

January 19, 2021

## Nebraska Procurement Reform Legislation Returns

We write to update you on LB61, procurement reform legislation first introduced in a slightly different format in 2018, which seeks to modernize and improve Nebraska's procurement laws. The sponsor, Sen. Mark Kolterman, has introduced LB61 for the 2021 legislative session.

### Introduction

Designed to remedy costly defects in current procurement processes, [LB61](#) (PDF) would authorize expedited agency and judicial review of large service contract awards by the State and would require that the taxpayer-protective standards in the Administrative Procedures Act (“APA”) be applied in reviewing State procurement decisions. Applicable only to service contracts cumulatively worth over \$10 million, LB61 would apply to those contracts with the most significant impact on Nebraska taxpayers, thus restricting the State's authority to award contracts to unqualified or unscrupulous bidders.

### Background

Similar legislation last year (LB21) did not advance from committee during the legislature's short, pandemic-abbreviated session due in part to opposition from the Nebraska Department of Administrative Services (the “agency” or “DAS”) that the bill would have required to work harder, and conduct more thorough reviews of large contract awards.

The agency opposed LB21 on two grounds: (a) that the bill might add labor costs to the agency's procurement processes, and (b) judicial review could take more time than the current process. While an in-depth analysis of those mistaken conclusions by DAS is beyond the scope of this update, proponents of LB61 have presented compelling responses. Proponents of LB 61 have demonstrated that the bill would introduce best practices and a more competitive environment for Nebraska procurements, which not only will save taxpayer dollars and protect program beneficiaries, but also 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 LB61.

### Immediate Action Required

Recent events, including failed procurements, wasted taxpayer money and expensive ongoing procurement litigation provide further reasons for passing LB61. One case, [WIPRO v. Nebraska](#) (CI 19-676) (3/19), involves a massive technology contract awarded by the Department of Health and Human Services (“DHHS”) in 2014. DHHS terminated that contract 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 WIPRO defrauded it during the procurement process by deliberately underbidding the contract, thus requiring it to seek additional funding, and by misrepresenting its subcontractor's experience in prior contracts.

The *WIPRO* case bears relevance to LB61 for many reasons. First, at the time the contract was awarded to WIPRO in 2014, the State summarily dismissed a protest of the contract award filed by another bidder; that protestor argued that WIPRO *had underbid the contract and misrepresented its experience*. In other words, in the current litigation, still pending, the State now is making the same arguments the protestor made in 2014—arguments that the State summarily rejected without a hearing or judicial review in 2014. Had there been thorough judicial review available in 2014, these procurement defects likely would have been discovered.

Assuming the State is correct in the *WIPRO* 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 such protections were not in place, the State will continue to expend millions on this failed procurement, in addition to the \$10 million that has already been spent with no end product to show for it—as well as legal fees and other State resources—while still faced with a potential multi-million dollar exposure from the claims asserted by WIPRO. In short, LB61 could have avoided this massive six-year (and counting) procurement disaster and daily, ongoing waste of taxpayer dollars.

Second, the recently ended but still in the news litigation *PromiseShip v. Nebraska* (CI 19-2255) (2019) involved a five-year state contract valued at more than \$300 million for foster care case management services, which had been held for the past 10 years by PromiseShip, an affiliate of Boys Town.

After an unsuccessful administrative protest by PromiseShip, it filed suit in state court in July 2019, seeking 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, the Court found on October 15, 2019 that 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 Kevin R. McManaman’s decision in the PromiseShip litigation is notable in several respects. In particular, Judge McManaman allowed the case to move forward to trial on the merits and rejected the State’s efforts to dismiss it on standing grounds. On the other hand, because Nebraska has no official right of judicial review under its APA, the Court applied a standard of review that is highly deferential to the State.

That standard of review essentially required that the protestor show “bad faith” by the State, a showing the judge said had not yet been made. This deferential standard of review allowed him to find, at the injunctive relief stage, that the State’s arguably wrongful actions were within the State’s discretion, including its decisions 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 history (e.g., hundreds of children sleeping in corporate offices, etc.), and (3) ignore facts suggesting that the company intentionally underbid the Nebraska contract.

### Costs of Inaction Continue to Mount

Events since the end of the *PromiseShip* litigation have borne out the concerns raised by PromiseShip.<sup>1</sup> In particular, a whistleblower report about the Kansas-based awardee in the *PromiseShip* case, Saint Francis Ministries, reflects that it massively underbid the Nebraska contract and will lose tens of millions of dollars per

---

<sup>1</sup> See, e.g., Stoddard, Martha, “[Saint Francis Ministries is losing millions on its Omaha-area child welfare contract.](#)” *Omaha World-Herald* (Omaha), Dec. 22, 2020; Stoddard, Martha “[Whistleblower: Omaha-area child welfare contractor spent \\$80K on Cubs tickets.](#)” *Omaha World-Herald* (Omaha), Dec. 16, 2020.

year. In fact, absent a loan under the Coronavirus-related Paycheck Protection Program, Saint Francis likely would have run out of money in March of 2020.

More damningly, Saint Francis' underbid was not accidental. Recent reports show that Saint Francis leadership knew beforehand that the bid it submitted to Nebraska was a "loser." As a result, and as PromiseShip predicted in its challenge, Saint Francis has already come back to the State for more funding, and likely will continue to do so.

Finally, as DHHS confirmed in January 2021, Saint Francis still fails to meet the statutory caseworker ratios, which directly harms, and negatively impact outcomes with children. This same legal defect was identified two years ago and has never been corrected.

Both cases, *WTPRO* and *PromiseShip*, illustrate why LB61 is urgently needed. Arguably, had LB61 been in place at the time of these procurements, the awards would have been made to qualified and responsible bidders, after a prompt yet thorough judicial review, and the alleged defects in those proposals—which continue to be challenged at significant taxpayer expense—would have been identified and corrected. As it stands, Nebraskans continue to pay the price for our outmoded and ineffective procurement system and will continue to do so until needed changes are made.

### **More Information**

If you would like more information on the items discussed here, please contact [Tom Kenny](#), [David Bracht](#), [Edward Fox](#) or any of the members of [Kutak Rock's State Procurement Team](#) or [Government Relations Team](#). We would welcome the opportunity to discuss these issues with you.