



December 30, 2019

Procurement Reform Bill (LB21) Advances to 2020 Session

[LB21](#), legislation first introduced in 2018 to reform Nebraska’s procurement laws, has been carried over to the 2020 legislative session, and its sponsor, Senator Mark Kolterman, intends to advocate for its enactment in the 2020 Legislative Session, potentially with some clarifying revisions. As previously outlined (see below), LB21 would authorize expedited agency and judicial review of large service contract awards, and require that the more protective standards in the Administrative Procedure Act be applied in reviewing State procurement decisions. Aimed only at service contracts over \$5 million, the legislation would focus on those contracts with the most significant impact on Nebraska taxpayers, and examine expensive contract awards with a higher level of scrutiny, thus limiting the State’s discretion to award contracts in a manner inconsistent with state law and procedure.

Last year LB21 did not advance from Committee, primarily due to opposition by the Nebraska agency which would be required, under LB21, to worker harder by conducting a more thorough review of large contract awards. The agency opposed LB21 on two grounds: (a) that LB21 might add labor costs to the agency’s procurement processes, and (b) judicial review might take more time than the current process. While an in-depth analysis of those mistaken (in our view) conclusions is beyond the scope of this Update, proponents of LB21 have presented compelling responses and have demonstrated that LB21 would introduce best practices and a more competitive environment for Nebraska procurements, which not only will save taxpayer dollars but also will help attract higher quality vendors to the State. Proponents also have shown that the current system is broken, and indeed takes more time and costs more money than would occur under LB21.

Recent developments in 2019, in the form of ongoing procurement litigation, have demonstrated additional reasons supporting passage of LB21. The first case, [WIPRO v. Nebraska](#) (CI 19-676) (3/19), involves a massive technology contract procured by DHHS in 2014, which DHHS terminated in 2018, leading the contractor, WIPRO, to sue the State for more than \$30 million; in response, the State counterclaimed, seeking nearly \$60 million in damages. The State claims that the contractor defrauded it during the procurement process by deliberately underbidding the contract and later seeking additional funding, and by misrepresenting its subcontractor’s experience in prior contracts in Missouri and other places.

The WIPRO case bears relevance to LB21 for many reasons. Back in 2014 the State summarily dismissed an agency protest of the contract award filed by another bidder; that protestor argued that WIPRO had underbid the contract and misrepresented its experience in Missouri; in other words, in the ongoing litigation, the State now is making the same arguments the protestor made in 2014, arguments which the State summarily rejected (without a hearing or judicial review) in 2014. In 2014 as today, there exists no formal mechanism for judicial review of a procurement decision; it is likely that these allegations would have been fully investigated and resolved in 2014 if LB21 had been in place. Assuming the State is correct in the current litigation—that the WIPRO proposal underbid the contract and misrepresented its experience—these disqualifying defects existed in 2014 and should have been discovered during the protest process. But, because there was no effective protest process, the State will continue to expend millions on this failed procurement: more than \$10 million has already been spent on a technology solution that has not been provided, significant attorneys’ fees and staff resources in litigating the ongoing WIPRO case, the risk of a multimillion-dollar verdict against the State, and harm from

delay. The State still does not have the technology solution it sought back in 2014, and now needs to reprocure the contract with a suitable vendor.

Second, the ongoing *PromiseShip v. Nebraska* (CI 19-2255) (2019) litigation involves a five-year state contract for child welfare case management services, valued at more than \$300 million, and held for the past 10 years by PromiseShip, an affiliate of Boys Town. During the past 10 years, all other private child welfare contractors had been fired or gone out of business; only PromiseShip continued for the entire 10 years during which Nebraska's child welfare case management services had been privatized.

After an unsuccessful administrative protest by PromiseShip, in July 2019 it filed suit in state court. In its lawsuit, it sought various forms of relief, including an injunction to halt the newly awarded contract, which had been awarded to a Kansas agency that had never provided these services in Nebraska. After procedural motions by the State, which delayed and then led to two separate injunction hearings, on October 15, 2019 the Court ultimately found PromiseShip had legal standing to move forward with the case, and denied the State's motions to dismiss, but denied the injunction at that time. [See the Decision.](#)

Judge McManaman's Decision is notable in several respects, in particular by allowing the case to move forward to trial and rejecting the State's efforts to dismiss it. It is a virtually unprecedented decision in the context of a Nebraska state bid protest. In particular, the judge found that the unsuccessful bidder and the taxpayer plaintiff had established they could move forward to trial on the merits, a trial that would likely occur sometime in 2020. Because Nebraska has no official right of judicial review under its APA, the Court applied a standard of review that is highly discretionary to the State, and essentially required that the protestor show "bad faith" by the State, a showing he said had not yet been made in this early stage of the case. This lenient standard of review allowed the judge to find, at the injunctive relief stage, that the State's arguably wrongful actions were within the State's discretion, including its decision to: (1) allow the successful bidder to correct its proposal post-award, (2) ignore evidence that the successful bidder improperly withheld highly negative past contract performance (e.g., hundreds of children sleeping in corporate offices, etc.), and (3) ignore facts suggesting that the company intentionally underbid the Nebraska contract.

Arguably, if Nebraska had in place the judicial review mechanisms (and standard of review) used by most states and the federal government (which LB21 would enact), there would have been a different result in the PromiseShip case. But as noted, the Court denied the State's motion to dismiss, thus allowing the case to move forward to trial, with discovery and factual development that could allow the protestor to meet this very high judge-made standard. And as with the WIPRO case noted above, both the time and significant costs to the State from its failure to follow standard procurement processes have been very significant; these costs continue to mount.

These 2019 cases further demonstrate the need for immediate procurement reform in Nebraska. Nebraska legislators will be considering LB21 in the upcoming session, and would welcome the views of all stakeholders on this important legislation.

For More Information

To the extent you would like more information on the items discussed here, please feel free to contact the members of Kutak Rock's [Nebraska State Procurement Team](#), or [Government Relations Team](#). In the past two years alone, we have assisted clients with major state contract procurement disputes in Nebraska, Colorado, Iowa, Arkansas, Missouri, Oklahoma, Nevada, Washington and Michigan, and would be happy to discuss your or your clients' specific needs. We would welcome the opportunity to discuss these issues with you.