TESTIMONY OF WILLIAM G. HOLLAND, AUDITOR GENERAL
BEFORE THE
JOINT COMMITTEE ON GOVERNMENT REFORM
3/31/09

I was asked to be here today and give some brief testimony concerning the Illinois Procurement Code and related findings in my audit reports.

First, by way of background, the Illinois Procurement Code was enacted in 1998. The Code emanated out of work done in the early 90's by a Blue Ribbon Committee on the State Procurement Code. The Blue Ribbon Committee researched the laws that were current at that time; solicited and received testimony from dozens of individuals and organizations; and ultimately drafted legislation that became the basis for what is now the Illinois Procurement Code.

My observations today will be based on our experience in auditing compliance with the Code over the past ten years. While overall I believe that the Illinois Procurement Code continues to be a sound statute, there are areas in which (1) compliance with existing provisions needs to be enhanced; (2) existing provisions could be strengthened through clarifying language; and (3) new requirements could be considered.

However, before I proceed to discuss these three areas, I want to make it perfectly clear that I am not here to put myself in the position of a policy-maker. As many of you know, I do not take positions on legislation. My job is simple: audit against the criteria the General Assembly sees fit to enact. I hope that you will listen to my comments in that context.

First, I will discuss the areas in which my audit findings suggest compliance with the Code needs to be enhanced.

During the course of conducting our audits, it is neither possible nor practicable for my auditors to review every contract entered into by every agency. But we do test a sampling of contracts at each agency to determine whether purchases are being made in compliance with the Code. Over the years, this testing has shown some areas with which agencies have problems complying. For instance:

- First, agencies occasionally enter into contracts without following the proper competitive procurement process. While I would not say this problem is pervasive, it does exist. Sometimes the failure to follow the appropriate process is due to confusion about what constitutes a professional and artistic service – which need not be bid – and other types of services that must be bid. Guidance in this area is available in procurement rules and the Comptroller's SAMS manual, but agency personnel are not always familiar with these resources.

- Second, agencies do not always publish required notices in the on-line Procurement Bulletin. The public is to be notified via the Bulletin when agencies declare exemptions from the normal competitive process – for example, in emergency or sole source situations. Notice is also to be given when the lowest priced vendor is not selected for award.[1]
- Third, my auditors have also found procurement files that were missing key documents, such as a decision memorandum (which would document and explain the basis for award), evaluation scores, and even the winning bid.[2]
- Fourth, agencies do not always file contracts and leases with the Comptroller's office in a timely manner. Generally speaking, all contracts are to be filed with the Comptroller within 15 days of contract execution.

In summary, for the above areas, I believe if agencies simply followed the existing procedures in conducting procurements, maintained key documents for each procurement, and filed contracts with the Comptroller in a timely manner – all as currently required by the Procurement Code – some of the abuses of the past few years will not be repeated. Experienced staff, training for new employees and earnest application of the law would go far to addressing the above issues.

While I do believe the Procurement Code is a sound document, my audits have revealed several areas in which existing provisions could be strengthened through clarifying language. A number of these areas have been previously clarified through notices issued by the Department of Central Management Services in its role as Chief Procurement Officer. However, I believe these matters are critical enough that they should be addressed in statute. For instance:

1. The Code implies that contracts should be executed in a timely manner but does not explicitly prohibit agencies from accepting services from vendors before a contract is executed. My auditors routinely find contracts that were not signed by both parties before the vendor began work. Sometimes the agency and the vendor have reached an agreement on the terms and conditions of the contract but the paperwork has lagged behind. In other cases, however, agencies have allowed vendors to begin providing services while the contract terms and conditions were still being negotiated. This is unacceptable.

   When the State has begun accepting services without the benefit of a written agreement, it is at a disadvantage in negotiating contract provisions and is exposed to unacceptable and unnecessary risks and liability. While there may be emergency circumstances when a fully-executed written contract cannot be

[1] Following the 6/30/04 CMS audit, the Department of Central Management Services issued a series of CPO notices intended to clarify and strengthen various provisions of the Illinois Procurement Code. CPO Notice #39 (May 11, 2005) requires publication of an award to other than the lowest priced vendor for all RFP procurements. Previously, CMS required publication of a notice of award to other than the lowest priced vendor only on P&A contracts.

[2] Following the 6/30/04 CMS audit, the Department of Central Management Services issued a series of CPO notices intended to clarify and strengthen various provisions of the Illinois Procurement Code. CPO Notice #37 (May 11, 2005) requires all competitive procurement awards to be preceded by a written determination recommending the award of a contract to a specific vendor.

obtained before services are provided, this should be rare and discouraged – not frequent as we have found.

2. The Code requires subcontractor information to be disclosed in all "professional and artistic service" contracts. However, the Code is silent on the disclosure of subcontractor information for all other types of contracts. The identification of who is doing the work for the State is, I believe, a vital component of accountability and transparency. It would be helpful if the Code were clarified to require disclosure of subcontractors for every contract.[3]
3. The Code "restricts" but does not prohibit potential vendors from assisting in the development of specifications for upcoming bids and proposals. On a number of occasions, my auditors found that the winning vendor had developed information related to the procurement and/or was already working for the State on a small, no-bid contract that then provided the vendor with an advantage in competing against other vendors for a larger contract. The use of no-bid, small purchase contracts to give one vendor an advantage over other vendors on an upcoming large dollar procurement is not consistent with the Code's stated public purpose, which is to encourage fair and open competition.[4]
4. The Code requires contracts to be awarded only to vendors who are "responsible." "Responsible" vendors are those persons who "have the capability in all respects to perform fully the contract requirements and the integrity and reliability that will assure good faith performance." In at least one instance of which I am aware, the State awarded a contract to a vendor who did not legally exist at the time of award. From my perspective, I don't know how a non-existent entity could have demonstrated capability, integrity and reliability. You may wish to consider permitting contracts to be awarded only to entities that exist at the time of award.
5. The Code could use clarification in the area of public access to procurement information. The Code states that winning bids and proposals shall be public. The Code was also amended in 2006 to require all "pre-award, post-award, administration, and close-out documents relating to" a particular contract to be made public. Nevertheless, we continue to find agencies claiming confidentiality over such documents as: losing bids and proposals; losing vendor scores; and evaluators' names. We have even had agencies attempt to assert confidentiality over contracts, or parts of contracts.

   While there are legitimate reasons to shield a vendor's proprietary information, I believe the Code and the Freedom of Information Act, read together, would require virtually all information related to a procurement to be made public. For instance, in my office, all procurement documents, including the losing proposals,

---

[3] Following the 6/30/04 CMS audit, the Department of Central Management Services issued a series of CPO notices intended to clarify and strengthen various provisions of the Illinois Procurement Code. CPO Notice #41 (May 11, 2005) expanded the requirement to identify subcontractors from just P&A contracts to all contracts procured through an RFP process.

[4] Following the 6/30/04 CMS audit, the Department of Central Management Services issued a series of CPO notices intended to clarify and strengthen various provisions of the Illinois Procurement Code. CPO Notice #38 (May 11, 2005) requires agencies to publish a General Notice on the Illinois Procurement Bulletin if it wishes to engage a vendor to conduct a study, diagnostic, or data collection effort and any later solicitation must identify the vendor and a statement of its work product.

the evaluation scoresheets, and the names of the evaluators, are public documents. Any one can – and losing proposers often do - request access to my files to ascertain for themselves whether our procurement decisions are sound and well-documented. While no one likes to be second guessed, just knowing that my Office "might be" has the positive impact of ensuring that we follow all the rules to reach our procurement conclusions.

From my experience, those are the five areas in which existing requirements could be clarified or strengthened to further the statute's public purpose of fair and open competition and procurement transparency.

Finally, I will now briefly discuss some areas that are not specifically addressed in the current Procurement Code that you may wish to consider. But first I would like to give you some background on the development of the Code. As I mentioned, a Blue Ribbon Committee developed a draft of legislation that became the basis for the current Illinois Procurement Code. That draft drew heavily upon a Model Procurement Code issued by the American Bar Association. The ABA's Model Procurement Code at that time dated from 1979 and was subsequently updated in 2000.

The Model Procurement Code contains some provisions that, in my experience of the past 10 years, may be worth considering. These include:

- A renewed emphasis on training and education for procurement professionals. For instance, the Model Procurement Code suggests creation of a "Procurement Institute" to conduct procurement education and training programs. I understand that CMS has standardized a number of procurement processes and provides some guidance to State employees with purchasing duties. While creation of a new entity for this purpose may not be necessary, I do believe the level of non-compliance that we as auditors see would indicate that additional training and education on this topic would be helpful.
- Creation of a "Procurement Appeals Board" as an independent entity providing informal, expeditious, and inexpensive procedures for the resolution of procurement controversies. My auditors recently encountered an instance where a losing vendor was not even informed for 6 months that its bid was not eligible for consideration. Withholding timely and adequate information from competing vendors undermines the appeal process and the system of checks and balances such a process provides.

In conclusion, I would like to reiterate once again that I am not a policy-maker. I know that there are other perspectives – as well as resource limitations. As luck would have it, sorting through the various options and funding the results is not my job. Understand that my comments are derived from my factual experiences in testing compliance with the current Illinois Procurement Code. You can each be assured that I will continue to measure agency compliance in a fair and objective manner against whatever criteria you legislate.

I'll be happy to answer any questions you may have.