

## OUTLINE FOR PRESENTATION ON PROCUREMENT

DECEMBER 11, 2013

CHARLES A. GRUBE

### INTRODUCTION

Generally applies whenever government spends money.

Exceptions to executive branch procurement code.

There are several codes, for the executive branch, judicial branch and for education.

Executive Branch: A.R.S. § 41-2501 through -2673, A.A.C. R2-7-101 through 1009.

Judicial Branch: Supreme Court Administrative Order No. 2013-87, Arizona Code of Judicial Administration § 1-402.

Education: A.A.C. R7-2-1001 through 1195.

Even when technical procurement codes do not apply, officials should use as much competition as is practical. *Hertz Drive- Ur- Self Sys. v. Tucson Airport Auth.*, 81 Ariz. 80, 85, 299 P.2d 1071 (1956).

Why we care about complying with the procurement code:

Contracts void: *See Western Corr. Grp. v. Tierney*, 208 Ariz. 583, 586, 96 P.3d 1070, 1073 (App. 2004); A.R.S. § 35-154.

Civil penalties: A.R.S. § 41-2616(A).

Criminal penalties: A.R.S. § 41-2616(B).

Resources: Arizona Agency Handbook; State Procurement Office, <http://spo.az.gov/>.

**CAUTION:** the last legislative session produced a major procurement reform bill (HB 2599) that changed a lot of things. See the State Procurement Office summary attached. Do not rely on pre-2013 concepts. Also, there will be new procurement rules, expected in January 2014.

### OVERVIEW (Using executive branch procurement code).

The players: Director of ADOA

State Procurement Administrator

Agency chief procurement officers (“ACPO”)

Authorized procurement officers

The things that procurement codes require:

Notice

Solicitation

Response

Evaluation

Award

The types of solicitations

Invitations for bids

Requests for proposals

Requests for quotations

Procurements under \$100,000

Procurements under \$5000

Emergency procurements

Procurement of construction

Special procurement rules for specific types of contracts.

Specifications

Design vs. performance specifications

Requirements that specifications promote economy and competition

Brand name specifications

General rule against person developing specifications getting direct benefit from them. A.A.C. R2-7-404.

Evaluation committees.

Confidentiality during evaluation.

Negotiations and best and final offers.

Award standards.

Multiple-award contracts. A.A.C. R2-7-608.

Forms of contracts.

Mandatory statewide contracts

Cooperative purchasing. A.R.S. §41-2631 through -2635.

## **DISPUTE RESOLUTION**

3 major case types:

Protests

Contract Claims

Debarment

Structure:

Generally, administrative process, followed by judicial review. A.R.S. § 41-2614.

Hearings conducted by Office of Administrative Hearings.

Protests

The rules governing protests are A.A.C. R2-7-A901 through A911.

Any interested party can protest a solicitation, an award or a determination of not susceptible for award. A.A.C. R2-7-A901(A). *See* A.A.C. R2-7-101(31) for definition of interested party.

Required contents: A.A.C. R2-7-A901(B).

Time: If protest is based on improprieties apparent in a solicitation, the protest must be filed before the offer due date and time. A.A.C. R2-7-A901(C). In all other cases, the protest must be filed within 10 days after the ACPO makes the procurement file available for public inspection. The time can be extended on a showing of good cause, that some specific action or inaction of the purchasing agency resulted in protesting party being unable to protest within 10 days.

ACPO can issue a stay if there is a reasonable probability protest will be upheld or if the stay is in the best interests of the State. If ACPO denies the stay, the protestor can apply to State Procurement Administrator. Protestor has 10 days after notification of ACPO stay denial to do so.

ACPO has authority to resolve the protest. There is a list of remedies that the ACPO can use, such as terminating a contract or issuing a new solicitation. A.A.C. R2-7-A904(C). There is also a list of factors the ACPO should consider, including the seriousness of the procurement deficiency and the urgency of the procurement. A.A.C. R2-7-A904(B).

ACPO decision is due within 14 days of the protest, unless extended by ADOA director.

Any interested party can appeal the ACPO decision to the ADOA director within 30 days. The appeal must state the “precise legal or factual error in the decision” of the ACPO.

Stays during appeals are governed by A.A.C. R2-7-A907.

ACPO must file an agency report on the appeal within 14 days, unless extended by ADOA director. *See* A.A.C. R2-7-A908(A) for the required contents.

ADOA director has limited power to dismiss the appeal before hearing, for instance if it is untimely. A.A.C. R2-7-A910.

NEW: ADOA director has 42 days to act on an appeal.

Protest hearings are conducted as “contested cases” by OAH. *See* A.R.S. § 41-1092 through -1092.12 and OAH’s rules.

After OAH sends the recommended decision, the ADOA director has 30 days to accept, reject or modify it. If the ADOA director takes no action, the OAH decision becomes the final administrative decision. A.R.S. § 41-1092.08.

Judicial review is available to any party. A.R.S. § 41-1092.08(H).

There is not a lot of case law on protests in Arizona. You might review *R.L. Augustine Const. Co., Inc. v. Peoria Unified School Dist.*, 188 Ariz. 368, 936 P.2d 554 (1997); *Arizona’s Towing Professional v. State*, 196 Ariz. 73, 993 P.2d 1037 (App. 1999); and *Facilitec, Inc. v. Hibbs*, 204 Ariz. 39, 59 803 (2002).

## Contract Claims

The rules governing claims are A.A.C. R2-7-B901 through –B905.

If the claim is against the State, the claimant must file it with the ACPO within 180 days after the claim arises. A.A.C. R2-7-B901(A).

ACPO has power to settle and resolve.

If the claim cannot be resolved, the ACPO makes a decision. The time for the decision is within 60 days after the claimant makes a written request for a final decision. If the ACPO fails to make a timely decision, the claimant can proceed as if the claim were denied. A.A.C. R2-7-B903.

Claimant can appeal the ACPO decision to the ADOA director within 30 days. The required contents of the appeal, the requirement of an agency report and the hearing process are similar to protests. A.A.C. R2-7-B904.

The process is different if there is a State claim against a contractor. Then, the ACPO first tries to resolve the claim, and refers it to the ADOA director if the claim cannot be resolved. The ADOA director refers it as a contested case for OAH hearing directly, without the necessity of any appeal or agency report.

#### Debarment

Happens very seldom.

Rules appear at A.A.C. R2-7-C901 through -C911.

- I. Importance of Procurement Process
  - a. Visibility
  - b. Consistency
  - c. Fairness
- II. Authority
  - a. State Procurement
  - b. Agency Authority
    - i. Chief Procurement Officer
    - ii. Procurement Officer
- III. Background of Procurement Personnel
  - a. Chief Procurement Officer
  - b. Procurement Officer
- IV. Process to Buy
  - a. Written Request
  - b. Contract vs Open Market
  - c. Formal vs Informal solicitation
  - d. Goods vs Service
- V. Specifications and Scope of Work
  - a. Goods vs Service
  - b. Too restrictive
  - c. Too much detail vs not enough
- VI. Evaluation
  - a. Importance of Scope of Work/Specifications
  - b. Importance of evaluation Criteria
  - c. Importance of evaluation Committee understanding these items and their role
  - d. Importance of confidentiality
  - e. Authority to approve award and sign contract
- VII. Conflict of Interest/Significant Procurement Role
  - a. Public perception
  - b. Legislative actions
  - c. The number of Statutes dealing with these related issues

**Procurement Problem Areas**

<b>Summary</b>	<b>State Code</b>	<b>School Code</b>
Sole source procurement is permitted if there is a written determination that there is only one source for the required material, service or construction item. Sole source procurement shall be avoided except where no reasonable alternative sources exist.	41-2536	R7-2-1053
Emergency procurements are permitted when there exists a threat to public health, welfare or safety, or if a situation exists which makes compliance with procurement impracticable, unnecessary or contrary to public interest. Even with emergency procurements there must be such competition as is practicable under the circumstances.	41-2537	R7-2-1056
Persons with significant procurement roles are prohibited from deriving any direct or indirect benefit (including employment) from the procurement.*	41-2517 R2-5-501	R7-2-1105
*There are significant differences between the state and school codes		
All specifications shall be drafted in such a way as to encourage competition and shall not be unduly restrictive. Proprietary specifications shall be used only when no other specification is practicable.	41-2565 41-2566	R7-2-1104 R7-2-1009
An amendment to a solicitation shall be issued if necessary to furnish to other bidders information given to one bidder if the information will assist the other bidders in submitting bids or if the lack of information will prejudice the other bidders. If discussions are conducted, all offerors shall be accorded fair treatment with respect to the opportunity for discussions.	R2-7-B303 41-2534	R7-2-1026 R7-2-1047
Bids and proposals shall be evaluated according to the criteria in the solicitation; no criteria shall be used that is not set forth in the IFB or RFP.	41-2533 41-2534	R7-2-1031 R7-2-1046
<b>Additional Statutory Provisions</b>		
Any public officer or employee who has, or whose relative has, a substantial interest in any of the public agency's contracts, purchases, or decisions shall disclose that interest and shall refrain from participating in any manner in such contract, purchase or decision.		38-503
A public officer/employee shall not use or attempt to use his/her position to obtain any valuable thing or benefit that would not ordinarily accrue to him/her if the thing or benefit is of such character as to manifest a substantial and improper influence on the officer/employee with respect to his/her duties.		38-504
No public officer/employee may receive, directly or indirectly, compensation (money, a tangible thing of value, or a financial benefit) other than as provided by law for personally performing any service in a matter pending before his employer.		38-505
A person who contracts for or purchases any material, service, or construction in a manner contrary to the procurement code is personally liable for the recovery of all public monies paid plus 20% and legal interest, and all costs and damages.		41-2616(A)
A person who intentionally or knowingly contracts for or purchases any material, services or construction pursuant to a scheme or artifice to avoid procurement code requirements is guilty of a class 4 felony.		41-2616(B)
A person who serves on an evaluation committee and who fails to disclose contact with a competing vendor is subject to a civil penalty of between \$1,000 and \$10,000.		41-2616(C)

<b>Watch for Red Flags:</b>	<ul style="list-style-type: none"> <li>• Sole source and emergency procurements</li> </ul>
	<ul style="list-style-type: none"> <li>• Repeated purchases from the same vendor</li> </ul>
	<ul style="list-style-type: none"> <li>• Bids where only one vendor responds</li> </ul>
	<ul style="list-style-type: none"> <li>• Unusual evaluation committee membership</li> </ul>
	<ul style="list-style-type: none"> <li>• Frequent vendor visits</li> </ul>
	<ul style="list-style-type: none"> <li>• Vendors who establish close relationships with employees</li> </ul>
	<ul style="list-style-type: none"> <li>• Donations or gifts from vendors</li> </ul>
	<ul style="list-style-type: none"> <li>• Sponsorships, conferences or other events sponsored by vendors</li> </ul>
	<ul style="list-style-type: none"> <li>• Grant assistance</li> </ul>
	<ul style="list-style-type: none"> <li>• Unusual interest in contracts by persons not directly involved</li> </ul>
<b>Exercise Common Sense:</b>	<ul style="list-style-type: none"> <li>• A fancier or more expensive proposal is not always better. Focus on substance, not style.</li> </ul>
	<ul style="list-style-type: none"> <li>• Do your job. Don't let the vendor do your job for you.</li> </ul>
	<ul style="list-style-type: none"> <li>• Ask questions. Ask a lot of questions.</li> </ul>
	<ul style="list-style-type: none"> <li>• Ask why the vendor is offering you that free lunch or round of golf. Ask what strings are attached to that donation. Ask what's in it for the vendor.</li> </ul>
	<ul style="list-style-type: none"> <li>• As a purchasing officer, ask where the user department got its specifications or scope of work.</li> </ul>
	<ul style="list-style-type: none"> <li>• The reason vendors offer gifts, meals, trips, etc., is that such gifts can and do influence public employees.</li> </ul>
	<ul style="list-style-type: none"> <li>• If a vendor can establish a relationship with the public employee, then it has an advantage over its competitors. This sort of advantage is worth far more than the cost of any gift, meal or trip.</li> </ul>
	<ul style="list-style-type: none"> <li>• Don't mix business with pleasure. Don't mix family with work.</li> </ul>
<b>Remember:</b>	<ul style="list-style-type: none"> <li>• There is no such thing as a free lunch.</li> </ul>
	<ul style="list-style-type: none"> <li>• Your subordinates' ethics problems are your problems. Your superiors' ethics problems, and those of your peers, are probably your problems too.</li> </ul>
	<ul style="list-style-type: none"> <li>• Full and formal disclosure can cure a lot of ethics problems, but not all.</li> </ul>
	<ul style="list-style-type: none"> <li>• A bid protest is not much fun. A formal investigation is even less fun. Simply complying with the procurement rules is so much easier and quicker than dealing with the consequences of not complying.</li> </ul>
	<ul style="list-style-type: none"> <li>• Once public confidence is lost, it is very hard to regain.</li> </ul>

Rex Nowlan, December 11, 2013

## ADVISING THE PROCUREMENT CLIENT

### Commonly Raised Procurement Issues

I. Today we are discussing the **State Executive Branch procurement code**. Be aware that the Judicial Branch has its procurement code, Education for the School districts, has its own, and the Counties and Cities may have their own. The Superior Courts are probably the most flexible. They can adopt their own code or adopt that of the county or go with the judicial branch procurement code. All procurement codes are to be substantially similar to that of the state executive branch.

- a. Legal advice, not policy decisions.
- b. Beware of conflicts.
  1. Within the agency and any evaluation committee.
  2. With other agencies represented by this office.
    - i. This office represents virtually all state agencies, boards and commissions
    - ii. Talk to the other AAG and resolve issues internally before giving advice.

II. State Procurement Code was adopted by Laws 1984, chapter 251

- a. §1 states the purpose:
  1. Simplify, clarify and modernize the law governing procurement by the state.
  2. Permit continued development of procurement policies and practices.
  3. Make as consistent as possible the procurement laws among the various state agencies.
  4. Provide for increased public confidence in the procedures followed in public procurement.

5. Ensure the fair and equitable treatment of all persons who deal with the procurement system of this state.
6. Provide increased economy in state procurement activities and maximize to the fullest extent practicable in purchasing value of public monies of this state.
7. Foster effective broad-based competition within the free enterprise system.
8. Provide safeguards for the maintenance of a procurement system of quality and integrity.

III. Documentation.

- a. Ask for and review the documents related to the issue on which you are being asked to provide advice.
- b. Remind the procurement officer to document the decisions that require documentation. A.R.S. § 41-2502, A.A.C. R2-7-102 (note difference in A.A.C R2-7-101(39) defining the “procurement file”)
  1. What is the basis for the determination,
  2. Can the procurement officer articulate the reason for the determination?
  3. Is the reason appropriate given the purposes of the procurement code?

IV. Uniform terms and conditions.

- a. These are responsibility of the Director of the Department of Administration delegated to the State Procurement Administrator. A.R.S. §41-2585 (A), A.A.C. R2-7-601
- b. Any change must be approved by the State Procurement Administrator. A.R.S. § 41-2585(B)

V. Insurance and Indemnification.

- a. State is self-insured.
- b. Insurance requirements established by Risk Management in the Department of Administration.
- c. Any indemnification/hold-harmless by the state must have prior approval by Risk Management. A.A.C. R2-10-301
- d. Avoid putting this office in a conflict of interest.

- VI. Statewide Contracts. A.A.C. R2-7-607.
  - a. Government units are required to use existing state contracts.
  - b. Exceptions may be approved by the state procurement administrator.
- VII. Exempt does not mean “no competition.” *Hertz Drive-Ur-Self Sys. v. Tucson Airport Authority*, 81 Ariz. 80, 85,299 P.2d 1071, (1956)
  - a. Duty to be fair, honest and prudent.
  - b. Cannot just award a contract at its pleasure and uncontrolled discretion.
- VIII. Agency wants to exclude incumbent vendor.
  - a. Document the problems and provide concerns to the Director of the Department of Administration who is responsible for investigation and initiating debarment proceedings. A.A.C. R2-7-C902
  - b. Make “prior work” part of the evaluation factors.
    - 1. Evaluation factors and their relative importance must be stated in the solicitation. A.A.C. R2-7-C301 E.1.h.
    - 2. Evaluate this factor for each vendor with scrupulous fairness.
- IX. Multiple Awards.
  - a. Least number necessary to meet the requirements of the state. A.A.C. R2-7-608
  - b. Secondary level of competition.
- X. “Bundling”, *Prescott Courier, Inc. v. Moore et al.*, 35 Ariz. 26, 274 P. 163 (1929)
  - a. A solicitation may establish a scope of work that only a limited number of persons are qualified to perform predicated on a reasonable basis, promoting a legitimate purpose.
  - b. Putting multiple classes of work in the same solicitation to limit the vendor pool, discrimination against a certain class of vendors without reasonable grounds is illegal.
- XI. Evaluator Notes.
  - a. By definition not part of the Procurement File. A.A.C. R2-7-101 (39)
  - b. Are they a public record? May depend on whose notes they are.
    - 1. Public body or officer?

- 2. Necessary to accurately document official activities?
  - 3. Retention schedule?
  - c. If there is a protest, this will be an issue.
- XII. *Arizona Towing Professional, Inc. v. State*, 196 Ariz. 73, 993 P.2d 1037 (App. 1999)
- a. Use the rules, don't just make it up. Procurement is a process, use the process.
  - b. Termination for convenience really means termination in the best interest of the state because of some exigency.
  - c. Termination for convenience seldom works.
- XIII. *Grand Canyon Pipelines, Inc. v. City of Tempe*, 168 Ariz. 590, 816 P.2d. 247 (App. 1991)
- a. The purpose of procurement law is to protect the public.
  - b. There is no property interest in the award of a public contract until it is actually awarded.
- XIV. *City of Scottsdale v. Deem*, 27 Ariz. App. 480, 566 P.2d 328 (App. 1976)
- a. Deem is required to follow the established process too.
  - b. Award for "lost profits" overturned because Deem failed to take prompt legal action.
  - c. Deem could not in essence make the taxpayers pay twice.
- XV. *Ry-Tan Construction, Inc. v. Washington School Dist.*, 210 Ariz. 419, 111 P.3d 1019 (2005).
- a. There is no contract until the formal documents are signed.
- XVI. *New Pueblo Constructors v. State*, 144 Ariz. 95, 696 P.2d 185 (1985)
- a. Used most often as the case to bridge to federal case law as persuasive authority.

# Procurement Reform Q & As

## (Referencing Chaptered Version of HB 2599)

### Table of Contents

General Procurement Reform Questions.....	Page 2
<i>Why is the state expanding exemptions in the Arizona Procurement Code? Doesn't that mean less competition and increased costs?</i>	
<i>Why are you expanding procurement authority in ADOA?</i>	
<i>Is training and outreach going to require more staff? Can it be privatized?</i>	
<i>Why are you adapting the written determinations? Won't that mean less transparency?</i>	
<i>Why raise the informal bid limit to \$100,000? Doesn't that mean less competition?</i>	
<i>I'm still not sure why the change to cooperative purchases? Can you explain?</i>	
<i>Will there be rules guiding cooperative purchasing?</i>	
<i>Will striking the language surrounding competitive sealed bidding (41-2534) eliminate the state's ability to use competition impracticable justifications?</i>	
<i>How much money does the state spend annually on procurements?</i>	
<i>How many protests and appeals to protests does the state handle annually?</i>	
<i>Can state employees who serve in a significant procurement role have a financial interest in a firm responding to a solicitation?</i>	
<i>Why does the bill include a timeframe within which the ADOA Director must make a decision on an appeal? What is the exact timeframe?</i>	
<i>Would requiring an agency chief procurement officer to be an employee of the ADOA State Procurement Office be unconstitutional based on principles articulated in R.L. Augustine Const. Co., Inc. v. Peoria Unified School Dist. No. 11, 936 P.2d 554 (1997)?</i>	
<i>Why is the state interested in evaluating vendor performance?</i>	
<i>How will vendor performance be evaluated?</i>	
<i>Why is the bill removing the requirement to weight bid criteria (41-2533)?</i>	
<i>Under the competitive sealed proposal provision (41-2534), why the change from "competitive range" to "reasonably susceptible to being selected for award?"</i>	
Lobbying Provision.....	Page 5
<i>With the expanded definition of lobbying including the attempt to influence procurements, how will lobbyists know about the new requirements and that they must register with the Secretary of State?</i>	
<i>Will this legislation require sales and marketing individuals to register as lobbyists if they wish to pitch their company's products and services to state agencies?</i>	
<i>Will this bill create an uneven playing field by giving an advantage to a procurement specialist consultant?</i>	
<i>How many other states have a procurement lobbying provision?</i>	
<i>Will the proposed law create an administrative burden on lobbying companies?</i>	
No Hire Provision.....	Page 6
<i>How will vendors know when the time period begins that they cannot solicit state employees for employment?</i>	
<i>How will state employees and the vendor community become aware of the new requirements under the proposed legislation?</i>	
<i>How will the prohibition for soliciting employment be handled when contracting for the privatization of state operations?</i>	
<i>If there is a dispute in the future regarding the hiring provision, who will monitor the timing of the procurement process?</i>	
<i>How far reaching is the no hire provision? Will it extend to someone who moves out-of-state?</i>	
<i>What happens if a solicitation is cancelled? Will employees and vendors be in limbo in perpetuity?</i>	
<i>Do individuals providing advice about financing or paying for a procurement need to register as a lobbyist?</i>	
ProcureAZ Questions.....	Page 7
<i>What is ProcureAZ and how does it work?</i>	
<i>When does ProcureAZ notify vendors of pending procurement solicitations?</i>	
<i>Is there currently any marketing of the ProcureAZ system?</i>	
<i>How many vendors are registered on ProcureAZ?</i>	
<i>How old is the ProcureAZ system?</i>	
<i>Have there been any issues or flaws with ProcureAZ?</i>	
<i>Do all state agencies use ProcureAZ?</i>	

## GENERAL PROCUREMENT REFORM QUESTIONS

- 1. Why is the state expanding exemptions in the Arizona Procurement Code? Doesn't that mean less competition and increased costs?**

No, the expanded exemptions do not necessarily imply less competition and increased costs for the products and services identified. These procurements do not have competition available. In today's environment, the procurement officer must write a written statement detailing why competition is not available for these specific products and services each time they are purchased.

- 2. Why are you expanding procurement authority within the Arizona Department of Administration (ADOA)?**

Over the past few years, there have been recommendations from several sources regarding a lack of consistency in application and message regarding public procurement among state agencies. By reintroducing the compliance program, mandatory procurement training/certification program, and transfer of agency chief procurement officers to ADOA, these issues can be addressed to enhance policy implementation as well as support overall consistent management of the procurement process at a statewide level.

- 3. Is training and outreach going to require more staff? Can it be privatized?**

The plan is to outsource training and outreach components through contracting opportunities. Staff resources will be required to oversee the contracts.

- 4. Why are you adapting the written determinations? Won't that mean less transparency?**

There are many determinations in place within the Arizona Procurement Code, and the majority will not be affected. The determinations being addressed are mostly administrative and add time to the process. Their removal does not eliminate or reduce the procurement officer's responsibility to make sound business decisions when conducting solicitations.

- 5. Why raise the informal bid limit to \$100,000? Doesn't that mean less competition?**

Not at all. All purchases above the small dollar limit require competition—that's currently set at \$5,000. Raising the informal bid limit increases quote opportunities with small businesses, while reducing the time to conduct the procurements.

- 6. I'm still not sure why the change to cooperative purchases? Can you explain?**

Although we are required to aggregate our purchases, there are several unique products and services that an agency needs that add up to a low dollar amount. The state just doesn't have the volume that other local governments may have for that purchase. By expanding the ability for state agencies to utilize contracts solicited by other public entities and cooperatives, the state can realize a greater savings for that unique product or service. Limitations will be placed on the utilization of these contracts through the rulemaking process.

Also, the proposed changes would allow all 501(c)(3) companies to utilize statewide contracts. The State Procurement Office has been approached by several nonprofit associations that support the idea of their members receiving better pricing for their common products and services, because their members do not have the buying power to receive the level of discounts the state receives.

**7. Will there be rules guiding cooperative purchasing?**

Yes. The rules will be developed through stakeholder discussions and codified through the standard Governor's Regulatory Review Council rule process.

**8. Will striking the language surrounding competitive sealed bidding (41-2534) eliminate the state's ability to use competition impracticable justifications?**

No. Competition impracticable is still allowable under the emergency procurement statute (41-2537).

**9. How much money does the state spend annually on procurements?**

In FY12, the state spent approximately \$3.3 million for purchases that are procured under the procurement code.

**10. How many protests and appeals to protests does the state handle annually?**

In FY12, out of the 591 solicitations issued, the state received 41 protests of which 18 appeals to protests were received.

**11. Can state employees who serve in a significant procurement role have a financial interest in a firm responding to a solicitation?**

No. In an effort to promote greater transparency, HB2599 will require employees to disclose any financial interest he/she may have in a company responding to a state procurement solicitation. In addition, HB2599 will prevent an employee from serving in a significant procurement role if he/she in the past year worked for a firm responding to a solicitation.

**12. Why does the bill include a timeframe within which the ADOA director must make a decision on an appeal? What is the exact timeframe?**

The state has an interest in promoting efficiency and integrity in the administrative process. The proposed timeframe will ensure that both vendors, taxpayers, and the state can avoid protracted appeals. HB2599 will require the ADOA director to make a decision on an appeal within six weeks (42 calendar days). The director may also be granted an additional two weeks (14 calendar days) before the matter would be referred to hearing.

**13. Would requiring an agency chief procurement officer to be an employee of the ADOA State Procurement Office be unconstitutional based on principles articulated in *R.L. Augustine Const. Co., Inc. v. Peoria Unified School Dist. No. 11, 936 P.2d 554 (1997)*?**

No. The concerns expressed in *R.L. Augustine* will not be present if the agency chief procurement officers (CPOs) are employees of the ADOA State Procurement Office because the solicitation protest and contract controversy rules adopted by the ADOA director remain consistent with the two-tiered administrative decision and judicial review process articulated by the Arizona Supreme Court in that case. Consistent with the holding of that case, the purchasing agency CPO responds to protests with independent legal counsel from the Office of the Attorney General. The ADOA director (not the purchasing agency) remains the final decision maker and the final agency decision is subject to judicial review based on the administrative proceeding, and does not require the aggrieved party to bring a de novo action in superior court.

**14. Why is the State interested in evaluating vendor performance?**

HB2599 would grant rulemaking authority to establish vendor performance and evaluation standards. This information will be useful in guiding future procurement decisions while simultaneously protecting state and taxpayer interests.

**15. How will vendor performance be evaluated?**

The program approach and specific details will be discussed during stakeholder meetings and codified through the standard Governor's Regulatory Review Council rules process.

**16. Why is the bill removing the requirement to weight bid criteria (41-2533)?**

In today's environment, an invitation for bid involves products and services that must meet (or exceed) certain specifications. After a product or service has met the minimum requirements i.e., delivery, specifications, warranty, etc., the bid is awarded to the vendor with the lowest price. In contrast to an invitation for bid, a request for proposal is a solicitation method where criteria and weighting of the criteria are used in the evaluation process.

**17. Under the competitive sealed proposal provision (41-2534), why the change from "competitive range" to "reasonably susceptible to being selected for award?"**

Changing the "competitive range" reference aligns the state's statute with the Model Procurement Code, as well as being the terminology most familiar in public procurement.

## LOBBYING PROVISION

- 18. With the expanded definition of lobbying including the attempt to influence procurements, how will lobbyists know about the new requirements and that they must register with the Secretary of State?**

The Secretary of State's Office will post information regarding the registration of procurement lobbying on its website. In addition, it is the intent of Procurement Reform to provide outreach and education to currently registered lobbyists. Additional outreach to the vendor community and training of state procurement officers will also act as a mutually reinforcing educational tool within the procurement community.

- 19. Will this legislation require sales and marketing individuals to register as lobbyists if they wish to pitch their company's products and services to state agencies?**

No. This bill is inherently about good governance and transparency. Registration and client disclosure will only be required for individuals who meet the prerequisite of participating in, or working for someone who participates in, legislative lobbying. If a sales and marketing employee is not paid by a lobbyist and is not in some other way connected with a lobbying company, he or she would be exempt from registration.

- 20. Will this bill create an uneven playing field by giving an advantage to a procurement specialist consultant?**

No. Consultants without ties to the legislature most likely don't have the same level of influence, connections, or tactics of a legislative lobbyist who also does procurement lobbying.

- 21. How many other states have a procurement lobbying provision?**

Approximately 25 states have a procurement lobbying provision; however, each state has done this in varying ways. Those states include Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, Ohio, Oklahoma, Texas, Alabama, Idaho, Kansas, New Hampshire, North Carolina, Pennsylvania, and Tennessee.

- 22. Will the proposed law create an administrative burden on lobbying companies?**

While it is possible that the proposed law could increase the administrative tasks for some lobbying groups, other groups are already registering their procurement clients. In addition, it is in the public's interest to implement reforms that promote best practices in governance and transparency.

## **NO HIRE PROVISION**

**23. How will vendors know when the time period begins that they cannot solicit state employees for employment?**

ADOA will post the time period on the SPO website. The posting will include the date the first non-disclosure statement is signed pertaining to a particular solicitation, or request of a sole source or competition impracticable procurement.

**24. How will state employees and the vendor community become aware of the new requirements under the proposed legislation?**

ADOA will provide perpetual and ongoing training to state procurement officers who will in turn educate their agency staff. In addition, ADOA will provide outreach to the vendor community through various means.

**25. How will the prohibition for soliciting employment be handled when contracting for the privatization of state operations?**

Any solicitation for privatization will clearly identify the requirements for the potential hiring of state employees. Usually, state employees with a significant procurement role are not the same employees who are impacted by privatization and potential hiring. Additionally, the director may make a written determination that this provision does not apply.

**26. If there is a dispute in the future regarding the hiring provision, who will monitor the timing of the procurement process?**

Vendors and state employee supervisors who suspect noncompliance on the part of a state employee should report the wrongdoing to the State Procurement Office which will notify the Attorney General and/or human resources department, where applicable. Employees who suspect wrongdoing on the part of a vendor or other state employees should report the wrongdoing to their agency management who should in turn report to the State Procurement Office.

**27. How far reaching is the no hire provision? Will it extend to someone who moves out-of-state?**

Many of our vendors are out-of-state vendors who wish to conduct business with the State of Arizona. The hiring provision would apply.

**28. What happens if a solicitation is cancelled? Will employees and vendors be in limbo in perpetuity?**

Employees will have an opportunity to submit a request to the director to determine if the one-year exclusion is applicable for cancelled solicitations, sole source procurements and competition impracticable purchases.

**29. Do individuals providing advice about financing or paying for a procurement need to register as a lobbyist?**

No, they do not need to register as a lobbyist unless they are otherwise required to do so under State statute.

## PROCUREAZ QUESTIONS

### 30. What is ProcureAZ and how does it work?

ProcureAZ is the State of Arizona's online procurement portal. The system functions as an up-to-date vendor bidders list as well as a proactive notification tool. All formal solicitations are advertised electronically through ProcureAZ and registered vendors are notified via email of procurement opportunities. Unregistered vendors are also able to view a list of open solicitations through ProcureAZ.

### 31. When does ProcureAZ notify vendors of pending procurement solicitations?

ProcureAZ notifies vendors of pending procurement solicitations when the solicitation is published, which is two weeks or more before a bid opening.

### 32. Is there currently any marketing of the ProcureAZ system?

The State Procurement Office currently markets ProcureAZ on the ADOA homepage. In addition, the State Procurement Office regularly attends tradeshows in which they provide educational material regarding the ProcureAZ system. Moreover, as part of the overall Procurement Reform plan, the State Procurement Office is hosting a series of vendor fairs, educational webinars, and other relevant training and outreach activities.

### 33. How many vendors are registered on ProcureAZ?

Approximately 29,832 vendors are currently registered on ProcureAZ.

### 34. How old is the ProcureAZ system?

ProcureAZ was implemented in August 2009.

### 35. Have there been any issues or flaws with ProcureAZ?

There have not been any overall system issues or flaws with the application. As with any new electronic system, however, there have been varying degrees of end-user misunderstanding and lack of knowledge. These issues have been addressed with business process assistance as well as additional and on-going end-user training and marketing.

### 36. Do all state agencies use ProcureAZ?

All agencies authorized to conduct formal solicitations are using ProcureAZ for procurements, including the largest agencies (ADOA, ADOT, DES, and AHCCCS). Most agencies are also using the system for purchase order and invoice processing – a few examples include DHS, Revenue, DPS, DOC, Game & Fish, and DEQ.

PROCUREMENT REFORM FACT SHEET

EFFICIENCY	QUALITY	CONSISTENCY	TRANSPARENCY
Cooperative purchasing expansion to allow piggyback purchases & nonprofits Exemptions now include textbooks for School for Deaf and Blind, entertainment at State Fair, utilities for all agencies, professional certifications and memberships Written determinations no longer required to use other procurement methods Determinations for pre-offer Informal bid threshold increases to \$100,000 Eliminate IT procurement evaluation requirements Small business set aside increases to \$100,000	Establish vendor performance standards Mandatory training/certification	Statewide compliance program CPO reporting structure Centralized AG procurement attorney unit	Procurement lobbyist disclosure Revolving door restrictions for those with a "significant procurement role" 42-day time period to issue final decision on protest appeals Written disclosure of financial interest

NEW EXEMPTIONS TO THE ARIZONA PROCUREMENT CODE	
Arizona State Schools for the Deaf and Blind	Textbooks
Arizona Exposition & State Fair Board	Professional entertainment
Statewide	Water, gas and electric utilities
Statewide	Professional certifications, professional memberships and conference registrations

EXPANDED AUTHORITY OF ADOA DIRECTOR
<ul style="list-style-type: none"> <li>Establish and maintain procurement compliance programs</li> <li>Establish and maintain a mandatory procurement training and certification program</li> <li>Employ staff as necessary to perform the duties outlined in the Arizona Procurement Code</li> <li>Establish procurement offices as the Director determines necessary to maintain an effective and efficient program of procurement administration</li> <li>Provide consultation to state agency management in aspects of procurement with full recognition of the needs of management</li> <li>Enter into agreements with any state government unit or political subdivision of the State to agency of a political subdivision of the State to furnish procurement administration services and facilities of the department. Any agreement shall provide reimbursement to the State of the actual cost of the services and facilities furnished</li> <li>Enter into agreements with the Attorney General for dedicated legal resources to support any State governmental unit in procurement legal matters</li> </ul>

WRITTEN JUSTIFICATIONS: REMOVAL	
Multi-Step Sealed Bidding	Written justification no longer needed if it is not practicable to initially prepare a definitive purchase description that is suitable to permit an award
Competitive Sealed Proposals	Written justification no longer needed when use of competitive sealed bidding is not practicable or not advantageous to the State

SUPPLIER PERFORMANCE / EVALUATION
ADOA Director shall issue rules that address vendor performance and evaluation of past performance

MISCELLANEOUS PROVISIONS	
Delegation of Authority	ADOA Director may delegate specific procurement functions to any State governmental unit
Informal Bid Threshold	Increase amount to \$100,000
Collection of Data	ADOA Director may prescribe procurement systems for use by agencies
Advisory Groups or Evaluation Committees	ADOA Director may appoint evaluation committees to assist with respect to solicitation evaluations. Members of the evaluation committees are not eligible to receive compensation but are eligible for reimbursement of expenses
Procurement of IT and telecommunications systems; definitions	Eliminates
Competitive Sealed Bidding	No longer sets forth evaluation criteria to be used, including the weighting of identified criteria. Bids will be evaluated based on the requirements set forth in the Invitation for Bids
Competitive Sealed Proposals	No longer need to publicly read the name of each Offeror and other relevant information. Only need to record the name of each Offeror
Competitive Sealed Proposals	Procurement officer may invite Offerors to submit a BAFO if reasonably susceptible to being selected for award
Cost Reimbursement Contracts	Removes exception to use this type of contract
Energy Consumptive Material	Governor's Office of Energy Policy, not the Arizona Commerce Authority is responsible for establishing specs
Protest Process	ADOA Director has 42 days (with 14 day extension) to rule on a protest appeal after the agency files its report

NONPROFIT CORPORATION: DEFINITION CHANGE	
Nonprofit Corp. Definition	Includes corporations under IRS Section 501(c)(3) – 501(c)(6) or corporations under §115, if created by 2+ local public procurement units, and nonprofit agencies that serve individuals with disabilities under 41-2626

PROCUREMENT LOBBYIST REGISTRATION & DISCLOSURE	
Application	Board, commission, department, officer or other administrative unit of this state, or the Governor's Office
New Provision	Persons who are compensated for the primary purpose of lobbying on behalf of an entity AND who attempt to influence the procurement of materials, services or construction by a board, commission, department, officer or other administrative unit of this state, or the Governor's Office must register as a lobbyist and disclose client identity.
Exemption	If a person is not paid by a lobbyist or is in some way connected with a lobbying firm, registration is not required. For example, sales and marketing individuals may seek information regarding a procurement without registering with the Secretary of State's Office.
Other	Procurement lobbyist must disclose his or her designation as a lobbyist.  Former State employees who had a significant procurement role must wait one year after leaving State government to lobby the board, commission, department, officer or other State administrative unit that previously employed them.

REVOLVING DOOR RESTRICTION / SIGNIFICANT PROCUREMENT ROLE	
Application	Board, commission, department, officer or other administrative unit of this state, or the Governor's Office
New Provision	<p>"Significant Procurement Role" means: (1) participated in the development of a procurement; (2) participated in the development of an evaluation tool; (3) approved a procurement or an evaluation tool; (4) solicited quotes greater than \$10,000 for the provision of materials, services or construction; (5) served as a technical advisor or an evaluator who evaluates a procurement; (6) recommended or selected a vendor to provide materials, services or construction, or; (7) served as a decision maker or designee on a protest or an appeal by a party.</p> <p>An employee who has a significant procurement role cannot <u>accept an employment offer</u>, <u>have employment discussions</u>, or <u>solicit an employment opportunity</u> (regardless of who would receive the position) with any person or entity lobbying for or potentially responding to a solicitation from the time the first non-disclosure agreement is signed for the solicitation (or request for a sole source/competition impracticable) to one year after the materials are delivered or services/construction begins.</p> <p>An employee who previously worked for a person or a firm that responded to a solicitation cannot serve in a significant procurement role for a period of one year following the person's previous employment.</p> <p>An employee with a significant procurement role must sign a non-disclosure agreement pertaining to the particular solicitation or at the time of a request for a sole source/competition impracticable and provide written disclosure of any financial interest the officer, employee or the spouse may hold.</p> <p>Knowing violations is a class 2 misdemeanor. Upon conviction, the person is ineligible for employment in the State personnel system for a period of 5 years and if the person is an employee at the time of the violation, he or she is subject to suspension for no less than 90 days or dismissal.</p>
Exemption	Employees may submit a written request to seek clarification of whether the employee played a significant procurement role. An agency response will be provided within 15 days. This prohibition may not apply if the solicitation, sole source procurement of competition impracticable procurement was cancelled or is associated with the privatization of existing State services that would result in the elimination of the employee's position. For agency executive leadership, the Governor's Office will make a determination within 30 days.
Other	Agencies must notify their employees when the first non-disclosure agreement is signed on a particular solicitation and the agency must notify SPO who will then post it on its website.

COOPERATIVE PURCHASING	
Piggyback	Local public procurement unit, department, any other state or an agency may now participate in, sponsor, conduct or administer a cooperative purchasing agreement with any buying organization not located in Arizona that would also qualify as a "public procurement unit."
Expansion	<p>501(c)(3) nonprofit corporations may now use Statewide contracts</p> <p>Definition now includes "external procurement activity" as available for cooperative purchases</p> <p>Cooperative purchasing now may include joint or multi-party contracts between local procurement units, departments or agencies and open-ended contracts that are available to local public procurement units.</p>