

An Overview of the Model Code for Public Infrastructure Procurement

Articles 1 through 10 cover basic policies for the procurement of supplies, services, and construction; disposal of supplies; and legal remedies. Article 11 provides socioeconomic policies that a State may wish to amplify or tailor to local needs. Article 12 establishes ethical standards for public officials and contractors in connection with governmental procurement. The following is a synopsis of the scope of each Article.

General Provisions

Article 1 describes the general purposes of the Code, specifies its applicability, provides guidance for interpretations and contains definitions of terms.

Chief Procurement Officer

Article 2 establishes the Office of the Chief Procurement Officer and sets forth the basic organizational concepts for establishing procurement policy and conducting procurement operations.

Source Selection and Contract Formation

Article 3 describes the source selection and contract formation methods authorized by the Code and authorizes procurement officials to select and apply these methods. These source selection methods include: competitive sealed bidding, competitive sealed proposals, small purchase procedures, sole source procurement, emergency and special procurements. There is no statutory preference for competitive sealed bidding, although Section 3-202 makes competitive sealed bidding a default source selection method. The Article contains requirements for contracting by each method, and contracts not awarded by competitive sealed bidding generally require a written justification, which will be a matter of public record. The Article permits the use of any type of contract although it prohibits cost-plus-a-percentage-of-cost contracts.

Section 3-103 (b) and (c) adds flexibility in the extent to which Competitive Sealed Proposals may be used as a source selection method and requires the use of this method in the award of contracts for design-build, design-build-operate-maintain, and design-build-finance-operate-maintain services. Section 3-103(5), Evaluation Factors, requires that RFP's state the relative importance of price and other factors and subfactors that will be separately evaluated and scored by the procuring agency. Section 3-103(8) authorizes the Procurement Officer to conduct debriefings after source selection decision and contract award. Section 3-107 authorizes the Chief Procurement Officer or the Head of a Purchasing Agency to initiate Special Procurements in limited circumstances, with public disclosure of the reasons therefore both in advance and after such procurements where the application of all requirements of competitive sealed bidding or competitive sealed proposals is deemed to be contrary to the public interest. Section 3-303, "Substantiation of Offered Prices," changes the 1979 Code's requirement to submit certified cost or pricing data to a less burdensome standard appropriate to the commercial supplies and services that state and local governments buy.

Specifications

Article 4 contains requirements for developing, monitoring, and using specifications. It requires that specifications be written in a manner to maximize competition to the extent possible.

Procurement of Infrastructure Facilities and Services (New Title)

Article 5 authorizes five different project delivery and finance methods for use by agencies in managing the infrastructure facilities and services in their infrastructure collection. Delivery methods are structured so that an agency can select from among any of the project delivery methods based on the circumstances of each project and its impact on the overall portfolio of projects and services. (Section 5-103, Choice of Project Delivery Methods). These five delivery methods are Design-Bid-Build (including Construction Management At-Risk as a permitted variation), Design-Build, Design-Build-Operate-Maintain, Design-Build-Finance-Operate-Maintain, and Operations and Maintenance. The starting gate for these competitions is the statement of “design requirements” in the RFP, which establishes a common minimum threshold of owner requirements in these competitions. The finish gate is the submission of “proposal development documents” by offerors in response to the RFP.

Article 5 covers the use of bid, performance and payment bonds; and contract clauses for change orders, differing site conditions, variations in estimated quantities, suspension of work, and termination. It also establishes criteria for making price adjustments due to changes and variations in estimated quantities. The Article includes provisions for the competitive award of contracts for architect and engineer professional services. Section 5-205 authorizes additional forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately, or as one element of design-build-operate-maintain or design-build-finance-operate-maintain services.

Modification and Termination of Contracts for Supplies and Services

Article 6 has been reserved.

Cost Principles

Article 7 has been reserved. Should an enacting jurisdiction wish to include in its Model Code a comprehensive set of contract cost principles, the text of Chapter 7, Cost Principles, of the Recommended Regulations to the *ABA 2000 Model Procurement Code for State and Local Governments* may be considered.

Supply Management

Article 8 has been reserved. Should an enacting jurisdiction wish to include in its Model Code coverage of such topics as quality control, inventory management, excess property transfer, and the disposition of surplus property, the text of Chapter 8, Supply Management, of the Recommended Regulations to the *ABA 2000 Model Procurement Code for State and Local Governments* may be considered.

Legal and Contractual Remedies

Article 9 provides mechanisms for the resolution of disputes relating to solicitations and awards, bid protests, contract performance, and debarment or suspension determinations. In addition, this Article provides procedures for handling contracts awarded in violation of law.

Cooperative Purchasing

Article 10 contains provisions designed to facilitate cooperative procurement among units of government. Public Procurement Units are freely authorized and encouraged to enter into cooperative purchasing arrangements with one another. The definition of Public Procurement Unit includes local governments, other state governments, local governments in other states, federal agencies of the United States, and any not-for-profit entity comprised of more than one such Unit or Activity. The intent is to broaden the opportunity for state and local governments to work together in the provision of infrastructure facilities and services.

Assistance to Small and Disadvantaged Businesses; Federal Assistance or Contract Procurement Requirements

Article 11 provides administrative procedures for assisting small and disadvantaged businesses in learning how to do business with the enacting jurisdiction. This Article also can be used to incorporate additional state socioeconomic policies that are to be implemented through the procurement process. Article 11 requires compliance with federal law and regulations not presently reflected in the Code to the extent required by the terms of Federal grants or other funding arrangements applicable to the project.

Ethics in Public Contracting

Article 12 contains ethical standards with accompanying sanctions that are applicable to all participants in the public procurement process. The proposed ethical standards cover conflicts of interest, gratuities and kickbacks, contingent fees, and misuse of confidential information. Additionally, this Article authorizes establishment of an Ethics Commission with authority to render advisory opinions to participants in the procurement process.

Dedication

In Memory of Craig Othmer of Santa Fe, New Mexico, a long-time supporter of all of the ABA's Model Procurement Code projects and a member of the Steering Committee for the 2000 ABA Model Procurement Code for State and Local Governments.