

THE 2000 ABA MODEL PROCUREMENT CODE

By John B. Miller

INTRODUCTION

In July 2000, at the annual meeting of the American Bar Association in New York City, the ABA House of Delegates adopted the 2000 ABA Model Procurement Code for State and Local Governments. The 2000 Code replaces the 1979 ABA Model Procurement Code, which has been adopted in sixteen states and in thousands of local jurisdictions. The 1979 Code followed years of work by the ABA Sections of Public Contract Law and State and Local Government Law, and other national organizations interested in state and local procurement. Since 1979, the Code has been adopted in full by sixteen (16) states; in part, by several more; and by thousands of local jurisdictions across the United States.

THE REVISION PROJECT: 1997 TO 2000

The Sections of Public Contract Law and State and Local Government have been joint sponsors of the Model Procurement Code Revision Project since July 1997. The purpose of the Project was to update the Model Procurement Code to fit the requirements and needs of state and local governments and their contractors in the year 2000. The goals of the Revision Project were simple, yet profound:

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

PRESERVING THE PRINCIPLES OF THE 1979 MODEL PROCUREMENT CODE

The 1979 Code offered states and local jurisdictions, for the first time and in one place, a basic formulation of the fundamental principles upon which durable procurement systems rest. These principles have well served the public officials who manage state and local procurement and thousands of private sector suppliers. The 2000 ABA Model Procurement Code did not change these basic principles. Indeed, they have become bedrock notions in the American law of public procurement.

1. Competition
2. Ethics
3. Predictability (stability, advanced publication, accountability)
4. Clear Statements of Procurement Needs
5. Equal Treatment of Bidders/Offerors
6. Methods of Source Selection
7. Bid / Proposal Evaluation

8. Reduction in Transaction Costs for Public and Private Sector Entities
9. Procurement of Construction Related Services
10. Remedies
11. Facilitation of Intergovernmental Transactions (Cooperative Procurements)

THE UPDATE PROCESS

Prior to the commencement of the Revision Project, both the National Association of State Procurement Officials (NASPO) and the National Institute of Governmental Purchasing (NIGP) approached the sponsoring ABA Sections and unofficially requested that the 1979 Code be updated to meet the modern requirements of advanced procurement transactions. Throughout the Project, these and other groups interested in state and local procurement practices contributed their suggestions and their comments to the Project. The approach followed in updating the Code was a simpler, more focused version of the extensive process followed in 1979 to generate the original document. A Reporter system was used to focus on the technical improvements required to update the Code, while preserving its basic principles.

Reporters and The Steering Committee

Two Reporters were named by the sponsoring Sections to conduct and manage the Project. These Reporters operated at the direction of the Councils of each Section, and were coordinated by a small Steering Committee comprised of two representative members from each Section. The Reporters and the Steering Committee members are national experts in state and local procurement with significant experience in past Code drafting efforts. The Reporters were **Margaret E. McConnell** and **John B. Miller**. The four members of the Steering Committee were: **Thomas J. Madden, Larry C. Ethridge, Craig T. Othmer, and Charles D. Olson**. The Councils of each of the sponsoring Sections retained the right to conduct individual debates on the revisions proposed by the Reporters. Each Section adopted slightly different texts. These differences were resolved by the Steering Committee.

Project Communications

Broad participation in the Revision Project was essential to its success. To achieve this goal, the Project was conducted on the World Wide Web through the Massachusetts Institute of Technology (MIT). The Project solicited and encouraged full participation by members of the sponsoring Sections, interested associations, and individual procurement officials and agencies throughout the country through the revision process. In addition to participation via the World Wide Web, extensive comments and suggestions were received by leading procurement organizations. These groups included, to name just a few: the National Institute of Governmental Purchasing (NIGP), the National Association of State Procurement Officials (NASPO), the Construction Industry Roundtable (CIRT), the American Consulting Engineers Council, and the Council On Federal Procurement of Architectural & Engineering Services.

SUMMARY OF THE CHANGES

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

Article 1 – General Provisions

Article 1 describes the general purposes of the Code, specifies its applicability, provides guidance for interpretations and contains definitions of terms used in more than one Article. The 2000 Code adds new definitions for the terms “Electronic,” “Public Notice,” “Signature,” and “Written or In Writing” and modifies the definition of “Construction.” These definitional changes, and the accompanying technical changes made elsewhere in the Code, facilitate the use of electronic means of communication to publish requirements, make advertisements, and, as technology continues to develop, seamlessly move to all-electronic procurement transactions.

Article 2 – Procurement Organization

Article 2 sets forth the basic organizational concepts for establishing procurement policy and conducting procurement operations. The 2000 Code modifies Article 2 to provide greater flexibility in how the procurement functions are carried out in the enacting jurisdiction.

Article 3 – Source Selection and Contract Formation

Article 3 describes the selection and contract formation methods authorized by the Code, and authorizes procurement officials to select and apply these methods. These source selection methods include: competitive sealed bidding, competitive sealed proposals, small purchase procedures, sole source procurement, emergency procurements, and a competitive selection procedure for designated types of services. The Article contains requirements for contracting by each method. The 2000 Code revises Article 3 to add flexibility in the use of Competitive Sealed Proposals as a source selection method, and requires the use of this method in the award of contracts for design-build, design-build-operate-maintain, and design-build-finance-operate-maintain services. The communication of evaluation factors and their application in competitive sealed proposals is further defined and authority is given for the purchasing agency to conduct debriefings after source selection decisions are made. The 2000 Code includes a new section authorizing special procurements in specifically limited circumstances when clearly in the public interest. The 2000 Code substantially revises the old code’s requirement for certified cost or pricing data, and substitutes a less burdensome standard that is less costly and much more appropriate to the commercial supplies and services state and local governments buy.

Article 4 -- Specifications

The 2000 Code makes only technical changes to Article 4, which contains requirements for developing, monitoring, and using specifications.

Article 5 – Procurement of Infrastructure Facilities and Services (New Title)

Article 5 is substantially revised in the 2000 Code, and gives state and local governments the tools to implement a robust infrastructure strategy that attracts innovation, encourages new businesses to form and enter expanding markets, and encourages steady improvement in the quality and cost performance of infrastructure facilities and services.

Article 5 establishes five project delivery methods that may be applied to acquire infrastructure projects and services. These five delivery methods are Design-Bid-Build, Design-Build, Design-Build-Operate-Maintain, Design-Build-Finance-Operate-Maintain, and Operations and Maintenance. For three of these options – Design-Build, Design-Build-Operate-Maintain, and Design-Build-Finance-Operate-Maintain – the 2000 Code contains the procedures for applying the competitive sealed proposal process of Article 3 as the source selection method. The starting gate for these competitions is the statement of “design requirements” in the RFP, which establishes a common minimum threshold of owner requirements in these competitions. The finish gate is the submission of “proposal development documents” by offerors in response to the RFP.

A Practical Mechanism for Adding Design-Build Legislation

The 2000 Code provides a practical, flexible legislative solution to state and local governments interested in adding Design-Build, Design-Build-Operate, and Design-Build-Finance-Operate to their menu of procurement options. The 2000 Code preserves the competitive process, produces objective evidence of value for money, ensures public safety, lowers transaction costs, and encourages good management practices on the public and private side of each procurement.

Preservation of Existing Options

The Design-Bid-Build project delivery method from the 1979 Code is preserved intact, and the language from the 1979 Code describing the process for selecting architects and engineers remains intact, with technical corrections to fit the new Article 5.

Article 6 – Modification and Termination of Contracts for Supplies and Services

The 2000 Code makes only technical changes to Article 6, which authorizes the use of clauses in contracts for supplies and services covering changes and variations in estimated quantities.

Article 7 – Cost Principles

The 2000 Code makes no changes to Article 7, which provides for the promulgation of regulations establishing cost principles to be used to cost-type contracts.

Article 8 – Supply Management

The 2000 Code makes no changes to Article 8, which establishes requirements for control over the life cycle of supplies procured and establishes criteria for management, transfer, and disposal of surplus property.

Article 9 – Legal and Contractual Remedies

Article 9 provides mechanisms for the resolution of disputes and handling contracts awarded in violation of law. Other than the Commentary at the beginning of Article 9, which relates to (a) the application of the North American Free Trade Agreement and the World Trade Organization Government Procurement Agreement; and (b) the use of alternative dispute resolution mechanisms; Article 9 is unchanged in the 2000 Model Procurement Code.

Article 10 – Intergovernmental Relations (Cooperative Purchasing)

The 2000 Code makes important definitional changes to Article 10, which encourage and facilitate cooperative procurement arrangements among different tiers of government units and across states. The intent of these changes is to broaden the opportunity for state and local governments to obtain volume discounts through joint purchasing and to lower the transaction costs of both purchasing agencies and vendors in completing such transactions.

Article 11 – Assistance to Small and Disadvantaged Businesses; Federal Assistance or Contract Procurement Requirements

The 2000 Code makes no changes to Article 11, which provides administrative procedures for assisting small and disadvantaged businesses in learning how to do business with the enacting jurisdiction.

Article 12 – Ethics in Public Contracting

The 2000 Code makes no changes to Article 12, which contains ethical standards with accompanying sanctions that are applicable to all participants in the public procurement process. The proposed ethical standards cover conflicts of interest, gratuities and kickbacks, contingent fees, and misuse of confidential information.

Implementing Regulations

The development, adoption, and publication of Model Procurement Regulations consistent with the 2000 ABA Model Procurement Code is next on the ABA's list of activities.

CONCLUSION

The first code established and institutionalized bedrock notions of competition, fair treatment, and value for money into state and local procurement. The 2000 ABA Model Procurement Code for State and Local Governments builds on this time-tested model to upgrade state and local procurement systems for the information age.

John B. Miller is Associate Professor of Civil and Environmental Engineering at MIT, in Cambridge, MA. He is the Director of the American Infrastructure Consortium, <http://aic.mit.edu/>, a past Chair of the ABA Section of Public Contract Law, and served as one of two reporters revising the Code. Professor Miller's October 2000 book, *Principles of Public and Private Infrastructure Delivery*, is now available from Kluwer Academic Publishers, at <http://www.wkap.nl/book.htm/0-7923-7201-8>.

To obtain a copy of the 2000 Model Procurement Code for State and Local Governments (Product Code 539-02-00), contact the ABA Order Fulfillment Office at 1-800-285-2221.