

Governor's Supplier Diversity Council

October 29, 2013 Meeting

Minutes from October 29, 2013 Governor's Supplier Diversity Council Meeting

Attendees:

In person: Ken Anderson, Dean Stotler, Cathy Imburgia, Ron Frazier, Shirley Lerner, and Michelle Morin

On the phone: Devona Williams PhD, Brian Leahy, Wendy Brown, Valerie Watson, Sakthi A. Vel PhD, and James Collins

Absent: Anas Ben Addi, Nick Callazzo III, and Clay Hammond

Meeting Opened:

Meeting Called to Order by Ken Anderson, GSDC Chair, at 10:34am.

Quorum:

The meeting opened with a quorum reached with five members in attendance at start of meeting and a sixth joined the meeting.

Prior Meeting Minutes:

Minutes for the meeting held on August 26, 2013, were reviewed without being read, two corrections were made one to spelling and one to correct a date, and the minutes were accepted via motion by Dean Stotler and seconded by Ron Frazier.

October 29 Meeting Notes:

- Ken Anderson provided a brief update indicating that the Governor's Office is still reviewing the proposals from the Council with respect to the Small Business Focus Program and that the Governor's office will make a determination to go forward with one of the two options.
- Michelle Morin, Office of Supplier Diversity, provided a response to an email sent to the Council by council member Clay Hammond after the last SDC meeting. Mr. Hammond's email suggested the two reports he attached be considered by the Council: Governor Bush's Equity in Contracting Plan, Florida, November 9, 1999 (attached as Exhibit A) and Report of the Select Committee on Minority, Women, and Disadvantaged Business Enterprise Inclusion Pursuant to House Resolution 78, Pennsylvania, September 16, 2009 (attached as Exhibit B). Michelle presented a report to the council (attached as Exhibit C) providing a summary informing that both programs provided by Mr. Hammond have expired and offering current status information for each state. In particular the Pennsylvania program terminated in 2012 and a new program was commenced in PA in March of this year. The Florida program had a sunset date in 2001 and before that occurred Florida made all programs race and gender neutral, effective January 1, 2000. Each of these two states' current programs were reviewed and compared to each other and to Delaware.
- Chair Ken Anderson requested that each initiative leader provide an update. Before that occurred Ken requested that the Council consider a protocol for addressing these initiatives with a focus to move the needle. To that end he requested a conference call on November 15th for leaders to provide up to date status on the initiative to determine if any

are mature enough to share in a meeting with the Governor on December 19 from 10am to 11am at the Governor's office. Ken also shared that there is an expectation of an Executive Order with respect to the race and gender neutral Small Business program. Dean added that another may be focused on a Disabled Owned Business Enterprise. Ken then announced that the next Council meeting will be November 21st.

- Initiative leaders provided updates as follows:
 - Dean Stotler provided an update on items 2 and 3 of the initiatives: "Encourage School Districts to report their Diversity spend on the Supplier Diversity Score Card" and "GSS to actively participate in School Districts Vendor Days including the providing of training; School Districts represent approximately one-third of the State's spend". Dean provided an update that the Contracting office is working on scheduling trainings with the schools districts, by county. These trainings will require each school to send their procurement officials to the training event. There is some push back from the school districts in scheduling. Dean requested an official letter from the Supplier Diversity Council to engage the School Districts to create alignment with the procurement training and supplier diversity efforts.
 - Dean Stotler provided an update on item 1 of the initiatives: "Examine and where practical, establish a standard for all agencies in terms of contract length and increased transparency on how the length of contract decisions are made". Dean provided an update that a national research project was conducted with all states with an outcome that there is not a length of contract statutory requirement anywhere. The decisions are left to the Agency of need, the market being procured within and the level of complexity of solicitation and award. Wendy Brown, DHSS liaison echoed the need for this flexibility and spoke against a standard contract length absent any flexibility in the process. Dean is making a copy of the Summary of Contract Term Standards survey available (attached as Exhibit D).
 - Dr. Devona Williams provided an update on item 7 of the initiatives: "Evaluate the consistency and integrity of the RFP process, including follow-through and status updates by Procurement personnel. Create accountable timelines for Vendors who have submitted formal proposals" Devona asked to hear from business owners present to learn of challenges, from a capacity perspective, of being responsive to clients when follow through and status updates are not provided to bidding vendors over period of time outside of those established in the solicitation. Devona identified that a first step to this initiative, which was assigned to her in her absence at the last Council meeting, is to gather that information to look to a broader perspective than herself and then to request a meeting with Dean Stotler of GSS. A detailed conversation followed with Devona Williams, Cathy Imburgia, and Ron Frazier providing specific personal business experiences and examples including: that vendors are held to strict timelines and the soliciting entity is not, that Cathy indicated she had not heard back from four bids she submitted last year and that she has no idea if the solicitations had been pulled back, Ron has requested a debrief to learn how his bid was evaluated, and that he thinks it is unreasonable for a company who has submitted a bid to not hear back. Dean provided comment that

MyMarketplace.Delaware.gov holds the current status of all solicitations and that if a contract is still listed then it is in play if it has not been moved forward to the awarded section. Dean further explained that there are various occurrences that may make a solicitation move more slowly than projected, including researching the technology business case, evaluations of in-person demonstrations or presentations, scheduling, budget, and other timing elements. Dean indicated that a conversation regarding milestone timelines of state procurement is a good conversation to have with various examples, which allows a conversation of various types of solicitations, some of which have codified procedures. A conversation continued regarding what caveats exist that may disqualify a bidding vendor. Ron wanted to learn more about this and about how to appeal a decision of non-responsiveness and he provided an example of a company that forgot to submit the prices sheet with their bid. Dean reviewed the risk averse standing about late submissions of materials elements of a bid submission. Dean also described the protest process and educated that the timing of a protest does not have to wait until the open or award of a bid. He further indicated that the goal of procurement is to fairness and the best outcome for the state and the vendors. Ken circled the conversation and asked the council if this topic is one that is legitimate to continue and does it belong under this initiative. Devona suggested this conversation is the vendor side and that this initiative is the process, consistency, and timelines of steps and outcomes as well as the structure of RFPs. She provided an example that a solicitation and bid that is now over one year in evaluation and will extend to March of 2014. Her focus is on the capacity of the vendor, as it is a challenge in this process to maintain capacity this long after a bid submission. Cathy suggests that the communication to the vendors about ~~of~~ the timeline changes is important and that vendors need to know their rights. Ron asked what the criteria are to determine what is material in a bid submission. Wendy Brown of DHSS shared that their RFPs state which requirements are mandatory and to therefore assume that those are materials. She further explained that if her office gives a vendor a pass to submit missing information that they need to give all vendors that equal opportunity. She made it clear that for DHSS that if mandatory requirements are not met then the bid submission is out and is not considered. Dean shared that that is consistent with GSS and that a solicitation is intended to be read by the vendors from cover to cover. He further explained that the manner in which the state treats one solicitation may apply enterprise wide to all procurements. Vendors are expected to read entire RFPs and to provide all necessary documents and materials in their submissions. Ron asked how a vendor or the community knows if anything is received late. Dean explained that all submissions are received and date stamped. Any acceptance of late submissions by a vendor that is then considered could suggest collusion with a vendor, which is a criminal act. Bids are kept in a locked facility for security purposes. The unintentional act of not submitting pricing is still a concern at the procurement table for risk aversion. Again the Chair asked if this topic should be raised into an initiative. Ron suggested including the waiver clause and Ken asked Devona to look at the waiver clause as part of this initiative. Cathy asked if this is part of the data now and if this data is considered in the

score card. She asked if the reasons for protests were known and counted. Dean offered a copy of a report from the National Association of State Procurement Officials (NASPO) on Bid Protest Research (attached as Exhibit E). He further shared examples including when a vendor raises questions during the Q&A or in the exceptions process of the solicitation. There is a learning opportunity here. Wendy added that DHSS created and implemented a pre-prebid meeting for more complex services. The purpose was for vendors to meet with staff to brainstorm or hear complaints on previous solicitations as well as to review current trends. DHSS tried this two or three times, it was open to anyone to attend you did not need to be a bidder to attend. ~~They~~ The attendance and outcome were not what was hoped for. Dr. Sakthi A. Vel asked a clarification question. Dean offered another report on this topic National Association of State Procurement Officials (NASPO) Effective Communication Whitepaper (attached as Exhibit F). There are various tools to share communication with vendors including direct vendor meetings, vendor fairs, tradeshow, and other community education opportunities. Dean made it clear that there is a hard line once an RFP is posted, then the process is formal and follows the hard time lines. Ken asked if there is something more for the council to do on this topic. Cathy asked if a vendor can excuse themselves and join a solicitation team. Dean indicated that such a vendor would have to meet the non-disclosure requirements and that the state would have to find a need and then hire a consultant for a solicitation team. He was not sure if such a need exists. Wendy added that sometimes DHSS will add a member of the public to an evaluation team, if that individual had used the services of such a contract in the past, but they would not be a provider of the services. Shirley Lerner of DSCYF added that they have had a non-participating agency join DSCYF on an evaluation team, but that it is one involved in the work of DSCYF and meeting the non-disclosure requirements. Chair again asked if the council should pursue this topic in its initiatives or not. Cathy suggested to pursue the topic as Devona raised it and then spoke to ~~on~~ item 6 of the initiatives "Devise a method for effectively communicating current Supplier Diversity Score Card information to the Supplier Diversity Community" asking if the questions about communication raised in this discussion are included in this item #6 and if the council can look at the analytics. Devona responded that those issues are included within the 7th initiative and that she will also look at the waiver clause and the bid protest data that Dean mentioned. Ken then claimed Chair's prerogative to incorporate all of these topics into initiative number 7 and Devona indicated she will collaborate with Cathy offline.

- Michelle Morin attended the Second Annual Conference of the National Association of State Minority, Women, and Disadvantaged Business Enterprise Directors (NASMWDD) this week on October 23, 24, and 25. Michelle is a new member of the Board of Directors. The agenda included various state and federal program conversations lead by top officials and or attorneys and reviewed various certification, participation goals, disparity study cautionary conversations, best practices and analytics conversation. OSD will draft a memo to highlight the outcomes of the conference to be shared with the Governor's Supplier Diversity Council and others. A large take-away is that in large part Delaware meets the best practices reviewed and discussed at this conference. As time did

not permit at this Council meeting, Chair Ken Anderson has asked that Michelle provide an overview of this conference at the next Council meeting.

- Michelle shared that Mr. Ron Tutundji of DuPont Company was recently honored with a “Shining Star Award” by the Women’s Business Enterprise Council of PA-DE-sNJ (WBEC), at their Annual Awards Luncheon on October 11, 2013. WBEC is the local chapter of the national Women Business Enterprise National Council (WBENC). Additionally, DuPont has announced the new Manager of Supplier Diversity, Mrs. Loren Hopkins Taylor. She was present with Ron as he accepted the Shining Star Award. Michelle indicated she is securing Loren’s bio to submit to Chair for consideration of continued support to the Council by DuPont.
- Ken reiterated the list of recommendations for new GSDC Voting Members as previously submitted from the last Council meeting as:
 - Mr. Charles Gillean;
 - Mr. Carlos Dipries(sp);
 - Ms. Hollis Thomases;
 - Mrs. Theresa (Terri) Brown-Edwards, Esq.; and
 - Once a bio is obtained for Mrs. Loren Hopkins Taylor she will be added to this list.
- Ron inquired if there are sources within state procurement that vendors can explain or present their capabilities. Dean responded that there are such opportunities in Delaware and that Delaware Department of Transportation (DelDOT) does pre-qualify vendors and the state may pre-qualify vendors. Further that Delaware Department of Natural Resources and Environmental Control (DNRC) does this as well. Ron asked if it is known to what extent these pre qualifications are used and what is the extent of these when the new small business focus program will begin. Dean indicated that these prequalifications are used in the Public Works procurement area almost exclusively. Vendors looking to be a prime or a sub-contractor should be on the prequalification list. These are not to pre-screen and limit. The Public Works Pre-Qualification list Dean spoke of is found at <http://dfm.delaware.gov/prequal/index.shtml>.

Public Question / Comment:

No members of the public responded to Ken Anderson, GSDC Chair’s question if any Public was present and wished to comment. No members of the public were in the meeting room, it is unknown if any members of the public were on the phone as none self identified. No questions or comments were raised by the Public.

Next Meetings:

1. A Conference Call will be held on Friday, November 15, 2013. Time and phone number to be announced at a later point in time by Ken Anderson, GSDC Chair. The purpose for the conference call is for each leader of a Council Initiative to provide an update and to vet any recommendations from each initiative that may be mature enough to bring to the attention of the Governor.
2. A meeting with the Governor is scheduled for Thursday, December 19, 2013, from 10:00am to 11:00am at the Governor’s Office. Further details to be provided by Ken Anderson, GSDC Chair.

3. The next Supplier Diversity Council meeting is scheduled for Thursday, November 21, 2013. Time and location to be announced at a later point in time by Ken Anderson, GSDC Chair.

Meeting Adjournment:

Meeting adjourned by Ken Anderson, GSDC Chair, without motion, at 11:49am.

GOVERNOR BUSH'S EQUITY IN CONTRACTING PLAN

Among the State's most important duties is the obligation to dispense public goods fairly and equitably. In a unified Florida, we must give minority- and women-owned businesses fair and equal opportunities to compete for dollars the State spends in procuring goods and services.

To the extent minority businesses* are given fair opportunities to compete, all Floridians benefit. Expanding the profitability and spending power of these businesses allows them to provide employment opportunities and to increase economic growth and development within our communities. This expansion of economic opportunity reduces unemployment and the need for State-supported social welfare programs, and at the same time increases the State tax base and the demand by minority businesses from other businesses within their industry for raw materials and production support. Increased economic output and employment by minority businesses have a positive rippling impact throughout the State.

Minority business opportunities, however, have often been the fodder for controversy. Those on one extreme would have the State ignore race and economic disadvantage altogether. Those on the other extreme defend the tired ways of the past, where members of one racial group are automatically given advantages over members of another. But there is a third way, a way that pursues and embraces diversity without reliance on automatic advantages for one group over another.

Today we are announcing a new plan of fairness and equity in the State's purchasing of goods and services. Under the One Florida Initiative, we are committed to State purchases of high-quality goods and services at advantageous prices, and to a fair and equal opportunity for all to compete for State contracts. We are also committed to embracing diversity enthusiastically, so that the State's vendors reflect the full diversity of Florida's citizens. The time has come to change to a system that is more effective and transparent. In doing so, we must honestly ask ourselves where we are now, where we want to go, and how we get there.

Where are we now?

The State has a statutory program – first adopted in 1985 and scheduled to sunset in 2001– that purports to seek fairness and equity in State contracting. Over time,

* The State's present minority business program addresses both minority-owned and women-owned businesses. For ease of reference, the term "minority business" will be used hereafter to mean both types of businesses, unless expressly stated otherwise.

however, the program has proven to be weak, ineffective and misleading. It obscures more problems than it addresses and fails to reach out aggressively to many minority businesses with whom the State could do business.

On the surface, the State's race- and gender-conscious minority business program appears to have substance. But the deeper one digs, the less substance one finds.

Under the current statutory program, the law sets voluntary goals for each agency, stated as a percentage of State contract dollars that should go to minority businesses in four categories: construction, architectural and engineering, commodities, and contractual services. Under the law, each agency is "encouraged" to spend with certified minority businesses 21 percent of its construction expenditures, 25 percent of its architectural and engineering expenditures, 24 percent of its commodities expenditures, and 50.5 percent of its contractual services expenditures. For each of these four categories, the goals are further subdivided by race and gender. For example, for contractual services, agencies are encouraged to spend 6 percent with black Americans, 7 percent with Hispanic-Americans, 1 percent with Asian-Americans, 0.5 percent with Native Americans, and 36 percent with American women.

Closer examination, however, reveals that these voluntary percentage goals are illusory and misleading, because they are applied to a "base" figure that is much smaller than an agency's total spending on goods and services. Take, for example, the 1998-99 goals for the Department of Children and Family Services (DCF). Last year, DCF had a minority business spending **goal** of \$6 million. DCF reached that figure by applying the percentage goals stated above to a minority business spending "**base**" of \$19 million. In reality, though, DCF spent approximately \$1.7 billion on goods and services last year. DCF was allowed to reduce its "base" from \$1.7 billion to \$19 million by exempting many types of projects, such as emergency procurements, State term contracts, single-source vendor contracts, and projects deemed "too difficult" for a minority vendor. So when DCF reported last year that it reached 95% of its goal, it did not mean 95% of all available spending; it meant 95% of a greatly reduced amount of money.

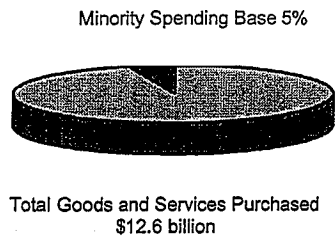
For DCF, the difference between total spending (\$1.7 billion) and the minority spending "base" (\$19 million) was approximately \$1.68 billion. The current minority business program keeps this amount hidden.

The Department of Children and Family Services is no exception; the same dynamic applies to every agency in State government. In fact, when all agencies are combined, the State spent over \$12.6 billion procuring goods and services in FY 98/99. Yet the collective minority spending "base," for purposes of calculating the goals, was less than \$627 million – only 5.0% of total available spending.

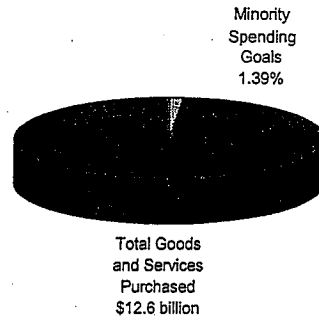
Using this artificially reduced spending **base** of \$627 million, State agencies had a collective minority business spending **goal** of \$178 million in FY 98/99. But considering

the actual spending base of \$12.6 billion for all agencies, the \$178 million goal equals only 1.4% of available State spending. The State exceeded this goal by spending \$257 million with certified minority businesses, thus allowing it to declare success. But considering the fact that the total spent was only 2.0% of available State spending, the results can hardly be deemed a "success."

FY 1998-99 Minority Spending Base
(\$627 million) vs Total
Goods and Services Purchased (\$12.6 billion)



FY 1998-99 Minority Spending Goals
(\$178 million) vs Total
Goods and Services Purchased (\$12.6 billion)

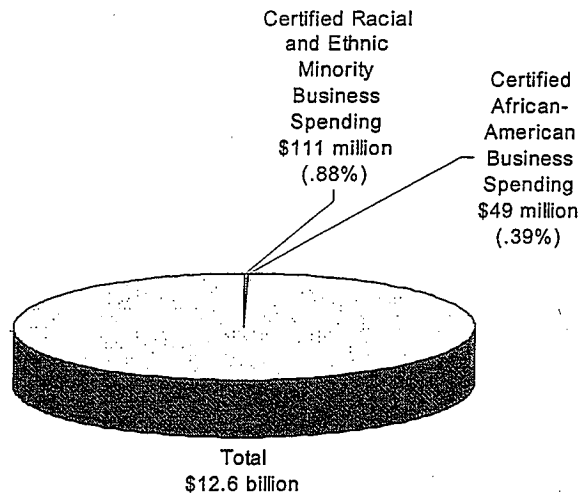


The problems with the existing minority business program do not end there. Defenders of the status quo place much of their trust in price preferences and set-asides for minority businesses. Price preferences allow minority businesses to submit bids at higher prices; set-asides automatically give all or part of a State project to such businesses. Yet recent court decisions have called into question the constitutionality of these measures. Race and gender set-asides at the Florida Department of Transportation and in Miami-Dade County have already been declared unconstitutional by federal courts. Legal counsel, based on the findings of the State's consultants, have advised that price preferences and set-asides at other agencies could also be successfully challenged. It is only a matter of time before these measures are struck down by the courts as well.

Moreover, these measures have failed, by any reasonable criterion for success. In FY 98/99, the State spent \$257 million with certified minority businesses, of which \$146 million – well over half – went to businesses owned by white women. The remaining amount – \$111 million – was spent with African-American, Hispanic, Native American and Asian-American businesses. Of this amount, African-American firms received \$49 million.

The State does not keep track of price preference and set-aside figures, but everyone agrees that these measures account for only a share of all minority business spending. Compared to the overall State spending pie of \$12.6 billion, the total amount last year (\$111 million) that went to certified businesses owned by racial and ethnic minorities was very small, roughly .9 % of all available State spending. The even smaller

subset attributable to set-asides and price preferences was minuscule in comparison to the overall State spending pie.



Race and gender set-asides and price preferences are wrong because they grant an artificial advantage at the expense of non-minority businesses, and because they too often prevent the State from utilizing the most cost-efficient vendor. But even if these measures were not wrong on these scores, it is senseless to expend so much energy and emotion fighting over measures that result in such a relatively tiny fragment of spending with minority businesses.

Yet another problem with the existing program is that agencies receive credit toward their minority business goals only when they utilize a "certified" business, *i.e.*, a business that has gone through a complicated and cumbersome certification process. The end result is that agencies have little or no incentive to reach out proactively to non-certified minority firms. And many minority businesses do not bother to participate given the bureaucracy involved.

In addition, the State has no way of measuring the amount of business it does with all minority firms. The State only tracks its spending with certified businesses, even though our consultants tell us that the State spends more money with uncertified firms than with certified ones.

To return to our example of the Department of Children and Family Services, this department directs a large amount of funds each year to non-profit agencies owned and operated by minorities. Under present law, non-profits cannot become certified, so the State does not measure this amount of spending. Thus, DCF spent a good deal more with minority firms last year than the \$6 million it spent with certified firms. The State should measure and recognize spending with all minority businesses (whether certified or not),

and should encourage agencies to reach out to all types of minority businesses, whether certified or uncertified, non-profit or for-profit.

To summarize, our review of the present minority business program shows:

- ◆ the "percentage goal" results reported by each agency present a very distorted picture of minority business spending
- ◆ the system creates no incentive to reach out to uncertified minority businesses
- ◆ the system's most controversial element, set-asides and price preferences, are its weakest and least successful feature.

Other troublesome aspects of the present system are found not in the law creating the minority business program, but in the spending practices and patterns of State agencies. Certain patterns make it difficult for these businesses to compete and strongly suggest that the State has not been proactive in reaching out to them. First, only five (5) of forty-nine (49) reporting agencies or other entities accounted for 50% of State spending with certified minority businesses last year. The Department of Transportation alone accounted for almost 16% of all spending. Second, between 1992 and 1996, 98.1% of the total amount of State disbursements went to only 5% of the total amount of non-minority firms. In other words, a relatively small number of non-minority firms are receiving the lion's share of State spending. Third, of disbursements to non-minority firms between 1992 and 1996, 83% went to non-minority firms with a presence in Tallahassee. This is particularly telling, given that the majority of minority firms are located in South Florida. Fourth, from 1992 to 1996, over 70% of goods and non-professional services were bought on term contracts, which are dominated by large non-minority firms. This concentration of State spending suggests a long-term reliance on a few suppliers with a vested interest in maintaining the status quo.

Where Do We Want To Go?

As these practices demonstrate, the current process for encouraging minority contracting in Florida has failed, yet gives the false appearance that the State has maximized its minority business opportunities. There are untapped opportunities all across State government for minority vendors and service providers who are currently overlooked. For example, there are whole categories of minority businesses that may be overlooked by State agencies because they do not count toward the agency's minority contracting goals, including uncertified businesses, not-for-profit organizations, and businesses that exceed a certain number of employees or net worth. There are minority businesses that have never contemplated contracting opportunities with the State, and if they did, would not know where to turn first. At the same time, Florida's set-aside

program, while artificially guaranteeing access to contracting for a select few, stifles the idea that unfettered access to opportunity is available to all.

There is a better way to expand opportunity for minority businesses, while ending unfair race- and gender-based State practices. Diversity in contracting is not something that can be dictated by law or edict, but something to be achieved through hard work. And we believe it can be achieved through committed leadership in a State government that makes this one of its highest priorities, and by improved procedures and practices that justly take into consideration a broad representation of Florida's commerce base.

In moving toward this system, our goals in the One Florida Initiative will be clear:

First, eliminate the artificial percentage goal-based system, and move to a system that bases its success on what matters most – the bottom line. Success should be judged by the total amount of State contracting dollars flowing to all minority businesses, in comparison with the total amount of available State spending.

Second, increase the levels of spending that the State dedicates to minority businesses.

Third, demonstrate that expanding opportunities for minority businesses can be accomplished without unfair and potentially illegal set-asides that artificially guarantee outcomes. We will demonstrate in my agencies that we can achieve better results than current race- and gender-conscious practices that continue to divide our State.

And finally, expand opportunities for minority businesses in ways that continue to respect our solemn obligation to spend taxpayers' money wisely. Our efforts to expand opportunity do not mean we will have to pay more for goods and services. There are qualified minority firms in Florida willing and able to meet the State's price for good value. Again, it takes the will and effort to find them.

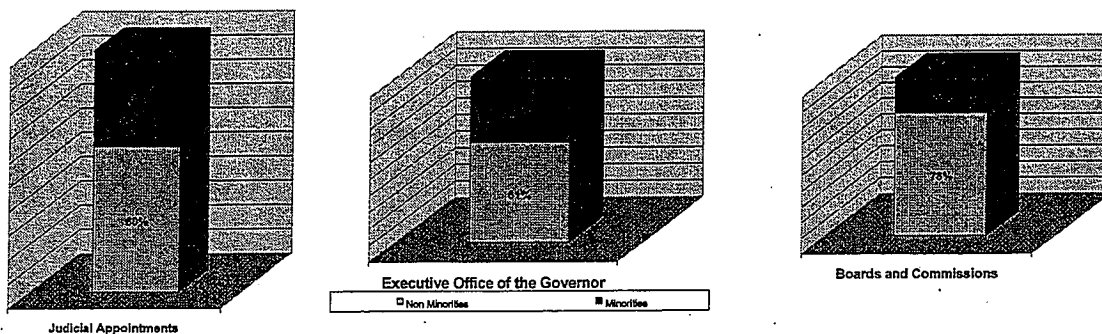
With these reforms in place, we will ensure opportunity for all and the full participation of our citizens in the commerce of the State.

How do we get there?

The programs of yesterday have outlived their usefulness, producing only a relatively small pool of minority businesses doing business with the State. Leadership to exact change is the key.

A Governor cannot do this alone. I need help – help from my agencies, from other agencies, from the Cabinet, from the State University System, and from the Legislature. But I intend to lead the way.

Through strong executive leadership, I have one of the most diverse group of agency heads and senior staff members in the history of Florida. Similarly, the diversity in my appointments to the judicial bench and to hundreds of boards and commissions is unparalleled.



Expanding economic opportunity for minority businesses will require similarly strong leadership at the top, not just in the Governor's Office, but in every executive agency. To this end, I have repeatedly brought my agency heads together to reinforce the importance of broadening minority contracting opportunities in Florida. They understand the message: we must do better than we are doing today under a system that uses smoke and mirrors to declare success. I will hold my agency heads and their procurement officers directly accountable for any failure to increase spending with minority businesses. Without accountability and consequences for poor results, policy changes will become meaningless and unproductive.

But leadership alone cannot ensure the long-term success of Florida's efforts to expand minority contracting opportunities. Changes to the State's procurement system, minority business program, anti-discrimination laws, and fiscal policies are also needed to meet our goals.

Under the One Florida Initiative, we are committed to the following changes in State policy. Most of these changes are not self-executing, and will require implementation through legislation, rule change, executive order, Cabinet action, task force or other mechanism. But all of the changes are necessary if the State is to move beyond ineffective programs toward policies and practices of greater fairness for all.

1. Implement Truth in Measurement

The present voluntary goal system actually obscures the true amount of minority business spending. The vast majority of State spending evades serious examination because it is excluded from the base to which the minority business percentage goals are applied.

The present goal system is deceptive and too easily allows the State to give the inaccurate perception that minority businesses have received fair and equal opportunities at State dollars. The system should be changed. A much better approach would be to hold each agency accountable for all of its spending, with an emphasis not on artificial and truncated goals, but on the bottom line – total actual dollars spent with minority firms.

This measure of success – total dollars actually spent – provides a much more accurate gauge of how the State is performing in this area. It is this measure by which our agencies should be judged. And it is this measure by which we intend to succeed, as we seek to increase the total dollars actually spent with minority firms each year.

Because the State measures the amount of spending with certified minority businesses only, it is presently impossible to determine just how much the State spends with minority businesses, certified and uncertified alike. Success can only be measured against a true baseline of all spending. To measure the baseline, the Department of Management Services has drafted a plan for the mandatory registration of all vendors that do business with the State. Under this plan, every vendor would be asked to identify itself as minority-owned, if applicable. This mandatory registration system would capture the total extent of minority business spending across all agencies, and afford the State an unprecedented, accurate measurement of such spending.

Legislation is necessary to eliminate the present goal system, and a legislative appropriation may be necessary to fund the changes in the State automated accounting systems that are required to measure all minority business spending.

2. Reform Procurement to Encourage the Pursuit of Diversity

The Florida procurement system must be reformed to procure the highest quality products at advantageous prices. It will have to be re-centered to break the grip of firms with a Tallahassee presence. And it must come out from under the cover of darkness, as spending decisions will be subjected to increased scrutiny and observation.

The State minority business plan has failed, in part due to deficiencies in the State's procurement system. One such deficiency is the collective failure to harness procurement agents' purchasing discretion in ways that are sensitive to diversity. To understand properly the extent to which procurement agents have discretion concerning

the vendors they use, one must understand the State's competitive bidding requirements. Although most purchases must be competitively bid, purchases in Category 1 (less than \$15,000) and Category 2 (between \$15,000 and \$25,000) need not be. In FY 98/99, the State spent \$2.4 billion in purchases within these two categories. The State could literally double the present amount of measurable minority business spending and make only a modest dent in Category 1 and 2 spending.

At least three reform measures are in order. First, procurement agents toil in relative obscurity. These agents do good work, but if their decisions are exposed to greater visibility and if they receive clear messages from leadership that the State values relationships with minority businesses, spending with these businesses will increase.

In this vein, my office has identified over 100 key procurement agents in my agencies, the Cabinet agencies, the State University System and the Water Management Districts. With the concurrence of the Cabinet and other leadership, these agents will soon report directly to me and to their agency heads the amount of minority business spending for which they are personally responsible, using the new, more accurate measurement of minority business spending that DMS will implement. We have asked the agents located in my agencies to assemble for a meeting following the press conference at which this initiative is announced. We have even flown some of these agents in from other cities. At this meeting, I will explain the One Florida Initiative and the philosophies laid out herein, and will emphasize to these agents that we can and should do better in minority business spending.

Second, all key procurement agents in all agencies should be reclassified to Select Exempt Service (SES) or Senior Management Service (SMS) status to make them more accountable to leadership. In addition, we should add diversity to the ranks of these positions.

Third, most State spending decisions are Tallahassee-centered, yet the majority of minority businesses are headquartered downstate. Shifting the locus of decision making downstate through "regionalized" State spending, where appropriate, should result in stronger local relationships between procurement agents and minority businesspersons where they live and work. Accordingly, my agency heads will look for ways to locate more purchasing agents and offices in urban regions throughout the State.

For example, the Department of Management Services operates 14 Regional Service Centers throughout Florida. These centers provide an infrastructure for locating procurement personnel in areas of the State to increase access to spending decision makers. DMS will soon place permanent procurement offices at one or more of these sites, which will address minority business opportunities within certain geographical areas of south and/or central Florida.

A few other agencies have placed purchasing personnel in district or regional offices throughout the State. But more should do so. We must do a better job of bringing decision makers closer to most minority business owners.

No further action is necessary to require procurement agents in my agencies and in the Water Management Districts to report to me; once we have implemented our new minority business measurement system, these agents will begin reporting to me and to their agency heads immediately. I will seek the concurrence of the Cabinet and of leadership in the State University System to require the other identified agents to make the same reports to me and to other leadership, including the Cabinet and the Chancellor of the State University System, where appropriate. To reclassify these positions to SES and SMS, agency heads must simply submit a request to DMS. Agency heads presently have the discretion to place more procurement personnel in cities outside Tallahassee, although legislative appropriations may be necessary to the extent these changes have a fiscal impact.

3. Cut the Red Tape in the Certification Process

To become certified, businesses must complete an extremely complicated process that takes many hours to complete and requires exhaustive amounts of information concerning the nature, ownership, history, and assets of the business. Many minority businesses decline to become certified because they view the process as cumbersome. Even my Secretary of Elder Affairs, Gema Hernandez, a Hispanic woman, refused to complete the process while a private small businesswoman because of the cost and time involved.

Other minority businesses decline to become certified because they wish to avoid the perception of preferential treatment. Still other minority businesses remain uncertified because they exceed the \$3 million net worth limit on certifiable businesses.

Currently, agencies receive credit toward their voluntary goals only when they contract with those firms that have been certified by the State as minority-owned. Although State agencies currently contract with uncertified minority businesses, the present minority business program provides little additional incentive to proactively recruit more uncertified minority businesses, because the agencies receive no goal credit for contracting with them. Ironically, our consultants tell us that the State does a majority of its minority business spending with uncertified, rather than certified, businesses.

The new universal registration system, where *all* minority vendors are registered and all minority spending is tracked, will not be a substitute for certification. We must keep the certification process, at least until such time as race- and gender-based set-asides and preferences are entirely eliminated. But certification must be made easier for minority businesses.

To that end, the Minority Business Advocacy and Assistance Office, which administers the certification process at the Department of Labor, has proposed a series of changes that will make more businesses eligible and will ease the certification burdens, especially upon start-up businesses that presently find it nearly impossible to become certified. First, the process should be streamlined to a much shorter application. Second, in an era of increasing hardship for smaller businesses in their competition against more efficient larger companies, the old size restraints on certifiability must also be eased. The size limit on certifiable businesses should be increased from \$3 million net worth to at least \$5 million, and perhaps more for certain industries; the limit on the maximum number of employees should be increased as well. Third, the State should automatically certify any business that has already become certified by a local government. Currently, the State only recognizes businesses certified by local governments that reciprocally recognize State certification. If the State automatically recognizes all local certifications, business owners need only complete a local or a State application – not both. Fourth, the burden on start-up businesses should be eased by eliminating the requirement that they produce two receipts from prior projects.

Making the certification process easier and expanding eligibility requirements will allow more businesses to become certified; rewarding agencies that reach out to the expanded universe of certified businesses will lead to increases in minority business spending. To streamline the certification process in these ways, legislation will be necessary.

4. Reprioritize the Minority Business Advocacy and Assistance Office

The mission of the Minority Business Advocacy and Assistance Office must also be reshaped. The Office currently spends most of its time determining each agency's statutory percentage goals and certifying businesses as minority-owned. Neither activity is very productive, for the percentage goals tell us little about how an agency is doing, and the certification process is mainly an additional burdensome hoop through which firms must jump to do business with the State. The Office, constrained by statutes requiring these tasks, thus spends little time assisting minority firms in more tangible ways. Eliminating the useless percentage goal process and making the certification process easier will free the Office to spend more of its time aggressively recruiting minority firms and facilitating relationship-building with procurement agents and other key decision makers. Connecting minority businesses with these decision makers – otherwise known as "matchmaking" – must become the Office's number one priority.

If matchmaking is to become the Office's top priority – and if the Office is to play a vital role in gathering minority business spending information – the Office should be moved from the Department of Labor and Employment Security to the Department of Management Services, where the bulk of the State's procurement activity takes place. Once at DMS, the Office will serve as the clearinghouse for all the minority business spending information received from the key procurement agents in every agency, which

information will in turn be reported directly to me, my agency heads, the Cabinet and other leadership, allowing us to monitor performance trends on an agent-by-agent basis.

And in keeping with the philosophy of increased matchmaking, my office has identified 84 leading minority business associations throughout the State. We are directing top procurement agents in each of my agencies to visit and speak with these associations and share with them information concerning business opportunities at each agency. Concurrently with the release of this plan, my Office is informing these associations of our initiative.

To move the Minority Business Advocacy and Assistance Office to DMS, legislation is required. Although legislation will be required to eliminate the present goal system and to streamline the certification process, no legislation is required to shift the Office's focus to matchmaking activities.

Furthermore, several changes proposed in my plan, including the State's new universal minority business registration system and the simplification of the State's certification process, will require legislation to address the possibility of fraud in registration or certification. Set-asides and price preferences have historically induced fraud, as businesses intentionally misrepresented themselves as minority-owned in order to win a set-aside or preference. The elimination of set-asides and preferences will mean far less potential for fraud, but legislation nevertheless should be adopted to strengthen existing penalties for fraud and to allow audits when necessary.

5. Boost the State's Anti-Discrimination Efforts

The State must improve its anti-discrimination efforts. Discrimination against minority businesses must be detected and eliminated through rigorous vigilance and zero-tolerance enforcement. Presently, no substantial mechanism exists for fielding and investigating complaints of racial and gender discrimination by State agents. My Chief Inspector General, Marcia Cooke, has proposed a plan that I intend to take to the Legislature to ensure that such complaints are thoroughly investigated and appropriate corrective action taken when necessary.

In short, the plan allows an aggrieved individual or corporate entity to file a complaint with the Minority Business Advocacy and Assistance Office, which in turn will direct the Office of the Inspector General at the relevant agency to perform an investigation into the allegations of discrimination. The Chief Inspector General will conduct her own investigation should the agency Inspector General investigation fail to bring about a satisfactory resolution of the matter. State employees determined to have participated in race or gender discrimination will undergo disciplinary action, up to and including termination, and businesses found to have filed a complaint of discrimination in bad faith will be barred from competing for State business for a period not to exceed five years. The plan will require implementing legislation.

We will also support legislation that will ban from State contracts businesses or individuals found by a court of law to be guilty of racial or gender discrimination, when the circumstances are appropriate and just to do so. The State must have a policy of zero tolerance for vendors who engage in such practices.

6. Eliminate Unconstitutional Set-Asides and Price Preferences

The federal judiciary has become increasingly suspect of race- and gender-conscious programs that are unsupported by air-tight evidence of present, not merely past, discrimination. A federal court has already declared unconstitutional the Florida Department of Transportation's set-aside program because its experts' evidentiary disparity study did not support it. The evidence gathered in the disparity study performed for the other State agencies strongly suggests that racial and gender preferences in the State's minority business program are similarly susceptible to constitutional challenge.

To protect the State from further legal challenge, race- and gender-based set-asides and price preferences – which, as previously discussed, lead to a relative pittance for minority businesses in any event – will no longer be used in my agencies. These measures are presently optional, and each agency has complete discretion to use them or not. Accordingly, I have directed my own agency heads not to use them. In addition, I will call upon my Cabinet colleagues to join me in this commitment for the Cabinet agencies. And we will support legislation eliminating the discretionary use of race- and gender-based set-asides and price preferences in all agencies of State government.

With the elimination of set-asides and price preferences, there is no substitute for firm, committed, personal leadership from me, my agency heads and other State leaders to improve minority business spending practices. The procurement reform described earlier will be the central mechanism for achieving success in this area.

There remains a place, however, for race- and gender-neutral programs that complement our direct leadership. One such program is the HUBZone program, an innovative initiative first sponsored by U.S. Senators Christopher Bond (R-Mo) and Max Cleland (D-Ga). The goal of the program is to stimulate economic development and create jobs via special contracting opportunities for businesses that are located in Historically Underutilized Business Zones ("HUBZones") and that hire employees who live in the surrounding communities.

Under federal law, metropolitan census tracts with a high percentage of economically disadvantaged residents are eligible for designation as urban HUBZones. Small businesses that are wholly owned and controlled by U.S. citizens and that commit to hiring at least 35% of their employees from the HUBZone may participate in the federal program. Participating businesses can self-certify compliance with the hiring component of the program, subject to challenges by interested parties.

Florida should adopt its own urban HUBZone program as a fresh alternative to existing minority contracting programs that use legally suspect racial preferences. Like the federal program, Florida's program should be narrowly tailored to cover our Front Porch communities and other truly disadvantaged urban communities, and should require business owners to create jobs in those communities. Top procurement agents should meet with managers from participating companies to share information concerning business opportunities and the State's bidding procedures. Urban HUBZone businesses would be expected to compete with other companies on price and quality, but would be awarded bonus points in competitive bid scoring because of the community-enriching value of their employment practices. This practice is similar to one presently used by several State agencies, which award bonus points to bidders which structure their bids to include significant minority subcontracting participation. Coupled with aggressive outreach by Front Porch Florida and the Minority Business Advocacy and Assistance Office, this approach should result in more jobs for minorities throughout the State of Florida and increased State contracting with minority business owners -- without quotas or set asides. Implementation of this program would require legislation.

7. Enhance Business Development for Racial and Ethnic Minorities

There are some who would have the State be entirely race-neutral in all its dealings. I believe, however, that we must be intentional about diversity. Diversity should be embraced, not shunned. Race-consciousness is appropriate, as long as the State does not benefit one racial or ethnic group to the detriment of another.

In the business arena, appropriate race-conscious programs are those that meet the legitimate business development needs of a targeted racial or ethnic group without depriving the needs of non-minorities. My agencies will develop and enhance legitimate race-conscious programs such as mentorship programs for minority businesses, linked deposit programs (whereby the State places a certain amount of its deposits in institutions that lend to eligible minority businesses on favorable terms), and finance and technical assistance programs to foster minority franchise development.

The latter minority franchise program is currently under development by the Black Business Investment Board (BBIB). The BBIB's franchise financing and development program will increase the number of minority-owned franchisees in the state, and is a win-win formula for both franchisers and franchisees. Franchisers recognize that diversity can help the bottom-line by increasing business in the urban core and areas not otherwise served. Minority franchisees in turn have the advantage of being able to offer an established product with an identifiable trademark, and benefit from the business training, management and operational system established by the franchiser.

The BBIB will identify large, well-established franchisers that wish to expand in Florida, and are interested in offering opportunities to minority entrepreneurs. The BBIB

will also address one of the major problems that minorities face in starting a new franchise business: the need for flexible financing. The BBIB financing program will be designed to provide qualified minority entrepreneurs with fixed rate financing and longer, more flexible repayment terms, as well as providing incentives for private sector lenders to participate in franchise projects.

Additionally, my administration has already reached out to involve minority businesses in emergent industries. By way of example, the Everglades Restoration Project will be one of the largest engineering projects in history, over \$8.0 billion in public works projects over a 40-year time span. The Governor's Office announces today a joint effort with Florida A&M University to correct a historical absence of minority involvement in Everglades restoration. Members of the Governor's staff will teach a course on Everglades restoration at Florida A&M beginning in January 2000. The course will be taught in the school's Environmental Sciences Institute, but students of engineering and business will be encouraged to attend. Further the Governor has asked for a report from the South Florida Water Management District by Dec. 15, on their efforts to broaden minority involvement in this momentous project.

Another initiative we will support is the expansion of the Bond Guarantee Program presently administered through the Small Business Development Council at Florida A&M University. Currently, the program assists only minority firms doing business with the Department of Transportation. The program should eventually be expanded to train and enhance the bonding capacity of minority firms doing business with other State agencies as well.

Finally, we believe that the State should play a role in encouraging the private sector to be intentional and proactive about diversity as well. My administration will promote the availability of the Internet-based database of certified minority firms to major State contractors and other large corporations throughout the State, in order to facilitate matchmaking in the private sector. The sharing of this information will improve access by minority firms to vendor or subcontracting opportunities with major businesses throughout the State.

We are also announcing today the creation of a new award for private businesses that encourage minority entrepreneurship (either through contracting, mentoring, or other means). It is our hope that the new "Governor's Award for Excellence in Diversity" and its attendant public recognition will serve as an encouragement and motivational force for exercising good corporate citizenship in encouraging minority entrepreneurship. While many corporations subcontract a percentage of their workload to select populations in order to obtain federal contracts or meet federal requirements, it is public recognition that makes companies (and others alike) appreciate the value of empowering entrepreneurship by underrepresented groups. In the coming weeks, our Office of Tourism, Trade and Economic Development will announce the criteria for selection of this new award.

We are pleased to announce that the Florida Chamber of Commerce and the Florida Council of 100 have joined us as partners in the One Florida Initiative. Their members will join forces with my administration to enhance minority entrepreneurship opportunities statewide.

We are also pleased to announce that my administration and Black Enterprise Magazine have initiated a positive dialogue, with the end goal of a partnership between the State and the Black Enterprise 100, the nation's leading black businesses. We look forward to collaboration with the Black Enterprise 100 in providing matchmaking opportunities to Florida's minority businesses. To this end, we soon hope to lead Florida's minority business leaders in a trade mission to various members of the Black Enterprise 100, in order to encourage the expansion of their business operations within the State.

To achieve One Florida, we must transcend the mechanisms of the past. There is a better way. Our plan fully embraces diversity without resort to divisive preferences. Leadership, commitment and innovative outreach programs are the keys to success and to the full and vibrant participation of minority businesses in the economic life of the State. We must be satisfied with nothing less.



**REPORT OF THE SELECT COMMITTEE ON
MINORITY, WOMEN, AND DISADVANTAGED BUSINESS
ENTERPRISE INCLUSION
PURSUANT TO HOUSE RESOLUTION 78**

SEPTEMBER 16, 2009

TABLE OF CONTENTS

<u>SECTION</u>	<u>PAGE</u>
Chairman's Remarks	3
House Resolution 78	4
Members of the Select Committee	7
Purpose	8
Committee Structure	8
Method	9
Findings	10
Recommendations	17
Appendix A: Hearing Agendas and Transcript Copy Information	23
Appendix B: M/W/DBE Workgroup Recommendations	30
Appendix C: PGCB Diversity Analyst Job Description	32
Appendix D: TRB-DBE National DBE Program Manager Survey	35

CHAIRMAN'S REMARKS

In 1984, Representative Gordon Linton convened a select committee to investigate the Commonwealth as it relates opportunities for minority-owned, women-owned and disadvantaged-owned business enterprises. Since that time, there have been various investigations to illuminate the issues surrounding opportunities for minority and women contracting in Pennsylvania. In order to commission a select committee to uncover the latest issues in this area, I introduced and the full House adopted House Resolution 78 on March 25, 2009.

Pursuant to this resolution, the Select Committee on Minority, Women, and Disadvantaged Business Enterprise Inclusion investigated the degree to which minority-owned business enterprises (MBE), women-owned business enterprises (WBE), and disadvantaged-owned business enterprises (DBE) have been utilized in contracts awarded by the Commonwealth of Pennsylvania. This report is the result of many hours of hard work by our Committee members and their staff and I greatly appreciate their diligence and commitment.

This report tries to identify institutional and other barriers with workable solutions to minimize or eliminate those impediments. As a result of our six-month investigation, I believe our set of recommendations, if enacted, will offer a more balanced and open environment for all businesses in Pennsylvania.

As Chairman, I am proud of this report because it is based on vital input from the public, businesses, experts, and state officials. We held five public hearings across our state that collected testimonies from 63 testifiers. Although as a committee we have made every effort to explore critical and various elements to a fair business climate for MBE/WBE/DBEs, I am sure there is more for us to explore in the future. Ultimately, I believe our recommendations will help small businesses grow and keep Pennsylvania moving in the right direction.

In closing, I commend all members of this Select Committee for working in a bi-partisan manner to produce this report. I look forward to working with them and the rest of our colleagues in the House and Senate to implement our recommendations.

A handwritten signature in blue ink that reads "Jake Wheatley, Jr." with a stylized flourish at the end.

Representative Jake Wheatley, Jr., Chairman

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE RESOLUTION

No. 78

Session of
2009

INTRODUCED BY WHEATLEY, FEBRUARY 11, 2009

AS REPORTED FROM COMMITTEE ON INTERGOVERNMENTAL AFFAIRS, HOUSE
OF REPRESENTATIVES, AS AMENDED, MARCH 23, 2009

A RESOLUTION

Providing for the establishment of a select committee to investigate the degree to which minority-owned business enterprises, women-owned business enterprises and disadvantaged-owned business enterprises have been utilized in contracts awarded by the Commonwealth of Pennsylvania.

WHEREAS, Over the past two decades numerous legislative proposals, resolutions, gubernatorial proclamations and executive orders have encouraged the development of programs, policies and practices designed to ensure participation by minority-owned, women-owned and disadvantaged-owned business enterprises in contracts and services awarded by the Commonwealth and its agencies, boards, commissions and authorities; and

WHEREAS, Federal, State and local government inclusion programs have existed and operated for nearly three decades; and

WHEREAS, Analytical studies reveal the level of the Commonwealth's performance in the creation of programs to ensure participation by minority-owned, women-owned and disadvantaged-owned business enterprises in contracting, as well as that of the Federal Government, other states and some local governments; and

WHEREAS, The findings of these studies evidence the need for and importance of providing opportunities for the development and growth of nontraditionally owned small business enterprises; and

WHEREAS, A national study concluded that a substantial percentage of newly created jobs are provided by firms that employ fewer than 20 persons; and

WHEREAS, Not unlike many small businesses, minority-owned, women-owned and disadvantaged-owned business enterprises have the potential of producing jobs to help reduce unemployment, thereby helping the unemployed and underemployed achieve economic independence; and

WHEREAS, The nation is experiencing a deep economic recession that has resulted in the loss of hundreds of thousands of jobs a month nationwide and a high rate of unemployment; and

WHEREAS, Pennsylvanians Statewide have not escaped the economic downturn and have suffered job loss, loss of health care benefits and, in some cases, home foreclosures; and

WHEREAS, Small businesses are the backbone of Pennsylvania's economy; and

WHEREAS, The national and global financial crisis, the high rate of unemployment, the high cost of goods and services and the resulting economic depression have combined to require the development and implementation of activities by the Federal Government to stimulate the national economy; and

WHEREAS, The Congress is considering legislation, the American Recovery and Reinvestment Act of 2009, under which the Commonwealth of Pennsylvania anticipates receiving significant Federal funds for infrastructure projects and other State government needs; and

WHEREAS, Congressional passage and Presidential approval of the American Recovery and Reinvestment Act and the subsequent allocation of funds to this Commonwealth make it necessary and appropriate to ensure that minority-owned, women-owned and disadvantaged-owned business enterprises are in a position to

participate fully in economic recovery activities anticipated by the Federal Government; and

WHEREAS, The Commonwealth appropriates millions of dollars for infrastructure projects and goods and services annually; and

WHEREAS, Owners of minority-owned, women-owned and disadvantaged-owned business enterprises have expressed concern over the failure of the Commonwealth to fully utilize their businesses in contracting and procurement activities; therefore be it

RESOLVED, That the Speaker of the House of Representatives appoint a select committee to consist of seven members, four from the majority party and three from the minority party, to investigate the awarding of Commonwealth contracts for the purpose of ascertaining the degree to which minority-owned, women-owned and disadvantaged-owned business enterprises have been awarded Commonwealth contracts between January 1, 2000, and December 31, 2008, the number of all such contracts awarded by appropriate categories, the number awarded by subject of business enterprise, the geographic location of the contracts and the total monetary value of such contracts; and be it further

RESOLVED, That the select committee may hold hearings, take testimony and make investigations at such places as it deems appropriate in this Commonwealth; and be it further

RESOLVED, that the work of the Select Committee include an investigation of barriers, including, but not limited to, institutional barriers and money, management and market barriers that may constrain participation by minority-owned, women-owned and disadvantaged-owned business enterprises in this Commonwealth's contracting and procurement activities and an identification of any specialized approaches for eliminating such barriers; and be it further.

RESOLVED, That the select committee issue a report of its investigation, which shall include any recommendations the select committee deems appropriate, to the House of Representatives within six months of the adoption of this resolution.

**Members of the Select Committee on Minority,
Women, and Disadvantaged Business Enterprise
Inclusion**

Representative Jake Wheatley, Jr., Chairman

Majority Members:

Rep. Ronald Buxton
Rep. Babette Josephs
Rep. W. Curtis Thomas

Minority Members:

Rep. Karen Beyer
Rep. T. Mark Mustio
Rep. Curtis Sonney

PURPOSE

House Resolution 78 of 2009 established the Select Committee on Minority, Women, and Disadvantaged Business Enterprise Inclusion and required the Committee to:

“...investigate the degree to which minority-owned business enterprises, women-owned business enterprises and disadvantaged-owned business enterprises have been utilized in contracts awarded by the Commonwealth of Pennsylvania.” (pg. 1 Lines 1-5)

This includes, but is not limited to, whether:

- The awarding of Commonwealth contracts between January 1, 2000, and December 31, 2008, produced a certain degree to which minority-owned, women-owned and disadvantaged-owned business enterprises have been awarded Commonwealth contracts.
- Barriers, such as institutional, money, management, and market, constrain participation by minority-owned business enterprises, women-owned business enterprises and disadvantaged-owned business enterprises in the Commonwealth’s contracting and procurement activities.
- Specialized approaches can be implemented to eliminate such barriers.

COMMITTEE STRUCTURE

House Resolution 78 specified that the Speaker of the House of Representatives should appoint seven members, four members from the majority party and three from the minority party, to the Select Committee.

METHOD

In order to gain first-hand knowledge of the current environment for minority-owned, women-owned, disadvantaged-owned business enterprises in the Commonwealth's contracting and procurement activities, the Select Committee held five public hearings across Pennsylvania and collected testimony from 63 testifiers. Both oral and written testimonies were submitted by minority, women, and disadvantaged businesses, state agencies, prime contractors, and other stakeholders.

The first hearing was held on May 20, 2009, in Pittsburgh and collected testimony from various stakeholders, including minority-owned, women-owned, and disadvantaged-owned businesses in western Pennsylvania. This hearing had 15 testifiers.

The second hearing was held on May 27, 2009, in Philadelphia and collected testimony from various stakeholders, including minority-owned, women-owned, and disadvantaged-owned businesses in eastern Pennsylvania. This hearing had 15 testifiers.

The third hearing was held on June 1, 2009, in Harrisburg and collected testimony from various stakeholders, including minority-owned, women-owned, and disadvantaged-owned businesses in central Pennsylvania. This hearing had 19 testifiers.

The fourth hearing was held on June 15, 2009, in Harrisburg and collected testimony from state agencies and the State System of Higher Education about their contracting process. This hearing had 8 testifiers.

The fifth and final hearing was held on June 29, 2009, in Harrisburg and collected testimony from various prime contractors and state-related universities about their state contracting experiences. This hearing had 6 testifiers.

After analyzing all the hearing transcripts, information collected, and approaches by other states, the Select Committee held a meeting on September 11, 2009, to discuss the Committee's draft report. It was agreed to revise the draft with various edits and vote on the final report at the Committee's next meeting.

The Committee held a voting meeting on the Committee's final report on September 16, 2009, and the report was approved by a 7-0 vote. Chairman Wheatley announced that he would present the report to the full House at the next occurrence of session.

FINDINGS

Pennsylvania Department of General Services

Governor Edward G. Rendell issued Executive Order 2004-2 to establish the guidelines and framework for eliminating barriers and creating opportunities for diverse suppliers and markets throughout the Commonwealth. The below statistics are related to minority-owned and women-owned businesses' participation in state contracts under the jurisdiction of the Pennsylvania Department of General Services and do not include the entire Commonwealth contract spend (Note: Minority women business enterprises are classified as MBEs.):

Calendar Year 2008:

Minority-Owned Business Enterprise (MBE) Commitment – \$30,938,294.85 (5.14%),
Women-Owned Business Enterprise (WBE) Commitment – \$21,948,429.53 (3.64%)
Total Commitment – \$52,886,724.38 (8.78%)

Calendar Year 2007:

MBE Commitment – \$24,491,254.76 (3.54%)
WBE Commitment – \$29,657,040.32 (4.29%)
Total Commitment – \$54,148,295.08 (7.83%)

Calendar Year 2006:

MBE Commitment – \$44,618,489.00 (5.95%)
WBE Commitment – \$22,731,037.26 (2.94%)
Total Commitment – \$72,876,474.52 (8.88%)

Calendar Year 2005:

MBE Commitment – \$20,639,231.39 (2.98%)
WBE Commitment – \$29,905,849.77 (4.32%)
Total Commitment – \$50,545,081.16 (7.30%)

The Bureau of Minority and Women Business Opportunities is the central unit with the Pennsylvania Department of General Services (DGS) that has the responsibility for promoting, facilitating, and optimizing opportunities for minority, women, and disadvantaged businesses.

Peter Speaks, Deputy Secretary of DGS and Special Advisor to the Governor for Minority, Women-Owned and Disadvantaged Business Development, testified that the Rendell Administration has accomplished the following:

- Streamlined the certification process, which resulted in an overall increase of 40% of the number of certified minority- and women-owned businesses.
- Incorporated the “best value” protocol, which looks not only at cost but technical and disadvantaged business participation as well.
- Increased the scoring weight or evaluation rate in request for proposals from 10% to 20%. For example, out of 100 points total, a maximum of 20 points can go toward minority and women business utilization.
- Created opportunities for the first time in Commonwealth real estate transactions and in energy-savings contracts, where participation levels range between 20% and 25%.

- Established a pilot micro loan program and sheltered bond program to assist emerging small businesses with access to capital and bonding.
- Formed the Office of Diversity that works very closely with the Bureau of Minority and Women Business Opportunities to create a more coordinated and integrated system across the entire Commonwealth. These two offices conducted a workgroup that made various recommendations (see Appendix B).

DGS Secretary James Creedon testified that in March 2008 the Commonwealth implemented the Business Opportunity Fund, a concept developed cooperatively between Pennsylvania Department of Community and Economic Development, DGS, Community First Fund and Bridgeway Capital. As a pilot program in 13 central Pennsylvania counties, this fund provides capital and technical assistance to MBE and WBE small businesses. In 2009, the program has been expanded to 15 additional counties in western Pennsylvania. Additionally, the fund also provides these services to emerging entrepreneurs who have historically been denied similar assistance from traditional financial institutions.

In April 2008, the Commonwealth released its first ever disparity study in building construction and design. The disparity study, which was the most comprehensive and objective measure of the effectiveness of Pennsylvania's MBE/WBE program, examined state construction projects over a three-year period of January 2003 to December 2005, to determine whether MBE/WBE participation levels were commensurate with the availability of minority-owned and women-owned businesses to perform the work. The study found that there was a *statistically significant disparity* in the award of prime and subcontracting opportunities to minority- and women-owned firms and the award of prime contracts to women-owned firms.

Peter Speaks also testified that the Rendell Administration is focusing on a number of new initiatives and challenges, such as:

- Identifying greater opportunities in the area of prime contracting.
- Establishing minimum participation targets in our procurements.
- Requiring that prime contractors bring on a non-discrimination or diversity coordinator in the \$900 million of new prison construction this year.
- Encouraging joint venturing among subcontractors.
- Working on a mentor-protégé program.
- Looking to apply the MBE/WBE program to grant applications.
- Seeking to acquire new technology or software to more timely and efficiently track and report minority and women business utilization and spend.

Chief Diversity Officer for the Commonwealth of Pennsylvania

Pennsylvania's Chief Diversity Officer Trent Hargrove testified that the office of the Chief Diversity Officer was created by Governor Rendell's Executive Order 2008-6 to establish a framework for enterprise-wide diversity management strategy to underscore the governor's commitment to creating a culture of inclusion that promotes diversity and equal opportunity throughout state government and to systematically address the changing demographics of the Commonwealth. Primary objectives include providing more effective ways to include women and minorities in our workforce, vendor participation, contracting, customer service and outreach programs. Pennsylvania is the first state in the nation to establish this position of a chief

diversity officer with the oversight authority to fully integrate and transform diversity principles at a statewide level. The Governor's Executive Diversity Council includes the Governor's Chief of Staff, DGS Secretary, Secretary of Administration, and a variety of other cabinet level positions, whose role is to guide, provide direction and approval and authority for the recommendations and programs that might be made by the chief diversity officer.

Pennsylvania Unified Certification Program

Valerie Payne, Chair of Pennsylvania Unified Certification Program (PA UCP), testified that the PA UCP certifies Disadvantaged Business Enterprises (DBE) for all aviation, transit, and highway recipients in Pennsylvania under 49 Code of Federal Regulations, Parts 26 and 23. PA UCP was created because the federal government mandated that all states cease and desist with separate DBE certification processes without reciprocity within their own states. PA UCP forged a collaborative relationship with DGS and executed a Letter of Understanding so that firms that are currently certified by the PA UCP receive a truncated DGS application, which cuts down certification time, and helps to remove barriers. With the thrust at the national level being toward reciprocity between states, PA UCP is already working on a draft reciprocity agreement with surrounding states to further increase opportunities for DBEs.

PA UCP has a website (www.paucp.com) where all firms certified as DBE and/or Airport Concessions Disadvantaged Business Enterprise (ACDBE) in Pennsylvania are listed in a database which can be searched by DBE firm name, type of business, residing county, class type, North American Industry Classification System (NAICS) code, by keyword search or firms' work description. The database currently lists 1,263 firms eligible to participate as DBEs or ACDBEs.

Pennsylvania Turnpike Commission

Valerie Payne, Director of Policy and Administration for Pennsylvania Turnpike Commission (PTC), testified that since 1991 the Pennsylvania Turnpike has awarded \$3.82 billion in construction contracts, of which \$381 million or approximately 10% was awarded to MBE/WBEs. Of that amount, \$177 million went to MBE and \$204 million to WBE. Since 2000, the Turnpike has awarded \$660 million in engineering consultant contracts, \$76 million or approximately 11.5% was awarded to MBE/WBEs. The Turnpike's efforts have been recognized by the US Department of Transportation's Office of Small and Disadvantaged Business and has received a minority enterprise development award from the Minority Business Opportunity Commission of the US Department of Commerce.

Pennsylvania Department of Transportation

Tucker Ferguson, Director of the Bureau of Construction and Materials for Pennsylvania Department of Transportation (PennDOT), testified that PennDOT administers two separate equal opportunity programs: the federal DBE and the Commonwealth's MBE/WBE programs. PennDOT has 4 DBE categories: 1) construction goals; 2) consultant engineering goals; 3) research programs; and 4) other services types of programs and contracts. In response to Governor Rendell's Executive Order 2004-6, PennDOT utilized contracting mechanisms such as invitations for bid, sole source contracts, purchase orders, and requests for proposals to achieve an 8% participation level for MBE/WBE firms in agency-controlled contracts. PennDOT does monitor MBE/WBE participation on site and primes have seven days to meet their goals.

Pennsylvania Gaming Control Board

Mozelle Daniels, Director of Diversity and Special Counsel of the Executive Director for the Pennsylvania Gaming Control Board (PGCB), testified that out of 393 construction contracts for PGCB, 146 or 37.1% were awarded to minority and women owned businesses, which is the highest amount of inclusion of all state agencies that provided testimony to the Committee. PGCB has requirement that all general and subcontractors deliver a formal diversity plan to the entity before commencing work on a construction site. To ensure accountability, these contractors are also required to provide quarterly reports concerning the performance of its diversity plan (see Appendix C for PGCB's Diversity Analyst job description. These reports include:

- The total number and value of all contracts or transactions awarded for goods and services.
- The total number and value of all contracts awarded to MBE/WBEs.
- A list of each contract or transaction awarded to MBE/WBEs and the actual value of each contract or transaction.
- The total number and value of all contracts awarded that contain a participation plan.
- A list of each subcontract awarded to MBE/WBEs under contracts containing a participation plan and the actual value of each subcontract.
- A comprehensive description of all efforts made by the regulated entity to monitor and enforce the participation plan.
- Information on minority and women investment, equity ownership and other ownership or management opportunities initiated or promoted by the regulated entity.

Pennsylvania State System of Higher Education

Dr. Peter Garland, Executive Vice Chancellor of the Pennsylvania State System of Higher Education (PASSHE), testified that PASSHE must follow the state Procurement Code like all state agencies and recognizes the importance to educate and encourage the growth and development of MBE/WBE as well as other diverse suppliers and contractors. PASSHE's efforts include:

- Use the DGS's MBE/WBE database as a tool for PASSHE procurements and encourage prime contractors to do the same for subcontracting.
- Participate in diversity supplier/trade shows or other procurement related community outreach programs.
- Host a "Meet the Buyer" or diverse supplier trade shows locally or regionally in conjunction with other PASSHE universities or other agencies. These shows include presentations on how to do business with PASSHE.
- Provide opportunities for communication such as registries and websites.
- At the local level or in conjunction with other PASSHE entities, advertise in publications with quantifiably diverse demographics promoting the University as a buyer of goods and services.
- Provide information electronically concerning procurement opportunities to organizations representing diverse groups to facilitate the dissemination of this information through diverse communities.
- Provide training for procurement personnel on supplier diversity best practices.
- Membership and participation in diverse organizations such as Minority Supplier Development Council (MSDC) and Women's Business Enterprise Council (WBEC).

- Individual mentoring with suppliers to educate and provide a better understanding of how to prepare successful proposals and debriefing sessions to explain areas for improvement.

PASSHE's new strategies for 2009-2010 include:

- Continual sponsorship/participation in Supplier Fairs/Diversity Events.
- Spend analysis to look for opportunities to do larger collaborative contracts in commodity areas which are core competencies for larger groups of diverse suppliers such as promotional items and consulting.
- Improve the PASSHE website to include posting a calendar of events for all of the universities, creating a central registry of diverse suppliers that all universities can access, and posting presentations on how to do business with PASSHE.
- Create links and newsletters to information related to PASSH's MSDC and WBEC memberships as well as provide training on their database information.

The Pennsylvania State University

Duane Bullock, Manager for Supplier Diversity and Environmentally Responsible Purchasing at the Pennsylvania State University, testified that the University established the Supplier Diversity Program in January 2003 to ensure that minority, woman-owned, veteran and HUBZone businesses have full opportunity to compete for Penn State's business. The University has a full-time Supplier Diversity Manager and a Contractor Liaison in its Procurement Services and Office of Physical Plant Departments. These positions were designed to develop and maintain a strategic plan with the perpetual goal of increasing contractual commitments and procurement activity with diverse suppliers and contractors. Penn State's objectives in working with diverse suppliers and contractors are:

- To develop new and creative ways to utilize MBE, WBE and small businesses in every possible procurement opportunity.
- To ensure that relationships are mutually beneficial and cost-effective to both the University and its suppliers.
- To further develop the competitive supplier pool across all commodity and service categories.

University of Pittsburgh

The University of Pittsburgh submitted written testimony to state that the University encourages the use and development of minority and disadvantaged business enterprises, as well as enterprises which employ those who are physically challenged, in supplying goods and services to the institution. University Policy 05-02-05, Department Purchasing Authority and Responsibilities, requires that "positive efforts should be made to provide opportunities to bid to disadvantaged, women, and minority-owned businesses." Led by the University's Supplier Diversity Coordinator, all University of Pittsburgh employees who actively participate in the procurement decision-making process are to aggressively identify and provide opportunities to diversity suppliers.

Lincoln University

Lincoln University submitted a written statement to indicate that the University's standard contract terms and conditions include a provision related to minority-owned business subcontracting and reporting: "Because of its recognized role in the education of minority students, Lincoln University views with great importance affirmative efforts to employ on its contracts women and other minorities. The contractor therefore agrees to use its best efforts to give women and other minorities the maximum practicable opportunity to participate in its contracts and in the subcontracts it awards to the fullest extent consistent with efficient performance of its contract. Upon request the contractor should be prepared to provide evidence or documentation that they have utilized their best efforts concerning minority participation."

Temple University

Temple University submitted a written statement to state that the Office of Business Relations and Procurement was established in 2006 to ensure that MBE/WBE/DBEs are aware of business opportunities afforded by Temple. This office's director is charged with identifying and assisting MBE/WBE/DBEs in their interaction with the University's Purchasing Department. The office also is responsible for monitoring MBE/WBE/DBE participation in procurement of goods and services, as well as capital projects. Furthermore, the office works with various MBE/WBE/DBE organizations to ensure that their members are aware of Temple's interest in doing business with them and also sponsors events where information is made available to interested vendors and service providers. Where possible the Purchasing Department will include MBE/WBE/DBE vendors who are based close to the University in the bid process, in hopes of stimulating the local neighborhood economy and strengthening the local community. Temple is committed to improving MBE/WBE/DBE participation in all of its purchasing decisions.

National Survey of DBE Program Managers

Michael Behney, Director of Penn State University's Institute of State and Related Affairs, testified about a national survey of state DBE program managers conducted by the Center for Survey Research at Penn State Harrisburg. See Appendix D for the results, which include the 30 most important problems facing DBEs, 21 DBE program administration issues; and 80 innovative and race neutral activities in state DBE programs.

Barriers for MBEs and WBEs

Based on the testimonies collected at the Select Committee's five public hearings, barriers were found in eight areas: 1) communication/information; 2) process; 3) certification; 4) bonding; 5) standards/requirements; 6) mentoring/partnerships; 7) monitoring/tracking; and 8) enforcement. The Select Committee found that minority-owned, women-owned, and disadvantaged-owned business enterprises have to overcome various barriers to succeed:

- Lack of access to capital and necessary financial resources.
- Slow payment schedule from prime contractors to subcontractors.
- Awareness of state contract opportunities.
- Monitoring and enforcement of MBE/WBE participation.
- Limited approaches for business growth.

RECOMMENDATIONS

All state agencies should continue to implement the recommendations of the Minority, Women and Disadvantaged Business Enterprise Workgroup (see Appendix B), which consisted of representatives from the Pennsylvania Departments of General Services, Transportation, Community and Economic Development, and Public Welfare. These recommendations were made with the specific understanding that present funding and resources are limited and that a multi-year implementation and priority process would be required.

POTENTIAL LEGISLATION OR REGULATIONS

The Select Committee believes that its recommendations can be implemented via legislation or regulations to eliminate the systemic and historic barriers facing minority, women, and disadvantaged businesses in Pennsylvania. The legislation would also include other governmental or private entities receiving state funds.

This proposed legislative and regulatory package would institutionalize contracting opportunities in the Commonwealth for MBE/WBEs. Although DGS has certain policies in place governing MBE/WBE participation, executive orders are usually issued by each administration and becomes the primary tool for creating opportunities for MBE/WBE. With legislation and regulations, such opportunities can become more permanent and sustainable. The Committee proposes the following:

1) Definition of Small Business

In order to maximize and expand opportunities for minority- and women-owned businesses in state contracting, a small business, including MBE/WBEs, shall be considered as a business that is independently owned and operated; not dominant in its field of operation; not a subsidiary of another business; and not having not more than 250 employees. The definition of "minority" within the Small Business definition should also be reviewed for possible redefinition to create a level playing field. The inclusion of disabled veteran-owned business enterprises should also be further considered.

2) Mentor/Protégé Program

All Commonwealth agencies, boards, commissions, colleges and universities shall adopt and institute, with the assistance of DGS, a mentor-protégé program to assist, support and enable small MBE/WBEs to successfully compete for prime and subcontract awards by partnering with large companies (mentors) in state contracts. In addition, the mentor-protégé arrangement between a prime contractor and minority, women disadvantaged subcontractor shall be an important factor to be considered or weighed by the agency, board, commission, college or university in the award of any Commonwealth contract or award. DGS shall establish the appropriate and applicable guidelines and criteria for firms to participate in a mentor-protégé program.

3) Small Business Reserve

All Commonwealth agencies, boards, commissions, colleges and universities shall establish a Small Business Reserve (SBR) for the purpose of increasing economic opportunities for small businesses and affording small businesses, including MBE/WBEs, the opportunity to bid on state government contracts without competing with larger businesses.

Pursuant to section 2101 of the Commonwealth Procurement Code, 62 Pa. C.S. sec. 2101, it is the Commonwealth's policy to assist small businesses, including MBE/WBEs, with state contracting opportunities. Pursuant thereto, all Commonwealth agencies, boards, commissions, colleges and universities shall set into their SBR 10% of their procurement dollars for award to qualified small businesses. This amount shall consist of procurement dollars beginning \$25,000 dollars up to an amount not to exceed \$5 million. Bidders shall self-certify that they are qualified small businesses and verification of status will be confirmed by the awarding agency, board or commission prior to award.

For purposes of the SBR, the above definition of small businesses shall remain at 250, but shall be categorized in the following tiers:

- Tier 1: 0 – 100 employees with gross revenues not exceeding \$10 million and \$25 million for IT. All small businesses in this tier may bid on any SBR contract.
- Tier 2: 100 – 200 employees with gross revenues not exceeding \$30 million and \$35 million for IT. Small businesses in this tier may only compete for contracts \$100,000 and greater.
- Tier 3: 200 – 250 employees with gross revenues not exceeding \$40 million and \$45 million for IT. Small businesses in this tier may only compete for contracts \$250,000 and greater.

4) M/W/DBE Aspirational Targets

Commonwealth agencies, boards and commissions shall establish an overall aspirational target of 25% of procurement and construction dollars going to MBE/WBEs in all state contracts and grants, including but not limited to procurement of goods and services, construction, professional services, consulting, insurance, investment brokers and managers, bond work, real estate transactions and energy savings contracts. This section and aspirational targets shall also apply to sole source contracts. Contracts with optional renewal clauses that did not have initial M/WBE requirements at award time shall be subject to M/WBE review and inclusion requirements prior to the renewal of said contract. The agencies shall monitor, track, enforce and report on the award of any contract or grant quarterly and annually on their utilization and spend with M/W/DBEs to the Appropriation Chairs in the state House and state Senate.

5) Reciprocity of Certifications between DGS and PA UCP

In order to create greater uniformity and consistency in the Commonwealth's certification process, DGS shall accept the certification of the Pennsylvania Unified Certification Program (PA UCP). Certification of any MBE/WBE by DGS may be accepted by all local, city, county, municipal, school district and any other governmental or public entity as being adequate certification for the purpose of bidding or participating on any governmental or public bid, contract or award.

Any local, city, county, or municipal governments, school district, governmental or public entity, including colleges and universities, receiving Commonwealth funds of any amount shall be required to implement a MBE/WBE Diversity program that is subject to review by DGS. If a governmental or public entity, including colleges and universities, does not have a MBE/WBE program, the Commonwealth's program under the Bureau of Minority and Women Business Opportunities within DGS shall be applied to any contract, grant or project funded with state dollars to ensure compliance with all requirements.

6) Prompt Payments

Payments to subcontractors, including MBE/WBEs, shall be made within five business days of receipt of payment by the prime vendor. In addition, subcontracts with MBE/WBEs will not contain provisions waiving legal rights or remedies provided by laws or regulations of the federal government, Commonwealth of Pennsylvania, or the issuing authority through contract provisions or regulations. Moreover, prime contractor and prime consultants shall not impose provisions on MBE/WBEs that are more onerous or restrictive than the terms of the prime's contract with non-MBE/WBEs.

7) Diversity Plan

Through incentives, prime and general contractors should be encouraged to provide a Diversity Plan when bidding on work with the Commonwealth. All prime and general contractors doing business with any Commonwealth, agency, board, commission, college or university employment must submit a formal Diversity Plan to be reviewed and approved by the issuing agency, board, commission, college, or university. The prime and general contractors shall also be required to prepare and publish an annual Diversity Plan for inclusion of MBE/WBEs in any contract or grant, and identify the affirmative steps that will be utilized for inclusion of MBE/WBEs, such as:

- Including qualified small MBE/WBE/DBEs on solicitation lists.
- Assuring that small MBE/WBE/DBEs are solicited whenever they are potential sources.
- Dividing total contract requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small MBE/WBE/DBEs.
- Establishing delivery schedules, when the requirements of the work permit, which encourage participation by small MBE/WBE/DBEs.
- Tracking and counting MBE/WBE employment and labor.

8) Solicitation and Utilization

In addition to complying with existing Commonwealth policy requirements relating to the solicitation and utilization of small and disadvantaged businesses, contractors and grantees doing business with the Commonwealth shall make reasonable and good faith efforts to provide maximum practicable opportunities for small disadvantaged businesses to participate as contractors, professional service providers, subcontractors and suppliers. DGS' Bureau of Minority and Women Business Opportunities (BMWBO) shall provide quarterly training sessions on contracting opportunities. Contractors and grantees, at a minimum, shall:

- Consult with BMWBO to ensure significant contracting, professional service, subcontracting and purchasing opportunities for MBE/WBEs unless DGS agrees that contractor or grantee participation in outreach activities will satisfy this requirement.

- Participate in outreach activities and events to increase small and disadvantaged business interest and participation in contracting, professional service, subcontracting and purchasing opportunities; and the extent of the contractor's or grantee's commitment to participate in outreach participation shall be a consideration in the award of any contract or grant.
- Use the DGS website (www.dgs.state.pa.us) to identify certified MBE/WBEs as potential sources for professional service, subcontracting, purchasing, construction, equipment, services and supplies.
- Solicit certified MBE/WBEs for all contracting, professional service agreements, subcontracting and purchasing opportunities.
- Include certified MBE/WBEs on solicitation lists.
- Prepare and keep records of solicitations, including a bid tabulation, showing names of all firms solicited and the dollar amount of the bid, quote or proposal, as well as copies of all bids, quotes and proposals received; and
- Provide monthly reports to BMWBO on small disadvantaged business utilization.

9) Professional Services – Insurance Brokerage and Underwriting

In an effort to encourage and create greater economic opportunities in the area of professional services where MBE/WBEs and small disadvantage businesses have been historically underutilized, such as in the area of insurance underwriting as brokers services; investment management and brokerage services, law, auditing, architectural and engineering, and accounting, all Commonwealth agencies, boards, commissions, colleges and universities shall remove all barriers that limit or restrict participation by MBE/WBEs and shall utilize these MBE/WBEs in these areas to maximum opportunities to the extent possible or where feasible. This section shall also be applied to all sole source contracts.

10) Monitoring and Enforcement

Pursuant to its authority under the Commonwealth's Contract Compliance laws, policies and requirements, DGS and other state agencies shall institute and implement all necessary monitoring and enforcement of the provision contained herein and apply to the Commonwealths MBE/WBE Program; and shall implement and follow all contract compliance requirements, policies, guidelines and regulations and applicable laws pertaining to small minority women and disadvantaged businesses.

Each Commonwealth entity shall also provide mandatory quarter and annual reports on utilization of MBE/WBEs on the contract and an evaluation of the prime contractor's performance on the contract in dealing with the subcontractor or MBE/WBEs. Failure to comply with this requirement shall result in the withholding of payments to the prime contractor, suspension or debarment from doing any work for the Commonwealth in the future. DGS and any other agency, board, commission, college or university may also institute all appropriate and necessary administrative, legal, judicial and other proceedings after inquiry, review and/or investigation, if it finds that any person, contractor or grantee has failed to comply with or has violated any requirement or action set forth in these provisions.

11) Statewide Bonding Program

In order for MBE/WBE construction firms to build capacity and to competitively and successfully bid on state and other public contracts, the Commonwealth, through DGS, in concert with funding from the Department of Community and Economic Development, and the General Assembly shall make an annual appropriation of \$5 million for the Statewide Bonding Program.

Based on best practices, including the pilot project conducted by Minority & Women Educational Labor Agency (MWELA) in Allegheny County and comparative analyses of other states, DGS shall establish the criteria and structure for the statewide bonding program.

12) Agency, Board and Commission Oversight and Responsibility

All Commonwealth agencies, boards, commissions, colleges and universities shall identify best practices to significantly increase contracting opportunities for MBE/WBEs. All agencies, boards and commissions issuing and awarding contracts and/or grant funding shall develop and implement uniform templates, best practices and procedures to increase oversight, transparency and accountability in overseeing, administering, monitoring and enforcing requirements to ensure increased and sustained contracting opportunities for MBE/WBEs and shall perform the following:

- Ensure that M/W/DBEs participation is included as part of the agencies strategic priorities through identification of measurable goals and objectives.
- Develop a best practices manual for uniform implementation of policies, practices, programs and participation goals for M/W/DBEs.
- Establish a comprehensive quarterly and annual reporting process, which includes award amount and actual spending, for contractors, subcontractors, and suppliers.
- Designate single point of contact to implement, monitor and report workforce utilization and agency contractor participation (see Appendix C for possible job description).
- Create a coordinated cross-agency, integrated small business support services system to provide training, consulting information management, business management and technical assistance to M/W/DBEs to acquire the proficiency to compete on an equal basis with majority contractors, vendors, and consultants.
- Identify uniform monitoring, enforcement, tracking and reporting and guidelines practices.
- Allocate \$1 million to obtain uniform customized software program for monitoring, tracking and reporting on MBE/WBE participation levels, including but not limited to, the percentages, dollar amount, ethnicity, gender, and geography.
- Expand ability to quantify and measure the effectiveness of agency, board and commission MBE/WBE programs.
- Establish a disadvantaged business aspirational target of 25% for all procurements and spend with MBE/WBE.
- This section shall apply to the all sole sourced contracts where feasible and practicable and to all contracts on the IT/ITQ.
- Review DGS' e-marketplace system for potential expansion to all state agencies.

13) Restructuring of DGS' Bureau of Minority and Women Business Opportunities

The Deputy Secretary and Advisor to the Governor for Minority and Women Business Development, which oversees DGS' Bureau of Minority and Women Business Opportunities, should be elevated to a cabinet level position in a governor's administration to ensure continued oversight of MBE/WBE/DBE participation in state contracts. A cabinet secretary level position would carry the necessary staff and priorities to create greater accountability, as well as stronger monitoring and enforcement.

14) Delegation Agreements

DGS can authorize another agency, board or commission to procure goods and services or construction on behalf of the Commonwealth under certain conditions and act as a purchasing agency and contract on its own behalf for construction services if:

- The total estimated construction contract is no greater than \$100,000; and
- The agency complies with the requirements and procedures for competitive sealed bidding, competitive sealed proposals, multiple awards, sole source procurement, or emergency procurement.

The Commonwealth's MBE/WBE construction program under DGS shall apply to all sole sourced and delegated contracts and should be expanded across the Commonwealth enterprise to include, but not limited to, the following provisions that may be policy:

- Specifications for RFBs, RFPs, and RFQs for all Commonwealth-funded projects should include BMWBO's program requirements.
- Solicitations for all Commonwealth funded construction and design professional services contracts should be submitted to BMWBO before the contract is released to the public to ensure compliance with the MBE/WBE program requirements.
- Projects for the Commonwealth's universities and colleges should be subjected to the BMWBO's MBW/WBE program requirements.
- Large contracts should be unbundled to maximize small business participation at both the prime contract and subcontract levels. In making the initial determination whether subcontracting opportunities exist in a given contract, the Commonwealth should investigate the opportunities for unbundling large contracts. Unbundling these large procurements would increase the opportunities for MBE/WBEs and other small businesses to compete for Commonwealth contracts.

In determining whether projects should be unbundled, the following criteria should be considered:

- Whether or not the project takes place in more than one location.
- Size and complexity of the procurement.
- Similarity of the goods and services procured.
- Sequencing and delivery of the work.
- Public safety issues and convenience.
- Procurement segmentation options.

Projects that are initially funded by sources other than the Commonwealth, but are later reimbursed by the Commonwealth, in whole or part, should also be subjected to the MBE/WBE

provisions. These delegation agreements shall include enforceability provisions and the principal of detrimental reliance.

15) Financial Support and Technical Assistance

Financial support and technical assistance should be made available to firms that participate in programs through various state agencies. All Commonwealth agencies should continue to connect MBE/WBEs to other entities such as the Small Business Development Centers, Minority Business Enterprise Centers, Professional Technical Assistance Centers, for financial and technical assistance. To ensure maximum financial support, further study is needed of other states' best practices to determine additional measures to overcome the lack of capital barrier.

16) Require Prime Contractors to Make Good Faith Efforts

The Commonwealth should develop concise and detailed good faith effort requirements for its prime contractors, to ensure they are making a genuine attempt at meeting the state's MBE/WBE subcontractor participation requirements. Documentation of a good faith effort should include, but not be limited to, the following:

- Attendance at pre-bid or pre-proposal conferences.
- Copies of written notification sent to all MBE/WBEs that perform the type of work to be subcontracted, in sufficient time to allow the MBE/WBE to participate effectively.
- Advisement of the MBE/WBE of the specific work the prime contractor intends to subcontract, that their interest in the project is being solicited, and how to obtain information for the review and inspection of the plans, specifications, and requirements of the bid.
- A written statement that economically feasible portions of work were selected to be performed by MBE/WBEs, including where appropriate, segmenting or combining elements of work into economically feasible units.
- A statement of the efforts made to negotiate with MBE/WBEs, including the name, address, and telephone number of the MBE/WBE that was contacted; the date the negotiations took place; and a description of the information provided to the MBE/WBE regarding the plans, specifications and requirements for the portion of the work to be performed.

Appendix A

Hearing Agendas and Transcript Copy Information

Contact Information

For copies of hearing transcripts, go to www.house.state.pa.us or contact:

Anthony Frank Barbush
Chief Clerk
Pennsylvania House of Representatives
129 Main Capitol Building
Harrisburg, PA 17120-2020
(717) 787-2372



**Select Committee on Minority, Women and Disadvantaged Business Enterprise Inclusion
Public Hearing
May 20, 2009**

David L. Lawrence Convention Center – Pittsburgh, PA

AGENDA

3:30 p.m. Welcome and Opening Remarks

3:35 p.m. Panel One:

- **Monica Jones** – Allegheny Airport Authority
- **Susan Lami** – Lami Grub Architects, LP
- **Kathleen Bowman** – Victory Security Agency, LP
- **Greg Spencer** – Randall Industries
- **John Clark** – John J. Clark & Associates

4:35 p.m. Panel Two:

- **Lynne Jenkins** – Controls Link, Inc
- **Suresh Ramanathan** – Koryak Consulting, Inc.
- **Donald Williams** – Jet Industries
- **Fredrick Douglas** – Cosmos Technologies, Inc.
- **Kris Kirk** – Mentors, Inc.
- **Howard Graves** – Graves Architects

5:35 p.m. Panel Three:

- **Clarence Curry** – Sports and Exhibition Authority
- **Marc Little** – MWELA
- **Victor Diaz** – Hispanic Chamber
- **Oscar Worthy** – African American Chamber

6:30 p.m. Closing Remarks



**Select Committee on Minority, Women and Disadvantaged Business Enterprise Inclusion
Public Hearing
May 27, 2009
Pennsylvania Convention Center – Philadelphia, PA**

AGENDA

1:00 p.m. Welcome and Opening Remarks

1:05 p.m. Panel One:

- **Geri Swift** – Women's Business Development Center; Women's Business Enterprise Council of PA-DE-sNJ
- **Narasimha (Nick) B. Shenoy** – Asian American Chamber of Commerce of Greater Philadelphia
- **Leslie Stiles** – Pennsylvania Commission for Women
- **Varsovia Fernandez** – Greater Philadelphia Hispanic Chamber of Commerce
- **Jackie Hill** – PA Minority Business Enterprise Center

2:05 p.m. Panel Two:

- **Bruce A. Crawley** – Millennium 3 Management, Inc.
- **Kim Johnson** – African American Chamber of Commerce of PA, NJ & DE
- **Gary Shepherd** – 3rd Floor Media
- **Charnelle Hicks** – CH-Planning
- **Barnell D. Flowers** – BDF Industrial Fasteners

3:05 p.m. Panel Three:

- **Maceo N. Davis** – Quoin Capital LLC
- **Angelo R. Perryman** – Perryman Building and Construction Services, Inc
- **Karen Miller** – K & W Safety Construction Firm Ltd
- **George Stevens** – CSP Reprographics Inc
- **Lawrence O. Dibor** – Adcon Consultants Inc
- **Lennox Carth** – CKG Architects

4:05 p.m. Closing Remarks



**Select Committee on Minority, Women and Disadvantaged Business Enterprise Inclusion
Public Hearing
June 1, 2009
Room 60 East Wing – Harrisburg, PA**

AGENDA

10:00 a.m. Welcome and Opening Remarks

10:05 a.m. **Harry C. Alford**, President/CEO – National Black Chamber of Commerce

10:20 a.m. Panel One:

- **Peter Speaks**, Deputy Secretary of Department of General Services and Special Advisor to the Governor for Minority, Women-Owned and Disadvantaged Business Development
- **Valerie Payne**, Chair of PA Unified Certification Program and Director of Policy and Administration for PA Turnpike Commission
- **Paul Navarro** – Hispanic Chamber of Commerce of Central Pennsylvania
- **Amma Johnson** – Harrisburg Regional Chamber & CREDC
- **Jeffrey Lawrence** – African American Chamber of Commerce of Central PA
- **Nathan Heitzman** – Cheyney University

11:20 a.m. Panel Two:

- **Michael Behney** – Transportation Research Board, DBE Committee
- **Rosemary Chiavetta, Esq.** – Chiavetta Consulting
- **O. Tyrone Barnett** and **Fran Litten** – Diversetech
- **Robert Hendricks** – H2 Acquisitions Services
- **Bony Dawood** – Dawood Engineering Services
- **Patricia Gingrich** – American Personnel Managers & Consultants

12:20 p.m. Panel Three:

- **Leland Nelson** – Dirty Dog Hauling
- **Michelle Robinson** – Michelle Robinson Architects
- **Stephen L. Powell** – Powell Steel
- **David Cobb** and **Finesse Cobb** – DFC Graphics
- **Bill Alonso**, President – Labor Finders, Inc.
- **Lamar Childs** – LB Construction Enterprises



**Select Committee on Minority, Women and Disadvantaged Business Enterprise Inclusion
Public Hearing
June 15, 2009
Room G-50 Speaker K. Leroy Irvis Office Building – Harrisburg, PA**

AGENDA

- 10:00 a.m. Welcome and Opening Remarks
- 10:10 a.m. **Governor's Office of General Counsel**
Rodney Akers, Deputy General Counsel
- 10:30 a.m. **PA Department of Transportation**
H. Tucker Ferguson, P.E., Director of the Bureau of Construction and Materials
Jocelyn Harper, Director of the Bureau of Equal Opportunity
- 10:50 a.m. **PA Gaming Control Board**
Mozelle Daniels, Director of Diversity & Special Counsel of the Executive Director
- 11:10 a.m. **PA Turnpike Commission**
Valerie Payne, Director of Policy and Administration
- 11:30 a.m. **PA Department of General Services**
James P. Creedon, Secretary
- 12:30 p.m. **Office of Administration**
Trent Hargrove, Chief Diversity Officer for the Commonwealth of Pennsylvania
- 12:45 p.m. **PA State System of Higher Education**
Dr. Peter Garland, Executive Vice Chancellor
- 12:55 p.m. Closing Remarks



**Select Committee on Minority, Women and Disadvantaged Business Enterprise Inclusion
Public Hearing
June 29, 2009
Room G-50 Speaker K. Leroy Irvis Office Building – Harrisburg, PA**

AGENDA

10:00 a.m. Welcome and Opening Remarks

10:05 a.m. Panel One:

- **Myrna Toro**, President/CEO – Synterra Ltd.
- **John Smith**, Client Executive – Computer Aid, Inc.

10:50 a.m. Panel Two:

- **Andrew Notarfrancesco**, Manager – Gilbane Building Company
- **Jeff Kimball**, President/CEO – Kimball Corporation
- **Mike Cain**, Senior Project Manager – Mascaro Construction Company

11:50 a.m. **Duane Bullock**

Manager of Supplier Diversity and Environmentally Responsible Purchasing
Penn State University

12:25 p.m. Closing Remarks

Appendix B

**Minority, Women and Disadvantaged Business Enterprise Workgroup Recommendations
Submitted via Testimony of Pennsylvania's Chief Diversity Officer Trent Hargrove
at Select Committee's Public Hearing on June 15, 2009**

Minority, Women and Disadvantaged Business Enterprise Workgroup Recommendations

- 1) Identification of best practices on enterprise and agency levels and developing and recommending uniform templates, practices, and implementation procedures to insure inclusion of M/W/DBEs in all aspects of agency operations and contracting including grants, construction, services and supplies. Examples of these best practices include:
 - Agency heads being required to ensure that M/W/DBE participation is included as part of the agencies strategic priorities through identification of measurable goals and objectives.
 - Development of a best practices manual for uniform implementation of policies, practices, programs and participation goals for M/W/DBEs.
 - Designation of a single point of contact to implement, monitor and report workforce utilization and agency contractor participation.
- 2) Establishment of a comprehensive accountability and reporting process for staff, grantees, contractors, subcontractors, and suppliers. These practices include:
 - Identification of uniform monitoring, enforcement, and tracking practices.
 - Capture of M/W/DBE solicitation, award, and utilization data for all contracts as part of a central repository and database for contract and grant awards.
 - Obtainment of a customized software program for uniform monitoring, tracking and enforcement.
 - Expansion of the ability to quantify and measure the effectiveness of agency and Commonwealth M/W/DBE programs.
 - Development of performance standards for M/W/DBE participation for executives and senior-level managers.
 - Provision of training to agency staff on Commonwealth M/W/DBE policies and procedures.
- 3) Enhancement of the capacity and capability of available M/W/DBEs to participate in Commonwealth Programs through a variety of practices:
 - Creation of a coordinated cross-agency, integrated small business support services system to provide training, consulting, information management, business management and technical assistance to M/W/DBEs to acquire the proficiency to compete on an equal basis with majority contractors, vendors and consultants.
 - Development of mentor/protégé program to help M/W/DBEs increase capacity and capability.
 - Cultivation of positive private and public partnerships to enhance diversity initiatives.
 - Improvement of public relations to enhance communication and long term relationships and increase networking opportunities.
- 4) Establishment of rewards and recognition for outstanding performance in furtherance of workforce diversity and disadvantaged business utilization by Commonwealth contractors, subcontractors, and suppliers. The implementation strategies would include:
 - Development of appropriate recognition programs for agencies, contractors, vendors and consultants for M/W/DBE utilization.
 - Development of an integrated communications strategy to develop and disseminate internal and external communications, marking and messaging materials to promote M/W/DBE strategic priorities.
 - Coordination with Governor's Communications Office and Agency Press Secretaries appropriate messaging and marketing media to disseminate and support the M/W/DBE performance objectives, strategic priorities and initiatives.

Appendix C

Pennsylvania Gaming Control Board's Diversity Analyst Job Description

Note: Possible boilerplate guide for the job duties that, at a minimum, would be contained within existing EEO or Diversity/Non-Discrimination job duties.

PENNSYLVANIA GAMING CONTROL BOARD
OFFICE OF HUMAN RESOURCES
CLASSIFICATION SPECIFICATION

DIVERSITY ANALYST

Class Summary:

The primary function of the Diversity Analyst is to assist the Chief Diversity Officer (CDO) in coordinating and implementing various internal and external diversity events and diversity related activities. The employee shall communicate with the Human Resources Directors, Diversity Officers, Compliance Officers and Purchasing Managers for the slot machine licensees regarding matters pertaining to recruitment, hiring, training, retention and purchasing. Supervision is received from either the CDO or Chief Counsel.

Examples of Work May Include but Are Not Limited To:

Provides assistance to diverse applicants seeking employment information regarding slot machine licensees;

Provides assistance to diverse applicants seeking guidance relating to the SlotsLink employment application process;

Assists MBEs/WBEs with questions pertaining to the DGS certification process;

Assists the CDO at job fairs, vendor fairs and cultural events sponsored by the licensees to promote diversity;

Provides support in the tracking of diversity training programs sponsored by licensees;

Verifies the validity of MBE/WBE data forwarded to the PGCB by licensees in the quarterly diversity reports regarding construction and purchasing related activities;

Verifies the validity of the documentation relating to philanthropy and community outreach activities provided the PGCB in the diversity quarterly reports;

Communicates with licensees to ensure timely receipt of annually updated diversity plans;

Assists the CDO in coordinating outreach activities and events; and

Undertakes any other reasonable activities as directed by the CDO.

Minimum Experience, Education and Training:

A Bachelor's degree in a discipline appropriate to the position from an accredited college or university;

Or an Associate's degree in a closely related field from an accredited college and two years of additional experience from a government agency or a large business;

Or an equivalent combination of experience and training.

Appendix D

**TRB-DBE National DBE Program Manager Survey – Fall 2008
Submitted via Testimony of Michael Behney, Director of Penn State University's Institute
of State and Related Affairs at Select Committee's Public Hearing on June 1, 2009**



TRB-DBE
National DBE Program Manager Survey
Fall 2008

Conducted by
Center for Survey Research
Institute of State and Regional Affairs
The Pennsylvania State University

November 2008

WWW.TRBDDBE.ORG

Acknowledgements

TRB-DBE Survey Committee Members:

Mike Behney, Penn State University, mikebehney@psu.edu, 717.948.6174
Charles Wright, Florida A & M University, charles.wright@famu.edu,
850.599.8623

Richard Rolland, Eastern Washington University, rrolland@mail.ewu.edu,
509.359.6829

Dr. Ralph Sanders, Wisconsin Department of Transportation, Civil Rights
staff, ralph.sanders@dot.state.wi.us, 608.267.9527

Eugene Johnson, Wisconsin Department of Transportation (Ex-Officio),
eugene.johnson@dot.state.wi.us, 608.267.9527

Special thanks to Stephanie Wehnau, Assistant Director of the Center for
Survey Research at Penn State for assistance with the questionnaire
wording and administration of the web survey.

TRB-DBE National DBE Program Manager Survey Report

Background

The TRB-DBE Committee sponsored a web based survey of state DBE Program Managers that was conducted between September 15 and October 17, 2008. The purpose of the survey was to gauge the latest issues and concerns of the DBE program nationally and to use the results to stimulate directed research into the problems facing DBEs in general and the DBE program more specifically. The survey was conducted by the Center for Survey Research located at Penn State Harrisburg.

Twenty seven states and the District of Columbia responded (out of 52) which yielded a response rate of 54%. A copy of the email invitation to state DBE coordinators can be found in *Appendix A*. Follow-up reminder email can be found in *Appendix B*. A list of state DBE Program Managers that were invited to participate can be found in *Appendix C*. A copy of the Survey questions can be found in *Appendix D*. A content analysis of the survey responses can be found in *Appendix E*.

Survey questions focused on the following four topics:

1. Most important problems facing state DBE Programs
2. Race Conscious and Race Neutral goals for FHWA, FAA and FTA
3. Race Neutral Activities in state DBE Programs
4. Innovations in state DBE Programs

Summary of Findings

1. Most Important Problems Facing State DBE Programs

Sixty-nine individual responses were provided by states regarding problems facing the DBE Program. These responses have been organized into the following six topical areas:

- A. DBE Program Administration
- B. Issues with Federal Highway Administration
- C. Goal Setting Issues
- D. DBE Issues
- E. Majority Contractors
- F. Construction Related Issues on DBE Program

Specific responses follow organized by topical area:

A. DBE Program Administration

1. Insufficient staff to carry out responsibilities
2. Budget. The budget has impacted staffing and the undertaking of projects this year
3. Lack of funding and resource/staff
4. Staffing needs by states to monitor and administer the DBE program
5. The DBE Certifier position has been vacant for nearly a year. Certifications are therefore backlogged
6. Having a DBE staff of one that's within 1-2 years of retirement. It's never going to be a popular program. This program keeps being transferred around from one office to

- another. I think it's because once the new supervisor discovers all this program entails, they can't get rid of it fast enough
7. Separate MWBE goals from DBE project goals
 8. Marketing
 9. The need to complete a disparity study
 10. Failure of lead management to buy into the findings of disparity study
 11. Good Faith Effort Evaluation: Primes want DBE office to codify a numerical formula to help them create a level playing field. DBEs want more teeth in the program: require primes to list DBE and percentage with bid, denials when price is within 5% DBE office want proactive, early Prime DBE interaction for technical advice/assistance; challenge is how to credit meaningful effort
 12. How to bring on-board contracting officer to enforce administrative remedies when prime contractors are in non-compliance with DBE regulation
 13. Legal challenges and court decisions
 14. Need for more funding for the DBE Supportive Services program and a relaxation of the requirements to qualify for this type of funding. New requirements under previous civil rights director were determined to be onerous and impractical by many states
 15. No Supportive Services funding
 16. Recruiting new qualified DBE firms - due to PNW, and lack of willingness for a minority owned firm to fill out the required paperwork
 17. Poor recordkeeping does not keep a running tally of payments to DBE subcontractors. As such, most divisions do not know if they are meeting their annual overall goal
 18. Dealing with the every day challenges concerning administering the DBE program including good faith efforts, contract compliance and acceptance of program requirements, etc
 19. Guidance on how and when to include DBE contract goals
 20. In addition to the DBE goals and/or program there should be a Historically Under Utilized Business component. Most DBE's do not like the term "disadvantaged."
 21. Lack of consistency in certification standards between states

B. Issues with Federal Highway Administration

1. Getting goal approved by the FHWA
2. The difficulty with federal agencies to approve the goal setting methodology in the disparity study
3. Lack of support from the Nebraska Division FHWA office
4. Poor communication and inconsistent or nonexistent guidance from FHWA
5. Guidance on certification of DBE applicant who are not part of the presumed groups and who are not white males either
6. Stricter interpretation of federal regulations and tighter scrutiny of STA submissions by FHWA HQ
7. The new DBE/SS handbook is extreme overkill. Not knowing whether we'll get funded from year to year is very frustrating. This year we got what we asked for, but last year we originally got zero, then after re-submitting the work statement, got 100%. It left us dangling for several months and now I am always wondering if we'll get funded. It's been said that it was harder to get \$100,000 for DBE/SS than our entire construction budget. There doesn't seem to be any common sense here.

C. Goal Setting Issues

1. In absence of disparity study we have had to set all goals race neutral and resulting DBE participation has decreased
2. Lack of race neutral activities.
3. Design Build - DBE goals are being met entirely through construction

D. DBE Issues

1. DBEs ability to obtain bonding (two states indicated this response)
2. Access to capital
3. Assisting DBEs with access to credit and capital as well as bonding (two states indicated this response)
4. Cash Flow
5. Many of our DBE firms are stuck in the subcontracting arena due to bonding capacity issues
6. Building DBE capacity
7. Decreasing usage of DBEs by prime contractors since the implementation of a race/gender-neutral program
8. Encouraging more race-neutral DBE participation by contractors and consultants
9. Established and successful DBE firms are leaving the program. Newer DBE firms don't have the experience (and haven't been used since contractors would prefer to use DBE firms they have experience with)
10. The older DBEs are retiring and there are not many new firms coming on-line to take up the industry work. However, we are seeing this throughout the industry, not just with DBE firms
11. Firms graduating from the program are not being replaced by an equal number of new DBE's
12. Smaller DBE firms often are not capable of managing a business. They often know how to do the field work, but not the office work
13. Prime contractors are not eager to work with new DBEs
14. Primes are reluctant to use new subs
15. Lack of DBE prime contractors
16. Few or no DBEs certified for specialty work such as ITS
17. It appears that the majority of our DBE firms, both currently certified and new applications being received, are based in the consulting classifications and not in the construction industry classifications
18. Losing highway-related DBEs and gaining non-highway out-of-state DBEs. The number of certified firms has stayed about the same for the last 20 years, going up just slightly. We keep losing the ones we want to keep and getting applications from the ones we never use. The number of DBEs getting work on our fed-aid highway projects keeps going down. I think most of them drop their certification because they feel that the benefit does not outweigh the paperwork.
19. Not getting an influx of new DBEs
20. Would like to increase the number of ready, willing and able DBEs on Federal-aid construction projects
21. The white woman owned firms are getting the majority of the work committed to DBE firms

22. Strong vertical construction activity reduces the number of DBE firms that are bidding on federal highway work
23. Apathy among DBE owners
24. DBE's do not consider it a success to graduate from the DBE program
25. DBE firms are disproportionately in traffic control
26. Once most firms have found their niche, there is no desire or incentive to diversify. This is not exclusive to DBE firms.
27. Desire to expand their business without the knowledge to identify which way to go
28. Difficult to get DBEs to participate in business development programs, training and matchmaker events
29. Passiveness by DBEs in participating in a race/gender-neutral program (not actively using DBE/SS)
30. Smaller DBE firms not wanting DBE SS assistance.

E. Majority Contractors

1. Follow through by contractors on their commitments prior to award
2. Good Faith Effort
3. Prime contractors are subbing out less work because of economic conditions
4. Lack of cooperation from Prime contractors

F. Construction Related Issues on DBE Program

1. Rising fuel cost and the subsequent rise in supply cost
2. Hyperinflation in the letting costs (fuel, material/supplies): more \$\$ than ever before but considerably less spending power; represents lowest purchasing power in 20 years. What will the impact be on the DBE program: goal enforcement, DBE achievement, DBE firm's ability to compete
3. Slow Economy

2. Race Conscious and Race Neutral Goals for FHWA, FAA and FTA

2009 FHWA Goals

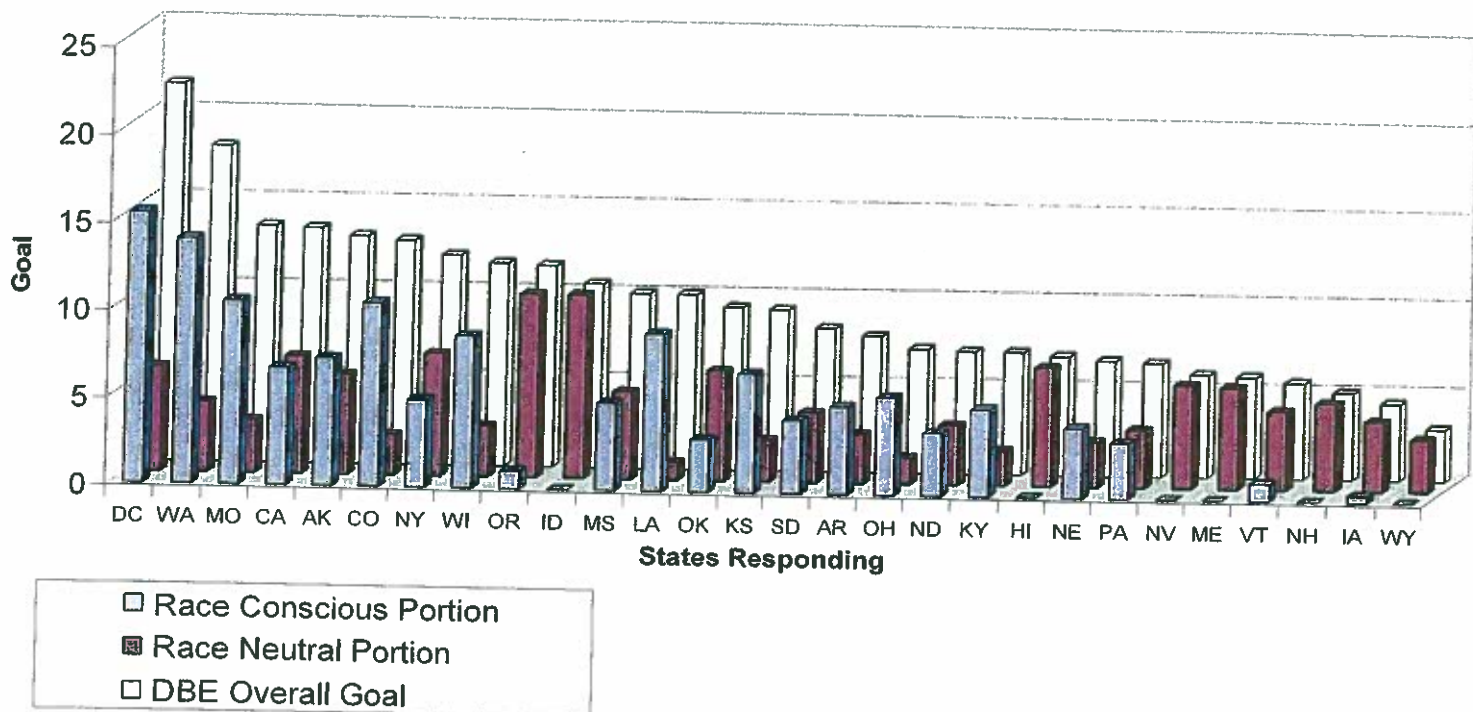
The 2009 FHWA Overall Goals reported by those responding ranged from a high of 21.5 (DC) to a low of 3.0 percent (WY). The 2009 FHWA Race Conscious portion ranged from a high of 15.5 (DC) to a low of zero percent (multiple states). The 2009 FHWA Race Neutral portion ranged from a high of 10.5 (OR & ID) to a low of 1 percent (LA).

Twelve states had a race neutral goal larger than the race conscious portion, two states had equal portions for race neutral and race conscious goals and 14 states had a race conscious goal larger than the race neutral portion. The average goal for those responding was 9.4 overall, 4.8 race conscious and 4.6 race neutral.

Six states indicated that they had a FHWA race conscious goal of zero but no state had a FHWA race neutral goal of zero.

Graph 1 (on the following page) depicts this variation in FHWA Goals by state.

GRAPH 1: FHWA Goals 2009



2009 FAA Goals

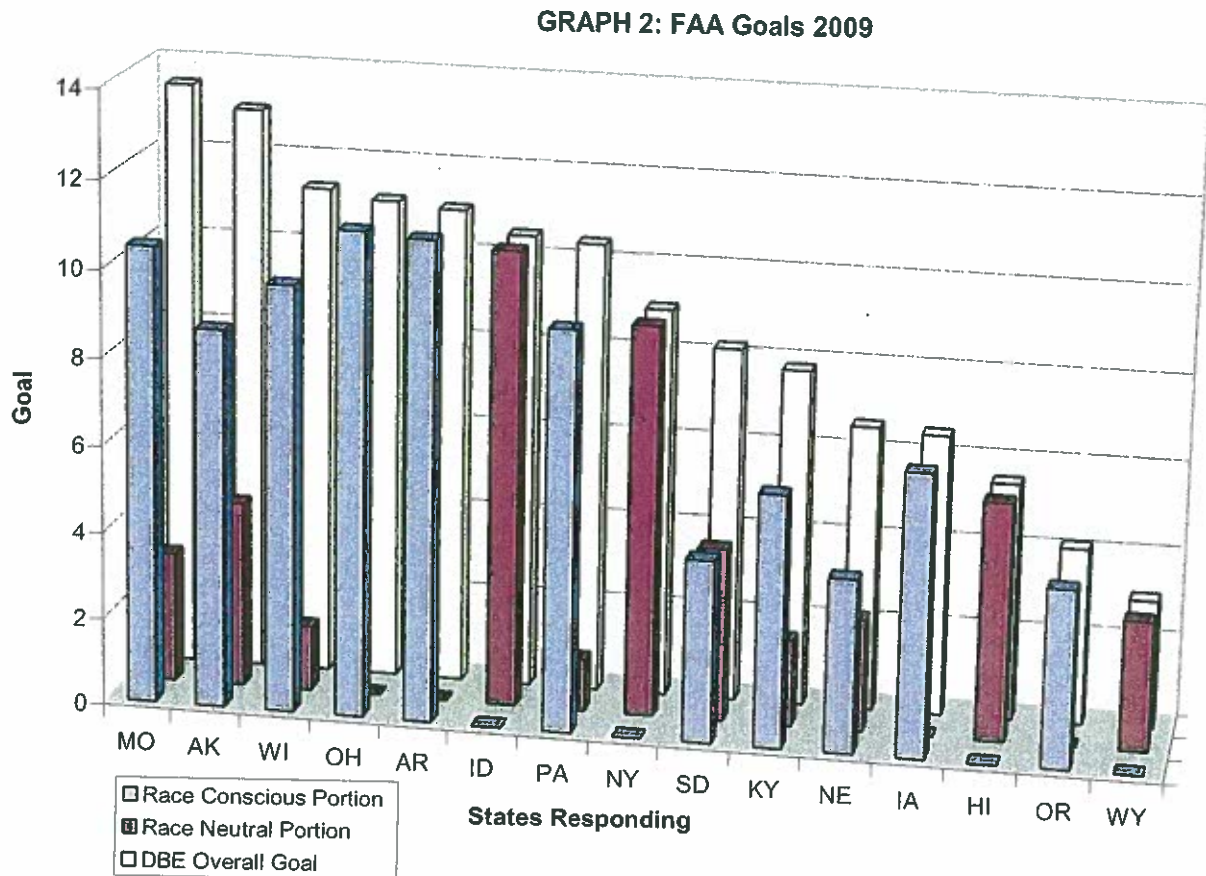
The 2009 FAA Overall Goals reported by those responding ranged from a high of 13.5 (MO) to a low of 3.0 percent (WY). The 2009 FAA Race Conscious portion ranged from a high of 11.1 (OH) to a low of zero percent (multiple states). The 2009 FAA Race Neutral portion ranged from a high of 10.5 (ID) to a low of zero percent (multiple states).

Four states had a race neutral goal larger than the race conscious portion, two states had equal portions for race neutral and race conscious goals and 11 states had a race conscious goal larger than the race neutral portion. The average goal for those responding was 8.8% overall, 5.7% race conscious and 3.1% race neutral.

Four states indicated that they had a FAA race conscious goal of zero and four states had a FAA race neutral goal of zero.

Graph 2 (below) depicts this variation in FAA Goals.

Please note: The FAA Goal submitted by MoDOT is the same numbers as in the FHWA Goal, because they haven't submitted an FAA goal separately.



2009 FTA Goals

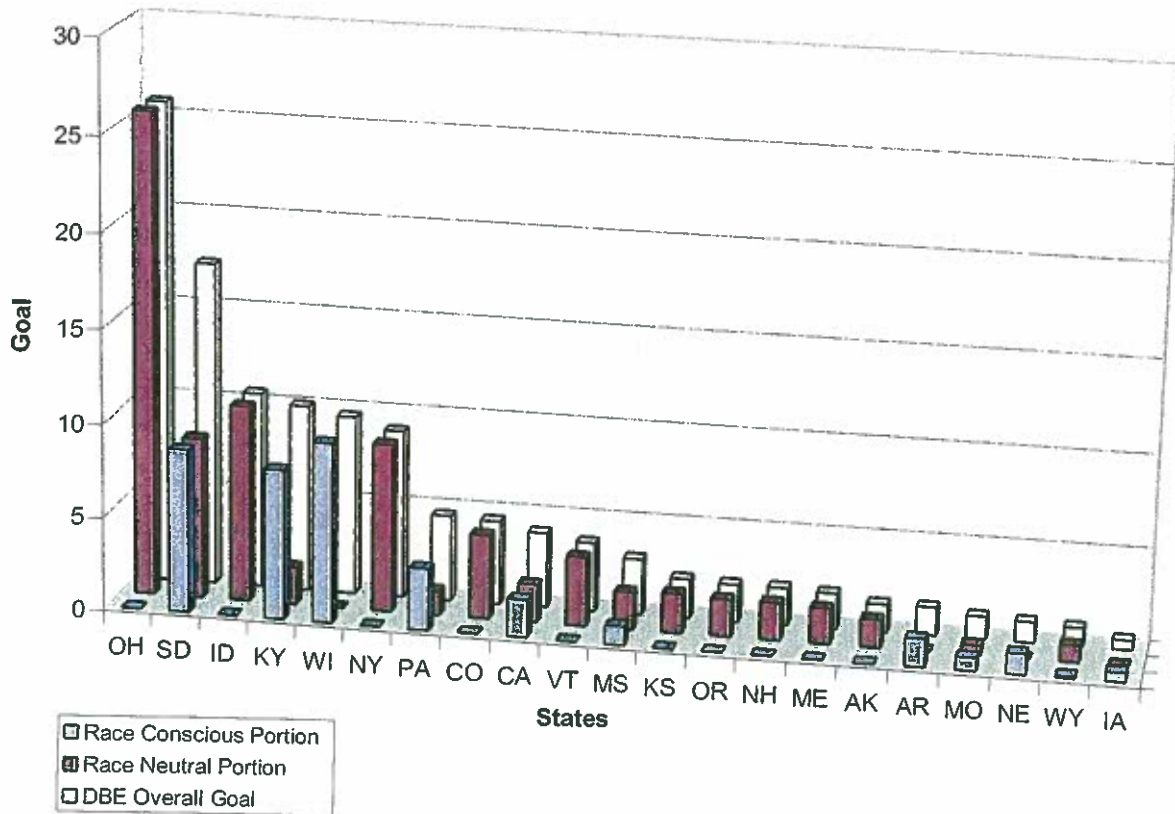
The 2009 FTA Overall Goals reported by those responding ranged from a high of 25.7 (OH) to a low of 0.5 percent (IA). The 2009 FTA Race Conscious portion ranged from a high of 9.6 (WI) to a low of zero percent (multiple states). The 2009 FTA Race Neutral portion ranged from a high of 25.7 (OH) to a low of zero percent (multiple states).

Twelve states had a race neutral goal larger than the race conscious portion, one state had equal portions for race neutral and race conscious goals and eight states had a race conscious goal larger than the race neutral portion. The average goal for those responding was 5.5% overall, 1.7% race conscious and 3.8% race neutral.

Ten states indicated that they had a FTA race conscious goal of zero and four states had a FTA race neutral goal of zero.

Graph 3 (below) depicts this variation in FTA Goals.

GRAPH 3: FTA Goals 2009



3. Race Neutral Activities in state DBE Programs

Over 74 individual responses were provided regarding race neutral activities states are using in their DBE Program. These responses have been organized into the following four topical areas:

- A. Supportive Services/Training
- B. Administrative Actions
- C. DBE Initiated Success
- D. Marketing/Outreach

Specific responses follow:

A. Supportive Services/Training

1. Specialized assistance to DBE firms to identify strengths and weaknesses. Make the strengths stronger and weaknesses into strengths.
2. Technical outreach to firms.
3. Contractor education classes
4. Provide technical assistance and other services to increase the number of DBEs competing in the highway industry.
5. Technical assistance (two states indicated this response)
6. Training classes
7. Aggressive use of DBE supportive services
8. DBE Supportive Services: marketing and training grants, assistance with writing/designing SOQs, one-on-one business management assistance.
9. One-on-one business reviews and technical assistance to find out what's keeping DBEs from getting work and how to develop their business.
10. Develop and offer a Business Development Program to provide one-on-one assistance with business plans, etc.
11. DBE Business Enhancement through development of business websites
12. DBE Supportive Services: free plans specs, assistance with bidding & estimating, formal training workshops on project/contract specifications, Invitations to Bid from prime contractors.
13. Providing DBE supportive services to DBE contractors (ex. how to develop business plans, how to prepare financial statements, etc.)
14. Electronic Bidding subscriptions
15. Interactive DBE Website
16. Circulate a pamphlet that discloses upcoming DBE contracting opportunities, training classes in business management, etc.
17. A DBE/SS consultant with construction and engineering experience to give DBEs business advice, particularly in estimating and bidding and other business advice.
18. Continuous communication between primes and subcontractors, DBEs and non DBEs.
19. Seminars on business development
20. DBE Business Recruitment
21. Write articles highlighting newly certified firms, for publication in the Supportive Services Newsletter, so primes and large subcontractors can learn about the knowledge, skills, and abilities of the new DBE firms.
22. Supportive Service program in metropolitan area (where most DBE firms reside): Construction College - series of DOT-facilitated training that provides information about how to do business with WisDOT and best practices. Loan mobilization program - provides working capital to DBEs with DOT contracts; facilitated by consultant, minority bank community based organization. Financial management technical assistance for DBE firms facilitated by a consultant accounting firm.
23. Monthly newsletters and other ongoing communications providing information on contract opportunities, laws, and regulations affecting small businesses, small business programs and benefits, and outside training events benefiting small businesses.
24. Publication of Supportive Services Newsletter 2 weeks prior to each bid opening whereby primes advertise which jobs they are planning on bidding on. Copies are made available on our website and sent to all primes/subs/suppliers via our division's listserv.

B. Administrative Actions

1. Mentor Protege Program (two states indicated this response)
2. History notes that 2% DBE participation is obtained in our contracts without intervention. However, selecting solicitations, times for the presentation of bids, quantities and specifications, and delivery schedules to facilitate DBE and other small business participation.
3. Pre-bid registration by all primes and subcontractors over \$500,000 so that DBE subcontractors and suppliers know who to bid to.
4. Enhancement projects
5. Dissemination of information at pre-bid conferences.
6. Unbundling projects
7. Encourage DBE to bid prime by offering debundling.
8. Contract packaging: unbundling, right-sizing opportunities to promote economic development opportunities evaluation of risk and opportunity associated with contract packaging options.
9. Provisional Prequalification - This program allows a prequalified subcontractor to perform work that they are not currently prequalified to perform. This Program enables a prequalified subcontractor to be trained in a different work classification, once they perform satisfactorily in that work classification.
10. We have race neutral DBE goals on consultant contracts and consultant engineering agreements.
11. Count when contractors to use DBE firms when there is no goal.
12. Smaller contracts for DBEs to bid on as prime contractors.
13. Count when contractors to use DBE firms in excess of the goal that has been set on the project.
14. Assisting prime contractors with DBE contacts
15. We set bi-annual goals for our contractors to achieve DBE participation.
16. Emerging Small Business Program
17. Contract Matchmaking
18. All monies committed or subcontracted to a DBE firm above the goal is counted as R/N
19. Direct contact by our office with apparent low-bid prime contractor requesting any additional items of work which may be sub-contracted out. Then our office will notify the appropriate DBEs of additional bid opportunities.
20. Matchmaking breakfasts
21. Partnering with other local jurisdictions that have DBE programs on outreach and training efforts
22. Encourage prime to maximize DBE utilization above and beyond the DBE goal.
23. Encouraging the contractor to provide additional work to DBEs
24. Provide our certified DBEs with contracting tools, including the Bid Express Small Business Tab, and e-mail weekly info on bid opportunities.
25. Selected consultant engineering agreements with a narrow scope of work are restricted to proposal by only small firms; this results in opportunities for small firms, most of whom are DBEs, to submit proposals as prime consultants. This program is known as the Small Firm Opportunity Program.
26. Implement a small business enterprise program.
27. Training primes and subs on various business centers, such as plan reading, bidding and estimating, and job costing.

28. Recognize contractors' efforts to use DBE firms on non-goal and non-federal aid contracts.
29. Incentives to primes and subs through our race-neutral ESB program (many of which are DBE firms)
30. Our state uses electronic bidding so there is very little face-to-face contact between primes/subs/suppliers in comparison to pre-electronic bidding process.
31. Setting DBE goals on a project by project basis and setting 0 goals on some projects where DBE participation is then counted as race neutral. Requiring contractors to submit plans on how they will attain DBE participation
32. Encourage and provide networking opportunities between DBE and nonDBE contractors.
33. Encouraging DBEs to bid as primes

C. DBE Initiated Success

1. DBEs performing more work than original DBE commitments (two states indicated this response)
2. DBE participation on non-DBE goal projects (two states indicated this response)
3. DBEs performing as prime contractors (three states indicated this response)

D. Marketing/Outreach

1. Meeting with prime contractors and providing copies of DBE directory and access on-line to the DBE directory as well.
2. On-line DBE directory with photos of DBEs to put a face to the name.
3. Direct email notification to all DBE of new construction projects. Projects also indicating which prime contractors that have taken sample proposals.
4. Participate in a network of business development and technical assistance partners (other state and federal agencies, CBOs, etc.) to offer training, matchmaker, and networking events to promote government contracting and greater participation by DBEs and small businesses.
5. Providing bidders list to DBE contractors so they can seek subcontracting opportunities.
6. Marketing Outreach: DOT facilitation networking between prime and DBE contractors at contract information meetings, mandatory pre-bids, use of speed networking. Bulls eye marketing to DBE firms: 5 timed contacts regarding upcoming opportunities using rotation of emails, phone calls, responsive technical assistance.
7. Outreach
8. DBE conference
9. We conduct networking events for firms in the highway construction and civil engineering industries

4. Innovations in state DBE Programs

Twelve states provided responses regarding innovations in their state DBE Programs.

Specific responses follow:

1. During the project goal setting process we identify DBE firms that may be able to meet the goal on the individual projects. Once the project goals are set a letter is sent to all contractors who have purchased plans for the project identifying possible DBE firms who

- are qualified to do the type of work on that project who have previously done similar work in a similar area. In addition a letter is also sent to each of the DBE firms notifying them of the upcoming project. This is an attempt to assist contractors in identifying DBE firms and assist the DBE firms in identifying contractors to whom they may want to submit a quote. On all projects of \$10M or greater, we hold an outreach event at the pre-bid meeting. We invite DBE firms who are qualified to perform work on the project from all over the state. At the meeting we have the DBE firms introduce themselves and give a brief description of the type of work they perform. At the conclusion of the meeting, the contractors and DBE firms have the opportunity to speak with one another. It is an attempt to give the DBE firms an opportunity to meet and talk with contractors who will be bidding on the job. *(Ohio)*
2. We open our technical assistance and various training opportunities to all consulting and construction firms, whether prime or subs. We have a Contractor/SHA Co-op Meeting each quarter that includes discussion of the DBE program, the annual goals, and what progress is being made throughout the year. This meeting includes all the stakeholders. *(Wyoming)*
 3. To assist DBE's statewide with contracting opportunities, the External Civil Rights Office provides DBE Supportive Services to minority and women owned businesses that will give guidance in bid preparation, bonding, financing, business development, and building business relationships. *(Missouri)*
 4. A job shadowing program developed by our DBE/SS consultant where a DBE who wants to expand their line of work is paired up with a company from another state (not a competitor) to help show them the ropes. It is particularly good because this other company can tell the DBE from their own experience what to expect. In order to work, you have to involve out-of-state companies who will not be threatened by helping this company become a potential competitor. *(South Dakota)*
 5. CDOT Bidders Loop: <http://www.dot.state.co.us/EEO/Loop/> *(Colorado)*
 6. We think our pre-bid sign-in requirements are extremely informative for all bidders and quoters. It facilitates a level of communication that is often lost with the advent of electronic bidding. *(North Dakota)*
 7. Have a DBE Program Fraud Hotline to report any abuses to the program. *(Washington State)*
 8. Mobilization loans to DBEs *(Arkansas)*
 9. Bulls eye marketing strategy. Speed networking at contracting meetings. Contract unbundling analysis. Committee facilitation for EJ and DBE. *(Wisconsin)*
 10. DBE/SS works extensively with other state and federal programs in providing joint business trainings and assistance. (Includes SBA, PTACs, SBDCs, TEROs, and other 501(c) non-profits.) *(Idaho)*
 11. We utilize auditors to analyze PNW financial information. We provide 1-on-1 assistance at outreach events for DBE certification application (we also have an auditor in attendance for financial questions). We conduct targeted outreach to DBEs to encourage them to expand their certification listing via credentialing for materials testing and sampling. *(New York)*

Appendix A

Initial Email invitation to State DBE Program Managers to Participate in Survey sent on 9/15.

Dear DBE Program Director,

My name is Eugene Johnson and I am the Director of the Bureau of Equity and Environmental Services in the Wisconsin Department of Transportation. I have also served for the last two years as the Chairperson of the Transportation Research Boards DBE Subcommittee (TRB-DBE Subcommittee). (Committee website can be found at www.trbdbbe.org). The TRB-DBE Subcommittee serves as an open forum for parties involved in Disadvantaged Business Enterprises (DBE/MBE/WBE) issues in transportation. One of the committee's primary functions is to encourage research for the purpose of promoting innovation and progress in DBE programs.

At this year's meeting, which was held in Washington DC on January 14, 2008, the committee proposed conducting a survey to gauge the latest issues and concerns of the DBE program nationally. It is hoped that this survey can be performed annually and that the results will be used to stimulate directed research into the problems facing DBEs in general and the DBE program specifically. The success of this project is dependent upon your cooperation. Please take the few moments necessary to share your thoughts and opinions with us by completing the short survey which can be found at www.TRBDBEsurvey.info. Please feel free to share this survey with your colleagues for their input. Your response is appreciated no later than October 17, 2008. The survey results may be published on the TRB-DBE Subcommittee website.

Thank you,
Eugene Johnson
TRB-DBE Committee Chairperson

Appendix B

Follow-Up Email invitation to State DBE Program Managers to Participate in Survey

Follow-up reminders to those not completing survey sent on 9/22, 9/29, 10/6 and 10/13 (Final Reminder) and is shown below:

REMINDER: Your response is appreciated no later than October 17, 2008.

Dear DBE Program Director,

My name is Eugene Johnson and I am the Director of the Bureau of Equity and Environmental Services in the Wisconsin Department of Transportation. I have also served for the last two years as the Chairperson of the Transportation Research Boards DBE Subcommittee (TRB-DBE Subcommittee). (Committee website can be found at www.trbdbe.org). The TRB-DBE Subcommittee serves as an open forum for parties involved in Disadvantaged Business Enterprises (DBE/MBE/WBE) issues in transportation. One of the committee's primary functions is to encourage research for the purpose of promoting innovation and progress in DBE programs.

At this year's meeting, which was held in Washington DC on January 14, 2008, the committee proposed conducting a survey to gauge the latest issues and concerns of the DBE program nationally. It is hoped that this survey can be performed annually and that the results will be used to stimulate directed research into the problems facing DBEs in general and the DBE program specifically. The success of this project is dependent upon your cooperation.

Please take the few moments necessary to share your thoughts and opinions with us by completing the short survey which can be found at www.TRBDBEsurvey.info. Please feel free to share this survey with your colleagues for their input. Your response is appreciated no later than October 17, 2008. The survey results may be published on the TRB-DBE Subcommittee website.

Thank you,
Eugene Johnson
TRB-DBE Committee Chairperson

Appendix C

List of State DBE Program Managers asked to participate in the survey

First	Last	Title	State
John	Huffman	DBE Coordinator	Alabama DOT
Jon	Dunham	Manager, Civil Rights Office	Alaska DOT
Lisa	Wormington	DBE Liaison Officer, Civil Rights Office	Arizona DOT
James	Moore	Section Head EEO/DBE	Arkansas State Highway & Transportation Dept.
Olivia	Fonseca	Deputy Director, Civil Rights Program, MS-79	California CALTRANS
Greg	Diehl	Supervisor, DBE Certification	Colorado DOT
Diane	Donato	Director, Office of Equal Opportunity Assurance	Connecticut DOT
Richard	Rexrode	DBE Program Manager	Delaware DOT
Francisco	Gonzalez	Equal Opportunity Specialist	District of Columbia DOT
John	Goodeman	DBE Certification Manager EEO	Florida DOT
Patricia	Fowler	DBE Assistant Administrator	Georgia DOT
Melanie	Martin	DBE Program Manager	Hawaii DOT
Julie	Caldwell	EEO Contract Compliance Officer & Chairperson, DBE Certification Committee	Idaho Transportation Department
Paul	Cerpa	Director	Illinois Office of Business & Workforce Diversity
Ronald	Minnis	Deputy Commissioner, Minority and Women's Business Enterprises	Indiana DOT
Roger	Bierbaum	Contracts Engineer	Iowa DOT
Doria	Watson	Civil Rights Administrator	Kansas DOT
Melvin	Bynes	DBE Branch Manager, Office of Business & Occupational Development	Kentucky Transportation Cabinet
Staci	Messina	Compliance Programs Director	Louisiana DOT & Development
Jackie	LaPerriere	EEO Civil Rights Office	Maine DOT
Zenita	Hurley	Director, Office of Minority Businesses Enterprise	Maryland DOT
Mark	Waterbury	Director of Certification	Massachusetts SOMWBA
Pat	Collins	Administrator, EEO Office	Michigan DOT
Joanne	Wagner	Director, Office of Equal Opportunity and Contract Management	Minnesota DOT
Stacey	Slay	DBE Coordinator, Office of Civil Rights	Mississippi DOT
Lester	Woods	External Civil Rights Administration	Missouri Highway & Dept. of Transportation
Sheila	Cozzie	Chief, Civil Rights Bureau	Montana DOT
Joe	Kisicki	DBE Civil Rights Coordinator	Nebraska NDOR
Roc	Stacey	Contract Compliance Manager, DBE Program	Nevada DOT
Jay	Ankenbrock	DBE Coordinator	New Hampshire DOT
Linda	Errico	Division of Civil Rights/Affirmative Action	New Jersey DOT
Jimmy	Gomez	Chief, EEO Program Bureau	New Mexico State Highway & Transportation Dept.
G.	Marion	Director, Civil Rights Bureau	New York Office of Audit & Risk Management Svs.
Queen	Crittendon	Director, Office of Civil Rights & Business Development	North Carolina DOT
Deborah	Igoe	Director, Civil Rights Division	North Dakota DOT
Deborah	James	Manager, External Civil Rights, Office of Contracts	Ohio DOT

TRB-DBE National DBE Program Manager Survey

Susan	McClune	Transportation Manager, Regulatory Services Division	Oklahoma DOT
C.	Miller	Small Business Programs Manager	Oregon DOT Office of Civil Rights
Jocelyn	Harper	Director, Bureau of Equal Opportunity	Pennsylvania DOT
Ana	Del Moral	DBE Coordinator, Civil Rights Office	Puerto Rico DOT and Public Works Highway and Transportation Authority
Vanessa	Crum	Administrator	Rhode Island DOT
Vivian	Patterson	Acting Director, DBE Program Development	South Carolina DOT
Denise	Voorhes	DBE Liaison Officer	South Dakota DOT
James	Dossett	Director, Business Opportunity Program Section	Texas DOT
Denice	Graham	Civil Rights Manager, Civil Rights Section	Utah DOT
Lori	Valburn	Civil Rights & Labor Compliance Chief	Vermont Agency of Transportation
Sharon	Challenger	Civil Rights Program Manager	Virgin Islands DOT
Doretha	Davis	DBE Coordinator	Virginia DOT
Brenda	Nnamdi	Director	Washington DOT Office of Equal Opportunity
Drema	Smith	Director, EEO Division	West Virginia Division of Highways
Michele	Carter	Civil Rights and Compliance Section Manager	Wisconsin DOT
Nora	Lyon	DBE/EEO Officer	Wyoming DOT

Appendix D

Survey Instrument:

INTRO

Welcome to the Transportation Research Board's DBE Subcommittee Annual Web Survey! This site is hosted by the Center for Survey Research at Penn State Harrisburg on behalf of the TRB-DBE subcommittee. The purpose of this survey is to gauge the latest issues and concerns of the DBE program nationally. Your participation is voluntary, and the survey will take about 5 minutes to complete. The information that you provide will help us to promote innovation and progress in DBE programs. Your response is appreciated no later than October 17, 2008. The survey results may be published on the TRB-DBE Subcommittee website. Please click "Next" to continue.

Please click "Next" to continue 1

2:

DIREC

Questions about the TRB-DBE Subcommittee should be directed to: Eugene Johnson, Wisconsin Department of Transportation (Chairperson of Committee) Email: eugene.johnson@dot.state.wi.us Phone: 608-267-9527 Questions or difficulties with the survey should be directed to: Stephanie L. Wehnau, Center for Survey Research at Penn State University Email: slh227@psu.edu Phone: 717-948-6429 Please click "Next" to continue.

Please click "Next" to continue 1

3:

Q01A

What are the three most important problems currently facing your state's DBE program? Your responses for this question will NOT be attributed to your state and will only be released in summary form.

Problem 1:

Please click "Next" to continue

4:

Q01B

Problem 2:

Please click "Next" to continue

5:

Q01C

Problem 3:

Please click "Next" to continue

6:

T01

Responses to all remaining questions will be attributed to your state. The next questions ask you about your state's current FHWA DBE goal (for Goal Year 2009). Please click "Next" to continue.

Please click "Next" to continue 1

7:

Q02B

What is the race conscious portion of the FHWA goal? Enter percent up to 1 decimal. For example: 10.3% or 2.0%.

TRB-DBE National DBE Program Manager Survey

8:	Q02C
What is the race neutral portion of FHWA goal? Enter percent up to 1 decimal. For example: 10.3% or 2.0%.	
9:	Q02D
State's current FHWA DBE goal	
10:	Q02E
According to your answers, your state's current FHWA goal is <Q02D>%. If this is NOT correct, please go back and change your answers to the previous questions. Please click "Next" to continue	
11:	T02
The next questions ask you about your state's current FAA DBE goal (for Goal Year 2009). Please click "Next" to continue. Please click "Next" to continue 1	
12:	Q02F
What is the race conscious portion of the FAA goal? Enter percent up to 1 decimal. For example: 10.3% or 2.0%.	
13:	Q02G
What is the race neutral portion of FAA goal? Enter percent up to 1 decimal. For example: 10.3% or 2.0%.	
14:	Q02H
State's current FAA DBE goal	
15:	Q02I
According to your answers, your state's current FAA goal is <Q02H>%. If this is NOT correct, please go back and change your answers to the previous questions. Please click "Next" to continue	
16:	T03
The next questions ask you about your state's current FTA DBE goal (for Goal Year 2009). Please click "Next" to continue. Please click "Next" to continue 1	
17:	Q02J
What is the race conscious portion of the FTA goal? Enter percent up to 1 decimal. For example: 10.3% or 2.0%.	
18:	Q02K
What is the race neutral portion of FTA goal? Enter percent up to 1 decimal. For example: 10.3% or 2.0%.	

19:	Q02L
State's current FTA DBE goal	
<hr/>	
20:	Q02M
According to your answers, your state's current FTA goal is <Q02L>%. If this is NOT correct, please go back and change your answers to the previous questions. Please click "Next" to continue	
<hr/>	
21:	Q03A
Please list up to three race neutral activities that your state is using to satisfy some or all of the DBE Goal.	
Race neutral activity 1:	
Please click "Next" to continue	
<hr/>	
22:	Q03B
Race neutral activity 2:	
Please click "Next" to continue	
<hr/>	
23:	Q03C
Race neutral activity 3:	
Please click "Next" to continue	
<hr/>	
24:	Q04
Please list any innovations in your program that you wish to share with other states. Please click "Next" to continue	
<hr/>	
25:	Q05A
Please list your name, title, and email address:	
Name:	
<hr/>	
26:	Q05B
Title	
<hr/>	
27:	Q05C
Email address:	
<hr/>	
28:	Q06
Please list the website address where you publish your current DBE goal and/or goal related documents. Your response will be attributed to your state.	
<hr/>	
29:	INT99
Thank you for your time! The survey results may be published on the TRB-DBE Subcommittee website. Please click "Next" to submit your survey. Complete.....	
<hr/>	

Appendix E

Content Analysis (Conducted by Ralph Sanders, WISDOT)

ANALYSIS AND INTERPRETATION OF DATA

The data obtained from the TRB-DBE National DBE Program Manager survey included a section where the respondents were asked to provide their views, opinions and critical insights regarding their specific state DBE Program. The content of the response and statements presented a very thick, rich and informative description of how the DBE Program Manager assessed the problems, limitations, and innovations facing the DBE Program. In this narrative, one approach to analyze the descriptive information gathered will be discussed and presented.

The analytic processes used in this phase of the study attempts to provide a mechanism for the reviewer to view the interrelated task of integration of the content of analysis that was provided by the DBE Program Manager's comments and statements. Therefore, the approach being deployed is referred to as "content analysis". Content Analysis is the analysis of text documents. The analysis can be quantitative, qualitative, or both. The process is basically an indexing of a variety of key words. Indexing of this nature can be seen in a variety of automated methods for rapidly indexing text documents. For instance, "Key Words in Context (KWIC) analysis is a computer software program that organized the text data. A computer program scans the text and indexes all key words. For this study, KWIC was not utilized based on the time and the constraint of programming the software to identify the "exception dictionary" or simply stated, the context of the meaning of the words used in the content of the statement.

In conducting the content analysis, the reviewer was limited specifically to the types of information specific to the available text supplied. For instance, the text that was evaluated is specific to the following topical areas contained in the survey. The topical areas contained in this section of the study are:

- Section 1 Most Important Problems Facing State DBE Programs.
 - Subpart A. DBE Program Administration.

- Subpart B. Issues with FHWA
- Subpart C. Goal Setting Issues
- Subpart D. DBE Issues
- Subpart E. Majority Contractors
- Subpart F. Construction Related Issues on DBE Programs

The second tier of comments and statements that will be indexed for conducting the context analysis will focus on Section 3 of the survey. The topical areas contained in this section of the study are:

- Section 3 Race Neutral Activities in State DBE Programs.
 - Subpart A. Supportive Services/Training
 - Subpart B. Administrative Actions
 - Subpart C. DBE Initiated Success
 - Subpart D. Marketing/ Outreach

The third tier of comments and statements that was indexed for conducting the context analysis focused on Section 4 of the survey. The topical areas contained in this section of the study are:

- Section 4 Innovations In State DBE Programs.

- | | |
|-----------------|---------------------|
| 1. Ohio | 6. North Dakota |
| 2. Wyoming | 7. Washington State |
| 3. Missouri | 8. Arkansas |
| 4. South Dakota | 9. Wisconsin |
| 5. Colorado | 10. Idaho |
| | 11. New York |

The analyst attempt to be cautious and careful as to only reporting on the data contained for this part of the data analysis. There was a election not to utilized a computer program for this content analysis mainly because of the limitation of a computer program inability to determine the statements or comment that someone meant by a term or phrase. It is relatively easy in keyword content analysis to misinterpret as a result contributed to the computer program did not take into account the subtleties of the meaning correctly.

SUMMARY OF KEYWORD FINDINGS

The following keyword findings provided a very tight narrowed viewed as to how the DBE Program Managers frequency of response(s) collected were dispersed attributing to the most frequent word.

		<u>KEYWORD</u>
Section 1	Most Important Problems Facing State DBE Programs.	
Subpart A.	DBE Program Administration.	STAFFING*
Subpart B.	Issues with FHWA	GOAL SETTING*
Subpart C.	Goal Setting Issues	GOALS*
Subpart D.	DBE Issues	BONDING*
Subpart E.	Majority Contractors	(EVEN)
Subpart F.	Construction Related Issues on DBE Programs	COST*

The second tier of keywords contained in this section of the study are:

		<u>KEYWORD</u>
Section 3	Race Neutral Activities in State DBE Programs.	
Subpart A.	Supportive Services/Training	BUSINESS*
Subpart B.	Administrative Actions	DBE*
Subpart C.	DBE Initiated Success	DBE*
Subpart D.	Marketing/ Outreach	DBE*

The third tier of keywords in Section 4 of the survey are:

		<u>KEYWORD</u>
Section 4	Innovations In State DBE Programs.	
1.	OHIO	DBE, FIRMS*
2.	WYOMING	MEETING, INCLUDES*
3.	MISSOURI	BUSINESS/DBEs*
4.	SOUTH DAKOTA	ORDER*
5.	COLORADO	LOOP*
6.	NORTH DAKOTA	(EVEN)
7.	WASHINGTON STATE	(EVEN)
8.	ARKANSAS	(EVEN)
9.	WISCONSIN	(EVEN)
10.	IDAHO	(EVEN)
11.	NEW YORK	AUDITORS*

(*Note: The caption EVEN denotes that there were no one keyword that had a increased frequency in the respondents comment(s).

CONCLUSION

A major asset to this application is that the study's content analysis has the advantaged of being unobtrusive is as that it did not require the researcher, analyst, or other members of the team to interact with the population of interest. The content analysis for this study provides an alternative consideration as to the interpretation of the data collected from this survey. In essence, the State DBE Program Managers indicated that staffing, goal setting, goals, bonding, cost, business, DBE(s) firms, meeting, includes, order, loop and auditors as the keywords imbedded in their comments and statement as being recurring concerns and interest. More detailed information can be reviewed in the Appendix for the Frequency Analysis and Summary Statement Tally.

In conclusion, the analyst viewed this process as both interesting and enlighten as to how State DBE Program Managers view the topical areas as it relates to Disadvantaged Business Enterprise Programming.

MEMORANDUM

TO: Supplier Diversity Council
FROM: Delaware Office of Supplier Diversity
DATE: October 17, 2013
RE: Information update regarding materials shared with the council by Mr. Hammond on September 6, 2013.

In response to the materials that Mr. Clay Hammond shared with everyone via email on September 6, 2013, this writing is to update you about the current status in the two states. The materials shared were regarding past programs in the Commonwealth of Pennsylvania and the State of Florida and are not reflective of current practices in either state.

SUMMARY

Each state's supplier diversity procurement practices will be reviewed separately below, but here is an overview:

- The Pennsylvania report is from 2009 and that program changed on July 19, 2012¹ to include Veterans and Service Disabled Veterans and then changed again, terminating on September 12, 2012, doing away with MBE, WBE, VBE, and SDVBE. These now all roll up into "Small Diverse Business". PA now has a Small Business Procurement Initiative which is a self certification as a "Small Business" with a one-year certification term. Those businesses can then seek outside diversity certification by certain third parties to complete a state "Small Diverse Business" status. The new small business program in PA updated in March 2013. There are some participation opportunities in PA, they are explained below.
- The Florida memo is from 1999 and was scheduled to and did sunset in 2001. Prior to the sunset, on January 1, 2000, Florida followed federal rules in transportation work and became race and gender neutral and remains so today. The only participation opportunities in FL are with transportation contracting and they are race and gender neutral, these are explained below.

I have provided various links to help you perform your own review of the materials.

¹ <http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1360&mode=2>

PENNSYLVANIA

Pennsylvania changed their Supplier Diversity program in 2012 and then created a self registry for two types of recognition in 2013. The new program focuses on goods, commodities, and services and the businesses must be small businesses in 5 sectors and has size caps. Public works construction and transportation projects are completely different areas. The “Small Business” self-certification and “Small Diverse Business” verification programs were created on March 30, 2013². Pennsylvania allows a self-certification as a small business and then requires that business, within one year of the small business self certification, to obtain a third party diversity certification to then receive the Small Diverse Business Verification³.

The third party diversity certification that the new rule allows includes:

- Unified Certification Program (UCP)* (this is a DBE certification processed by the state of PA and primarily for transportation purposes - it has both social and economic size caps for eligibility – requires annual renewal – it is free)
- United States Small Business Administration (SBA) 8(a) Program (it has both social and economic size caps for eligibility – is a onetime 9 year program - it is free)
- National Minority Supplier Development Council (NMSDC) (this is a corporate certification program, cost is approximately \$350 and requires an annual renewal and fee)
- Woman's Business Enterprise National Council (WBENC) (this is a corporate certification program, cost is approximately \$350 and requires an annual renewal and fee)
- VetBiz Vendor Information Pages (VIP) at vetbiz.gov (the V.A. processes this verification, requires renewals - it is free)

This PA self-certification website goes down on October 18th for a technology upgrade and is forecasted to be up and operational again on October 29th.

FLORIDA

The Florida Office of Supplier Diversity and the State of Florida do not have minority nor gender participation goals in state contracting. There are no benchmarks or aspirational goals for the state agencies to meet in spending with certified minority, women, or veteran owned businesses. Similar to Delaware, Florida agencies have plans for good business with the supplier diversity community and the spend of the state and of the agencies is measured and reported on. The Equity in Contracting Plan that Clay shared did sunset in 2001 and since that time Florida has not had any contracting goals, requirements, or benchmarks. The Florida Office of Supplier Diversity Website⁴ provides general information about certification and programs, there are no programs identified regarding participation goals and I verified this by telephone.

² <http://www.pabulletin.com/secure/data/vol43/43-13/566.html>

³ <http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1359&mode=2>

⁴ http://www.dms.myflorida.com/other_programs/office_of_supplier_diversity_osd

PROCUREMENT TYPES AND GOALS BY STATE

States generally procure in three categories: Goods and services, public works, and transportation. I have included participation goals for Pennsylvania and Florida and have categorized by procurement type. I have included Delaware for comparison. Both Pennsylvania and Florida, like all states, have transportation programs which include federal dollars and thus some federal compliance. For any state with a highway, bridge, railway, airport, or other transportation project that includes federal dollars there will be a participation goal to include Disadvantaged Business Enterprises (DBE) certified firms who are certified in that state. Delaware follows this same guideline. DBE certification has an economic element and in most but not all states there is a social (race and gender) element as well. Each state's Department of Transportation sets its own participation goals for the DBE program based on both federally approved criteria and state specific criteria.

Goods & Services

- Pennsylvania - there is not a percentage of procurement goal, but there is an aspirational goal for prime vendors bidding on contracts to include the Small Diverse Businesses as subcontractors. There are requirements to name the Small Diverse Business as a subcontractor in the bid papers and identify what part of the contract (in dollars and as a percentage of the whole) will go to the sub-contractors. The evaluation criteria of Goods & Services contracts can award (prorated) up to 20% of the overall points⁵ of the evaluation criteria for any contract where small diverse businesses are subcontractors.
- Florida - there is not a participation goal.
- Delaware - there is not a participation goal.

Public Works

- Pennsylvania - there is an anticipated participation level for all Public Works projects, it is 25% MBE/WBE [this language is still on the website – but it is of the Small Diverse Business] participation⁶
- Florida - there is not a participation goal.
- Delaware - there is not a participation goal.

Transportation

- Pennsylvania - PennDOT's proposed FAA goal for Federal Fiscal Years 2014 – 2016 is a proposed overall DBE goal is 7.00%⁷.
- Florida - Florida is 100% race neutral and has been since 01-01-2000 and the DBE race neutral participation goal is 8.18% for 2012-2014.⁸
- Delaware - DelDOT's DBE participation goal is: 11.43% Disadvantaged Business Enterprise (DBE) participation on federal aid contracts during FFY 2014 through FFY 2016. The goal includes a race-neutral participation goal of 1.71%⁹

⁵ http://www.portal.state.pa.us/portal/server.pt/community/rfp_scoring_formulas_overview/20124

⁶ http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1235&PageID=241987&mode=2&contentid=http://pubcontent.state.pa.us/publishedcontent/publish/cop_general_government_operations/dgs/community_content/construction_and_public_works/portlets/public_works_how_do_i_top_left/articles/disadvantaged_policy_for_design_professionals.html

⁷ <http://www.padbegoals.org/Portals/54/Reports/PUBLIC%20NOTICE%202014-6.pdf>

⁸ http://www.dot.state.fl.us/equalopportunityoffice/DBEProgram/DBE_Program_Plan9.13.pdf

⁹ <http://www.deldot.gov/information/business/dbe/pdf/PublicWorkshop8-6-2013-DBEGoal.pdf>

Positions on Standard Contract Lengths by State-Responses from Network Post

	Contract Length	Standard	Additional Comments
Alabama			
Alaska	Typically 5 year terms (1 year initial term, + 4, 1-year renewals).	No	Procurement officers are free to choose a contract length that is appropriate to what is being sought. Per AS 36.30.390 contracts may be entered into for any period in best interests of state provided term/conditions of renewal/extension, are included in solicitation/funds available for 1st fiscal period at time of contracting. Procurement officers must document why multi-term contract being used. 1) Estimated requirements must cover contract period/be reasonably firm/continuing. 2) contract will serve best interests through effective competition/promote economies in state procurement
Arizona			
Arkansas			
California			
Colorado	5 years	By Statute	TERM CONTRACTS: Anything > 5 years = State Purchasing Director approval. Typically 5-year terms with annual options/affirmation to renew. MULTI-YEAR CONTRACTS: Division of Purchasing/agencies with delegated purchasing authority may enter into supplies/services multi-year contracts-subject to funding availability. Specifications for multi-year contracts shall contain renewal/extension terms, if any. Methods to determine price escalation/de-escalation shall be part of original specifications and made a part of contract.
Connecticut	Average contract term = 3 years; some larger contracts have 5 year terms.	No	Connecticut we leave the determination up to our Contract Specialists/Agencies based on the market climate, workload and various other related factors. All term contracts have an option to extend for up to a full term however we have been very judicious about extensions due to the economic climate and increased interest in state opportunities by local companies.
Delaware	Determination up to buyer and Agency (considering the market, commodity or service)	No	Places a "reasonableness" standard prior to allowing publication (i.e. if a 15 year term is requested we would require significant documentation). Supplier Diversity Community is suggesting a public formula be established/followed re: length of term decisions for when contracts are formally bid (i.e. a 3-year term with 2 available 1-year extensions vs a 2-year term with 3 available 1-year extensions, etc. vs a simple 1-year award with subsequent rebid).
District of Columbia			
Florida	3-years (generally)	No	May be shorter or longer. Statutory language allows renewal for 3 years or the term of the original contract, whichever is longer.
Georgia			
Hawaii			

Idaho	No standardized length or the formula for years related to renewals.	No	Contract terms are very specific to product/service and need to be discussed/agreed to between agency subject matter experts and purchasing experts.
Illinois			
Indiana			
Iowa			
Kansas			
Kentucky			
Louisiana			
Maine	4-years (typical)	No	Entertain longer term periods if there is well defined business need.
Maryland			
Massachusetts	No restrictions on contract term length, or length and number of extensions.	No	No plans to limit/standardize initial term or extension options. Just launched new approach to our Supplier Diversity Program. For more info, see mass.gov/osd
Michigan			
Minnesota	Contracts and amendments = 5-year limit; original contract= 2 years.	Statute	Given the specificity in our law, we have no methodology for making related decisions. Exception to limits: "unless the commissioner determines that a longer duration is in the best interest of the state."
Mississippi			
Missouri			
Montana			
Nebraska			
Nevada	4-years (typical)	Admin Policy	Standard length outlined in State Administrative Manual as policy, not statute. Allows us to vary standard term, when significant/compelling evidence demonstrated/in best interest of the state. Attempts to codify term length in statute not successful-have maintained flexibility.
New Hampshire			
New Jersey			
New Mexico			
New York	1-3 year initial term (generally); optional extension periods range from multiple single years to single multi-year.	No	Contract term applicable to sourcing area. Also have unilateral cancellation for convenience clauses (normally 30 or 60 days prior notice)- provides alternatives when long-term contracts no longer advantageous (not normally exercised).
North Carolina	No longer than 3-year, including all extensions and renewals	Admin Policy	Exceptions when approved by SPO (requires justification for >3-year term).
North Dakota	No > 4-years [(including all renewals and extensions) generally].		Terms on case-by-case basis (considering type of commodity/service, competition, complexity, market volatility/price fluctuations, costs associated with switching contractors, etc.) If contract crosses a biennium, include termination clause for non-appropriation. Contract term impacts contractor's ability to hold prices firm. Solicitation and contract may include provisions for contractor to request price adjustments (based upon evidence of increased costs or an index, e.g., Consumer Price Index.)

Ohio	No > 2-3 years	Admin Policy	Procurement Terms and Conditions do not allow renewal/ extension > than 24 months. Terms > 2-3 yrs. may not guarantee best pricing/quality. When supplier feels there is no competition (especially over an extended period of time) performance/cost can be unacceptable/unreasonable. Procurement has weekly methodology meetings re: agency requests to purchase (RTPs) & contract elements (e.g. length of term). Then collaborate with agencies on methodology (ITB, RFP, etc.) & develop scope of work & contract terms.
Oklahoma			
Oregon	1 or 2-year base term, with 3 - 4 option years (generally)	No	Term contracts help save time and money through leveraged volumes, quality standards, improved delivery time, and avoiding repetitive bids. Term contract needs to specify initial term and any options for extensions/renewals. Routine rebids =fair treatment of bidders. Most term contracts =1-year with option for1-year renewal. Longer term is justifiable based on time/effort invsetment, e.g., larger software system. Also adjust contract lengths and no longer mandate terms. Best practice is to continue to support open competition frequently.
Pennsylvania	Limit term contracts to 5-years.	Admin Policy	Initial term can be combination of 2 or 3 years with remaining as renewals. Based on market conditions, type of good/service, etc. Require justification and approved waiver from CPO to extend contracts beyond 5 years.
Rhode Island			
South Carolina	no > 1 year maximum; term life of all contracts no > 5 years (we do a lot of them)	Statute	Procurement Code requires this (absent written justification that longer term will enhance competition/lower pricing. CPO may approve term up to 7 years (do some of them). Longer than 7 years can only be approved by oversight Board (do some, but advise agencies against it-except on development projects with substantial contractor investment/start-up costs).
South Dakota			
Tennessee			
Texas	Generally no > 5 years.	No	Based on general guidance for good practices in Contract Management Guide. No uniform term limits. E.g., Council on Competitive Government document destruction contract is with Texas Industries for the Blind and Handicapped. Straight preference contract- term is essentially unlimited & agencies required to use it. Texas Procurement and Support Services (TPASS) term contracts trending toward 1-year initial term with 3, 1-year renewals = four years maximum.
Utah			
Vermont	Up to 4 years-including extensions (generally)	Admin Policy	Exception: "good cause or statutory authority" approved in advance per Vermont's Administrative Bulletin 3.5. Considerations include nature of goods/services & status of industry/market involved. Generally, shorter contracts favored over longer contracts. Maximum for approved extensions is 2 years.

			No restrictions on term length, or extensions allowed. No plans to limit/standardize initial term or extension options. Our eProcurement contract was 15 years. Long term contracts allow state to leverage buying power/obtain maximum savings/reduce administrative costs to award contracts. Limiting/restricting long term contracts = higher prices/increased administrative costs. Diversity advocates need to identify cost impact of restriction to administration/legislature before attempting to pass such laws/regulations. Up to state to determine if citizens are willing to pay more to support socio/economic objectives. See reference from Nash and Cibinic, George Washington University, on length of multi-year and indefinite quantity/indefinite delivery contracts.
Virginia	Our contracts are usually one to two base years with 3-4 option years.	No	
Washington			
West Virginia	1-year (generally) with 2 or 3, 1-year renewals on mutual agreement	Statute	Awarded contract cannot exceed future legislatures-per statute
Wisconsin			
Wyoming			



State Bid Protests

Introduction

This National Association of State Procurement Officials (NASPO) research brief was prepared by the Bid Protest Work Group formed under NASPO's Emerging Issues Committee. It examines bid protest policies and practices in state central procurement offices across the nation. The paper draws heavily from the results of a NASPO Bid Protest Survey conducted in February 2013, which registered a response rate of 82%.

The NASPO 2008 Practical Guide recognizes the value of having workable procedures for bidders and contractors to file bid protests, appeals, complaints and contract claims, noting that "[a] procurement system that is truly open isn't afraid to be challenged on its contract award and management decisions." Current bid protest practices among the states suggest that incorporating a fair mechanism to evaluate bid protests helps to ensure a level playing field for all vendors. The approach recommended in the NASPO Practical Guide is to have procedures established by law providing the opportunity for a bid protestor or contractor to appeal decisions on bid protests and contract claims, a fair hearing on the issues and prompt resolution¹.

Section 9 of the American Bar Association (ABA) 2000 Model Procurement Code includes model language for legal and contractual remedies; many states have partially or completely adopted the Model Procurement Code. Commentary included in the model code notes that "it is essential that bidders, offerors, and contractors have confidence in the procedures for soliciting and awarding contracts" and this can be ensured by "allowing an aggrieved person to protest the solicitation, award, or related decisions"².

Federal bid protests have been part of the federal procurement system since the early 20th century. The United States

Congress authorizes bid protests and recognizes their role in providing "redress to disappointed bidders and offerors and in ensuring the integrity of the federal procurement process"³.

There are three primary administrative and judicial forums that have authority to hear bid protests against the federal government: the procuring agency, the U. S. General Accountability Office (GAO), and the U. S. Court of Federal Claims. Each has different rules and standards it applies to a protest. These rules can be found at the links below:

- [Comptroller General Bid Protest Regulations](#).
- [Rules of the United States Court of Federal Claims](#) (as amended through July 2, 2012)

GAO provides an objective, independent, and impartial forum for the resolution of disputes concerning the awards of federal contracts⁴. Filing a GAO protest generally triggers an automatic stay of contract award or performance during the time the protest is pending as opposed to the process where the protest is filed with the Court of Federal Claims.

Although not yet a common occurrence and part of the routine procurement process like federal protests are, protests filed at the state level seem to have increased in most states in recent years.

Definitions and Bid Protest Processes

The NIGP Dictionary of Terms⁵ defines protests as "oral or written objections by a potential interested party to a solicitation or award of a contract, with the intention of receiving a remedial result; may be filed in accordance with agency

¹ NASPO State and Local Government Procurement: A Practical Guide. (2008). Lexington, KY: NASPO

² American Bar Association Model Procurement Code for State and Local Governments. (2000)

³ GAO Bid Protests: An Overview of Time Frames and Procedures. (2011). Congressional Research Services

⁴ Bid Protests at GAO: A Descriptive Guide, Ninth Edition. (2009). Retrieved March 4, 2013 from: <http://www.gao.gov/decisions/bidpro/bid/d09417sp.pdf>

⁵ National Institute of Governmental Purchasing (NIGP) Public Procurement Dictionary of Terms. (2010). Herndon, VA: NIGP

policy and procedure within predetermined timelines”.

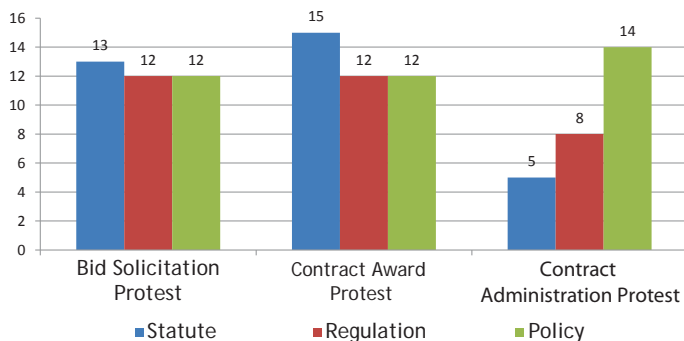
State definitions and procedures for bid protests vary among the states. Definitions and timing for filing and response for 42 states that participated in the NASPO survey are shown in Appendix I. Citations and website URLs, where available, for formal protest procedures established by statute, regulation, or policy by responding state are presented in Appendix II.

For most states that have a formal bid protest process, bid protest means an objection, challenge in connection with a solicitation, the award of a contract, or the intended award of a contract. The general practice in most states is that they have to be filed in writing to the head of the procuring agency or the central procurement officer/manager who has the authority to conduct an administrative review.

In most states, bid protest rules do not have express provisions imposing an automatic stay of contract award or performance with the filing of a bid protest. Depending on the jurisdiction's process, some states do not proceed further with the solicitation or award and suspend performance until a final decision is made regarding the protest, unless a determination is made that award or performance of the contract without delay is in the best interest of the state. The decision to stay lies with the chief procurement officer or senior executive who can make an override determination that the award of the contract without delay is necessary to protect state's interest or a protest is clearly without merit.

State Bid Protest Processes

Most states responding to the survey indicated that they have some type of formal process in place for protests in connection with bid solicitations, contract awards, and/or contract administration. The language setting up these processes resides in statutes, regulations, or policies. The chart below shows states that have bid protest processes in place, by type of law and policy.



Debriefing

The Federal Acquisition Regulations (FAR) Subpart 15.5 includes provisions on preaward and postaward debriefings. The language presented in Appendix III includes good

guidance about not turning debriefings into a point-by-point comparison of proposals. The focus is on the successful or unsuccessful offeror's proposal being debriefed and how it satisfied or did not satisfy evaluation criteria.

Results from the NASPO survey indicate that less than one fourth of the responding states have a debriefing process (Alaska, California, District of Columbia, Delaware, Hawaii, Iowa, Massachusetts, Michigan, New York, Pennsylvania, and Washington). The majority of respondents deem debriefings as effective means to deter a bid protest and eight states believe the opposite. Not all state procurement offices that conduct regular debriefings, however, have formal requirements to do so. There are states that conduct them informally and allow the opportunity for Q&As. A couple of states noted that although they do not have a debriefing process, they are considering allowing it. One state procurement official commented that his/her state did not have a positive experience with debriefings and rarely entertain them. In Alaska, there is no legal requirement for it. The process for informal debriefing is described in Alaska's Request for Proposals document template and is limited to the work performed by the contractor and performed at the discretion of the project director.

Respondents to the survey shared their experience implementing a debriefing policy in their state. Their exact comments and lessons learned are reproduced below:

- In my opinion, a debriefing conference humanizes the interaction and thereby reduces the number of protests received. People often read into what is communicated through formal correspondence, and in general, I think direct communication is far more effective.
- Our practice encourages debriefing and information resolution of disputes prior to formal protests. We have started including debriefing into the RFP/IFB key events timeline. Before formally issuing the award, we only share the company's relative rank and provide information about that company's bid review (other bidder information is not shared and only becomes available after announcement and issuance of award).
- We encourage debriefs, however they are not required. The vendors that participate appreciate the opportunity to discuss their bid response and learn more about the process. Our debrief language is below: DTMB-Procurement encourages all bidders - those who were successful in receiving an award and those who were not - to arrange a debriefing session with the buyer handling the solicitation. This is a great way to help improve your proposals and become more competitive in the future. Debriefings may be conducted in person, or over the phone. During this session, the buyer will review your

proposal, highlight its specific strengths, and indicate areas where the submission may have contained deficiencies. In preparation of a debrief request that the buyer email the Evaluation Synopsis. This document will show how the proposal was scored. Write down any questions concerning the Evaluation Synopsis before meeting with the buyer. The best debriefs take place when the bidder is prepared with questions. Please do not confuse a debrief with the protest process.

❑ No statute driven action. In cases where a vendor has been declared non-responsive, we will discuss the issue with the affected vendor prior to issuing the contract intent-to-award letter along with notice of those vendors being non-responsive.

❑ Vendors do not take full advantage of the debriefing but when they do, they can benefit for future opportunities by the lessons learned in the debrief. Debriefs also offer a more expeditious and open dialogue about vendors' real questions regarding the bid and subsequent award.

❑ We do not have a policy, but we do find that a debriefing with the suppliers helps them to improve their bidding practices and to understand how to improve and work closer with the state. Particularly in the more complex and higher dollar solicitations, a debriefing is very helpful and helps to alleviate vendor frustrations that could become a protest if not addressed by the State.

❑ Informal. I believe the best way to resolve sticky situations is to get the parties to the table and talk about it. Most of the time, the protestor wants to be heard and understood by somebody in charge of the situation. I call everyone to the table; the protestor, the agency buyer, the program expert, the lawyers...whoever needs to be in the room.

❑ While we have no formal policy, debriefings are available after an award is made based on a request for proposals.

❑ California holds debriefing sessions for bidders after the Intent to award is posted and the protest period has passed. This process is beneficial in assisting bidders in submitting future bids, but does not directly deter a bidder from protesting a current award.

❑ Debriefings are used as an educational tool to provide vendors with feedback on their specific proposal and where the Commonwealth is able to identify areas of strength and weakness in that vendor response.

❑ There is no policy, but at the times we have offered debriefing meetings we have not received protests.

❑ The key to successful debriefings is training in how to handle them. If poorly conducted, bidders will leave a debriefing more unhappy and frustrated than when they arrived. Without training, purchasers are often: defensive and argumentative about judgments decisions made, particularly if they were involved, - reluctant to respond to questions, for fear of disclosing improper information, or - too talkative, providing details of deliberations or their own opinions about the process or outcome.

More than two-thirds of states responding to the survey indicated that their bid protest rules do not provide greater access in advance of award to information relevant to the award not yet available through FOIA.

Close to half of the states responding to the survey track the protests for those bids over which they have authority. However, not all states keep a consolidated list of all protests at the central procurement office level; in other cases, each purchasing agency keeps a separate record and only appeals are kept at the central level.

Only three states that allow bid protests quantify the cost for a protest. Most states absorb the cost as the cost of doing business. For those states that quantify it, the protester or unsuccessful party is assessed all cost and charges. Any other costs are absorbed by the state.

California serves as an example of this cost absorption. Under the traditional bid protest process and protests of non-information technology service contracts, the state absorbs the entire cost of the protest. Under California's Alternative Bid Protests process, on the other hand, the cost of the arbitration is paid by the unsuccessful party. The cost is based directly on the Hearing Officer's established hourly rate. If the Procurement Division determined that the protest was frivolous and required the protestant to provide a bond, and the arbitrator determines that the protest is not frivolous, in addition to returning the frivolous bond, the state is subject to costs as follows: 1.If the arbitrator denies the protest, the protestant shall be liable for half of the costs of the arbitration. The state shall pay the remaining half of the arbitration costs. 2. If the arbitrator upholds the protest, the state shall pay for all costs of the arbitration and the protestant will be refunded the deposit by the Office of Administrative Hearings (OAH). A protestant who withdraws his or her protest before the arbitrator's decision has been issued will remain liable for all arbitration costs up to the time of withdrawal. These costs include, but are not limited to, the arbitrator's time in preparation, prehearing conferences, and hearing the protest. If the Procurement Division deemed the protest frivolous, any bond posted shall be forfeited to Procurement. Except as provided above, if any costs are determined to be payable by the protestant, that amount shall be subtracted

from deposit(s) of the protestant as ordered by the arbitrator. Any additional costs shall be billed to the Protester and any refunds shall be sent to the protestant by the OAH. If a protestant is a small business, then the state shall pay the OAH all arbitration costs and collect the amount due from protestant. Any other costs such as staff time and supplies are absorbed by the state budget.

Thirty-five states responding to the survey allow formal court action after administrative protests and/or dispute appeals have been exhausted. Two states without a formal administrative bid protest processes require formal court action for bid protests. Statistics on court proceedings are not captured at the state procurement office level.

Protest Bonds

Results from the NASPO survey show that 36 states (out of 42 responding) do not require protest bonds. Four states (Florida, Hawaii, Nevada, and Tennessee) require a bond with the submission of a protest. See chart below.



California also requires a bond, but only under the Alternative Protest Process; the traditional protest process does not include any cost. In California, if the coordinator makes a preliminary determination that the protest is frivolous, a "frivolous bond" is assessed.

Examples of language and values placed on protest bonds for states that are required to use them by statute or use them as a practice are shown in Appendix IV.

States' experience with protest bonds. Do they discourage frivolous protests?

When asked to describe their experience implementing their protest bonds policy, a few states that used them believe their protest bond policies do discourage frivolous protests. Other states indicated that they have not had a sufficient number of protest bonds to determine the impact. One state noted that bid protest bonds policies do not seem to discourage frivolous protests.

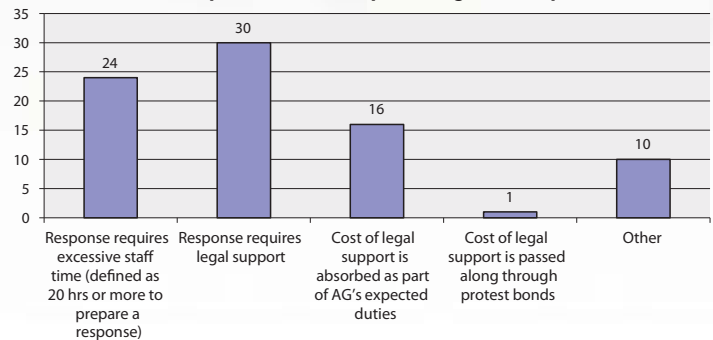
States that do not accept bid protest bonds were also asked to describe their experience and the benefit/value of not requesting a bond for a bid protest and weigh in on the same issue. A few respondents indicated that they did not have any issues associated with not requiring bid protest bonds and indicated that their protest procedures work effectively. Others noted that their approach is to avoid creating barriers

to the bid process and requiring protest bonds would discourage all protests, frivolous or otherwise. It was also noted that the administrative review process should be informal, flexible and responsive and all parties benefit from the early identification and resolution of any errors or other issues. Another common comment was that not requiring protest bonds avoids undue financial burden on small businesses. Also, one state explained that one reason for not calling protest bonds was that the volume of protests is manageable and did not force a consideration of policy change. On the other hand, one state that is considering requiring a bond equal to 10% of the contract value, noted that the goal is to avoid frivolous vendor appeals and allow the state to offset the cost of the review by deduction of costs from the bond.

Level of Effort to Respond to Bid Protests

Responding to bid protests is a time consuming effort. For most states, response requires excessive staff time (defined as 20 hours or more to prepare a response) and support from legal counsel. In one state, the cost of legal support is passed along through protest bonds.

States' experiences responding to bid protests



Below are verbatim state comments describing the type of effort involved in responding to bid protests.

- ❑ Protests/disputes are handled within the agency; AG is not involved unless the vendor files an Article 78 with the courts. Agency legal and procurement staff handle the administrative protest (Director is responsible party); the CPO handles the administrative appeal. The AG defends the state in court in the event the bidder elects to seek court action (which is allowed by statute at any time).
- ❑ The answers in this section depend on the nature of the protest. Simple issues such as late bid submissions can be completed within minutes. More complex protests may take significant time in research and legal review.
- ❑ If the SPO is the only available person with legal training, the response takes significant time away from other

duties. Average preparation time is probably slightly under the 20-hour threshold.

- ❑ The time and legal complexity varies immensely.
- ❑ Response to protests requires some time by Procurement as well as occasionally by legal counsel, but we believe that is part of doing business. We try to manage the time and effort spent responding to protests so it does not get excessive. We conduct some research and provide protest responses, and basically tell the protester if they chose to pursue the protest further, they should litigate.
- ❑ Cost of legal support under the Traditional Bid Protest process, and for protests of non-information technology service contracts is absorbed as part of the state's expected duties. Under the Alternative Bid Protest process, the state is able to pass along the cost of the Hearing Officer's time to a bidder/vendor that is unsuccessful in their protest. However, significant state staff time is spent to prepare the state's response and subsequently defend the state's selection, and the cost associated with this time is always absorbed by state.
- ❑ My organization absorbs the legal cost via interagency billing.
- ❑ We learn from most protests of ways to improve our processes or specifications. It is a very time consuming, painful process and it seems that the down turn of the economy has increased the numbers of protests.
- ❑ Response time varies based on the complexity of the procurement.
- ❑ The Division of Administration's Office of General Counsel, not the Attorney General, provides legal support. While some protests require considerable time I would not say such time is excessive.
- ❑ While there is additional staff time required to respond, I'm not sure I would term it excessive. If the documentation and process is solid, it's generally just packaging it together, which is already a part of our process on each and every award, so that vendors or other interested parties can download the info from our website. This includes score sheets, notes, etc.... they're all on our website when we issue a Notification of Award, so vendors can easily obtain the info. I honestly believe that also helps keep protests to a minimum, as they're not speculating on what might have happened... they have the facts.
- ❑ The AG defends. We do not have an assigned AG. Ad-

ditionally an AG is usually the hearing officer so the legal time is doubled.

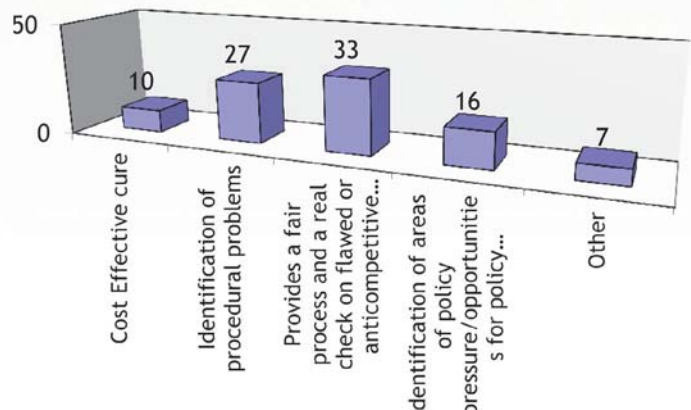
Value/Benefit of a Bid Protest Process

While definitions and bid protest processes vary among the states, there is definitely commonality running throughout, especially in terms of the value provided by allowing the process.

As mentioned before, many states deem protests as time consuming and expensive in terms of staff time required to respond, depending on the complexity of the procurement. Massachusetts indicated that the state chose the no protest process approach (since the late 1990s), because it was determined that there was no significant value in their protest policy and process.

Within the NASPO survey, the most frequently indicated benefits of having a bid protest process were providing a fair process and real check on flawed or anti-competitive awards as well as providing an opportunity to identify procedural problems. See chart below.

**Value/benefit of a Protest
as perceived by State Central Procurement Officials.**



Additional comments from respondents regarding the perceived value of having state bid protest policies are highlighted below:

- ❑ "Better image in the supplier community as a fair and open procurement system".
- ❑ "If protest does go to court, occasionally the court's decision/ruling settles ambiguity which can sometimes be written in the procurement statute".
- ❑ "Maintains the focus on "right the first time" from buyers knowing the public is going to scrutinize the process".

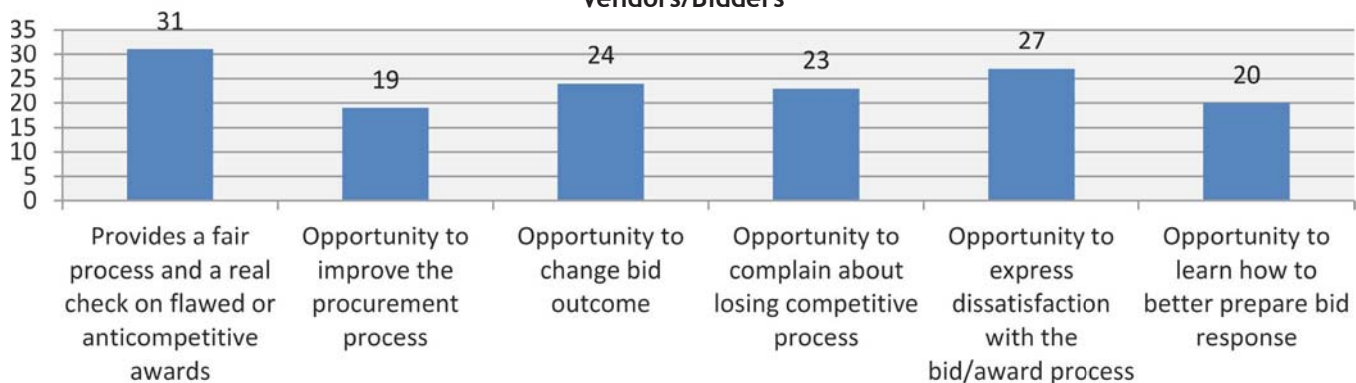
The benefits and value of having a bid protest process, cited by most respondents based on their experience working with vendors/bidders and feedback received from vendors are: “provide a fair process and real check on flawed or anti-competitive awards”, “opportunity to express dissatisfaction with the bid/award process” and opportunity to change the bid outcome. See the chart at the bottom of the page.

Less than half of the states responding to the survey believe that bid protests occur because the law allows the process. A good mix of state comments in response to the question “In your opinion, do bidders protest because the bid process, established by statute, regulation, or policy allows it” is shown below:

- ❑ They want to make sure the procurement process is fair and this is the avenue they use to state their concern about the process.
- ❑ I firmly believe that if we had statutes allowing for protests, it just invites a protest.
- ❑ Without fee or expense to file this is an easy way to take a shot at the process, complain about anything and everything and hope that something sticks. The value for the State Procurement Office has come in the ability to memorialize a response and when questioned by outside areas of pressure (i.e. legislature or constituent relations) the ability to produce a well-rounded and thorough response to the protest has proven beneficial to diffuse the concern that the process was flawed.
- ❑ Most times it is a business strategy to delay awarding the contract. Other times, there are valid reasons for unequal treatment or vague requirements.
- ❑ They want to exhaust all opportunities to potentially still receive the award.

- ❑ I do not believe protests are filed simply to delay the process. Protesting parties are usually sincere.
- ❑ We have the option of denying a request for appeal based on four criteria: 1. The petitioner is not aggrieved, 2. A prior request by the petitioner has been granted, 3. The request was made more than 15 days after notification, 4. The request is capricious, frivolous or without merit.
- ❑ A more publicized process may invite protests.
- ❑ In a significant number of cases, the protest is an attempt to get a second bite at the substantive evaluation process, rather than for review of defects in the process.
- ❑ Most bidders would not protest if the policy was not available. However, it does give the bidder the opportunity to have their concern/s heard.
- ❑ Not sure how to answer this question...yes they protest because it's allowed and couldn't if it wasn't...but I don't mind protests, because with the bond/security in place we don't get frivolous protests. The vendor genuinely feels aggrieved and we work through it.
- ❑ Our experience is that typically there is a misunderstanding or misperception about the bidding process or bidders have some incorrect information, or just want to challenge our process.
- ❑ Under the Traditional Bid Protest process, there are no bonds, fees or costs for filing a protest, as such, there is little disincentive to filing a protest. In addition, for the past several years, statistics (related to commodity and information technology acquisitions) show that approximately half of the protests filed are subsequently withdrawn by the protestant. In many instances, where

**Value/benefit of a Protest from a Vendor Perspective,
based on State Procurement Officials' Experience Working with
Vendors/Bidders**



the protestant is also the current contractor, the protest is lodged as a means to allow the protestant to generate additional orders before withdrawing the protest. Because of these types of practices, the state created the Alternative Bid Protest process, and the regulatory provision to assess a frivolous bond.

- ❑ Yes, the vendors protest because they are allowed to by law. If not allowed by law, there would be no protest process and consequently no official protest.
- ❑ At times protests seem to be frivolous and obstructive.
- ❑ Yes, sometimes a bidder protests because they can, but they still have to tell why they are aggrieved. More often, they protest because they don't understand the process, didn't read the documents, didn't follow the directions and lost. Sometimes because they think they have a better service or product than others. Sometimes because we made a mistake and they are right in pointing it out. Sometimes because we are ignorant of their industry and didn't do a good job of specifying or evaluating.
- ❑ Over the past five years in my role as the policy and protest manager, I respond to approximately 12 protests a year (60) and only two that I can recall were upheld. In my opinion, bidders protest because they lost and it costs them nothing to submit a protest. I strongly believe that if they must submit even a nominal amount of money in the form of a protest bond, we would likely see a lot fewer protests.

Examples of the Most Significant Bid Protests throughout the States

Below are exact comments from a few responding state procurement officials who were willing to share their most significant bid protest for the purpose of this paper.

California

Below is an example of a protest that was particularly significant to California's Department of General Services (DGS). First, it raised awareness of the need to develop a set of rules or framework around which acquisition staff can assess a bidder's responsibility. In addition, it demonstrated the success of the regulation that allows the state to render certain protests frivolous. The protest process is time intensive and costly to the state. Considerable time and effort was spent evaluating the documents, preparing the state's defense, and attending the hearing. If this procurement had not been conducted under the Alternative Protest process, there would have been no mechanism to stop the protest from going through the entire protest process again.

California's DGS conducted an IFB for "Wood and Guardrail Posts, and Survey Stakes" on behalf of the Department of Transportation (DOT). The intended award was protested on the grounds that the intended awardee was not a responsible bidder, citing the awardee's (personal) bankruptcy filing and claims of no assets, among other reasons. The intended awardee currently held the Wood Post contract, and the contracting staff at DOT had no documented performance issues with the current contractor (intended awardee), in fact the DOT found the contractor's performance to be satisfactory. Presented during the hearing was documentation from the bankruptcy hearing essentially showing that although the intended awardee was initially discharged from his debts, due to having virtually no assets, this decision was revoked, due to misrepresentation made by the intended awardee about monies paid to him from the current DOT contract. The Hearing Officer upheld the protest, finding the intended awardee to be an unreliable and unfit business partner for the state. The State then announced its intent to award the contract to a new contractor (the former protestant) and the award was again protested; this time by the former awardee. As this procurement was conducted under the state's Alternative Bid Protest process, the state rendered the new protest "frivolous" and required that the protestant submit a bond in the amount of 10% of the estimated contract value to proceed. As the protestant has no financial means to put up the bond, he did not provide the bond, and the protest was closed.

Florida

There are several significant bid protest cases within the state of Florida. An example of two such cases includes the issues of standing by a non-bidder and a challenge to bid specifications. These two seminal cases are *Advocacy Center for Persons with Disabilities v. Department of Children and Families*, 721 So. 2d 753 (Fla. 1st DCA 1998) and *Capeletti Brothers v. Department of General Services*, 499 So. 2d 855 (Fla. 1st DCA 1986) ("The purpose of the bid solicitation protest provision is to allow an agency, in order to save expense to the bidders and to assure fair competition among them, to correct or clarify plans and specifications prior to accepting bids." A challenge to an RFP must be directed to specifications that are so vague that bidders cannot formulate an accurate bid, or are so unreasonable that they are either impossible to comply with or too expensive to do so and still remain competitive")

Nevada

Traditionally, many of our protests center around challenging evaluators scoring of a given proposal. One example was our Auction Services contract for excess/surplus property. An unsuccessful vendor, who previously held the contract, filed a protest based on scoring. He refused to accept the low scores his firm received. He challenged the fact that the evaluators who had intimate knowledge of the services he'd

previously performed, scored him lower than those who did not and had based their scores completely on his proposal. The Hearings/Appeals Officer ruled that it was completely appropriate to have individuals familiar with his most recent state work on the panel and he was downgraded for his poor performance. It was a case of “past performance matters” and doing a poor job, but writing a good proposal doesn’t prevail. Nevada’s hearings/Appeals officers have been, to date, reluctant to substitute their judgment for that of credible evaluators. Most of the rare appeals we experience center around that issue. In Nevada, the hearings/Appeals Officer has two-(2) potential remedies. They may either uphold the state’s award or order a re-do of the solicitation. They cannot rearrange the evaluation and award a contract to someone other than the state has.

New York

There have been a number of protests over the years. Though not recent, one protest/dispute which was handled first administratively through administrative dispute/protest, then administrative appeal, then went to court, is an example of administrative practice being confirmed by the court. Outcome of this protest reaffirms state’s right to request lower price from bidders of a multiple award bid and codifies practice allowed in legislative change.

Lessons Learned and Guidance from State Procurement Officials

A few respondents to the NASPO survey were gracious enough to share some of their experiences with bid protests and offer some advice and guidance on how protests should be reviewed and responded to. Comments from State Procurement Directors are presented below, in their own words:

- ❑ Debriefing vendors is a great tool - we see fewer protests if we help vendors understand the evaluation process and how they scored.
- ❑ Be timely and factual. Don’t minimize a vendor’s position... all of them feel they’re best suited for contract award, so don’t take it personally. If there are numerical errors or process errors that are satisfactorily brought to my attention, I take action. I don’t need a vendor to go through the time and expense of a formal appeal as provided under the statute, if a math error has occurred or we didn’t perfect the solicitation process. I can simply withdraw the RFP/BID and re-do or take other appropriate action.
- ❑ Attempt to handle disputes informally first, provide written guidance to vendor community regarding policy, assign responsibility to receive and rule to a senior level procurement manager who gathers information and

recommended response from legal and the applicable procurement team. Allow an independent appeal to the CPO/ Deputy Commissioner responsible for procurement. Keep strong procurement records that will assist in protest review. Utilize counsel who will ultimately have to defend any legal challenge and assist the AG in the event of formal legal action. Set deadlines in the policy for receipt of protests and appeals so procurement awards aren’t delayed unnecessarily.

- ❑ Be impartial, courteous and responsive to the protester, regardless of how angry or weak the claim.
- ❑ Explain the standard of review and procedural requirements (in as simple language as possible). E.g., State employees are not required to always make the best possible decision, only a reasonable one. Try to explain the policies behind statutes and administrative rules, particularly if there seems to be little “harm” in ignoring them for the matter at issue. Don’t be defensive about adverse decisions. It should be a learning experience for all involved.
- ❑ Ensure the procurement file is properly documented and in order prior to posting the intent to award.
- ❑ Make sure the specifications and requirements are sound, and that the evaluation team understands and properly follows the evaluation methodology.
- ❑ Structure your response to the statement of protest to facilitate the hearing officer’s review.
- ❑ Have a discussion between the buying unit or department and legal staff once the statement of protest is received. Each protest point is vetted, and analyzed against the solicitation requirement and how the proposal or bid was evaluated. The exercise assists in preparing the state’s response to the protest, ensures that there were no errors in the evaluation, and prepares the staff for possible testimony.
- ❑ Always allow opportunity for discussion. Nine times out of ten, matters go away after sharing solicitation responses, etc.
- ❑ Be direct. Be succinct. Be factual. Don’t respond to allegations or claims that are immaterial to the bid process so that you are not sidetracked and address them for closure only as being immaterial to the bid process.
- ❑ A flexible, common-sense-based approach best serves both the state’s and vendor’s interests of promptly resolving issues while they are still manageable administratively.

❏ My advice to others is to follow your procedures and code requirements to the letter, and seek advice from your legal counsel if you have any questions. We have an administrative position designated to facilitate the protest process as well as the Complaint to Vendor (CTV) process along with other duties. The procedure is not posted anywhere, but it is one of our internal policies (PUR-007 Communications and Protest Procedure). When a vendor registers a complaint stating they had a concern about our bidding process, or questioning another bidder's qualifications, or any type of formal complaint, we treat it as a protest, and the procedure begins. Upon receipt of a protest letter or email, within 1 to 3 business days an acknowledgement of the protest is sent to the vendor stating we will respond in the coming days. Our procedure states we will address the points of the protest within 10 working days or sooner. We have four levels of protest. The first two levels do not involve legal counsel, and the last two involve them. If a protest is filed by a law firm representing a vendor, our legal counsel gets involved. Typically a protest is filed because a vendor does not understand our bidding process or evaluation process, and once that is explained, they understand. They may not like or agree to our explanation, but as long as we are following our procedure or State Code, typically a vendor will say they understand. Legal advises us sometimes if our explanations are sufficient to do battle in court if the protest would go to litigation.

❏ Ask your legal counsel to provide a summary.

❏ A few lessons from Oregon:

- Oregon has strong "sunshine" laws that make everything related to a procurement public.
- We resolve protests at the lowest level - usually at the buyer or buyer manager desk. If a protest gets to my desk (CPO), I will usually meet with the protestor to get their "side of the story". We find that sitting down with the offeror often results in an amicable result.
- We provide a timely written response to protests.
- If needed, we get legal counsel to help.
- We are not hesitant to change our course of action or admit we could do something better...and then do something about it so that we are fair to everyone involved. "Open and fair competition" is our mantra.
- We have cultivated a strong tradition of the Governor's Office staying out of procurement processes!

Acknowledgements

This NASPO paper was produced by the Emerging Issues Committee's Bid Protest Work Group, who provided important feedback and guidance throughout the process. Members of the work group included:

Dean Stotler, EIC Chair, Work Group Lead	Delaware
Jean Clark	Arizona
Shirley Ramudo	California
Carol Pfarr	Colorado
Tina Mohr	Connecticut
Justin Kaufman	Minnesota
Heather Pickett	Minnesota
Larry Maxwell	New Mexico
Don Greene	New York
Tony DesChenes	Honorary
Lee Johnson	Honorary
Ellen Phillips	Honorary
Monica Wilkes	Honorary

Special thanks are owed to Dean Stotler who provided excellent leadership throughout this true team effort. The committee would like to thank all states that responded to the NASPO Bid Protest Survey and provided feedback to the project. Appreciation is expressed to all work group members for their significant contribution to the survey development and NASPO Senior Policy Analyst Elena Moreland for her work and guidance throughout the research and analysis phase. NASPO would also like to acknowledge Chris Record's contribution, and editor Chris Heiss at AMR Management Services.

Disclaimer

NASPO is the National Association of State Procurement Officials and represents the directors of the central purchasing offices in all 50 states, the District of Columbia, and the territories of the United States. For more information on NASPO, please visit www.naspo.org.

NASPO makes no endorsement, express or implied, of any products, services, or websites contained herein, nor is NASPO responsible for the content or the activities of any linked Websites. Any questions should be directed to the administrators of the specific sites to which this publication provides links. All critical information should be independently verified.

AMR Management Services, Inc. provides NASPO with full management services. For more information on AMR, please visit www.AMRms.com.

Appendices

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)		
State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
ALABAMA		
The Division of Purchasing shall provide a notice of intent to award of all contracts let by competitive bid by electronic posting to the Division of Purchasing website. Any bidder adversely affected by an intent to award a contract let by competitive bid shall file with the Director of Purchasing a notice of protest within five (5) calendar days after the notice of intent to award is electronically posted. The notice of protest may be filed by mail, by hand delivery, by email or by facsimile.	The notice of protest must be filed with the Director of Purchasing by 5:00 PM, Central Time, on the fifth calendar day after the notice of intent to award is electronically posted. A formal written protest shall be filed within seven (7) days, excluding Saturday, Sunday, and State holidays, after the notice of protest is filed. The formal written protest may be filed by email in PDF format or by mail or hand delivery. The formal written protest must be filed with the Director Purchasing by 5:00 PM, Central Time, on the seventh day after filing the notice of protest. The bidder or its legal representative must sign the formal written protest or it will not be accepted. Failure to file either the notice of protest or the formal written protest within the time limits prescribed herein shall constitute a waiver of any protest of the award of contract. The formal written protest shall state with particularity the facts and law upon which the protest is based.	Within 30 calendar days of receipt of the timely filed, formal written protest, the Director of Purchasing shall issue a written decision with respect to the protest. Should the decision by the Director of Purchasing be adverse to the bidder, the bidder may seek relief in accordance with section 41-16-31 of the Code of Alabama.
ALASKA		
Alaska Stat. Sec. 36.30.560. An "interested party" (an actual or prospective bidder or offeror whose economic interest might be affected substantially and directly by the issuance of a contract solicitation, the award of a contract, or the failure to award a contract) may protest the award of a contract, the proposed award of a contract, or a solicitation for supplies, services, professional services, or construction by an agency.	Alaska Stat Sec. 36.30.565 (a) A protest based on alleged improprieties or ambiguities in a solicitation must be filed at least 10 days before the due date of the bid or proposal, unless a later protest due date is specifically allowed in the solicitation. If a solicitation is made with a shortened public notice period and the protest is based on alleged improprieties or ambiguities in the solicitation, the protest must be filed before the due date of the bid or proposal. Notwithstanding the other provisions in this subsection, the protest of an invitation to bid or a request for proposals in which a pre-bid or pre-proposal conference is held within 12 days of the due date must be filed before the due date of the bid or proposal if the protest is based on alleged improprieties or ambiguities in the solicitation. A protest based upon alleged improprieties in an award of a contract or a proposed award of a contract must be filed within 10 days after a notice of intent to award the contract is issued by the procurement officer. (b) If the protester shows good cause, the procurement officer of the contracting agency may consider a filed protest that is not timely.	Alaska Stat. Sec. 36.30.580. Decision by the procurement officer. (a) The procurement officer of the contracting agency shall issue a written decision containing the basis of the decision within 15 days after a protest has been filed. A copy of the decision shall be furnished to the protester by certified mail or other method that provides evidence of receipt. (b) The time for a decision may be extended up to 30 days for good cause by the commissioner of administration, or, for protests involving construction or procurements for the state equipment fleet, the commissioner of transportation and public facilities. If an extension is granted, the procurement officer shall notify the protester in writing of the date that the decision is due. (c) If a decision is not made by the date it is due, the protester may proceed as if the procurement officer had issued a decision adverse to the protester.
ARIZONA		
Any interested party may file a protest. A timely action with a legal/factual basis.	A Protest must be filed with 10 days of the action to the Procurement Officer.	Protests are first addressed by the Procurement Officer, within 14 days. The Procurement Officer's Decision can be appealed to the Director of Administration, within 30 days of the Decision. 14 days for protests. 21 days for appeals to prepare the Agency Report

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)

State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
ARKANSAS		
Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation of a contract may protest by presenting a written notice at least seventy-two (72) hours before the filing deadline for the solicitation response to the State Procurement Director or the head of a procurement agency. Any actual bidder, offeror, or contractor who is aggrieved in connection with the award of a contract may protest to the State Procurement Director or Head of a Procurement Agency (higher education).	The State Procurement Director or Head of a Procurement Agency (for higher education) has the authority to consider it. The protest shall be submitted in writing within fourteen (14) calendar days after the aggrieved person knows or should have known of the facts giving rise to the grievance.	There is no set time on the response from the State Director or Head of Procurement Agency. But once the decision is made, a written decision must be furnished to the protestor within five (5) days. That decision is final and conclusive. There currently is not an appeal review; the only recourse is legal/court action.
CALIFORNIA (Traditional Bid Protest Process)		
A protest is a challenge brought by a bidder during the competitive solicitation process asserting that the solicitation requirements are restrictive or unclear ("protest of requirements" applicable to Information Technology Acquisitions, only), or that the protestant should have been selected for award ("protest of award"). A protest may be filed by any "participating" bidder.	Unless approved for the Alternative Bid Protest Process, protests for Information Technology acquisitions or commodities are heard and decided by the Victim Compensation and Government Claims Board. There is no mandatory deadline for deciding these (Traditional) protests. Protests for non-information technology services are heard and decided by the Department of General Services, Office of Administrative Hearings; there is no mandatory deadline for deciding these decisions.	The State has ten calendar days to respond to protests heard by the VCGCB under the Traditional Bid Protest process. For non-information technology service protests, the Hearing Officer sets the time period for responding to the statement of protest.
CALIFORNIA (Alternative Bid Protest Process)		
A protest is a challenge brought by a bidder during the competitive solicitation process asserting that the solicitation requirements are restrictive or unclear ("protest of requirements" applicable to Information Technology Acquisitions, only), or that the protestant should have been selected for award ("protest of award"). A protest may be filed by any "participating" bidder.	Protests approved for the Alternative Bid Protest process are heard and decided by the Department of General Services, Office of Administrative Hearings.	The State has seven calendar days to respond to protests heard by the OAH under the Alternative Bid Protest process. By statute, a decision must be rendered within 45 days from the date the protest is filed.
COLORADO		
CRS 24-109-102 "Protested solicitations and awards" states that any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the head of a purchasing agency or a designee.	The head of a purchasing agency or a designee shall have the authority to settle and resolve a protest. The protest shall be filed in writing within seven working days after such aggrieved person knows or should have known of the facts giving rise thereto.	A written decision regarding the protest shall be rendered within seven working days after the protest is filed.
CONNECTICUT		
No protest procedure established by statute.	If there's a concern about a contract award, the vendor is asked to discuss with the Contract Specialist and Team Leader (debrief), if still dissatisfied, they can elevate to Procurement Director. If dissatisfied, from there they can entertain legal action.	

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)

State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
DELAWARE		
<p>A vendor may file a written protest challenging a compliance with applicable procurement procedures subject to the vendor's compliance with the following provisions. Any such written protest will be resolved in accordance with the following provisions.</p> <p>At a minimum, the written protest must include the following: a. The name and address of the protestor; b. Appropriate identification of the solicitation (solicitation number); c. Specific objection or challenge with supporting evidence. Note: Prior contractual relationships alone are not a basis for a protest; and d. The desired remedy.</p>	<p>The vendor must observe the following deadlines when filing a protest:</p> <p><u>Protest Filing Deadline</u> Challenge to Competitive Solicitation Process - Two (2) business days prior to the closing date and time of the solicitation, as published on bids. delaware.gov</p> <p>Challenge to an intended or Actual Contract Award - In the event GSS posts an award, the protest must be filed within ten (10) calendar days of the intent to award a contract. In the event GSS does not post an award, the protest must be filed within ten (10) calendar days of the date of the date the notice of award is issued.</p>	<p>The State, at its discretion, may deem issues not raised in the initial protest as waived with prejudice by the protesting vendor.</p> <p>Protest Resolution The Director of Government Support Services shall review and issue a written decision on the protest as expeditiously as possible after receiving all relevant requested information.</p> <p>Available remedies for sustained protests are as follows: a. If a protest is sustained prior to the closing date and time of the solicitation, available remedies may include, but are not limited to, the following: i. Modification of the solicitation document, including but not limited to specifications and terms and conditions; ii. Extension of the solicitation closing date and time (as appropriate); and iii. Cancellation of the solicitation. b. If a protest of the intended/ actual contract award is sustained, available remedies may include, but are not limited to, the following: i. Revision or cancellation of the award, ii. Re-evaluation and re-award or re-solicitation with appropriate changes to the new solicitation. c. The decisions made the Director of Government Support Services are final and permanent regardless of the protest being accepted or denied. However, the objecting party may appeal the decision by initiating legal proceedings with a Court in Delaware jurisdiction.</p>
DISTRICT OF COLUMBIA		
<p>Protest means a written objection by an aggrieved party to a solicitation for bids or proposals or a written objection to a proposed or actual contract award.</p> <p>Any aggrieved party can file a protest. Aggrieved person means an actual or prospective bidder or offeror (i) whose direct economic interest would be affected by the award of a contract or by the failure to award a contract, or (ii) who is aggrieved in connection with the solicitation of a contract.</p>	<p>The District's Contract Appeals Board considers protests.</p> <p>A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed with the Board prior to bid opening or the time set for receipt of initial proposals.</p> <p>In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation, but which are subsequently incorporated into this solicitation, must be protested not later than the next closing time for receipt of proposals following the incorporation.</p> <p>Protests other than those covered in paragraph (a) shall be filed with the Board not later than ten (10) business days after the basis of the protest is known or should have been known, whichever is earlier.</p>	<p>Twenty Business Days</p>

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)

State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
FLORIDA		
<p>There are two types of protest in Florida: a specifications challenge and a challenge to the intended award.</p> <p>A specification challenge can occur if the solicitation or specifications are so vague that a bidder cannot formulate an accurate response or the specifications are impossible to comply with.</p> <p>A challenge to the intended award occurs when the protestor can demonstrate that the state or agency has acted contrary to the agency's governing statutes, rules or the solicitation. See Section 120.57(3)(b), Florida Statutes</p>	<p>Per Section 120.57(3)(b), F.S., "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. With respect to a protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice of protest shall be filed in writing within 72 hours after the posting of the solicitation. The formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver."</p>	<p>The department's initial response is triggered by a notice to protest received within 72 hours of posting the solicitation or the intended award. After receipt of the written protest a settlement meetings between the protester and the department must occur within seven days of the department's receipt of the written protest. See Section 120.57(3)(d)1., Florida Statutes.</p> <p>If settlement is not reached, the department will transfer the matter to the Division of Administrative Hearings (DOAH). Once the matter is assigned to a hearing officer or administrative law judge a hearing will convene within 30 days unless the parties elect to waive the time frame. See Section 120.57(3)(e), Florida Statutes. The parties file a proposed recommended order 10 days after receipt of the transcript. The administrative law judge (ALJ) renders a recommended order to the department, 30 days thereafter. The department has 30 days to render a final order after receipt of the recommended order from the ALJ.</p>
GEORGIA		
<p>Definitions and requirements can be found in the Georgia Procurement Manual 6.5.1. available at: http://pur.doas.ga.gov/gpm/MyWebHelp/GPM_Main_File.htm</p> <p>Types of protests are: Challenge to Competitive Solicitation Process, Challenge to Sole-Source Notice, Challenge to Results of RFQC, and Challenge to an Intended or Actual Contract Award</p>	<p>Vendors Deputy Commissioner for Procurement two business days prior to closing the solicitation for challenge to competitive solicitation process, ten calendar days after the Notice of Intent to Award or Notice of Award for a Challenge to an Intended or Actual Contract Award.</p>	<p>No required response time. The solicitation is on hold until the decision is granted.</p> <p>Protestor may appeal to Commissioner within 3 days after protest decision by Deputy Commissioner.</p>
HAWAII		
<p>Hawaii Revised Statutes (HRS) chapter 103D, Part VII, Legal and Contractual Remedies Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation.</p>	<p>The chief procurement officer or a designee as specified in the solicitation.</p> <p>Except as provided in sections 103D-303 and 103D-304, a protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract under section 103D-302 or 103D-303, if no request for debriefing has been made, as applicable; provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.</p>	<p>(b) The chief procurement officer or a designee, prior to the commencement of an administrative proceeding under section 103D-709 or an action in court pursuant to section 103D-710, may settle and resolve a protest concerning the solicitation or award of a contract. This authority shall be exercised in accordance with rules adopted by the policy board. (c) If the protest is not resolved by mutual agreement, the chief procurement officer or a designee shall promptly issue a decision in writing to uphold or deny the protest.</p>

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)

State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
IDAHO		
<p>According to Idaho Code TITLE 67 Chapter 5733 (1) (a)-(e):</p> <p>(a) any vendor, qualified and able to sell or supply the items to be acquired, may challenge the specifications and shall specifically state the exact nature of his challenge.</p> <p>(b) any bidder whose bid was found nonresponsive may appeal such decision to the director of the department of administration. A nonresponsive bid, within the meaning of this chapter, is a bid which does not comply with the bid invitation and specifications and shall not apply to a vendor whose bid is considered but who is determined not to be the lowest responsible bidder as defined in this chapter.</p> <p>(c) A vendor whose bid is considered may protest the award.</p> <p>(d) In the case of a sole source procurement, any vendor, able to sell or supply the item(s) to be acquired, may challenge the sole source procurement.</p> <p>(e) The administrator of the division of purchasing may, on his own initiative, file a complaint with the director for a hearing before a determinations officer.</p>	<p>Idaho Code TITLE 67 Chapter 5733:</p> <p>(1) (a) There shall be, beginning with the day of receipt of notice, a period of not more than ten (10) working days in which any vendor, qualified and able to sell or supply the items to be acquired, may notify in writing the administrator of the division of purchasing of his intention to challenge the specifications and shall specifically state the exact nature of his challenge. The specific challenge shall describe the location of the challenged portion or clause in the specification document, unless the challenge concerns an omission, explain why any provision should be struck, added or altered, and contain suggested corrections.</p> <p>(1) (b) There shall be, beginning with the day following receipt of notice of rejection, a period of five (5) working days in which a bidder whose bid was found nonresponsive may appeal such decision to the director of the department of administration.</p> <p>(1) (c) A vendor whose bid is considered may, within five (5) working days following receipt of notice that he is not the lowest responsible bidder, apply to the director of the department of administration for appointment of a determinations officer. The application shall set forth in specific terms the reasons why the administrator's decision is thought to be erroneous.</p> <p>(1) (d) In the case of a sole source procurement, there shall be a period of not more than five (5) working days from the last date of public notice in which any vendor, able to sell or supply the item(s) to be acquired, may notify the administrator of the division of purchasing, in writing, of his intention to challenge the sole source procurement and briefly explain the nature of the challenge.</p> <p>(1) (e) The administrator of the division of purchasing may, on his own initiative, file a complaint with the director for a hearing before a determinations officer.</p>	<p>Typically 3 days.</p> <p>Idaho Code TITLE 67 Chapter 5733:</p> <p>(1) (a) Upon receipt of the specification challenge, the administrator of the division of purchasing shall either deny the challenge, and such denial shall be considered the final agency decision, or he shall present the matter to the director of the department of administration for appointment of a determinations officer. If the director of the department of administration appoints a determinations officer, then all vendors, who are invited to bid on the property sought to be acquired, shall be notified of the appeal and the appointment of determinations officer and may indicate in writing their agreement or disagreement with the challenge within five (5) days. The notice to the vendors may be electronic. Any vendor may note his agreement or disagreement with the challenge. The determinations officer may, on his own motion, refer the challenge portion and any related portions of the challenge to the author of the specification to be rewritten with the advice and comments of the vendors capable of supplying the property; rewrite the specification himself and/or reject all or any part of any challenge. If specifications are to be rewritten, the matter shall be continued until the determinations officer makes a final determination of the acceptability of the revised specifications. The administrator shall reset the bid opening no later than fifteen (15) days after final determination of challenges or the amendment of the specifications. If the administrator denies the challenge, then the bid opening date shall not be reset. The final decision of the determinations officer or administrator on the challenge to specifications shall not be considered a contested case within the meaning of the administrative procedure act; provided that a vendor disagreeing with specifications may include such disagreement as a reason for asking for appointment of a determinations officer pursuant to section 67-5733(1)(c), Idaho Code.</p>

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)		
State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
		<p>(1) (b) Non-responsive bid application. The director shall: (i) Deny the application; or (ii) Appoint a determinations officer to review the record and submit a recommended order to the director to affirm or reverse the administrator's decision of bid nonresponsiveness. The director shall, upon receipt of a written recommendation from the determinations officer, sustain, modify or reverse the administrator's nonresponsive bid decision. An appeal conducted under the provisions of this subsection shall not be considered a contested case and shall not be subject to judicial review under the provisions of chapter 52, title 67, Idaho Code.</p> <p>(1) (c) Upon receipt of the application, the director shall within three (3) working days: (i) Deny the application, and such denial shall be considered the final agency decision; or (ii) Appoint a determinations officer to review the record to determine whether the administrator's selection of the lowest responsible bidder is correct; or (iii) Appoint a determinations officer with authority to conduct a contested case hearing in accordance with the provisions of chapter 52, title 67, Idaho Code. A determinations officer appointed pursuant to section 67-5733(1)(c)(ii), Idaho Code, shall inform the director by written recommendation whether, in his opinion, the administrator's selection of the lowest responsible bidder is correct. The determinations officer in making this recommendation may rely on the documents of record, statements of employees of the state of Idaho participating in any phase of the selection process, and statements of any vendor submitting a bid. A contested case hearing shall not be allowed and the determinations officer shall not be required to solicit statements from any person. Upon receipt of the recommendation from the determinations officer, the director shall sustain, modify or reverse the decision of the administrator on the selection of the lowest responsible bidder or the director may appoint a determinations officer pursuant to section 67-5733(1)(c)(iii), Idaho Code. A determinations officer appointed pursuant to section 67-5733(1)(c)(iii), Idaho Code, shall conduct a contested case hearing and upon conclusion of the hearing shall prepare findings of fact, conclusions of law and a recommended order for the director of the department of administration.</p>

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)

State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
		<p>Upon receipt of the findings of fact, conclusions of law and recommended order, the director shall enter a final order sustaining, modifying or reversing the decision of the administrator on the selection of the lowest responsible bidder.</p> <p>(1) (d) Upon receipt of the challenge, the director shall either: (i) Deny the application; or (ii) Appoint a determinations officer to review the record and submit a recommended order to the director to affirm or reverse the administrator's sole source determination. The director shall, upon receipt of a written recommendation from the determinations officer, sustain, modify or reverse the administrator's sole source determination. An appeal conducted under the provisions of this subsection shall not be considered a contested case and shall not be subject to judicial review under the provisions of chapter 52, title 67, Idaho Code.</p> <p>(1) (e) The director shall appoint a determinations officer who shall make written recommendations to the director and the director shall render whatever decision is necessary to resolve the complaint.</p> <p>(2) The director of the department of administration is hereby authorized and directed to appoint a determinations officer whenever one is required by this chapter. The officer shall meet and render whatever determination is called for.</p> <p>When a complaint is filed pursuant to section 67-5733(1)(b), Idaho Code, no bid may be awarded until the final decision is rendered by the director of the department of administration; provided that in all other cases where a determinations officer is appointed by the director, the director shall have the power to allow the acquisition contract to be awarded to the successful bidder prior to or after the decision of the determinations officer if he determines such award to be in the best interest of the state.</p> <p>Any determinations officer appointed pursuant to this section shall exist only for the duration of unresolved complaints on an acquisition and shall be dismissed upon resolution of all such complaints. The determinations officer shall be guided in his determination by the best economic interests of the state for both the near future and more extended periods of time.</p>

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)		
State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
		<p>In addition to the powers conferred on the determinations officer, the director of the department of administration may: impose the penalty prescribed by section 67-5734(3), Idaho Code; enjoin any activity which violates this chapter; direct that bids be rejected, or sustained; direct that specifications be rejected, sustained or modified; and direct further legal action.</p> <p>(3) Challenges or appeals conducted pursuant to section 67-5733(1)(a), (1)(b), (1)(c)(i) or (1)(c)(ii), Idaho Code, shall not be considered to be a contested case as that term is defined in the administrative procedure act. An appeal conducted pursuant to section 67-5733(1)(c)(iii), Idaho Code, shall be conducted as a contested case according to the provisions of chapter 52, title 67, Idaho Code.</p>
ILLINOIS		
No Response		
INDIANA		
After the State makes a contract award, a bidder or respondent may submit a written letter of protest regarding the procurement methods and/or procedures used during the procurement process. The protest should indicate the specific process that the vendor disputes and the solicitation number.	<p>Protest must be received by the State not more than five (5) business days (as defined by the State work calendar) after the contract award date.</p> <p>The Director of Vendor Management/Protest Coordinator reviews them and responds to the protest.</p>	We acknowledge the protest within 5 business days; then give a formal response typically within 30 days. However, no timeframe is set in policy.
IOWA		
Vendor appeals. 105.20(1) Filing an appeal. Any vendor that filed a timely bid or proposal and that is aggrieved by an award of the department may appeal the decision by filing a written notice of appeal before the Director, Department of Administrative Services, within five calendar Days of the date of award, exclusive of Saturdays, Sundays, and legal state holidays.	Iowa's procedure is available at: https://www.legis.iowa.gov/DOCS/ACO/IAC/LINC/2-6-2013.Rule.11.105.20.pdf	Iowa's procedure is available at: https://www.legis.iowa.gov/DOCS/ACO/IAC/LINC/2-6-2013.Rule.11.105.20.pdf
KANSAS		
No Response		
KENTUCKY		
KRS 45A.285 Any actual or prospective bidder or offeror in connection with the solicitation or selection for award of a contract may file a protest with the Secretary of Finance and Administration Cabinet.	KRS 45A.285 (1) The Secretary of the Finance and Administration Cabinet, or his designee, shall have authority to determine protests and other controversies of actual or prospective bidders or offerors in connection with the solicitation or selection for award of a contract. (2) A protest or notice of other controversy must be filed promptly and in any event within (2) calendar weeks after such aggrieved person knows or should have known of the facts giving rise thereto. (3) The Secretary of the Finance and Administration Cabinet shall promptly issue a decision in writing.	<p>There is no time limit for responding to protests.</p> <p>KRS 45A.285 states only that the Secretary of the Finance and Administration Cabinet shall promptly issue a decision in writing.</p>

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)

State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
LOUISIANA		
Any person who is aggrieved in connection with the solicitation or award of a contract shall protest to the chief procurement officer (CPO). Louisiana Revised Statutes 39:1671 and Louisiana Administrative Code 34:1.3101	CPO hears protests. Protests with respect to a solicitation shall be submitted in writing at least 2 days prior to the opening of bids on all matters except housing of state agencies, their personnel, operations, equipment, or activities pursuant to R.S. 39:1643 for which such protest shall be submitted at least ten days prior to the opening of bids. Protests with respect to the award of a contract shall be submitted in writing within fourteen days after contract award.	A decision will be issued within 14 days.
MAINE		
Persons aggrieved by an agency contract award decision under Title 5 section 1825E may request a hearing of appeal.	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.	The Director of the Bureau of General Services shall notify the petitioner in writing of the director's decision regarding the request for hearing within 15 days of receipt of the request. If a request for hearing is granted, notification must be made at least 10 days before the hearing date.
MARYLAND		
No Response		
MASSACHUSETTS		
No protests for solicitations issued for goods and services.	N/A	N/A
MICHIGAN		
Bidder Protests of DTMB Purchasing Operations Solicitations: <u>Protest Instructions:</u> A. Only a bidder on a given solicitation may protest an award decision. A bidder is considered a vendor who has submitted a formal offer which meets all submission requirements and is therefore considered "responsive". B. A "No Bid" in the context of a protest does not constitute a formal offer. C. Purchasing Operations will not consider protests filed by manufacturers or suppliers selling through distributors, or businesses listed as subcontractors in a vendor's proposal. <u>Specification Protests:</u> A vendor should raise concerns about RFP specifications during the RFP Question & Answer period. If any vendor fails to protest a specification issue to the State with regard to proprietary or deficient specifications, prior to the bid deadline, subsequent protests regarding specifications may be held to be without merit. In fairness to bidders who meet specifications and to prevent delays in procurement,	To initiate a protest of an award recommendation a business must follow these steps: A. By the date and time identified in the Notice of Recommendation (NOR) issued in Bid4Michigan, the bidder wishing to protest must submit a written protest to the Chief Procurement Officer, Department of Technology Management & Budget (DTMB), 2nd Floor Mason Building, P.O. Box 30026, Lansing, MI 48909. If the published protest due date falls on a Saturday, Sunday, or State holiday, the protest must be submitted by the posted time on the next State business day to be considered. B. The written protest should include the RFP number and should clearly state the facts believed to constitute an error in the award recommendation, and the desired remedy. Only the information provided within the protest period will be considered in arriving at a decision. The Chief Procurement Officer is not required to take into consideration any material filed by any party after the protest deadline.	Vary based on complexity. C. The Chief Procurement Officer or their designee will provide a written response to the protesting party after investigating the matter or, if more information is needed, will schedule an informal meeting before issuing a decision. This decision is final. D. Until issuing a final decision on a timely protest, Purchasing Operations will not finalize an award of a contract or purchase order pursuant to a disputed solicitation. However, if there is a threat to public health, safety or welfare, or danger of immediate and substantial harm to state property from delay in making an award, the Chief Procurement Officer may proceed with an award and document the justification for such action.

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)		
State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
<p>Purchasing Operations will not withdraw a recommendation to award or re-evaluate proposals when a protest maintains that the RFP specifications were faulty or that a proposal exceeding specifications provided a better value than a lower proposal meeting specifications; unless the State determines that this action would be in its best interest.</p> <p><u>Protests without Standing:</u> To maintain the integrity of the procurement process and to ensure that state agencies receive procurements without undue delay, protests requesting waiver of the following omissions and requirements cannot be granted.</p> <p>A. Failure of a bidder to properly follow sealed proposal submission instructions.</p> <p>B. Failure of a bidder to submit the proposal to Purchasing Operations by the due date and time and in the format required (Online vs. Hardcopy).</p> <p>C. Failure of a bidder to provide samples, descriptive literature, or other required documents by the date and time specified.</p> <p>D. Failure of a bidder to provide a required proposal deposit or performance bond by the date and time specified.</p> <p>E. Failure of a bidder to submit a protest within the time stipulated in the Notice of Recommendation or as determined by the Chief Procurement Officer. However, if there are no responsive proposals, these requirements may be waived at the discretion of the Chief Procurement Officer.</p> <p>Bidder Protests of Agency Delegated Solicitations: Subject to the governance of the DTMB Chief Procurement Officer and DTMB policy, Agencies are authorized to review and respond to protests for solicitations done by the Agency within their standard delegation, special delegation letter or the Purchasing Alliance Program (PAL).</p> <p>Vendors should send protest letters to the respective Agencies Purchasing Director or designee, identified in the Notification of Recommendation letter issued on Bid4Michigan, who will conduct the protest review and draft the response. Agencies should forward a copy of all protests to dmb-purchknowledge@michigan.gov upon receipt. The draft responses should also be sent for review at least two (2) business days prior to the mailing of the response to the protesting party.</p>		

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)

State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
MINNESOTA		
No formal definition in statute or rule. Unless the solicitation is more prescriptive, any vendor who believes they have been adversely affected can file.	Protests are generally heard by the Chief Procurement Officer or his designee. Any limits on timing deadlines for filing or responding are stated in the solicitation document.	There is no prescribed time limit in statute or rule. The solicitation document will sometimes outline a prescribe time limit (e.g. 14 calendar days).
MISSISSIPPI		
A protest occurs when any actual or prospective bidder, offerer, or contractor feels they are aggrieved in connection with a solicitation or award. They can be filed by any actual or prospective bidder, offerer, or contractor. Mississippi Procurement Manual available at: http://www.dfa.state.ms.us/Purchasing/ProcurementManual/ProcurementManual.pdf	Protests are heard by the Public Procurement Review Board (PPRB). Protests must be submitted in writing by the aggrieved party within 7 days of the person knowing the facts giving rise thereto.	Once a protest is known by the PPRB they schedule a hearing as quickly as possible.
MISSOURI		
Definition of protest resides in rule available at: http://www.sos.mo.gov/adrules/csr/current/1csr/1c40-1.pdf		No timing requirement
MONTANA		
No Response		
NEBRASKA		
No Response		
NEVADA		
The details can be found below in Nevada Revised Statute (NRS) 333.370: Appeal by person making unsuccessful bid or proposal . 1. A person who makes an unsuccessful bid or proposal may file a notice of appeal with the Purchasing Division and with the Hearings Division of the Department of Administration.	NRS 333.370 1. A person who makes an unsuccessful bid or proposal may file a notice of appeal with the Purchasing Division and with the Hearings Division of the Department of Administration. within 10 days after: (a) The date of award as entered on the bid record; and (b) The notice of award has been posted in at least three public buildings, including the location of the using agency. The notice of appeal must include a written statement of the issues to be addressed on appeal. 2. A person filing a notice of appeal must post a bond with good and solvent surety authorized to do business in this state or submit other security, in a form approved by the Administrator by regulation, to the Purchasing Division, who shall hold the bond or other security until a determination is made on the appeal. Except as otherwise provided in subsection 3, a bond posted or other security submitted with a notice of appeal must be in an amount equal to 25 percent of the total value of the successful bid submitted. 3. If the total value of the successful bid cannot be determined because the total requirements for the contract are estimated as of the date of award, a bond posted or other security submitted with a notice of appeal must be in an amount equal to 25 percent of the estimated total value of the contract. Upon request, the Administrator shall provide: (a) The estimated total value of the contract; or (b) The method for determining the estimated total value of the contract, based on records of past experience and estimates of anticipated requirements furnished by the using agency.	NRS 333.370 4. Within 20 days after receipt of the notice of appeal, a hearing officer of the Hearings Division of the Department of Administration shall hold a contested hearing on the appeal in substantial compliance with the provisions of NRS 233B.121 to 233B.1235, inclusive, 233B.125 and 233B.126. The successful bidder must be given notice of the hearing in the same manner as the person who filed the notice of appeal. The successful bidder may participate in the hearing. 5. The hearing officer may cancel the award for lack of compliance with the provisions of this chapter. A cancellation of the award requires readvertising for bids and a new award in accordance with the provisions of this chapter. 6. A notice of appeal filed in accordance with the provisions of this section operates as a stay of action in relation to any contract until a determination is made by the hearing officer on the appeal. 7. A person who makes an unsuccessful bid or proposal may not seek any type of judicial intervention until the hearing officer has made a determination on the appeal.

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)		
State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
		<p>8. The Administrator may make as many open market purchases of the commodities or services as are urgently needed to meet the requirements of the Purchasing Division or the using agency until a determination is made on the appeal. With the approval of the Administrator, the using agency may make such purchases for the agency.</p> <p>9. Neither the State of Nevada, nor any agency, contractor, department, division, employee or officer of the State is liable for any costs, expenses, attorney's fees, loss of income or other damages sustained by a person who makes an unsuccessful bid or proposal, whether or not the person files a notice of appeal pursuant to this section.</p> <p>10. If the appeal is upheld and the award is cancelled, the bond posted or other security submitted with the notice of appeal must be returned to the person who posted the bond or submitted the security. If the appeal is rejected and the award is upheld, a claim may be made against the bond or other security by the Purchasing Division and the using agency to the Hearings Division of the Department of Administration in an amount equal to the expenses incurred and other monetary losses suffered by the Purchasing Division and the using agency because of the unsuccessful appeal. The hearing officer shall hold a hearing on the claim in the same manner as prescribed in subsection 4. Any money not awarded by the hearing officer must be returned to the person who posted the bond or submitted the security. [26:333:1951]—(NRS A 1963, 1058; 1971, 14; 1985, 45; 1991, 623; 1995, 378; 1997, 487)</p>
NEW HAMPSHIRE		
The State of NH Purchasing Rules (ADM 600), have specific guidelines for award protests. It is a 4 step process, and very detailed. Any bidder can file.	Protests are first heard by the Purchasing Agent, then the Administrator, an Informal Hearing Officer, and then the State Supreme Court. The protest has to be filed within 5 days after the date of Award, and the time period for each process differs.	
NEW JERSEY		
A protest can be lodged against either the specifications of an RFP or against the award of contract against a solicitation. All citizens can file protests.	Our Division has 2 full-time hearing officers, who will write-up a decision, which is then signed by the Director.	New Jersey has no set time limit for protests (some are a day/week, others are several months)
NEW MEXICO		
No Response		

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)

State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
NEW YORK		
<p>Dispute means a written objection by an interested party to any of the following:</p> <ul style="list-style-type: none"> a. A solicitation or other request by PSG for offers for a contract for the procurement of commodities or services. b. The cancellation of the solicitation or other request by PSG. c. An award or proposed award of the contract by PSG. d. A termination or cancellation of an award of the contract by PSG. e. Changes in the Scope of the contract by the Commissioner of OGS. f. Determination of "materiality" in an instance of nonperformance or contractual breach. g. An equitable adjustment in the Contract terms and/or pricing made by the Commissioner during a force majeure event. - Interested party for the purpose of filing a dispute relating to a solicitation, as used in this section, means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. - Interested party for the purpose of filing a dispute relating to a contract award, as used in this section, means an actual bidder or offeror for the subject contract. - Interested party for the purpose of filing a dispute relating to the administration of the contract, as used in this section, means the awarded Contractor for the subject contract. 	<p>OGS Procurement hears disputes (protests) for our bids and contracts.</p> <p>Other agencies deal with their own protests.</p> <p>If an agency does not have a protest policy they must follow the NYS Office of State Comptroller procedures located at: http://www.osc.state.ny.us/agencies/gbull/attachments/contractawardprotestprocedure.pdf</p> <p>However, a dispute may not be filed later than 10 days after issuance of the award.</p> <p>Disputes concerning the administration of the contract after award (see II.A.6 d-g), must be filed within twenty (20) business days by an Interested Party (see II.A.4) after the disputing party knows or should have known of the facts which form the basis of the dispute.</p> <p>Disputes concerning a solicitation shall be filed by an Interested Party (see II.A.2) with PSG no later than ten (10) business days before the date set in the solicitation for receipt of bids. If the date set in the solicitation for receipt of bids is less than ten (10) business days from the date of issue, formal disputes concerning the solicitation document shall be filed with PSG at least twenty-four (24) hours before the time designated for receipt of bids.</p> <p>Disputes concerning a pending or awarded contract must be filed within ten (10) business days by an Interested Party (see II.A.3) after the disputing party knows or should have known of the facts which form the basis of the dispute.</p>	<p>Notice of Decision: A copy of the decision, stating the reason(s) upon which it is based and informing the filer of the right to appeal an unfavorable decision to the Chief Procurement Officer shall be sent to the filer or its agent by regular mail within thirty (30) business days of receipt of the dispute.</p>
NORTH CAROLINA		
<p>A protest is a written claim of error related to a competitive contract award, including specific reasons and supporting documentation.</p> <p>Any bidder aggrieved by an award can file a claim.</p>	<p>Protests are heard by the State Purchasing Officer (SPO) in the first instance (10-day response), then unsatisfied protester may file a Contested Case with the Office of Administrative Hearings.</p>	<p>Ten days, if possible, within which to decide protest or to schedule an informal hearing.</p>

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)

State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
NORTH DAKOTA		
<p>An interested party may protest the award of a contract, the notice of intent to award a contract, or a solicitation for commodities or services.</p> <p>“Aggrieved party” can protest a solicitation. “Interested party” means a bidder or offeror that has submitted a response to a solicitation and is aggrieved may protest an award or notice of intent to award</p>	<p>Protests are heard by the procurement officer. Appeals are heard by the Office of Management and Budget</p> <p>Vendors - protest solicitation by deadline for questions or 7 calendar days before deadline for receipt of bids or proposals.</p> <p>Vendors - protest award/notice of award within 7 calendar days.</p> <p>Protest of a solicitation - If deadline for questions, must have brought to the attention of procurement officer by deadline.</p> <p>Otherwise, 7 calendar days before deadline for receipt of bids or proposals.</p> <p>Protests of award/notice of intent to award - vendors have 7 days after award or notice of award to file a protest.</p>	<p>Procurement officer has 7 calendar days to respond, can extend by 7 calendar days with written notice to protestor.</p> <p>Protests of award/notice of intent to award - Procurement officer has 7 calendar days to respond, can extend by 7 calendar days with written notice to protestor.</p> <p>Vendor has 7 calendar days to appeal to OMB.</p> <p>OMB has 7 calendar days to respond to appeal. (No extension provisions)</p>
OHIO		
<p>Anyone can file a protest anytime, with the Office of Procurement Services (OPS).</p>	<p>OPS will respond and address the protest points.</p>	<p>Ohio OPS Purchasing Procedure states we will respond within 10 working days after acknowledging the receipt of the protest.</p>
OKLAHOMA		
<p>Any bidder to a solicitation may file a protest within 10 business days of a contract award.</p>	<p>The initial protest goes to the State Purchasing Director for review.</p>	<p>The State Purchasing Director has 10 days to respond to a formal protest. The Purchasing Director will sustain or deny the protest. Upon notice of denial, within 10 days the bidder may file an appeal to the Director of the Office of Management and Enterprise Services. The Director may handle the protest or hand it off to an ALJ. Proper Parties: In addition to the supplier protesting the contract award, the Department of Central Services (now the Office of Management and Enterprise Services), the supplier awarded the contract and the state agency for which the bid was let may participate in the bid protest proceedings as a proper party. (E) Discovery. The conduct of discovery is governed by the Administrative Procedures Act, 75 O.S. §§ 309 et seq. and other applicable law.</p>
OREGON		
<p>In Oregon, protest processes are customized to each method of solicitation as an administrative review process prior to judicial review. Protests can be filed by “affected persons” - generally, these are offerors or potential offerors.</p> <p>An affected person may protest the procurement process, the contents of a solicitation document or the award or proposed award of an original contract</p>	<p>In all cases, an affected person must file a written protest with the contract review authority for the contracting agency and exhaust all administrative remedies before seeking judicial review. There are several different rules, since Oregon tailors the protest procedure to the solicitation method. A good example is at OAR 125-247-0700 through OAR 125-247-0740.</p>	<p>Generally, the submission of protests is governed by timing specific to the situation. In most situations, the response is not subject to a hard timeline, but expected to be timely. Usually, the process clock stops with a protest, so the contract review authority is motivated to take the matter up promptly so the agency can continue towards its ultimate goal of a timely contract award.</p>

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)

State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
PENNSYLVANIA		
<p>Any bidder or prospective bidder who is aggrieved in connection with the IFB, or award of the contract solicitation or award of a contract may file a protest. Protests relating to cancellation of invitations for bids and protests relating to the rejection of all bids are not permitted. A bidder is a person that submits a bid in response to the IFB. A prospective bidder is a person that has not submitted a bid in response to the IFB.</p> <p>Any offeror or prospective offeror or prospective contractor who is aggrieved in connection with the RFP or award of a contract may file a protest. No protest can be filed if the RFP is cancelled or if all proposals received in response to the RFP are rejected.</p>	<p>Protests in connection with an IFB must be filed in writing with the Deputy Secretary for Procurement, Bureau of Procurement Executive Office.</p> <p>Protests in connection with an RFP must be filed with the Issuing Office identified in the RFP.</p> <p>See requirements for filing and timing in Pennsylvania's Protest Procedure at:</p> <p>http://www.portal.state.pa.us/portal/server.pt/community/supplier_service_center/5104/resource_toolbox/513216</p>	<p>For protests in connection with IFBs, the Deputy Secretary for Procurement shall promptly, but in no event later than 60 days from the filing of the protest, issue a written decision.</p> <p>For RFPs, within 15 days of protest, the Issuing Officer may submit to the agency head or designee and to the protesting party a response to the protest. The protesting party may file a reply to the Issuing Officer's response within 10 days of the date of the response. The agency head or designee reviews the protest and any response or reply. He or she has the discretion to conduct a hearing. The agency head or designee shall promptly, but in no event later than 60 days from the filing of the protest, issue a written decision.</p>
RHODE ISLAND		
No Response		
SOUTH CAROLINA		
<p>South Carolina Statute SECTION 11-35-4210. Right to protest; procedure; duty and authority to attempt to settle; administrative review; stay of procurement. (1) Right to Protest; Exclusive Remedy. (a) A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(a) within fifteen days of the date of issuance of the Invitation for Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue. (b) Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.</p>	<p>Protests are heard by one of three chief procurement officers who oversee the primary areas of procurement of (1) construction, (2) IT, and (3) everything else.</p> <p>Timing: For mandatory filing times, see the statute above: 15 days for a protest of a solicitation; 10 days for a protest of an award.</p>	<p>"The appropriate chief procurement officer or his designee shall commence the administrative review no later than fifteen business days after the deadline for receipt of a protest has expired and shall issue a decision in writing within ten days of completion of the review." (11-35-4210(4))</p>
SOUTH DAKOTA		
<p>The State of South Dakota does not have a formal protest policy.</p>	<p>The State of South Dakota does not have a formal protest policy. Vendors may submit their protest to the Office of Procurement Management.</p>	<p>The State of South Dakota does not have a formal protest policy; the Procurement Director will review the protest and make a determination regarding its validity. If a vendor disagrees with the Procurement Director's decision they can pursue litigation.</p>

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)

State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
TENNESSEE		
"Protest" means a written complaint filed by an aggrieved party in connection with a solicitation or award of a contract by the Central Procurement Office. Any actual proposer who claims to be aggrieved in connection with a procurement may protest.	The Chief Procurement Officer hears protests in connection with a solicitation or award of a contract by the Central Procurement Office	The Chief Procurement Officer must resolve the protest within sixty (60) days from receipt of the protest. 5. If a protest is not resolved by mutual agreement (between the protestor and Chief Procurement Officer), the decision of the Chief Procurement Officer may be appealed to the Protest Committee. The Protest Committee is comprised of the commissioners of General Services and Finance & Administration and the State Treasurer, or their designees. Following the Chief Procurement Officer's resolution of the protest, the protester may appeal the decision to the Protest Committee. Such appeal must be made within seven (7) days from the Chief Procurement Officer's final determination or within seven (7) days following the CPO's failure to resolve the protest within sixty (60) days of receipt of the protest.
TEXAS		
Protests relate to alleging that the state violated law or rule in soliciting for or awarding a contract.		No deadline set in law or rule.
UTAH		
No Response		
VERMONT		
a) "Appeals", as used in this instance, means a written objection by an interested party to a procurement process or the award of a purchase order or contract. b) "Interested party for the purpose of filing a protest", as used in this instance, means an actual or prospective offeror whose direct economic interest would be affected by the award of the contract or by the failure to award a contract. If an "Interested Party" chooses to appeal a bid award or purchasing procedure, the initial appeal is filed with the Director of Purchasing & Contracting. If the issues are not resolved at this level the appeal is escalated through to the Commissioner of Buildings and General Services. There is no statutorily required appeal process.	The practice that the Office of Purchasing & Contracting follows is for the vendor to file a protest in writing and detail the nature of the protest with the Purchasing & Contracting Director. There is no requirement for a vendor to file an appeal/protest within a specific period of time.	There is no written policy and/or practice that identifies a timeline for responding. We attempt to resolve the protest/appeal in a timely manner. When a protest is received by the Office of Purchasing & Contracting, the Purchasing & Contracting Director, based on the nature of the protest, conducts a complete review of the entire file which includes a review of RFP process, bid review and evaluation, and contract award to determine any deficiencies that may exist. Once the review process is complete by the Office of Purchasing & Contracting, after findings, if any, are reviewed by the General Counsel, the vendor will be notified of the outcome. If the issues are not resolved at this level of appeal, it is escalated through the Chain of Command to the Commissioner of Buildings and General Services.
VIRGINIA		
A protest is a written complaint about an administrative action or decision brought by a bidder or offeror to the appropriate administrative section with the intention of receiving a remedial result. Any bidder or offeror can file a protest.	The contracting office responsible for the procurement hears the protest. Protests must be filed within 10 calendar days after posting of the notice of award or notice of intent to award.	The contracting office must respond in 10 calendar days of receipt with a decision.

APPENDIX I. Bid Protest Policies and Procedures. Definitions and Timing (2013 NASPO Bid Protest Survey)

State Definition for Bid Protests	Who Hears the Protest and Timing for Filing	Timing for Response and Decision Process
WASHINGTON		
After the apparent successful bidder is announced but before the contract is executed a Bidder may protest a) A matter of bias, discrimination, or conflict of interest on the part of an evaluator; b) Errors in computing the scores; or c) Non-compliance with procedures described in the procurement document or agency protest process or policy requirements. Only a Bidder may file a protest.	The agency is to assign a neutral party that had no involvement in the evaluation and award process to investigate and respond to the protest.	The purchasing agency has 10 business days to respond unless additional time is needed.
WEST VIRGINIA		
Protest means a formal, written complaint filed by a vendor regarding specifications or an award made with the intention of receiving a remedial result.	The director or his designee review the matter of protest and issue a written decision. A hearing is optional at the discretion of the director.	No specific timing required.
WISCONSIN		
No Response		
WYOMING		
Any bidder who does not receive an award is eligible to file a protest regarding a specific procurement.	Bidders/Proposers have ten business days to file their protest. The Procurement Manager reviews the protest.	The Procurement Manager reviews the protest and responds. Investigation commences upon receipt.

Appendix II Citations and website URLs for formal protest procedures established by statute, regulation, or policy by responding state (2013 NASPO Bid Protest Survey)

AK	Procurement Statutes: Article 08. LEGAL AND CONTRACTUAL REMEDIES http://doa.alaska.gov/dgs/docs/as3630.doc Purchasing Regulations: Article 13 LEGAL AND CONTRACTUAL REMEDIES http://doa.alaska.gov/dgs/docs/2aac12.doc Procurement – Administrative Manual AAM 82. PROCUREMENT http://doa.alaska.gov/dof/manuals/aam/resource/82.pdf Procurement Information Messages (PIMS) http://doa.alaska.gov/dgs/pdf/pims-all1.pdf
AL	www.Purchasing.Alabama.Gov
AR	http://www.dfa.arkansas.gov/offices/procurement/Documents/lawsRegs.pdf ACA 19-11-244
AZ	No response
CA	§ Protests of Proposed Awards for Goods Contracts (PCC § 10306) § Protests of Proposed Awards and Initial Protests for IT Contracts (PCC § 12102(h)) § Protests of Proposed Awards of non-IT Service Contracts (PCC § 10345) http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pcc&group=10001-11000&file=10335-10381 § Alternative Protest Pilot Project (PCC § 12125 et seq.) § Office of Administrative Hearings - Arbitration Regulations (California Code of Regulations, Title 1, Division 2, Chapter 5, § 1400 et seq.) § Victim Compensation & Government Claims Board (California Code of Regulations, Title 2, Division , Chapter 1, § 870 et seq.) § California Code of Regulations: http://government.westlaw.com/linkedslice/search/default.asp?tempinfo=word&RS=GVT1.0&VR=2.0&SP=CCR-1000 type in 'protest' in the space provided. State Contracting Manual (SCM) Volume 1 for non-IT Services, Chapter 6 http://www.dgs.ca.gov/ols/Resources/StateContractManual.aspx SCM Volume 2 for IT Goods, Chapter 7 http://www.dgs.ca.gov/pd/Resources/publications/SCM2.aspx SCM Volume 3 for IT Good and Services, Chapter 7
CO	Colorado procurement rule R-24-109-102-01 can be found at http://www.sos.state.co.us/CCR/Rule.do?deptID=14&deptName=100.800 Department of Personnel and Administration&agencyID=40&agencyName=101Division of Finance and Procurement&ccrDocID=1921&ccrDocName=1 CCR 101-9 PROCUREMENT RULES&subDocID=28116&subDocName=ARTICLE 109 REMEDIES&version=7
CT	N/A
DC	http://government.westlaw.com/linkedslice/default.asp?SP=DCC-1000 http://www.dcregs.dc.gov/Gateway/Agencyhome.aspx?SearchType=DCMRAgency&AgencyID=28 http://cab.dc.gov/page/rules-and-regulations-cab
DE	These are posted on our intranet site and not accessible outside of the firewall
FL	Section 120.57(3), Florida Statutes and Rule chapter 28-110, Florida Administrative Code http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0100-0199/0120/Sections/0120.57.html https://www.flrules.org/gateway/ChapterHome.asp?Chapter=28-110
GA	Georgia Procurement Manual (GPM) http://pur.doas.ga.gov/gpm/MyWebHelp/GPM_Main_File.htm
HI	HRS sec. 103D-701, Authority to resolve protested solicitations and awards http://www.capitol.hawaii.gov/hrscurrent/Vol02_Ch0046-0115/HRS0103D/HRS_0103D-0701.htm
IA	Iowa's bid protest procedure is available at https://www.legis.iowa.gov/DOCS/ACO/IAC/LINC/2-6-2013.Rule.11.105.20.pdf
ID	www.legislature.idaho.gov/idstat/Title67/T67CH57SECT67-5733.htm

Appendix II Citations and website URLs for formal protest procedures established by statute, regulation, or policy by responding state (2013 NASPO Bid Protest Survey)

IN	Procurement Protest Policy at http://www.in.gov/idoa/files/protest_policy_20091015.pdf http://www.in.gov/idoa/2476.htm
KY	KRS 45A.285
LA	Louisiana Revised Statutes 39:1671 and Louisiana Administrative Code 34:I.3101
MA	N/A
ME	http://www.mainelegislature.org/legis/statutes/5/title5sec1825-E.html http://www.maine.gov/purchases/policies/appeals.shtml http://www.maine.gov/purchases/policies/120.shtml Title 5 1825 E Chapter 120 (Rule)
MI	The protest policy is located at: http://www.michigan.gov/micontractconnect/0,4541,7-225-48677-20046--,00.html
MN	N/A
MO	http://www.sos.mo.gov/adrules/csr/current/1csr/1c40-1.pdf
MS	Listed in out procurement manual 6.101 thru 6.209 at http://www.dfa.state.ms.us/Purchasing/ProcurementManual/ProcurementManual.pdf
NC	Administrative Code: 01 NCAC 05B .1519 PROTEST PROCEDURES http://reports.oah.state.nc.us/ncac/title%2001%20-%20administration/chapter%2005%20-%20purchase%20and%20contract/subchapter%20b/01%20ncac%2005b%20.1519.html
ND	ND Century Code 54-44.4-12 at http://www.legis.nd.gov/cencode/t54c44-4.pdf?20130218120851 ND Administrative Code 4-12-14 at http://www.legis.nd.gov/information/acdata/pdf/4-12-14.pdf?20130218120919
NH	State of NH Administrative Rules, Administrative Rule 600
NJ	http://www.state.nj.us/treasury/purchase/AdminCode.shtml
NV	http://www.leg.state.nv.us/NRS/NRS-333.html#NRS333Sec370
NY	Dispute Resolution Procedures at http://www.ogs.ny.gov/BU/PC/Docs/VendorDisputePolicy.pdf Contract Award Protest Procedure for contract awards subject to the Comptroller's approval at http://www.osc.state.ny.us/agencies/gbull/attachments/contractawardprotestprocedure.pdf
OH	No Response
OK	The process is defined in the Central Purchasing Rules and can be found at: http://www.oar.state.ok.us/oar/codedoc02.nsf/frmMain?OpenFrameSet&Frame=Main&Src=75tnm2shfcdnm8pb4dthj0chedppmcbq8dtmmak31ctijjrgcln50ob7ckj42tbkdt374obdcli00
OR	There are several different rules, since Oregon tailors the protest procedure to the solicitation method. A good example is at OAR 125-247-0700 through OAR 125-247-0740.
PA	http://www.portal.state.pa.us/portal/server.pt/community/supplier_service_center/5104/resource_toolbox/513216

Appendix II Citations and website URLs for formal protest procedures established by statute, regulation, or policy by responding state (2013 NASPO Bid Protest Survey)

SC	S.C. Code Article 17, Legal and Contractual Remedies, Sections 11-35-4210 - 11-35-4420 at http://www.scstatehouse.gov/code/t11c035.php
SD	N/A
TN	Not yet online. Awaiting final approval.
TX	http://info.sos.state.tx.us/pls/pub/readtac\$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=34&pt=1&ch=20&rl=384
VA	Virginia Public Procurement Act and the Vendors Manual can be found at www.eva.virginia.gov under the Buyer Tab at top of Home Page.
VT	Policy is basically a written practice, it is not available on-line.
WA	http://www.des.wa.gov/SiteCollectionDocuments/About/Procurement_reform/Policies/Topic5_FinalComplaintAndProtestPolicy.pdf
WV	http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=269&Format=PDF See section 8.
WY	http://www.state.wy.us

Appendix III

Federal Acquisition Regulation (FAR) Subpart 15.5 Preaward, Award, and Postaward Notifications, Protests, and Mistakes

§15.506 Postaward debriefing of offerors.

- (a)
- (1) An offeror, upon its written request received by the agency within 3 days after the date on which that offeror has received notification of contract award in accordance with 15.503(b), shall be debriefed and furnished the basis for the selection decision and contract award.
 - (2) To the maximum extent practicable, the debriefing should occur within 5 days after receipt of the written request. Offerors that requested a postaward debriefing in lieu of a preaward debriefing, or whose debriefing was delayed for compelling reasons beyond contract award, also should be debriefed within this time period.
 - (3) An offeror that was notified of exclusion from the competition (see 15.505(a)), but failed to submit a timely request, is not entitled to a debriefing.
 - (4)
 - (i) Untimely debriefing requests may be accommodated.
 - (ii) Government accommodation of a request for delayed debriefing pursuant to 15.505(a)(2), or any untimely debriefing request, does not automatically extend the deadlines for filing protests. Debriefings delayed pursuant to 15.505(a)(2) could affect the timeliness of any protest filed subsequent to the debriefing.
- (b) Debriefings of successful and unsuccessful offerors may be done orally, in writing, or by any other method acceptable to the contracting officer.
- (c) The contracting officer should normally chair any debriefing session held. Individuals who conducted the evaluations shall provide support.
- (d) At a minimum, the debriefing information shall include—
- (1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;
 - (2) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;
 - (3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;
 - (4) A summary of the rationale for award;
 - (5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and
 - (6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.
- (e) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing shall not reveal any information prohibited from disclosure by 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C. 552) including—
- (1) Trade secrets;
 - (2) Privileged or confidential manufacturing processes and techniques;
 - (3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and
 - (4) The names of individuals providing reference information about an offeror's past performance.
- (f) An official summary of the debriefing shall be included in the contract file.

APPENDIX IV Bid Protest Bonds (2013 NASPO Bid Protest Survey)

State	Bid Protest Bonds Provisions and URLs where available	Bid Protest Bonds Values and How They Are Determined
California	<p>Regulation For the Alternative Bid Protest process, see:</p> <p>http://www.dgs.ca.gov/oah/GeneralJurisdiction/BidProtestRegs.aspx</p>	<p>Under the Alternative Bid Protest process, if the Coordinator makes a preliminary determination that the protest is frivolous protest is deemed frivolous, the Protestant is required to post a bond in an amount not less than 10% of the estimated contract value. In addition, a protestant is required to make a deposit (arbitration fee) ranging from \$1,500 to \$7,000, depending upon the estimated contract value.</p> <p>Under the Alternative Bid Protest process, the bond amount if a protest is deemed frivolous and the arbitration deposit are established in regulation. The amount of the deposit is set in regulation as follows: 1. For contracts up to \$100,000.00, the deposit shall be \$1500.00. 2. For contracts of \$100,000.00 up to \$250,000.00, the deposit shall be \$3,000.00. 3. For contracts of \$250,000.00 up to \$500,000.00, the deposit shall be \$5,000.00. 4. For contracts of \$500,000.00 and above, the deposit shall be \$7,000.00.</p> <p>A Protestant certified as a Small Business may submit a copy of the Small Business Certification in lieu of the deposit specified</p>
Florida	<p>Statute Section 87.042(2) (c), Florida Statutes and Rule Chapter 28-110.005, Florida Administrative Code</p> <p>https://www.flrules.org/gateway/ChapterHome.asp?Chapter=28-110</p> <p>http://www.leg.state.fl.us/Statutes/index.cfm?AppMode=Display_Statute&SearchString=&URL=0200-0299/0287/Sections/0287.042.html</p>	One percent of the estimated contract amount
Hawaii	<p>Statute HRS sec. 103D-709, Administrative proceeding for review.</p> <p>http://www.capitol.hawaii.gov/hrscurrent/Vol02_Ch0046-0115/HRS0103D/HRS_0103D-0709.htm</p>	<p>(1) For contracts with an estimated value of less than \$1,000,000, the protest concerns a matter that is greater than \$10,000; or (2) For contracts with an estimated value of \$1,000,000 or more, the protest concerns a matter that is equal to no less than ten per cent of the estimated value of the contract. (e) The party initiating a proceeding falling within subsection (d) shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of: (1) \$1,000 for a contract with an estimated value of less than \$500,000; (2) \$2,000 for a contract with an estimated value of \$500,000 or more, but less than \$1,000,000; or (3) One-half per cent of the estimated value of the contract if the estimated value of the contract is \$1,000,000 or more; provided that in no event shall the required amount of the cash or protest bond be more than \$10,000.</p>
Nevada	<p>Statute</p> <p>http://www.leg.state.nv.us/NRS/NRS-333.html#NRS333Sec370</p>	25% of the expected amount of the contract in question.
South Carolina	<p>Statute</p> <p>http://www.scstatehouse.gov/code/t11c035.php</p> <p>S.C. Code Section 11-35-4215</p>	<p>The practice in South Carolina is that the CPOs do not require protest bonds.</p> <p>If required, the Code states: "The agency may request that the appropriate chief procurement officer require any bidder or offeror who files an action protesting the intended award or award of a contract solicited under Article 5 of this code and valued at one million dollars or more to post with the appropriate chief procurement officer a bond or irrevocable letter of credit payable to the State of South Carolina in an amount equal to one percent of the total potential value of the contract as determined by the appropriate chief procurement officer."</p>
Tennessee	<p>Tennessee Code Annotated § 4-56-103(c)(3) available at:</p> <p>http://www.capitol.tn.gov/Bills/107/Bill/HB1476.pdf</p>	<p>The protest bond shall be payable to the State of Tennessee in the amount of five percent (5%) of the lowest bid evaluated as listed on the "File Open for Inspection" letter pertaining to the solicitation. If a protest letter is received prior to or during the proposal evaluation, the proposer shall be required to provide a protest bond, payable to the State of Tennessee, in the amount of five percent (5%) of the estimated maximum liability provided on the procurement document. The protest bond amount for a revenue contract shall be five percent (5%) of the minimum annual guarantee (MAG). If there is not a MAG, the protest bond for a revenue contract shall be five percent (5%) of the estimated income of the lowest evaluated proposal.</p> <p>They are required unless an exemption is awarded to a small, minority-owned, woman-owned, or Tennessee service-disabled veteran-owned businesses.</p>



Effective Communication between State Procurement and Industry

I. Introduction

For state governments, like any sophisticated buyer, market research is a key part of developing a “best value” strategy. All states strive to conduct research regarding leading practices before issuing a solicitation. This research is particularly important when a state is acquiring complex supplies or services. The National Association of State Procurement Officials (NASPO) Practical Guide has long recognized the value of getting appropriate vendor input prior to a procurement, noting that:

“[t]he central procurement office should develop guidelines for vendor input into the process of determining agencies’ needs or preparing initial specifications, so that the agencies and the central procurement office may obtain the benefits of vendor expertise without creating unfair bias or a conflict of interest.”¹

An informed understanding of current industry capabilities and practices results in both better Requests for Proposals (RFPs) and better contracts. As Steve Kelman from Harvard’s Kennedy School of Government wrote:

“When government doesn’t take advantage of [industry] knowledge before issuing an RFP, it loses. Failure to get early, honest feedback results in many misunderstandings in contract language, which bedevil contracts after they are signed and lead to disappointments or even litigation. In addition, lack of pre-RFP communication often leads to requirements that are

NASPO Staff Contact:

Elena Moreland
Senior Policy Analyst
emoreland@amrms.com
(859) 514-9159

Disclaimer

NASPO makes no endorsement, express or implied, of any products, services, or websites contained herein, nor is NASPO responsible for the content or the activities of any linked Websites. Any questions should be directed to the administrators of the specific sites to which this publication provides links. All critical information should be independently verified.

¹ NASPO State and Local Government Procurement: A Practical Guide. (2008). Lexington, KY: National Association of State Procurement Officials

unnecessarily expensive to meet but could have been made more economical with small changes.”²

As states struggle with fewer staff, the pre-RFP one-on-one meeting between state officials and corporate representatives can be a very cost effective and easy-to-use tool to conduct market research. One-on-one meetings with industry representatives can, however, be controversial. Procurement officials and their customers in the agencies sometimes fear that pre-solicitation meetings and discussions with vendors will create the “appearance of impropriety” and be seen as favoritism for a particular company. For example, if a state official meets with vendor A, but not vendors B and C, and A wins the competitive bid process, does that mean the official was biased toward vendor A’s solution?

NASPO Guide (2008) provides general guidelines regarding improper communication with vendors:

“[...] purchasing personnel need to communicate with vendors, at a minimum to understand the relevant markets. However, communications should always be open to all possible vendors. A good rule is that if the procurement officer calls one vendor, he or she calls them all. Calling one the officer already knows, particularly for help in writing specifications, leads to inside information leaking out, and an unfair advantage of competitors. All communications should avoid the appearance of favoritism.”

These concerns can have a chilling effect on communication with vendors. In response to a request for a meeting prior to release of an RFP, one state official wrote: “if I meet with them even as an introductory meeting, then I assume they understand they will be precluded from bidding on any project we bid out the next 6 months.”³ It is important to note that this communication came from a state that has no such prohibition to a one-on-one meeting between state officials and vendors.

To alleviate undue concerns and to facilitate such exchanges, this paper will explore how procurement officials can understand the issues involved and address them in a way that allows them to use one-on-one exchanges in a manner consistent with the obvious necessity for transparency and integrity.

First, the paper will summarize certain relevant findings from a NASPO 2011 survey of state-vendor communication practices. Secondly, the paper will examine the federal mod-

el that has existed since 1997 under the Federal Acquisition Requirements (FAR). Next, we will review the laws and policies of nine states that have policies or regulations that impact one-on-one state-vendor communications. Fourthly, the paper will provide an overview of the regulatory requirements on vendors and lobbyists involved in one-on-one meetings with state officials. Furthermore, we will discuss other pre-RFP communication tools that were addressed in the survey. Next, we will offer a framework to help state officials analyze specific situations in their own state. Finally, the paper will conclude with some recommendations to help states form their own policies.

The ultimate purpose of this research is to help procurement officials and state policy makers develop state-vendor communication guidelines or policies in their respective states. While this paper will not recommend a particular approach to one-on-one state-vendor communications, general observations and a framework for analysis are included. We hope this research and analysis will guide the discussion.

II. Survey

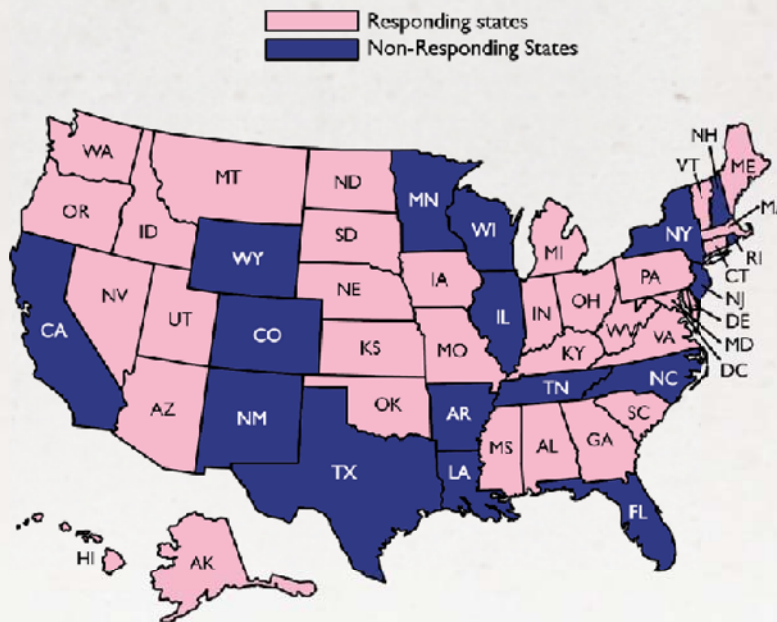
In 2011, the National Association of State Procurement Officials (NASPO) formed a work group to conduct a survey and study current practices in state-vendor communications.⁴ The State-Vendor Communications Work Group was tasked to examine the statutory and regulatory coverage for interacting with vendors and suppliers and best practices used by states to communicate and exchange information prior to publication of a formal solicitation. A total of 33 states and the District of Columbia participated in the survey, as shown in Figure 1.

In summary, the vast majority of responding states reported that there are no statutory or regulatory limitations on their ability to communicate with vendors prior to publication of a formal solicitation. Yet, many responded that they do not take full advantage of certain opportunities for communication and exchange of information with vendors. We recognize that there are many tools for pre-RFP communication, such as RFIs, RFQs, Vendor Fairs, etc., and this paper will reference these various practices. However, one particular tool, the pre-RFP one-on-one meetings between state officials and industry representatives appears to be the most controversial and, therefore, will be the focus of our discussion in this paper.

The work group began its research with the 2011 survey. The survey found that the majority of the states responding do not have “laws, rules or regulations, standard of conduct,

-
- 2 Steve Kelman (2010, February 17). Effective communication between government and industry can save money and prevent misunderstandings. Federal Computer Week. Retrieved from <http://fcw.com/articles/2010/02/22/comment-steve-kelman-communications.aspx>
- 3 This White Paper has drawn from prior research and analysis completed for an article previously published in Government Procurement Magazine. See, Campbell, P. & Rector, R. (2010, April 1). Open Access for All. Competing Priorities: Procurement Integrity vs. Need for Access to Supplier Intelligence. GOVPRO. Retrieved from http://govpro.com/resource_center/procurement_prof/open-competition-201004-05/
- 4 2011 NASPO State-Vendor Communication Survey Results, National Association of State Procurement Officials. Retrieved from http://www.naspo.org/content.cfm?id/communications_survey

Figure 1. 2011 NASPO State-Vendor Communication Survey

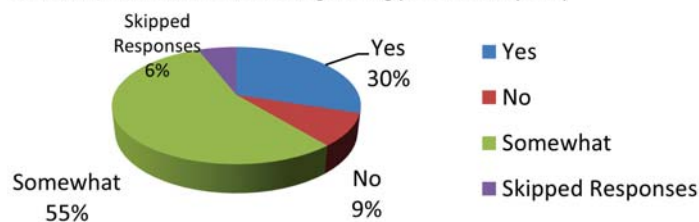


Source: 2011 NASPO State-Vendor Communication Survey

or code of ethics, containing specific provisions related to communication with vendors/suppliers prior to publication of a formal solicitation.” Specifically, 88% of all respondents deem that there are no limitations in their laws, guidelines, or agency practices to their ability to communicate with vendors/suppliers prior to publication of a formal solicitation. However as shown in Figure 2, less than a third of responding states reported that they take full advantage of statutory or regulatory allowances for communication and exchange of information with vendors prior to the RFP.

When asked about practices used by the procurement agency to communicate with vendors/suppliers and allow them to understand the solicitation requirements and the needs of the agency prior to publication of a formal solicitation, only 61% responded using one-on-one meetings. That means 39% are using other tools as part of their research. See Figure 3.

Figure 2. Do you think that your agency takes full advantage of the opportunities for communication and exchange of information with vendors prior to publication of a formal solicitation, consistent with state laws governing procurement? (N=33)



Source: 2011 NASPO State-Vendor Communication Survey

Despite various jurisdictions that may not be taking full advantage of this tool, the survey results indicate that many state officials are generally comfortable with pre-RFP exchanges of information and communication with suppliers. They understand the importance of communicating with industry representatives in an open and fair manner and recognize the value vendors provide in terms of market information and industry standards.

This is further evidenced by procurement officials’ attendance at various networking events, hosting of vendor shows at the state level routinely, attendance at meetings with disadvantaged businesses, green vendors, product shows, etc., or one-on-one meetings that occur every year at NASPO’s “How to Market to State Governments” Marketing Event.

In addition, unpublished results from an Audio Response System (ARS) survey during a session at the 2011 NASPO Annual Conference show that the majority of the state procurement officials attending the session indicated that they feel very comfortable in meeting one-on-one with vendors while conducting general research. A significantly lower number agreed that they feel very comfortable in meeting one-on-one with vendors while in the development stage of a solicitation.⁵

Nevertheless, some state officials will decline requests for such meetings citing the concern about perceptions of

5 “Emerging Issues —State-Vendor Communications” Session at the NASPO’s 2011 Annual Conference. In this session, the panel discussed findings from the 2011 State-Vendor Communication Survey and surveyed the audience using the ARS system regarding states’ practices for vendor communication and exchange of information prior to publication of a formal solicitation.

unfair bias or conflicts of interest that may arise from such meetings. The survey confirms that state statutes and regulations are providing public officials with only general guidance on the matter. In the absence of specific guidance, it is reasonable to conclude that those who fail to take full advantage of this tool may be doing so because of the lack of such guidance. Moreover, questions remain on the level of specificity that a state can share with a vendor during a meeting. As with most things in life, “the devil is often in the details.”

The following section will provide an overview of the federal model that was enacted in 1997 and provides specific guidance and a bright-line test.

III. Federal Model

The federal procurement model may differ from state government in many ways, but both systems require that competitive procurements be conducted with integrity, openness, and fairness.⁶ At the federal level, this goal is articulated in the FAR as follows:

“An essential consideration in every aspect of the [acquisition] System is maintaining the public’s trust. Not only must the System have integrity, but the actions of each member of the [acquisition] Team must reflect integrity, fairness, and openness [...] Fairness and openness require open communication among Team members, internal and external customers, and the public.”⁷

Open communication with potential vendors prior to issuance of a solicitation is an essential part of the procurement process. This is consistent with the NASPO guidelines which encourage states to develop guidelines so they can use vendor expertise when preparing a solicitation in a fair, unbiased manner that does not create a conflict of interest.

But what is unfair bias? As we have asked earlier, if a state official meets with Vendor A, but not others, does that mean the official is biased toward Vendor A’s solution? And what is a conflict of interest? If a state has spent time with one particular vendor discussing that vendor’s approach, is there a conflict of interest?

At the federal level, this issue was addressed during the 1996 revision of FAR Part 15, “Contracting By Negotiation.” Balancing the dual goals of “openness” and “integrity” in the

procurement process, the FAR drafters decided to encourage exchanges of information between public officials and potential vendors:

(a) Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged. Any exchange of information must be consistent with procurement integrity requirements (see [FAR] 3.104). Interested parties include potential offerors, end users, Government acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition.

(b) The purpose of exchanging information is to improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government’s requirements, and enhancing the Government’s ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.

(c) Agencies are encouraged to promote early exchanges of information about future acquisitions. An early exchange of information among industry and the program manager, contracting officer, and other participants in the acquisition process can identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions. Some techniques to promote early exchanges of information are—

- (1) Industry or small business conferences;
- (2) Public hearings;
- (3) Market research, as described in [FAR] Part 10;
- (4) One-on-one meetings with potential offerors (any that are substantially involved with potential contract terms and conditions should include the contracting officer; also see paragraph (f) of this section regarding restrictions on disclosure of in-

⁶ See, e.g., FAR 1.102-2(c). See also American Bar Association (ABA) Section of Public Contract Law, Principles of Competition in Public Procurements, <http://www.abanet.org/contract/admin/poc.html> (setting forth ten principles of competition in public procurement, including that “all parties involved in the acquisition process must participate fairly, honestly, and in good faith”).

⁷ FAR 1.10202(c)(1).

- formation);
- (5) Presolicitation notices;
- (6) Draft RFPs;
- (7) RFIs;
- (8) Presolicitation or preproposal conferences; and
- (9) Site visits.

* * *

(f) General information about agency mission needs and future requirements may be disclosed at any time. After release of the solicitation, the contracting officer must be the focal point of any exchange with potential offerors. When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage. Information provided to a potential offeror in response to its request must not be disclosed if doing so would reveal the potential offeror's confidential business strategy, and is protected under [FAR] 3.104 or Subpart 24.2. When conducting a presolicitation or preproposal conference, materials distributed at the conference should be made available to all potential offerors, upon request.⁸

Thus, the federal rule not only encourages early exchanges of information with vendors, but it specifically identifies "one-on-one meetings" as an appropriate means of accomplishing these exchanges.⁹ There are important caveats in the rule – added in response to public comments – that ensure fair treatment of all vendors and to make sure that procurement integrity rules are followed.¹⁰ In addition, there is a helpful, bright-line test on when these exchanges with potential vendors should stop: "After release of the solicitation, the contracting officer must be the focal point of any exchange with potential offerors" (emphasis added).

But the overall message to federal procurement officials is clear: feel free to exchange information openly and freely with vendors prior to a solicitation being issued, just be sure to treat all vendors fairly.¹¹ This message was recently reinforced in February 2011 when the Office of Federal Procurement Policy issued a policy memorandum to the federal

acquisition community entitled "Myth-Busting': Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process."

Noting that access to market information is critical for public procurement, the memorandum states that "productive interactions between federal agencies and our industry partners should be encouraged to ensure that the government clearly understands the marketplace and can award a contract or order for an effective solution at a reasonable price." The memorandum also states that "[e]arly, frequent, and constructive engagement with industry is especially important for complex, high-risk procurements."

The memorandum then addresses ten "myths" about federal procurement, including the following (footnote omitted):

Misconception – "We can't meet one-on-one with a potential offeror."

Fact -- Government officials can generally meet one-on-one with potential offerors as long as no vendor receives preferential treatment.

Prior to issuance of the solicitation, government officials – including the program manager, users, or contracting officer – may meet with potential offerors to exchange general information and conduct market research related to an acquisition. In fact, the FAR, in Part 15, encourages exchanges of information with interested parties during the solicitation process, ending with the receipt of proposals. There is no requirement that the meetings include all possible offerors, nor is there a prohibition on one-on-one meetings. Any information that is shared in a meeting that could directly affect proposal preparation must be shared in a timely manner with all potential offerors to avoid providing any offeror with an unfair advantage (FAR 15.201(f)).

The government ethics rules and Competition in Contracting Act, (10 U.S.C. § 2304), prohibit preferential treatment of one vendor over another. Where vendor interaction is expected to include

⁸ FAR 15.201.

⁹ See also FAR 31.205-38(b)(5) (defining allowable "selling costs" to include efforts such as "person-to-person contact" for the purpose of familiarizing a potential customer with the contractor's products or services).

¹⁰ "Some respondents expressed concerns that the increased exchanges between the Government and industry throughout the acquisition process increased the risk of unfair practices. The final rule encourages earlier and more meaningful exchanges of information between the Government and potential contractors to achieve a better understanding of the Government's requirements and the offerors' proposals. This rule contains limits on exchanges that preclude favoring one offeror over another, revealing offerors' technical solutions, revealing prices without the offerors' permission, and knowingly furnishing source selection information. In addition, the guidance in the final rule has been revised to alert contracting officers of the safeguards contained at 3.104, Procurement Integrity, and 24.2, Freedom of Information Act." 62 Fed. Reg. 51224, Sept. 30, 1997. FAR 3.104 prohibits, among other things, the knowing disclosure or receipt of sensitive procurement information prior to award of a contract; this information includes both "contractor bid or proposal information" and "source selection information," and there are criminal and civil penalties for violations. FAR 24.2 sets forth policy and prohibitions on the disclosure of information, including contractor's trade secrets and confidential commercial information, under the Freedom of Information Act, 5 U.S.C. § 552, as amended.

¹¹ This is consistent with guidance from the 2008 NASPO Practical Guide, which advises: "[...] communications should always be open to all possible vendors" and "all communications should avoid the appearance of favoritism."

contract terms and conditions, any one-on-one meetings should include, or at least be coordinated with, the contracting officer (FAR 15.201). After the solicitation is issued, the contracting officer shall be the focal point for these exchanges. (Special rules govern communications with offerors after receipt of proposals; that situation is not addressed here.)

Some vendors have expressed concern that involvement in pre-solicitation discussions might lead to exclusion resulting from organizational conflict of interest (OCI) concerns. This should not be the case. While a vendor who, as part of contract performance, drafts the specification for a future procurement will almost certainly be barred by OCI rules from competing for that future procurement, pre-solicitation communications are generally less structured, less binding, and much less problematic. When a vendor, in its role supporting the government, is drafting specifications for a future acquisition, the government is relying on the vendor to provide impartial advice regarding the requirements needed to meet the government's future needs. Ensuring that the vendor will not be motivated by a desire to win the future contract is the way we try to ensure that this advice will be impartial. This differs dramatically from the pre-solicitation context. In the latter context, the government is not looking for impartial advice from one source, but is instead looking for a variety of options from a variety of sources, each one understandably, and reasonably, attempting to demonstrate the value of its own approach. These marketing efforts, in themselves, do not raise OCI concerns.

In sum, as a matter of both law and policy, there is no problem at the federal level with pre-solicitation, one-on-one meetings between agency officials and vendors, provided that no vendor receives preferential treatment.¹² For example, no vendor should receive proprietary information from a Government official concerning another vendor or its solu-

tion, and no vendor should receive Government "source-selection information" that is relevant to the procurement and competitively valuable, but is not available to all competitors.¹³ Source selection information is defined as "information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly."¹⁴ This information includes, for example, vendors' costs or prices, source selection plans, evaluations and rankings of proposals, and other information marked as sensitive by the Government. In addition, if competitively useful information is provided to one vendor in a meeting, it should subsequently be provided to all potential vendors as soon as practicable, but no later than the next general release of information to all vendors.¹⁵

Importantly, experience at the federal level suggests that government officials have been able to follow these rules without significant protests from vendors. In fact, in the first eleven years after October 1997 when the FAR's one-on-one discussions rule took effect, there were over 9,400 bid protests filed at the U.S. Government Accountability Office ("GAO")¹⁶, as well as hundreds at the U.S. Court of Federal Claims. In that time, there is not a single reported case in which a protest was sustained because of a vendor receiving preferential treatment during one-on-one discussions prior to release of a solicitation.¹⁷

This is not to say, however, that stakeholders should take pre-solicitation discussions lightly, particularly if they are likely to result in less than full competition. For example, in *Google, Inc. v. United States*, 95 Fed. Cl. 661 (2011), the court enjoined the agency's planned procurement of an enterprise email system using only specified Microsoft products. The court prevented the agency from proceeding because the agency did not comply with federal rules requiring it to (1) identify the statutory basis for less than full and open competition, (2) properly estimate costs of alternative courses of action, (3) identify all sources that had expressed interest in competing for the opportunity, and (4) describe how the agency would overcome or remove barriers to competition in subsequent procurements.¹⁸ The court describes in

12 With regard to preferential treatment, the FAR makes clear that offers must be treated equally, but not identically: "All contractors shall be treated fairly and impartially but need not be treated the same." FAR 1.102-2(c)(3). For example, as long as an agency acts impartially and provides vendors with equivalent information, it would not need to follow a "script" or establish precisely equal timeframes for such discussions.

13 See FAR 9.505(b) ("Preventing unfair competitive advantage"); . Indeed, the Procurement Integrity Act provides civil and criminal penalties for persons who knowingly disclose or obtain "contractor bid or proposal information" or "source selection information" before the award of a Federal agency procurement contract to which the information relates. See 41 U.S.C. § 423; FAR 3.104. "Contractor bid or proposal information" is defined as competitively sensitive information (e.g., cost or pricing data, information marked as proprietary by the contractor) included in a vendor's bid or proposal. See FAR 3.104-1.

14 See FAR 2.101.

15 See FAR 15.201(f).

16 Report to Congress on Bid Protests Involving Defense Procurements, GAO Report No. B-401197, April 9, 2009, Figure 1 (Fiscal Year 1998 through Fiscal Year 2008).

17 There is a case in which the Department Of Justice ("DoJ") voluntarily cancelled a solicitation based on a potential "unfair advantage" provided to one or more of the offerors as a result of the agency's pre-solicitation communications with certain potential offerors; however, the DoJ subsequently awarded the contract on a sole-source basis to a contracting team that included the same contractor that received the unfair advantage, so the protest was sustained on that basis. See *Superlative Technologies, Inc.*, B-310489, B-310489.2, Jan. 4, 2008, CPD ¶ _____. See also *Superlative Technologies, Inc.*, B-310489.4, 2008 CPD ¶ 123 (sustaining second protest when DoJ failed to implement the corrective action recommended by GAO and failed to investigate the procurement integrity and conflict of interest issues it had identified).

18 *Id.* at 678.

detail the numerous pre-solicitation market research meetings that the agency conducted over several years with representatives of Microsoft and Google. Significantly, the court found no evidence of bad faith or improper conduct by the parties, concluding that they were motivated by “competitive zeal and interest in customer satisfaction.”¹⁹

The federal model is very instructive and there is over fifteen years of experience where the approach appears to be working very well. And while we know from the NASPO survey that state governments do not have such fully developed policies, it is important to review what state guidance does exist.

IV. State Statutes and Guidelines

The primary NASPO survey question was as follows: “Does your state have a law, statute, rule or regulation, standard of conduct, or code of ethics concerning any communication with vendors/suppliers prior to publication of a formal solicitation?”

For those thirteen states responding affirmatively, we have reviewed the laws, regulations and/or policies referenced in their survey responses, as well as any laws, regulations and/or policies that the work group discovered after conducting additional research. We have provided a summary of the relevant language in nine of those states: Connecticut, District of Columbia, Delaware, Georgia, North Dakota, Ohio, Oregon, Illinois, and Massachusetts. Again, our focus is not to address all pre-RFP communication tools, but rather those that focus on less formal exchanges, such as one-on-ones. While none of these state regulations or policies is as detailed or complete as the federal model, they each offer illustrative value.

In **Connecticut**, state officials must always have at least two employees meet with a vendor, one of whom shall be a purchasing/fiscal person and one could be a technical person or a product user. Agency employees should never make any promises or commitments to vendors about using their product or services during the pre-solicitation process. (Source: General Guidelines regarding Communications with Vendors)

Connecticut’s General Guidelines also provide that a vendor can provide substantive help to the agency on procurement, only if this help is pursuant to an existing contract,

which provides that the vendor shall not submit a bid or proposal. In fact, the guidelines specifically state with regard to vendors “if they help on the front end, then they can’t play on the back end.”

The key issue here is determining what is considered “substantive” help that would prohibit a vendor from bidding. According to Connecticut’s Director of Procurement, the intent of this provision is not to prohibit a vendor from sharing best practices or successes in other states or innovative new solutions or for their state to gather benchmarking information. However, if a vendor provides substantive assistance, such as assisting in writing specifications or recommending an action or approach that would clearly favor the vendor, then those actions would be considered substantive and the vendor would be prohibited from bidding on the solicitation.

In the **District of Columbia**, the contracting officer shall furnish identical information concerning a proposed procurement to all prospective contractors receiving the RFP. District personnel shall not provide advance knowledge or information about a future solicitation to any prospective contractor. 27 DCMR Sec. 1602.3 & 1602.4 (Solicitation of Proposals).

The statute also states that “presolicitation notices and conferences may be used as preliminary steps in procurements by CSP. If presolicitation notices are used, the contracting officer shall prepare and issue each notice to potential sources and shall publicize the notice in a newspaper of general circulation. A presolicitation conference may only be used when approved by the contracting officer.” 27 DCMR Sec. 1604 (Presolicitation Notices and Conferences)

The key issue here is determining what is considered “identical” information that must be provided to all prospective contractors. A vendor can be most helpful by suggesting solutions that address specific problems rather than generic solutions. Therefore, the state can benefit most when the procurement official shares high-level goals for the program, what will define success on the project and/or what the state perceives as the largest barriers to success.

However, unless the state official reads from the same script for every vendor meeting, and every vendor asks exactly the same questions, he/she may share information with one competitor that he/she does not share with another. Does this mean he/she has allowed one vendor to improperly acquire information that other competitors do not have?

¹⁹ Id. at 680.

By contrast, the federal rule is explicit and states that “All contractors and prospective contractors shall be treated fairly and impartially but need not be treated the same.”²⁰

Delaware has a general conduct statute that would govern state employee communications with vendors at all times regardless of the timeline of a procurement. To supplement the public notice of solicitations, 29 Del. C., Sec. 6923 (3) allows the maintaining of a list of perspective vendors which serves as a list of vendors to communicate upcoming solicitations to. Agencies and Procurement Officials meet with vendors one-on-one and in business reviews to share this information.

Pursuant to **Georgia’s** administrative rule, as potential sources of supply are identified, “the procurement professional may contact potential suppliers directly to request information. The procurement professional’s contact with potential suppliers may occur informally, such as by telephone or email. Alternatively, the procurement professional may determine a more formal method of gathering information from suppliers as desired, such as the Request for Information (RFI) method. Georgia Procurement Manual 2.2.3.2 (Request Information from Suppliers).

Finally, the Georgia Procurement Manual also provides that “advisory or consultative services which suppliers often provide to state entities will be regarded as normal sales effort, and no preferential treatment will be given to suppliers providing such services when contracts are awarded. Georgia Procurement Manual 2.2.3.3 (Use of Advisory Services).

North Dakota’s administrative rule provides that “prior to issuing a solicitation, the procurement officer may hold a specification meeting to seek information necessary to prepare a suitable specification and competitive solicitation. Chapter 4-12-06 (Specifications for Commodities and Services) 4-12-06-08 (Specification Meeting). The rule also provides that “no state employee or official will furnish information to a prospective bidder or offeror if, alone or together with other information, it might give the prospective bidder or offeror an unfair advantage. Chapter 4-12-04 (Ethics in Public Procurement) 4-12-04-03 (Handling of Information).

In **Ohio**, “it is the policy of the Office of Procurement Services (OPS) to maintain open lines of communication with all parties participating in the bidding and contract award processes. [...] Prior to contract award, there may be communications between OPS, the customer agency and the sup-

pliers regarding a potential contract for supplies, services or information technology. These communications may be verbal or written. Communications are conducted prior to issuance of an Invitation to Bid, Request for Proposals or Reverse Auction Qualification Summary and may be used in developing the bidding documents, to conduct necessary research on items or services to be purchased, to ascertain if resulting specifications would be restrictive, and to discuss changes to an existing contract in preparation for the new ITB/RFP/RAQS, etc.” In addition, “pre-bid conferences may be conducted prior to issuance of the ITB to discuss proposed bid specifications” Ohio Department of Administrative Services, General Services Division, Office of Procurement Services, Policy and Procedure PUR-008 “Communications and Protest Procedures”; Ohio Administrative Code Section 123:5-1-07 (Invitation to Bid Process (C) (1)).

Oregon’s administrative rule provides that “authorized agencies are encouraged to conduct research with Providers who can meet the state’s needs. Authorized Agencies must document the items discussed during the research phase of Solicitation development. The research phase ends the day of a Solicitation release or request for a Quote according to an Intermediate Procurement, unless the Solicitation or Intermediate Procurement provides for a different process that permits ongoing research.” Oregon Administrative Rule OAR 125-246-0635 Authorized Agency and Provider Communications (1) Research Phase.

The **Illinois** Procurement Code provides that “any communication that a state employee has with a vendor pertaining to a procurement matter must be reported and made publicly available. Additionally, if a vendor has an Illinois-registered lobbyist and that lobbyist speaks to a state employee regarding a procurement matter, the lobbyist, too, will need to report the communication.” Illinois Procurement Code 30 ILCS 500/50-39(a), effective January 1, 2011, concerning pre-solicitation vendor communications.

Finally, **Massachusetts’** regulations provides broad authority for procuring departments to interact with prospective bidders. The regulation provides that “a Procuring Department may gather information to assist in the development of a potential Procurement by inviting other Departments, potential Bidders or other interested parties to provide technical and business advice concerning industry standards, practice, general cost or price structures or other information which is relevant to the type of Commodities or Services, or both, that a Procuring Department seeks to procure.” Section 21.03 (Requests for Information or Interest (RFI)) of Procurement Regulations 801 CMR 21.00 (Procurement

20 FAR 1.102-2(d). But, see, FAR 15.201(f) (“When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage.”).

of Commodities or Services, Including Human and Social Services).

Massachusetts' procurement regulations (801 CMR 21.03) and policies (entitled "Requests for Information (RFI) - An Optional Planning Tool" found in Procurement Policy chapter entitled "How to Do a Competitive Procurement") provide such substantial flexibility that, as a matter of practice, the central procurement office, the Operational Services Division, routinely posts RFIs and draft RFRs for comment and regularly interacts with vendors in a variety of ways prior to publication of a formal solicitation as part of their "best value" procurement principles.

In each of the above nine states' regulations or policies, they appear to allow pre-RFP communication. The question remains, as it does with the federal statute, how much and what type of information can a state share with a vendor? In section VII below, the work group will share a framework that we hope will be useful in determining how much a state can share at different times during the procurement process.

V. Vendor Reporting and Disclosure

The regulatory requirement on vendors and lobbyists to report their activities has expanded over the last few years to include procurement related activities. The Illinois Procurement Code cited above is a prime example. The complexity of these requirements has created another possible barrier to one-on-one meetings with potential vendors. Procurement officials have commented that this expanded regulatory requirement creates, at minimum, confusion which can lead to additional barriers to communication.

In the final analysis, this is a reporting and disclosure requirement for vendors, not public officials. The following summary is designed to help public officials see that this is not a primary concern for states, and help vendors understand what their own requirements are in this area. Moreover, the existence of these reporting and disclosure requirements demonstrate support from policy makers that pre-RFP communications are part of the process. Policy makers could have chosen to place an outright ban on communications. Rather, they have put in place these kinds of requirements to ensure transparency in the system.

1. Lobbying

Every state, and a majority of large cities and counties, has lobbying laws. These laws require those trying to influence government to register and, in most cases, report the details of their attempts to influence. Although it varies by jurisdiction, many jurisdictions consider at least some attempts to influence the procurement process to be lobbying.

Depending on how the law is written, vendors may choose to limit the amount of contact with state officials by contacting only certain individuals within an office or by limiting the discussion to certain topics.

Not every state requires company representatives involved in obtaining government contracts to register as lobbyists. However, it is becoming more and more commonplace for jurisdictions to require a company that is seeking a contract with the state to have its representative, the company itself, or both, register with the state. Every state has differing views of what sort of contacts require registration, and some also have time or expenditure thresholds that must be met before registration is required.

Some states, such as Maine, Nevada, and Nebraska, do not include the executive branch within the scope of the lobbying law, so any contact with executive branch officials or employees, whether it is with the governor or a purchasing agent, is not considered lobbying. Other states do include contact with the executive branch as part of the definition of lobbying, but do not consider sales- or contract-related discussions to be encompassed within that definition. Arizona, Colorado, and West Virginia are examples of such states.

If lobbyist registration is required in a state, periodic reporting is required in order to maintain compliance with the state lobbying laws. A majority of states have either one uniform lobbying law that covers all branches, or lobbying laws that are harmonized between branches. Tennessee is typical of the former. Its lobbying law covers both branches and requires semi-annual reporting of lobbying activity. Ohio is an example of the latter. Executive branch lobbying laws are located in a separate part of the code from the legislative branch laws, but the provisions are essentially identical, and reports are filed on the same schedule and with the same government organization.

There are a handful of states that have completely separate registration and reporting schemes for legislative and executive branch lobbying. This can be an advantage for the vendor, as the executive branch reports are typically simpler and filed less frequently. Kentucky, for example, only requires executive branch lobbyists to file once every year, while legislative branch lobbyists are required to file six reports each year. The executive branch reports are completely different from those in the legislative branch and are filed with a completely different organization.

An even smaller number of states have separate requirements for vendors' lobbyists. New York requires lobbyists to identify on their registrations and reports whether their lobbying is procurement, nonprocurement, or both. Georgia defines "vendor lobbyists" separately in its code and requires those who qualify to identify themselves as such on the reg-

istration form. Vendor lobbyists follow a monthly reporting scheme that is the same as the one for executive branch agency lobbyists, but different than the scheme for legislative branch and local lobbyists.

Just as every state has differing schemes under which their lobbying laws are laid out, every state has differing reporting requirements. With regard to reporting, the three most important issues are:

- Who is required to report;
- When are reports due; and
- What must be reported?

Reporting will be required of either the lobbyist, the employer, or in some cases, both. Exactly who needs to report will be laid out in the applicable statutes. Where the employer of the lobbyist is required to report, it is incumbent upon the employer to obtain from its lobbyist or lobbyists the information needed to correctly complete its reports.

The timing of reports also varies widely by jurisdiction. Annual, semi-annual, and quarterly reporting schedules are most common, but reports can be due three, six, and 12 times per year. The employer of a lobbyist needs to be aware that it may have reports due on a different schedule than its lobbyists.

Although the information required to be reported also varies by jurisdiction, there tends to be less variation in the kind of information sought by the regulators. Typically, a lobbyist or entity will be required to include in a report their contact information, their expenditures on lobbying for the reporting period, which may include the portion of the salary of the lobbyist attributable to lobbying in that jurisdiction, gifts or political contributions made to government officials or employees, the specific issues or contracts that were discussed with officials and employees, and the officials and employees that were contacted or provided gifts and contributions.

It is clear that any business involved in procurement needs to know whether their activity requires them to register as a lobbyist. Once registered, there are different reporting requirements and a company with a registered lobbyist will need to know exactly what those requirements are in order to remain compliant.

2. Vendor Disclosure

It is quite common for a state to require a winning bidder to disclose information about itself or its activities prior to the award of the contract. Procurement officials may be familiar with some requirements, as some laws require vendors make the disclosures directly to their office. Other disclosures are made to other organizations within government.

These types of disclosures are less likely to disrupt the flow of information between the procurement office and potential vendors, as there is no relation between the required disclosure and any communications that may take place. It is possible, however, that some vendors may choose not to engage in pre-RFP communication due to the perceived burden of complying with the disclosure requirements. Again, the notice and disclosure requirements protect procurement officials and are further evidence that policy makers understand that these types of communications are appropriate and part of the process.

Required vendor disclosures generally fall into two categories: conflicts of interest and legal compliance. Conflicts of interest can take several forms. New Jersey requires vendors receiving non-publically advertised contracts with an anticipated value in excess of \$17,500 to disclose political contributions made by the business entity during the preceding 12-month period. Alabama focuses on relationships with public officials and employees, requiring disclosure statements to reveal officials and employees who may gain financially from a contract due to having family relationships with the vendor, the vendor's family, or the vendor's employees. The state also requires disclosure of paid consultants or lobbyists involved in the bid or contract. Such disclosures are required from all bidders for contracts exceeding \$5,000, unless the contract is awarded by competitive bid, in which case only the vendor awarded the contract is required to disclose such information.

Other states use disclosures to ensure compliance with the law. Illinois bidders and vendors must, among several requirements, certify that they are registered with the state board of elections as required by law or that they are exempt from the requirements. Kentucky requires bidders to submit an affidavit verifying compliance with the state's campaign finance laws. Contractors and subcontractors must reveal violations of the state's applicable tax, labor, and human rights statutes within the previous five years. Vendors to state, county, or local governments in Ohio with contracts aggregating more than \$100,000 must certify that they are not an organization on the U.S. Department of State's terrorist exclusion list and that they have not provided support or resources to a terrorist organization.

3. Pay-to-Play

Generally, pay-to-play laws involve political contributions given with the expectation that a contract will be awarded to the contributor in exchange for making the contribution. Pay-to-play laws typically contain one or more of the following provisions:

- Restrictions on the amount of political contributions that may be made by potential or

current contractors;

- Restrictions on the ability of candidates or politicians to receive political contributions from potential or current contractors;
- Restrictions on the ability of a contractor to receive a contract if it has made political contributions to a candidate;
- Termination of a vendor's currently held contracts if that vendor makes a political contribution; and
- Reporting requirements for bidders or contractors to demonstrate compliance with the contribution restrictions.

Of course, the reporting requirements contained in pay-to-play laws are the most germane to this paper. For example, New Jersey has a reporting component where businesses holding contracts with the state aggregating over \$50,000 must file an annual report listing all political contributions over \$300, including contributions made by those with a 10 percent or more interest in the business, by subsidiaries of the business, by political action committees controlled by the business, and by the officers, directors, and partners of the business, and their spouses and children. The states with pay-to-play reporting all have similar thresholds and, for the most part, require similar information to be reported.

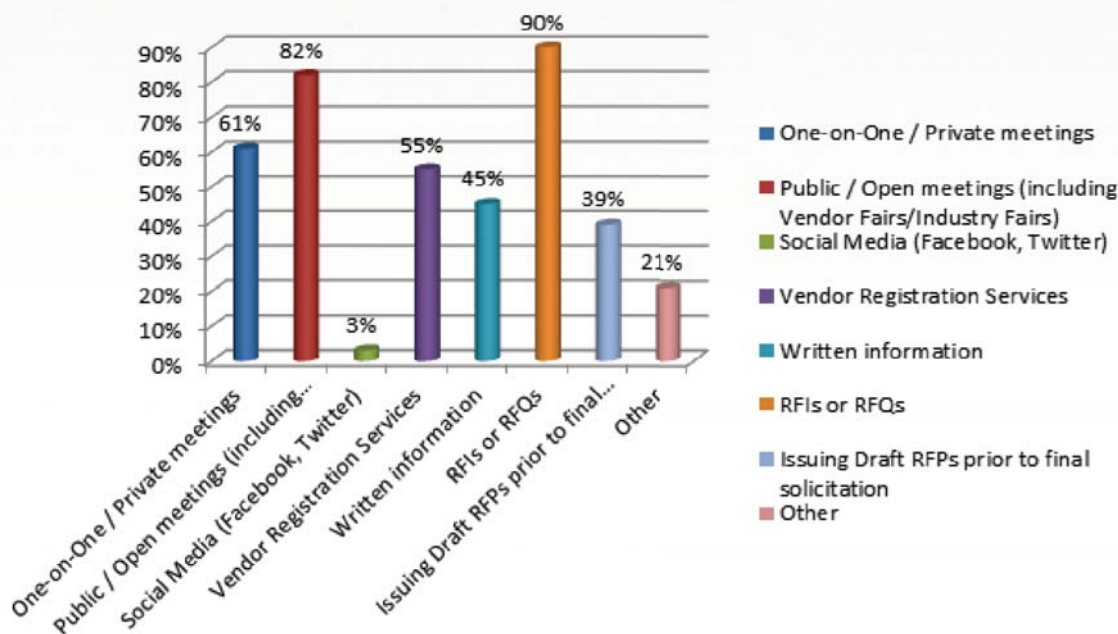
these reporting and disclosure requirements, the onus is on vendors to comply with these requirements. The take away for state officials is that policy makers have put a framework in place to ensure fairness and transparency.

VI. Additional Research Tools

In addition to the one-on-one meetings, the work group wanted to address certain other tools that permit pre-RFP communications between government and industry.

Results from the survey indicate that RFIs or RFQs are practices used by most states (90% of the responding states) to communicate with vendors. Other practices used by states to communicate with vendors and explain the solicitation requirements pre-RFP include public or open meetings (including vendors fairs/industry fairs), used by 82% of the states responding to the survey; one-on-ones/private meetings are used by 61% of the responding states and vendor registration services are used by 55% of the responding states.

Figure 3. What practices does your agency use to communicate with vendors/suppliers and allow them to understand the solicitation requirements and the needs of the agency prior to publication of a solicitation? (N=33)



Source: 2011 NASPO State-Vendor Communication Survey

In summary, while state officials may want to be aware of

A Request for Information (RFI) is defined by Thai and

Pitzer (2010) as “a form of market research used prior to complex procurements, such as RFPs”.²¹ Like one-on-one meetings, RFIs are issued pre-RFP to gauge vendors’ interest in a project and gather input from vendors regarding industry trends and practices.

The next step that can be used in a procurement process following an RFI is issuing a draft RFP. A draft RFP is a preliminary version of an RFP that is sent out to potential vendors. It provides an opportunity for industry to review and understand the requirements of a solicitation, and to provide their comments and feedback on the various sections of the solicitation including the Statement of Work (SOW) and provisions and clauses.

The NASPO State and Local Government Procurement Practical Guide (2008) recommends as a best practice to provide wide notice of the pre-solicitation conferences (convened through RFIs) and conduct them as an open meeting to ensure openness and fairness of the procurement process. And while most RFIs are published for all to see, the NASPO Guide also recognizes the discretion that procurement officials enjoy “to invite only those vendors who are expected to make a substantial contribution to the official’s knowledge.” It has also been noted that there are some limitations to the value provided by an RFI stemming from a vendors’ reluctance to share proprietary information with their competitors in an open meeting or even in writing, knowing that states may have to make that information public under public records laws.

Another often used tool is the Requests for Quotations (RFQ). The RFQ is defined in the NIGP Public Procurement Dictionary of Terms (2008) as small order amount solicitation methods where the supplier “is asked to respond with price and other information by a pre-determined date. Evaluation and recommendation for award should be based on the quotation that best meets price, quality, delivery, service, past performance and reliability”. RFQs are typically used as supporting documentation for sealed bids.

Some states responding to the 2011 survey offered additional practices they use to communicate with vendors prior to issuance of an RFP as follows:

- written information provided by the vendor
- vendor manuals (Missouri)
- e-Procurement systems (Virginia)

- pre-solicitation notices and conferences (DC)
- pre-bid or proposal conferences (South Dakota)
- public meetings after a solicitation issuance for vendor training (Massachusetts)
- one-on-one meetings offered to all vendors with the team responsible for the solicitation (Massachusetts)
- one-on-one/private meetings for information gathering, not to discuss specifics of a solicitation that has not been issued (North Dakota)
- one-on-one meetings with procurement officials and agency personnel to understand requirements and upcoming needs, in addition to periodic vendor business reviews (Delaware)
- new and closed RFIs, RFPs and related solicitation documents published on the State Procurement Portal. (Delaware)

All of these tools offer benefits to both state officials and industry representatives through enhanced dialogue about the best solution for the state.

VII. Framework

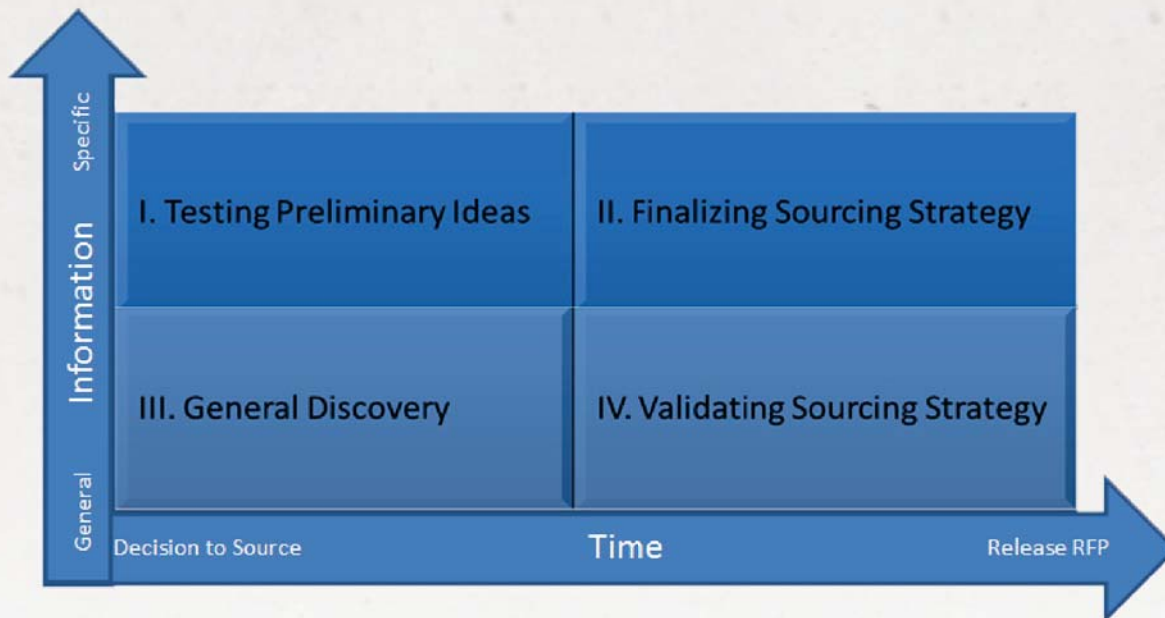
In the absence of specific rules or guidelines to address one-on-one meetings with vendors, the perception issue alone can often prevent helpful dialogue. Bottom line, ambiguity will only discourage communication and prevent constructive dialogue. As noted before, NASPO recommends that “[t]he central procurement office should develop guidelines for vendor input into the process of determining agencies’ needs or preparing initial specifications, so that the agencies and the central procurement office may obtain the benefits of vendor expertise without creating unfair bias or a conflict of interest.”²²

This paper has shared the federal model and some examples from states that have attempted to codify guidelines in this area. These examples may help procurement officials to determine a policy that works in their respective state.

21 Pitzer, J. & Thai, K. (2009). Phase Two: Solicitation and Development. In Introduction to Public Procurement (3rd Edition). (pp. 125-144). Herndon, VA: National Institute of Governmental Purchasing, Inc.

22 NASPO State and Local Government Procurement: A Practical Guide. (2008). Lexington, KY: National Association of State Procurement Officials.

Figure 4: Framework Matrix



However, none of these policies, including the federal model, address with any great clarity the type of information that can be shared at various times in the process.

Moreover, despite the fairly longstanding federal rule that encourages communication, the Office of Federal Procurement Policy still had to issue its “myth-busting” memorandum in February 2011 to counter misconceptions and clarify what kinds of communication are appropriate.²³

Regardless of what any statute, rule or policy may say, context matters. In other words, procurement officials must make judgment calls based on the specific facts and circumstances of the procurement at hand. Therefore, we have developed a framework to help analyze the question on a case-by-case basis.

As can be seen above in Figure 4, we have built a single matrix that can serve as a framework or lens to view this complex issue. It does not factor into account every variable that must be considered. It is designed to help procurement officials consider two of the most important variables: timing of the communication and the level of specificity regarding what information can or should be shared.

The “X” axis of the matrix is “Time” and the “Y” axis is “Information.” The X axis spans from the initial decision to conduct a procurement, or “Decision to Source,” to the release of the RFP. The Y axis spans from “General Informa-

tion” to “Specific Information.” This framework creates four quadrants in the matrix.

The upper left quadrant is entitled “Testing Preliminary Ideas” (I). The upper right quadrant is entitled “Finalizing Sourcing Strategy” (II). The lower left quadrant is called “General Discovery” (III) and the lower right quadrant is called “Validate Sourcing Strategy” (IV).

As an example, if it is early in the procurement process and general information is discussed, such as trends in the industry or leading practices, we are in quadrant III “General Discovery”. At this stage, the likelihood of providing any one vendor an unfair advantage is unlikely. The state official can discuss goals for the procurement or larger initiatives and there should be nothing inappropriate about sharing this information.

Similarly, even if the procurement office has developed some preliminary ideas about their sourcing strategy, the state may want to test those ideas to understand their application. Testing “Preliminary Ideas” (I) is still early in the procurement process and therefore the entire sourcing strategy is subject to change. While policies should be developed for what types of information not to share, the ability to test very specific ideas with industry experts as a tool to gauge whether the approach is consistent with leading or best practices is invaluable.

²³ The White House. Executive Office of the President, Office of Management and Budget. Office of Federal Procurement Policy. (2011, February 2). Memorandum from the Administrator for Federal Procurement Policy. Myth-Busting: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process. Retrieved from <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/Myth-Busting.pdf>

In both of these circumstances, quadrants I and III, the release of the RFP is still likely months away and there is plenty of time for any interested vendor to seek out this same information. And as long as that vendor is given an opportunity to meet and discuss the procurement too, this approach promotes transparency while allowing the state to complete its due diligence.

As the process gets closer to the RFP and the strategy has been developed, tested, revised and improved, the state procurement office may still need to “Validate the Sourcing Strategy” (IV). The state may still have questions about how technology platforms interact or the benefits of integrating certain programs. It may be helpful to ask about the results of similar programs in other states now that your state’s strategy is more clearly defined. At this point, one must be more sensitive to disclosing information that may create a competitive disadvantage. However, the successful federal model has demonstrated that exchanges with potential vendors are appropriate at any point until release of the RFP. Nevertheless, at this point in the process, it would be important to avoid any direct reference to specific details in the RFP or tell anyone vendor what’s included in the final specifications.

At some point, it is time to finalize the sourcing strategy prior to releasing the RFP. At this stage, in quadrant II, with the RFP close to final, there is a greater chance one might provide a vendor an unfair early view of the final specifications which might create an unfair advantage. Again, there is nothing to suggest communication should cease at this point, but public officials need clear guidance at this stage to preserve procurement integrity.

This framework will hopefully assist state officials in analyzing how best to approach one-on-one state-vendor communications. A consistent approach will only serve to enhance overall fairness. When equal access is the standard for fairness, the procurement official is not at risk of improperly meeting with a vendor regarding an upcoming procurement or of disclosing information that is not precisely the same to each vendor. Rather, as long as the procurement official treats all potential vendors impartially and provides equivalent access to all, the process is fair.

VIII. Conclusion and Recommendations

The issue of effective communications between industry representatives and state officials continues to warrant more education and increased awareness. The 2011 NASPO Survey has identified several practices currently being used by states across the country. This white paper focused on one particular practice, the pre-RFP one-on-one meetings between state officials and vendors. And the survey was

clear that most states have not issued sufficient guidance on how best to conduct these one-on-one meetings with vendors.

The paper also provided a framework that is intended to aid procurement officials as they are presented with this issue every day. In the end, however, we hope this paper will help procurement officials and state policy makers develop guidelines for their state so that everyone will benefit when appropriate from vendor expertise.

Therefore, NASPO recommends that Chief Procurement Officers develop guidelines for vendor input into the process of determining agencies’ needs or preparing initial specifications so that the agencies and the central procurement office may obtain the benefits of vendor expertise without creating unfair bias or conflict of interest. As each state engages in their own policy development, NASPO would encourage them to consider the issues raised in this white paper.

In summary, build a consensus among key stakeholders regarding the fundamental policy and legal issues that require procurement integrity and fairness to avoid creating an unfair competitive advantage. At the same time, educate your colleagues about the benefits of gaining vendor expertise as states develop strategic sourcing strategies. As Kelman from Harvard wrote, “[w]hen government doesn’t take advantage of [industry] knowledge before issuing an RFP, it loses.”

Next, if the state will benefit from vendor expertise, encourage one-on-one meetings with vendors in a manner that avoids creating an unfair competitive advantage. For example, the closer your meeting is to the solicitation and the more detailed the information you release may necessitate direct involvement from responsible procurement staff. Moreover, differentiate between gathering information and sharing information. Gathering information raises very few concerns. Sharing information is where most issues arise. Do what is in the best interest of the state, but do so thoughtfully and based on clear guidance from a statewide policy. In the final analysis, NASPO believes that ambiguity surrounding the rules for one-on-one communication between states and vendors will only discourage communication and prevent constructive dialogue. NASPO remains committed to supporting its members as they develop policies in this important area.

Acknowledgements

This paper was prepared under the guidance of NASPO's State-Vendor Communication Work Group.

Appreciation is expressed to the following work group members, attorneys, and staff for lending their time, resources and information and participating in the writing of this document:

- Dean Stotler, Emerging Issues Committee Chair and Director of the Government Support Services, Office of Management and Budget for the State of Delaware
- Gary Lambert, State-Vendor Communication Work Group Co-Chair and Assistant Secretary for the Operational Services Division for the Commonwealth of Massachusetts
- Paul Campbell, State-Vendor Communications Work Group Co-Chair and Vice President, State Solutions, United-Healthcare, Illinois
- Fred Springer, NASPO Honorary Member and Partner at Bryant Miller Olive, Florida
- Keith McCook, Deputy General Counsel for the Office of General Counsel, South Carolina Budget and Control Board
- William McAvoy, Deputy State Purchasing Agent and General Counsel for the Operational Services Division for the Commonwealth of Massachusetts
- Kyu Cho, Consultant to the Operational Services Division for the Commonwealth of Massachusetts
- Richard Rector, Partner, DLA Piper, Washington, DC
- Elizabeth Bartz, President and CEO, State & Federal Communications, Inc.
- John Cozine, State & Federal Communications, Inc.
- Elena Moreland, Senior Policy Analyst for NASPO, AMR Management Services

Special thanks are owed to Paul Campbell who led this true team effort and made a significant contribution by compiling sections from each author and writing an initial draft of the paper. NASPO would also like to thank Keith McCook and Richard Rector for their legal analysis, Elena Moreland for her work as the lead NASPO staff on this project, as well as Sam Hearn and Chris Heiss from AMR Creative Services for their creative input regarding this publication.

NASPO is the National Association of State Procurement Officials and represents the directors of the central purchasing offices in all 50 states, the District of Columbia, and the territories of the United States. For more information on NASPO, please visit www.naspo.org.

AMR Management Services, Inc. provides NASPO with full management services. For more information on AMR, please visit www.AMRms.com.