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State Procurement - A Tipping Point for Reform?

We see a confluence of events in the procurement reform arena, and find ourselves working amidst larger national movements which appear to favor state procurement reform, both at the individual state level (e.g., Nebraska) and at a larger level—in the approximately 20 states which have neither adopted the ABA’s Model Procurement Code, nor authorized a right to judicial review of procurement award decisions. We believe these events will support one another and lead to reform in Nebraska and potentially many other states.

At the national level, an ABA task force will this week begin a process of reforming the [ABA’s Model Procurement Code](#), which was last revised in the year 2000. That effort will bring together legal scholars, state procurement officers, private attorneys and other stakeholders to revise the Code and adapt it to current state needs and processes.

Second, a leading national trade and public advocacy leader, the [Information Technology Industry Council](#) (“ITI”), has launched a nationwide effort—directed at state and local authorities and stakeholders—to [advance IT Modernization and Cyber-Security improvements at the state and local level](#). To the extent governing officials take prudent steps to modernize IT and improve Cyber Security, states will be using their existing and/or reformed procurement systems to secure new contracts for IT services and products, and retain expertise from the private sector, which in turn will make the need for efficient and fair contracting processes even more compelling, and make ITI’s, the ABA’s and related efforts more timely.

Finally, at least one State, Nebraska, appears to be on the verge of modernizing and reforming its procurement processes through new legislation, LB61, which would provide unsuccessful bidders the express right of judicial review of erroneous contract award decisions. While the Nebraska bill does not adopt in full the ABA’s 2000 Procurement Code, it would be groundbreaking nevertheless, and would for the first time in the State’s history give unsuccessful bidders the express right to have a neutral court review the decisions of procurement officials in the State. If successful, LB61 should lead not only to further reforms in State procurement processes, but also could persuade the many other states which currently disallow judicial review of award decisions that it would be in their citizens’ interests to reform antiquated, non-transparent systems, and thereby ensure the selection of the highest quality bidder and the best value for the state’s taxpayers, program beneficiaries and other stakeholders. In Nebraska, reform-minded senators, such as LB61 sponsor Senator Kolterman, will likely be aided by an ongoing legislative investigation authorized by LR29, which directed the investigation of a failed procurement for child welfare services and is due to issue a report in December 2021 describing those failures and prescribing improvements in State procurement processes. Last year, ITI and other proponents testified

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in support of LB61 and likely will do so again in 2022. For more information on LB61, see our [January 2021 Legislative Update](#).

More Information

Kutak Rock has taken a leadership role in each of the above areas, will have attorneys participating in the ABA Task Force, will be working with ITI, and also will be working to ensure enactment, and testifying once again in support of, LB61. If you would like more information on the items discussed here, please contact Tom Kenny, David Bracht, Edward Fox, Suzanne Shehan-Ames 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.

