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DEVELOPMENT AND IMPLEMENTATION OF THE MODEL PROCUREMENT CODE

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I. BACKGROUND

During the period of 1920 to 1970, there were major developments in the area of Federal procurement,^{1/} but little change in State and local procurement systems. Many State purchasing laws are as old as 50 years, clearly outdated in scale and technology to the needs of modern State purchasing. State and local procurement organizations today find themselves confronted with procurement responsibilities of great magnitude and sophistication. At the present, total State and local procurement expenditures total \$115 billion dollars per year,^{2/} substantially exceeding Federal procurement. Yet for all its size, less attention has been paid to the State and local sector than to any major component of the Gross National Product.

The need for a Model Procurement Code became clear in 1974 when the National Association of State Purchasing Officials (NASPO), supported by a grant from the Law Enforcement Assistance Administration (LEAA), conducted a comprehensive analysis of State and local procurement practices. Their report, State and Local Government Purchasing,^{3/} set standards for measuring the effectiveness of State and local procurement systems and made recommendations for improving them. These recommendations covered a wide range of issues: how to structure the purchasing organization, what types of procurement techniques should be used in given situation, and how to facilitate cooperative purchasing.

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A theme of the NASPO Report is that centralized purchasing is the preferred method, and is more efficient and economical than decentralized purchasing.

Interest in a Model Procurement Code began to grow within the American Bar Association in the late 1960's. In 1974, the American Bar Association officially chartered the Coordinating Committee on a Model Procurement Code for State and Local Governments, as a joint undertaking of the Sections of Public Contract Law and Urban, State, and Local Government Law.^{4/} In March of 1975, LEAA awarded a grant to the ABA to support the development of a procurement code to serve as a comprehensive model statute for State and local governments. LEAA's involvement in the Project was based on the theory that a comprehensive and modern procurement code would simultaneously reduce the opportunity for white collar crime and help to eliminate the waste of tax dollars caused by inefficient procurement methods. The work of the Project has continued for four years under the continued sponsorship of LEAA and with additional funds from the Department of Housing and Urban Development, the Department of Health, Education, and Welfare, and the Project's Pilot Jurisdictions.

Drafting of the Code took place from 1975 to 1978. Ten National Substantive Committee developed the first two official drafts of the Code, and the Coordinating Committee assumed this function with the issuance of its Tentative Draft in July of 1978. This draft was reviewed

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at the ABA Annual Meeting in New York on August 5, 1978. The draft was then revised in accordance with suggestions received from purchasing professionals and State and local officials for submission to the Councils of the sponsoring ABA Sections for approval and transmittal to the ABA House of Delegates. The Council of the Section of Public Contract Law and the Council of the Section of Urban, State, and Local Government Law approved the draft in November of 1978. On December 15, 1978, the Final Draft of the Model Procurement Code was sent to the Secretary of the ABA and members of the House of Delegates for official approval at the mid-year meeting in Atlanta. On February 13, 1979, the House of Delegates of the American Bar Association unanimously approved the Model Procurement Code. In its resolution of approval, the ABA's policymaking body urged legislative consideration of the Code by State and local governments.

II. Goals of the Code

The Model Procurement Code is designed to accomplish several objectives. A primary goal is to simplify, professionalize, and modernize the public purchasing process of State and local governments. This could result in substantial savings of tax dollars. Various code provisions such as bulk purchasing, standard specification, and uniform bidding will further this goal.

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One of the most important principles of the Code is that of accountability in the procurement process. Procurement officials must have relatively broad discretionary powers which can sometimes be channeled into personal gain. The Model Procurement Code can better guide public purchasing officials in the performance of their duties by clearly defining this discretion and providing a system for accountability. By providing the foundation for a comprehensive and modern procurement system, the Model Procurement Code will eliminate the need for ad hoc measures and thus define the discretion vested in public purchasing officials to that level necessary for the performance of their duties within the established public purchasing system. It is hoped that public confidence in government will be restored through this strengthening of ethical standards by opening-up the decision-making process to public scrutiny. As Thomas J. Madden, General Counsel of the Law Enforcement Assistance Administration said in his address to the joint meeting of the Sections of Local Government Law and Public Contract Law, at the 1975 Annual Meeting of the Association:

....a modern and effective procurement system with a strong and effective mechanism for dealing with ethics and conflicts-of-interests for public officials must be part of any open and progressive state and local government.

The Code has a very real potential of enabling each State to handle all of its purchasing activities under a single procurement system. Federal regulatory guidelines are currently imposed on procurements of State and

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local governments who are spending Federal grant funds (such as Attachment O to the Office of Management and Budget Circular A-102 requiring the States and localities to comply with a broad spectrum of Federal Standards when expending funds from Federal sources). The Office of Federal Procurement Policy has endorsed the Model Procurement Code Project and has indicated that adoption of the Code by State and local governments might be accepted as prima facie evidence of compliance with Attachment O of OMB Circular A-102 and, therefore, that procurement systems review and detailed contract review by Federal grantor agencies would be waived. This would greatly simplify the administration of the procurement aspects of Federal grant programs. In a letter to S. Shepherd Tate, President of the ABA, the Office of Federal Procurement Policy Administrator Lester A. Fettig commented on the Code's potential impact upon Federal Grants: "One objective for improving the Federal Assistance system is to reduce the administrative burdens, the 'red tape,' which State and local government grantees have so often associated with participating in Federal assistance programs." The NASPO Report pointed out that there are basically fifty different procurement systems with little opportunity for effective dialogue or interaction between jurisdictions. Another result of widespread adoption of the Code will be the creation of a vehicle by which the States and local governments may communicate since they are operating under essentially similar statutory provisions. Purchasing officials will be using the same conceptual framework provided by the Code; the Code will provide a medium through which purchasing officials may communicate to solve mutual problems.

III. Model v. Uniform Code

The decision was made at an early stage to develop a "model" rather than a "uniform" procurement code, due to the diverse organizational structure of the States and local bodies and their differing procurement needs. Development of a model code would thus allow for adaptation in accordance with particular State and local needs. The concept of the Model Procurement Code is that of a statutory framework embodying sound procurement principles and basic policies as set out in the NASPO Report. The framework and policies will be implemented by regulations. This system allows for a dynamic structure adaptive to the ever-changing procurement environment. The use of regulations to implement statutory policies permits change and modification dictated by experience and provides a means for improvement and innovation in procurement techniques. A model, rather than uniform code, allows substantial flexibility for local options.

IV. Implementation

In January of 1977, a Pilot Jurisdiction Program was begun with LEAA assistance and matching funds from participating States and cities. The Pilot Jurisdiction Program is a collaborative effort between the American Bar Association and various pilot States and cities looking to the development of modernized State procurement codes for legislative consideration.

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The Pilot Jurisdiction Program has two goals. The fundamental objective of the Implementation Program is to refine and improve the Code in order to make it an effective practical body of procurement law. The pilot phase has been very important in gaining reaction to the various Code drafts. Secondly, the implementation program is of crucial importance in making State and local governments aware of the content of the Code and in paving the way for enactment by their legislatures.

To date, extended Pilot State Programs have been conducted in Kentucky, New Mexico, Tennessee and Louisiana. Formal activities are currently underway in Utah. Kentucky became the first State to adopt Code-based legislation in March of 1978. Proposed Codes have been developed by Working Committees in Tennessee, New Mexico, and Louisiana and have been recommended for legislative consideration in those States. Knoxville, Tennessee was the first local pilot jurisdiction in the country to adopt legislation based on the Code. The San Diego Working Committee recently completed its review. The Baltimore Working Committee has produced a proposed draft which is soon to be presented to a city executive committee. In California, the project cooperated as part of a comprehensive three-tier study of the State's entire public contract system, undertaken by the California Department of General Services. Briefings on the background and major concepts of the Code were held at

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the request of State officials in Massachusetts, and Pennsylvania. Maryland, Arkansas, Delaware, and South Carolina have independently developed legislation or studies based on the Model Procurement Code. Interest in project participation has also been expressed by Minnesota, Arizona, and Iowa. Independent local projects are currently underway in Rome, Georgia, Moline, Illinois, and Niagara County, New York.

In the majority of the project's pilot States and cities, initial interest in project participation originated at the chief executive officer level. Most state officials cited the Code's highly visible potential for economy and efficiency in procurement as their primary reasons for participating in the project. Rejuvenation of public confidence in the system by modernizing procurement laws and casting "sunshine" on purchasing procedures was also a frequently mentioned factor in the decision to become a pilot State or city.^{5/} In some jurisdictions where purchasing problems had recently surfaced, there was a great deal of interest in the Code from the standpoint of combating white collar crime. Several home rule cities became involved because of a complete lack of specific statutory language in their codes other than very broad purchasing powers contained in their charters.

In an address to the National Contract Management Association - Washington Chapter - S. D. Zamansky, City Purchasing Agent for Baltimore, Maryland discussed Baltimore's interest in becoming a Pilot city.^{6/}

Under the above circumstances, we might well wonder why we have an interest in the Model Procurement Code. In as simple terms as possible our primary reason is self-interest. We must recognize the need to conform to the procurement standards requirements of an increasing volume of Federal grants. We wish to maintain our progressive and enlightened approach to all means of better City government. We believe we cannot afford to overlook the possibilities of further improvement in the important area of proper and ethical procurement management, fitting to these times and our own circumstances, including acquisition of more sophisticated technological needs. We also wish to secure as much of a guarantee as possible for the integrity of the procurement process and further fulfillment of the basic principles, policies and objectives already started. We believe that we owe the public this evidence of dedication to these criteria. We consider that by our becoming a Pilot City we are being given a great opportunity to find means of improvement and to modernize our procurement methods for even better results. In brief, we consider our participation in the American Bar Association Model Procurement Code a matter of serious intent for better City Government and an investment in integrity as evidence of that intent. If the ABA/MPC did not exist, we would be compelled to invent an equivalent.

Pilot jurisdictions are selected on the basis of State or local initiative and willingness of the jurisdiction to provide funding, personnel, and administrative support. Actual implementation in each jurisdiction consists of two groups--the Implementation team is responsible for initiating and guiding the implementation effort while the Working Committee performs the project work. Working Committees generally include a mixture of legislative and executive branch representatives, as well as local officials and members of the private sector with direct interests in procurement. As the purpose

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of this program is to develop a modernized State procurement code to be submitted to the legislature, the Working Committee compares the State's existing procurement practices with the Model Procurement Code in a series of Colloquia Programs and State Working Committee meetings. The colloquia series consists of daylong sessions aimed at three basic objectives: informing State and local officials as to the content of the Code; uncovering problems with the existing purchasing system in the State; and raising for consideration working alternatives to the existing system. The ABA Coordinating Committee establishes a liaison team responsible for assisting the State Working Committee and sharing insights derived from legislative decisions and discussions in other pilot jurisdictions. Thus, each pilot State analyzes existing statutory language, examines the responsibility for control of procurement, and studies present procurement practices, comparing existing State practice against the Draft Code. From this detailed comparative analysis, the Working Committee develops its own draft of the Code adapted to meet its own unique needs.

An assessment of the Pilot Jurisdiction process was made in the Coordinating Committee report "Implementation of a Model Procurement Code for State and Local Governments: Process Assessment." (February 7, 1979). Several conclusions were reached by the Committee:

Establishing a sound implementation structure depends to a great extent on the initial selection of personnel who are knowledgeable as to the jurisdictions' current purchasing system and who are attuned to the

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need for changes in that system. Program coordinators should also have an awareness of local political trends to facilitate the organization and progress of the jurisdiction's working group.

The nucleus of the Working Committee should be identified in the early planning stages, with membership left open until after the informational colloquium has been held. Particular care should be taken to gather a broad-based audience for the colloquium so that those in the procurement community may learn first hand of the scope of the pilot jurisdiction program and the basic concepts of the Model Procurement Code.

If key personnel are involved at the outset and a well organized locally oriented colloquium is held, the foundation will have been laid for a successful pilot jurisdiction program.

V. Organization of the Code

The Model Procurement Code is a comprehensive enabling statute designed to provide a legislative foundation upon which a state or unit of local government can build and operate a modern and efficient purchasing system. Its twelve Articles set forth fundamental principles and policy guidance for the procurement of supplies, services, and construction for public purposes, administrative and judicial remedies for the resolution of controversies relating to public contracts, and a set of ethical standards governing public and private participants in the procurement process.

In addition to the Twelve Code Articles, supplemental regulations and commentary are being drafted by the Code Committees. In recognition of the diverse public purchasing needs of the various States, some of the Code's provisions are drafted to reflect alternative and optional provisions. The Code is designed to be applicable at the State government level, and to be available on an optional basis to local governmental units. The following will summarize each Article of the Code and the major issues faced by the pilot jurisdictions.

Article 1 states the general purposes of the Code, specifies its applicability, and contains definitions of terms used in more than one Article. A major issue in the pilot jurisdictions has been the applicability of the Code to local governments: whether the State will mandate that local governments follow all or part of the Code or whether localities will be free to adopt the Code at their own discretion.

Article 2 sets forth the basic organizational concepts for establishing procurement policy and for conduct of the procurement function. It calls for creation of a procurement policy office and the position of chief procurement officer. The Code is designed to simultaneously centralize the procurement function and separate policymaking from day-to-day operations. Some pilot jurisdictions have had difficulty with this organizational scheme; they have, therefore, retained the philosophy of Article 2 while modifying it

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to fit existing political structures. Article 2 also provides for exemptions from central procurement and for training of procurement personnel.

- Article 3 establishes competitive sealed bidding as the preferred method for contracting but also authorizes the use of other source selection methods in appropriate, specified situations. The other source selection methods are 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, and contracts not awarded by competitive sealed bidding generally require a written justification which is a matter of public record. The Article prohibits cost-plus-a-percentage-of-cost contracts but permits the use of any other type of contract. It also requires the submission of cost or pricing data for contracts awarded without adequate price competition and for contract price adjustment.

Key issues in the pilot jurisdictions have been what methods of source selection should be authorized and under what circumstances they should be used. The Code authorizes the use of competitive sealed proposals, a method allowing considerable latitude for negotiations with vendors, which has not been heretofore authorized by any State purchasing law. Each pilot jurisdiction has incorporated this provision into its proposed legislation but has retained a stated preference for competitive sealed bidding.

Another major issue raised by all pilot jurisdictions was the problem of how to procure professional services. This was not covered in early code drafts, but has now been included at the request of pilot jurisdictions. Under §2-302, certain services are exempted from centralized purchasing. Using agencies may then under §3-207 award such contracts on the basis of the most qualified officer's demonstrated competence to perform the desired services at a price determined to be fair and reasonable to the jurisdiction.

. Article 4 contains requirements for developing, monitoring, and using specifications. It requires that specifications be written in a manner to maximize competition to the extent possible. It also establishes a preference for commercially available items to incorporate the emerging concept of performance purchasing, letting the market place work for the purchasing official.

. Article 5 contains special aspects of construction procurement, including the promulgation of regulations to facilitate the use of various construction contracting and management methods; use of bid, performance and payment bonds; and contract clauses for change orders, variations in estimated quantities, suspension of work, and termination. It also establishes criteria for making price adjustments due to changes and variations in estimated quantities. The Article also includes provisions governing the award of contracts for architect, engineer, and land-surveying services in lieu of the competitive procedures provided in Article 3.

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A major issue in Article 5 concerns the procurement of architect-engineer services. Architects and engineers took the position that such service should be procured solely on the basis of competence for a given project, while purchasing officials believed that their services should be procured on a basis which provides for consideration of price as one of the selection factors which would also include technical competence of the offerors, technical merits of offers, and the scope of the project. The Code, and most of the pilot jurisdictions, have adopted the method proposed by the architects and engineers. ¹⁷

. Article 6 authorizes the use of clauses in contracts for supplies and services covering changes, temporary work stoppages, and variations in estimated quantities and sets forth the criteria for making price adjustments pursuant to such clauses. It also authorizes the inclusion of other clauses, including liquidated damages, excusable delay, and termination.

. Article 7 provides for the promulgation of regulations establishing cost principles to be used to determine types of cost reimbursable under cost-type contracts.

. Article 8 establishes requirements for control over the life cycle of supplies procured and establishes criteria for management transfer, and disposal of surplus property. This Article bars only agency people, not all government employees, from obtaining surplus property.

. Article 9 provides disputes resolution mechanisms for controversies relating to contract solicitations and awards, contract performance, and debarment or suspension determinations. In addition, this Article provides procedures for handling contracts awarded in violation of law. The major issue has been the proposed establishment of a procurement appeals board. Most jurisdictions have chosen not to establish this administrative board and have instead placed jurisdiction over procurement disputes in their local courts where sovereign immunity in contract cases has been waived by the state.

. Article 10 eliminates legal barriers to a wide range of efforts among units of government. It permits several jurisdictions to jointly use real and personal property and to share personnel. The Article also provides that a State, at the request of other jurisdictions, may provide procurement information and technical services to those jurisdictions.

. Article 11 provides administrative procedures for assisting small and disadvantaged businesses in learning how to do business with the enacting jurisdiction and methods for facilitating transactions with such businesses. It should be noted that this Article could be used to incorporate State socioeconomic policies that are to be implemented through the procurement process. Most professional purchasing organizations feel

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that socioeconomic procurement provisions should not be part of a procurement scheme. Some Federal grantor agencies have argued that such policies are an integral part of any procurement code.

. Article 12 contains ethical standards with accompanying sanctions that are applicable to all participants in the public procurement process, not just government employees. The proposed ethical standards cover conflicts of interest, gratuities and kickbacks, contingent fees, and misuse of confidential information. Additionally, this Article authorizes establishment of an Ethics Commission with authority to render advisory opinions to participants in the procurement process. Section 12-308 was modified by all pilot jurisdictions to ease restrictions on employment of former employees. In addition, some jurisdictions strengthened enforcement mechanisms.

VI. Endorsement of the Code

The Model Procurement Code Concept has received endorsements from a variety of sources including private organizations, State Governments, and various branches of the Federal Government. These include Senator Lawton Chiles, Chairman of the Subcommittee on Federal Spending Practices, Efficiency, and Open Government of the Committee on Government Operations; the National Institute of Government Purchasing; Elmer B. Staats, the Comptroller General of the United States; the Office of Federal Procurement Policy, Office

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Management and Budget; the National Association of State Purchasing Officials; the Fiscal Affairs and Government Operations Committee of the Southern Legislative Conference; the National Association of Attorneys General and the National District Attorneys Association.

VII Future Plans

The process of modernization of State and local procurement began with the NASPO analysis of State and local procurement law. The second major step was concluded this past February when the American Bar Association approved the Model Procurement Code. A good deal of effort has brought this process to its current status. Volunteer efforts by the ABA Coordinating Committee and the two Sections of the American Bar Association have been extraordinary. To achieve large scale adoption similar efforts must be put forth in each of the States and local jurisdictions throughout the country.

Without further efforts, the Code could make progress on its own. Such progress would be slow and inefficient. What is necessary is a more intensive effort to let government contract officials, elected officials, the State and local Bar, suppliers and the public become informed of the contents of the Code. Supplemental regulations could be drafted to ease the burden of those State and local people who wish to consider the Code.

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in detail, Such regulations would provide each adopting State or local government with a basis to proceed on to rapid implementation of the Code.

Training or retraining efforts must be mounted in each adopting jurisdiction. No code, no matter how good or how accepted it may be, can be self-implementing. In many jurisdictions, there exists a knowledge of procurement basics. To the extent concepts in the Code differ and a more formal or different process is structured, some training must come from outside sources.

The hope of all of those who have worked on the NASPO Study, the Model Code and the pilot projects is for large scale adoption of the Code throughout the country over the next, five to ten years. The prospects for large scale adoption appear good. The Code has received substantial attention since the ABA approval. The process is moving forward in many of the pilot jurisdictions. The product is available. The mood of the public and elected officials is agreeable.

Because the Model Code was developed by State, local and private procurement professionals to respond to State and local needs, the Code has the momentum and the potential to make a lasting contribution to better government.

Footnotes

- 1/ vom Baur, Fifty Years of Government Contract Law, 29 FED. B.J. 305 (1970).
- 2/ Department of Commerce, Bureau of Economic Analysis, 57 SURVEY OF CURRENT BUSINESS No. 9 (Sept. 1977); Figure updated by information from Department of Commerce.
- 3/ Council of State Governments, State and Local Government Purchasing (1975).
- 4/ Members of the Coordinating Committee include F. Trowbridge vom Baur (Chairman), vom Baur, Coburn, Simmons & Turtle, Washington, D.C.; Orris S. Heistand, Jr. (Administrative Vice-Chairman), Morgan, Lewis & Bockius, Washington, D.C.; James M. Marsh, LaBrum & Doak, Philadelphia, Pennsylvania; Sherwin M. Birnkrant, City Attorney, Pontiac, Michigan; Professor Louis F. Del Duca, Dickinson School of Law, Carlisle, Pennsylvania; and Patrick J. Falvey, General Counsel, Port Authority of N.Y. & N.J., New York, New York. Former members include Roy H. Semtner, Kerr, Davis, Erwine, Krasnow, Rhodes & Semtner, Oklahoma City, Oklahoma and Max E. Greenburg, Trayman, Harris, Cantor, Reiss & Blasky, New York, New York.
- 5/ Coordinating Committee on a Model Procurement Code, The Final Report, Implementation of a Model Procurement Code for State and Local Governments: Process Assessment (Feb. 1979).
- 6/ Zemansky, Purchasing Practices in Baltimore, National Institute of Governmental Purchasing, THE PUBLIC PURCHASOR (1st Quar. 1978).
- 7/ This is consistent with the approach of The Brooks Bill, see Pub. L. No. 92-582, 86 Stat. 1278 (Codified at 40 U.S.C. §541 (Supp. 1978)).

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