for the provision of goods and services and public works or improvements for amounts greater than $200,000.00.
Pay-To-Play Rules: Overview

• Pay-to-play laws: bar or limit political contributions/gifts given by government contractors to public officials

• Federal: SEC adopted Rule 206(4)-5. Contains three key prohibitions:
  • 2 year prohibition on adviser providing compensated services to a government entity following a political contribution to certain officials of that entity;
  • prohibition on the use of third-party solicitors not themselves "regulated persons" subject to pay-to-play restrictions; and
  • prohibition on efforts by advisers to solicit political contributions to certain officials of a government entity

• Rule 206(4)-5 does not preempt existing state and local pay-to-play rules.

• State pay-to-play statutes typically address who is covered, restrictions against seeking government business by making campaign or other contributions to elected officials.
Pay-to-Play Rules: State Examples

- State Examples:
  - Connecticut: bars state contractors from making political contributions to candidates running for state legislative offices where single contract is valued at $50,000 or more or series of contracts valued at $100,000 or more. Conn. Gen. Stat. § 9-612(g)(2)(A)-(B).

  - Kentucky: prohibits elected official from awarding no-bid contract to any entity whose officers or employees, or the spouses of officers or employees, contributed more than $5,000 to the elected official's campaign. KY. Rev. Stat. 121.330(1)-(4).

  - Maryland: requires public contractors to file campaign contribution disclosure reports with the State Board of Elections. MD. Code, Elec. Law § 14-101, et seq.

  - West Virginia: prohibits any person entering into contract with state or its subdivisions, or any state department/agency, from directly or indirectly making any contribution to any political party, committee, or candidate for public office or to any person for political purposes or use. W. VA. Code. § 3-8-12(d).
State Ethics & Compliance Regulations

• 29 States and D.C. have statutes equivalent to the federal False Claims Act.
  o May be limited to Medicaid false claims.
  o Qui Tam provisions being incorporated more frequently.

• Chicago, Philadelphia, and New York City have enacted city-level FCA legislation

• State Examples:
  o Delaware: defendant is liable for any false claims when the government of Delaware provides any portion of the funds. Broad definition of ‘government.' Del. Code Ann. tit. 6, §§ 1201 et seq.
  o Georgia: only claims regarding Medicaid Fraud are the proper subject of a suit. Ga. Code Ann. § 49-4-168 et. seq.
  o Virginia: "Virginia Fraud Against Taxpayers Act" mirrors FCA. Violators must pay civil penalty of not less than $5,000 and not more than $10,000. Va. Code § 8.01-216.3
Selected State-level Standard Contract Terms and Conditions
Dealing with the Terms and Conditions

• No legal professional can know every state and local procurement law, regulation, executive order, etc. that provides the basis for the term and condition.

• **Practice Tip:**
  • Ask government legal counsel to provide citations and sources. Sometimes government has even prepared a white paper or official response, which will give you a starting point for your own research.
Preferences for In-State Vendors

• In-state preference: advantage for bidders/proposers in response to solicitation for products or services granted based on pre-established criteria.

• Tie Bids: many states give preference to resident bidders in breaking ties

• Criteria may include:
  • supplier's geographic location;
  • residency requirements;
  • origination of product/service.

• State Examples:
  • Alabama: preference shall be given to Alabama person, firms, or corporations provided there is no sacrifice or loss in price or quality. Ala. Code § 41-16-57.
  • Florida: Preference to bidders within Florida if commodities can be purchased at no greater expense, and of equal quality. Fla. Admin. Code Ann. r. 25-25.009(5).
IT Procurements: Federal v. State

• Federal: 41 U.S. Code § 2301 - Use of electronic commerce in Federal procurement
  • The head of each executive agency, after consulting with the Administrator, shall establish, maintain, and use, to the maximum extent that is practicable and cost-effective, procedures and processes that employ electronic commerce in the conduct and administration of the procurement system of the agency.

• States: many conduct formal procurement process through electronic means.

• 2014 NASPO Survey of State Procurement Practices:
  • 32 responding jurisdictions indicated use of electronic procurement system
  • Most remaining states: in process of implementing electronic procurement system or in-house solution.
  • Almost all participants' systems have capability to receive bids and proposals, provide requisitions/purchase orders, solicitation development, and contract award.
  • 23 state electronic procurement systems do not maintain record of contractor performance.
Limitations on Contractor Liability

• Federal
  • Sovereign Immunity: contractor cannot sue federal government or governmental agencies unless permission to sue is granted in a legislative act.
  • Tucker Act: federal government waives sovereign immunity with respect to certain lawsuits.
  • FAR 52.246-25 - Limitation of Liability

• State
  • State and local entities often resist efforts to include limitation of liability provision

• Practice Tip:
  • Be prepared to explain the risk to your business clients. These are the kind of decisions that can literally threaten the survival of a business.
Limitation on Indemnity

• States and local governments may not permit mutual indemnification clauses due to fiscal law restrictions.
• States have not appropriated for indemnification.
• **Practice Tip:**
  • Be prepared with an alternative means of protection. For example, if your concern is the customer could use the electronic tools you provide to infringe on a third-party's IP, include a contract clause that allows you to order removal of any infringing material.
Venue/Governing Law

• Venue/governing law: States often will require their own venue or governing law.

• Practice Tip:
  • Ask the State to provide you with a proper citation.
  • Often times, the State will tie venue and governing law together, even though the applicable statute does not. It may be possible to have state's governing law be applicable, but the venue remain open.
Performance Bonds

• State may require a performance bond.

• **Practice Tip:**
  • Be aware of the scope of the bond; i.e., does it cover a refund, payment for a replacement solution, etc.
  • Does the Bond include Joint and Several Liability? If so, are you the deep pocket?
Most Favored Pricing

- This clause ties your pricing to the pricing of other customers.
  - Often similar to GSA schedules basis of award system.
  - Can be extremely resource intense; does your company have the time and money to administer such a clause?
  - Possibility of significant liability for violation.
Insurance Requirements

- The State may require that you adhere to their insurance requirements.
  - Obviously most companies have insurance, but do those requirements align with the State's requirements?
  - Will your own insurance be sufficient?
Important Terms and Conditions

• Adherence to specific security policies, either physical or cyber
  • Do you have the ability to adapt your product or service?

• Audits
  • States will often push audits with no limitations, so can you negotiate a compromise?

• Ability for state to remove/approve subcontractors
  • Consider the disruption to your business.

• Registration requirements in State/Local vendor databases
  • Can you support the various deadlines and filings?
Claims Against State and Local Governments
Waiver of Sovereign Immunity

- State may expressly waive sovereign immunity
  - Alaska: a corporation having a contract claim against the state may bring an action in state court that has jurisdiction over the claim. Alaska Stat. Ann. § 09.50.250

- Georgia: "The state's defense of sovereign immunity is hereby waived as to any action ex contractu for the breach of any written contract now existing or hereafter entered into by the state or its departments and agencies." Ga. Const. art. I, § 2, ¶ IX.

Waiver of Sovereign Immunity

- Waivers of sovereign immunity are in derogation of the common law and are narrowly construed.

- Counties, cities, towns, and municipalities, when performing governmental functions, typically enjoy the same protections of sovereign immunity as the State.

- **Practice Tip**: As you go deeper into local governments, check to be sure the contract is authorized. Without proper authority, the approval or execution of a contract is an *ultra vires* act, making it null and void. *King George County Serv. Auth. v. Presidential Serv. Co. Tier II*, 267 Va. 448, 454-55 (2004) (local utility entered into purchase contract without resolution by utility's board authorizing or ratifying contract).
State Procurement Statutes

• Each State has its own statutes, regulations, and policies developed within the political process of a given state. How to figure it all out?

• Practice Tip:
  • ABA Public Contract Law Section's "Guide to State Procurements" summarizes all of the public procurement rules and regulations for the 50 states. It is a quick reference guide and a first step.
  • National Association of State Procurement Officials (www.naspo.org).
  • Local government organizations in states (e.g., Local Government Attorneys of Virginia (http://www/lgava.org/)).
  • http://www.loc.gov/law/help/guide.php (link to U.S., state, and foreign laws)
Contract Claims

• Some states and localities have mandatory dispute resolution procedures such as:
  • Venue requirements;
  • Exhaust administrative procedures before judicial review;
  • Limits on alternative dispute resolution.

• State Examples:
  • Virginia: non-binding mediation or arbitration only. Va. Code § 2.2-4366.
Contract Claims - Administrative Review

Example of actual administrative review procedure:

- Contractor files notice of claim to County and Program Manager (outside contractor) within 15 days of event giving rise to claim;
- Contractor must provide a detailed certified claim within 30 days after initial notice to the Program Manager, who then has 30 days to decide the claim;
- If denied, the Contractor has 15 days to appeal to the County Manager, who then has 30 days to decide the appeal;
- If denied by the County Manager, the Contractor must appeal within six months to the County Board, which then must decide the claim within 90 days;
- If the County Board denies the claim, then and only then can the contractor file suit in Virginia circuit court, but it must do so within 30 days of the County Board's decision.
Indemnification

• **Real-Life Example: Both Indemnification Clauses included in the Same County Contract**

• § 22 - The Contractor covenants for itself, its employees, and subcontractors to save, defend, hold harmless and **indemnify** the County and all of its elected and appointed officials, officers, current and former employees, agents, departments, agencies, boards, and commissions (collectively the "County" for purposes of this section) **from and against any and all claims made by third parties or by the County** for any and all losses, damages, injuries, fines, penalties, costs (including court costs and attorney's fees), charges, liability, demands or exposure, however caused, resulting from, arising out of, or in any way connected with the Contractor's acts or omissions, including the acts or omissions of its employees and/or subcontractors, in performance or nonperformance of its work called for by the Contract Documents. If, after Notice by the County, the Contractor fails or refuses to fulfill its obligations contained in this section, the Contractor shall be liable for and reimburse the County for any and all expenses, including but not limited to, reasonable attorneys fees incurred and any settlements or payments made. The Contractor shall pay such expenses upon demand by the county and failure to do so may result in such amounts being withheld from any amounts due to Contractor under this Contract.

• Article 6 **Indemnification** - The Contractor covenants to save, defend, hold harmless, and indemnify the County, and all of its elected and appointed officials, boards and commissions, officers, departments, agencies, agents, and employees (collectively the "County") from and against any and all claims, losses, damages, injuries, fines, penalties, costs (including court costs and attorney's fees), charges, liability, or exposure, however caused, **resulting from, arising out of, or in any way connected with the Contractor's intentional, negligent, or grossly negligent acts or omissions** in performance or nonperformance of its work called for by the Contract Documents. This indemnification shall survive the termination of this Contract.
Indemnification

• Virginia courts enforce indemnification clauses permitting recovery of attorneys' fees incurred in defense of a suit between contracting parties.


• *Coady v. Strategic Resources, Inc.*, 258 Va. 12 (1999) (awarding legal fees to SRI under indemnification clause between contracting parties which referenced attorneys’ fees).

• **Practice Tip**: carefully check the indemnification provision to determine exposure to public entity for outside contractor costs and attorneys’ fees.
Contract Claims – Administrative Review

• Be aware of potential conflicting deadlines for filing appeals from administrative denials.

• Va. Code § 2.2-4363(E) states: "The decision … shall be final … unless the contractor appeals within six months of the date of the final decision on the claim by the public body ..."

• Va. Code § 2.2-4365 states that a contractor must bring a complaint in circuit court within 30 days of the date of the county's disallowance of a contractor's claim.

• Va. Code 15.2-1246: "[claimant] may appeal within 30 days after service of such notice. In no case shall the appeal be taken after the lapse of six months from the date of the decision."
Limitations on Contractor's Damages

• State and local entities often include limitations on the types of damages that a contractor can recover.

• "The Contractor's sole relief… shall be the Contractor's direct costs which result from the delay."

• The Contract excludes several categories of costs, including: (i) payroll and compensation costs for the contractor's officers, executives, and other personnel for "general administration of the Work and not specifically included in the agreed upon schedule of job classifications"; (ii) expenses of the contractor's office sites other than the project site; (iii) the contractor's capital expenses; (iv) costs due to the negligence of the Contractor or its subcontractors; (v) other overhead or general expense costs of any kind; (vi) extended office overhead (except office and temporary facilities at the site or lost profit); and (vi) costs associated with the preparation of changes orders or the preparation and filing of claims.
Limitations on Contractor's Damages

- State statutes may also limit the overall damages a contractor can recover. Va. Code § 2.2-4309, as amended, states:
  - "A. A public contract may include provisions for modification of the contract during performance, **but no fixed-price contract may be increased by more than twenty-five percent of the amount of the contract or $50,000, whichever is greater, without the advance written approval of the Governor or his designee**, in the case of state agencies, or the governing body, in the case of political subdivisions.
  
  ***

- **D:** The provisions of this section shall not limit the amount a party to a public contract may claim or recover against a public body pursuant to § 2.2–4363 or any other applicable statute or regulation. Modifications made by a political subdivision that fail to comply with this section are voidable at the discretion of the governing body, and the unauthorized approval of a modification cannot be the basis of a contractual claim as set forth in § 2.2–4363."
Limitations on Contractor's Damages

• Some states and localities prohibit or limit amount of punitive or consequential damages a contractor may recover.

• State Examples:
  • Alabama: limits civil liability of government entities to $100,000 for damage or loss of property; only in tort actions. Ala. § 11-93-2. No punitive damages against state or any county/municipality.
  • Idaho: government entities and their employees not liable for punitive damages. Idaho Code § 6-918.
  • New Jersey: there shall be no recovery against the State for punitive or consequential damages arising out of contract nor shall there be any recovery against the State for claims based upon implied warranties or upon contracts implied in law. N.J. Stat. Ann. § 59:13-3.
Questions?

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