



Caveat Vendor: The Case for Repairing Nebraska's Contract Procurement Process

by Thomas J. Kenny, Edward Fox, and Meghan Blinn

Introduction

Each year, Nebraska's state agencies invite national, international and hometown vendors to bid on valuable state contracts for goods and services. State officials routinely reach out to major corporations, seeking to attract quality companies to serve Nebraskans, to bring quality services, expertise, investment and jobs to the State. But lurking in Nebraska's statutory scheme and procurement practices are hidden dangers to all prospective Nebraska vendors: Nebraska law does not offer those vendors a hearing process to challenge improper procurement decisions; Nebraska law does not provide an express right of judicial review when the State wrongfully awards a contract to an irresponsible or corrupt vendor; Nebraska procurement officials do not consider their published "Vendor Manual"¹ to be legally binding on the State. Instead, Nebraska offers vendors only vague protest procedures that severely restrict disappointed vendors' rights to protest an improper award, and ostensibly vests in one unelected agency official total discretion to decide bid protests on contracts worth millions, and

even billions, in taxpayer dollars. Unlike in many other states and in the federal system,² and unlike with many other agency decisions made in Nebraska,³ Nebraska law provides no explicit right to appeal, or effectively challenge, an agency's contract award decision, even if the agency acted unlawfully, arbitrarily, or in violation of its own Vendor Manual.

For example, in 2016, the State Purchasing Bureau of the Department of Administrative Services (DAS) awarded the largest service contract in State history, on behalf of the Nebraska Department of Health and Human Services (DHHS). DAS issued a Request for Proposal (RFP) for Medicaid Managed Care Services in support of its Heritage Health program, which sought to procure three long term contracts, valued at more than \$1 billion annually. Despite the importance of these services to Nebraska's citizens and the significant expense involved, the State argued in a subsequent bid protest that DAS's award decision was not subject to judicial review by any court; that the protestor could not conduct discovery into the State's decision making; that DAS's own

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CAVEAT VENDOR

published Vendor Manuals were not legally binding on the State; that settled Nebraska Supreme Court precedent did not apply; and that the award decision was solely in the discretion of DAS, subject only to the limits of “bad faith.” Rather, DAS claimed that the sole right to challenge this monumental decision consisted of a written protest letter, followed by a “meeting” with DAS, as prescribed in the cursory Standard Protest/Grievance Procedures for Vendors posted on the DAS website; those Grievance Procedures, moreover, contain no discernible standards of any kind, nor any limits on DAS’s discretion.⁴ Unsuccessful bidders and taxpayers, according to DAS, must be bound by the decision of the Director, who, in his sole, unfettered discretion, reviews the conduct and decisions of his subordinates within DAS.⁵

This glaring omission in Nebraska law seemingly delegates to a single agency appointee, who need not be an attorney, the final and unreviewable authority to decide multibillion dollar bid protests, creating significant risk to all Nebraskans. The primary risk, obviously, is that DAS’s award decision could be arbitrary, illegal, contrary to law, or simply erroneous under the terms of the RFP, and could approve the selection of a corrupt, conflicted or “irresponsible” contractor which does not provide the best value to Nebraskans. Less obviously, however, this gap in State law may discourage qualified national or international companies from seeking to do business in the State of Nebraska, or ever returning to the State after suffering significant harm from Nebraska’s deeply flawed procurement process. These risks are real, and have at times resulted in significant harm⁶ to Nebraskans.

In addition to the troubled Heritage Health procurement, Nebraskans were similarly harmed in 2007, when DAS selected a tiny, untested company from Arizona to perform an enormously complex long term Medicaid Management Information Systems (MMIS) contract valued at more than \$50 million per year. In doing so, DAS chose a company with fewer than 100 employees over a Fortune 100 company, ACS State Healthcare (later merged into Xerox), which had more than 20,000 employees and a solid MMIS performance record in multiple states. DAS rejected ACS’ protest, which argued that the awardee had a conflict of interest and was not a “responsible bidder” capable of performing such a sophisticated contract. After rejecting ACS’ bid protest, DAS then argued ACS had no right to seek judicial review.⁷ Less than two years later, the State voluntarily terminated the winning bidder’s contract for non performance after paying it more than \$7 million in taxpayer dollars and receiving no valuable services⁸ (“the Company did not have the capacity to deliver the system they proposed”). The MMIS system DAS sought to procure was never built; even today, Nebraska still has no MMIS system. Had this procurement been reviewed through an impartial administrative appeal process and by an independent reviewing

court, the procurement’s obvious defects would almost certainly have been uncovered, and the costs of selecting a clearly unqualified vendor avoided.

Because Nebraska’s procurement decisions implicate millions, or even billions, of scarce taxpayer dollars, directly impact numerous State programs and thousands of program beneficiaries, and because the lack of judicial review arguably creates an arbitrary process and inhospitable climate for businesses considering whether to enter Nebraska to bid on State contracts, the Unicameral should consider legislation to amend the Nebraska Administrative Procedures Act (“APA”) so that agency procurement decisions would be treated as contested cases, including that the decisions in such cases are entitled to judicial review pursuant to Neb. Rev. Stat. § 84 917. Effective judicial review would protect Nebraska’s taxpayers and programs, ensuring both disinterested judicial review of contested procurements and compliance with Nebraska’s competitive bidding laws, and would ensure businesses interested in entering the State that they will have a fair opportunity to compete for State business.

Nebraska’s Bid Procurement Procedures and Protest Process

In Nebraska, contracts for services by State agencies are governed by Neb. Rev. Stat. 73 501, *et seq.*, and should be procured in a manner consistent with these purposes:

Establish[ing] a standardized, open, and fair process for selection of contractual services, using performance based contracting methods to the maximum extent practicable, and to create an accurate reporting of expended funds for contractual services. This process shall promote a standardized method of selection for state contracts for services, assuring a fair assessment of qualifications and capabilities for project completion. There shall also be an accountable, efficient reporting method of expenditures for these services.⁹

Except for limited exceptions, “[a]ll proposed state agency contracts for services in excess of fifty thousand dollars shall be bid in the manner prescribed by the division procurement manual or a process approved by the Director of Administrative Services.”¹⁰ Pursuant to this statutory directive, the Nebraska Department of Administrative Services’ (“DAS”) Materiel Division issued the State of Nebraska Vendor Manual (“Manual”), with the latest edition becoming effective January 26, 2017.¹¹ The Manual sets forth Nebraska’s bid procurement process and procedures.

The DAS Materiel Division State Purchasing Bureau (“SPB”) administers most bidding procedures, with these statutory purposes:

- (1) To increase public confidence in the procedures followed in public procurement;

CAVEAT VENDOR

- (2) To insure the fair and equitable treatment of all persons who deal with the procurement system of this state;
- (3) To provide increased economy in state procurement activities and maximize to the fullest extent practicable the purchasing value of the public funds of the state;
- (4) To foster effective broad based competition within the free enterprise system; and
- (5) To provide safeguards for the maintenance of a procurement system of quality and integrity.¹²

In attempting to “appeal” a procurement decision in Nebraska, vendors will unhappily discover that current procedures largely ignore these statutory “purposes.” Those procedures simply fail to account for the potential that agencies awarding State contracts sometimes make mistakes, or fail to follow applicable agency rules, laws, official guidance, or the terms of the RFP at issue. Applicable procurement guidelines provide no effective recourse for a disappointed bidder that believes DAS acted arbitrarily or failed to comply with Nebraska law. Instead, such bidders are directed to the single page Standard Protest/Grievance Procedures for Vendors, and are then told any attempt to seek further review would be futile and opposed by the State.¹³

The Standard Protest/Grievance Procedures provide only the following redress for an aggrieved bidder:

- **Written Protest** – Must be filed within ten (10) business days after the intent to award is posted. Must be directed to the DAS Materiel Division Administrator.

- **Response to Written Protest** – A response must be made in writing by the DAS Materiel Division Administrator, “generally” within ten (10) business days of receipt.

- **Request for Meeting** – If unsatisfied with the decision of the DAS Materiel Administrator, a written request for a “meeting” must be filed within ten (10) business days from the date of the response from the DAS Materiel Division Administrator, directed to the Director of Administrative Services.¹⁴

- **Meeting** – A meeting will be scheduled and held with the vendor, Materiel Division Administrator, and Director of Administrative Services or the Director’s designee for the vendor to present their issues.

- **Final Decision of Director** – A written final decision of the Director of Administrative Services will be sent to the protestor, “generally” within ten (10) business days, but additional time is available if necessary to fully examine the issues presented.¹⁵

Beyond these five steps, Nebraska law provides no further express administrative or judicial process to review bid protest determinations, and no impartial review. Because DAS regula-

tions do not provide for a “contested case hearing” in response to an agency protest, judicial review of an adverse determination has been considered unavailable under the Nebraska APA.¹⁶

Nebraska’s lack of an express right to judicial review for billion dollar bid protests stands in marked contrast to the full range of APA review Nebraska law provides for numerous other agency disputes.¹⁷ To take one of many examples, a Medicaid beneficiary denied coverage for a medical procedure has statutory rights to a full administrative hearing, discovery to learn the basis for the State’s decision, then a right to seek district court review of the final agency decision.¹⁸ But for a multi million dollar contract award decision impacting thousands of Medicaid beneficiaries (i.e., Heritage Health, or the MMIS contracts), the State provides neither the bidders nor the taxpayer with an administrative hearing or discovery rights, let alone judicial review of the agency’s decision. Indeed, the lack of an administrative hearing or rights to conduct discovery into the State’s decision making severely prejudices protesters’ ability to discover the factual basis for the award decision¹⁹; the absence of rights to a hearing or discovery are compounded by the very brief, 10 day protest period. Taken together, these flaws arguably deprive protestors of their due process rights to meaningfully challenge on award decision.²⁰

In other words, Nebraska has no bid protest procedure beyond the simple, unrecorded, unreviewable “meeting” provided for in the Grievance Protest Procedures; the DAS final decision made after this meeting is not, according to DAS and the Nebraska Attorney General, subject to judicial or other review. If the initial “appeal” to the administrative agency is not successful, a vendor seeking to further challenge any deficiencies in the procurement process has no other option than to attempt to challenge the award decision in state or federal court. As explained below, however, this option is fraught with procedural roadblocks arising from defects in Nebraska law, as well as those advocated in litigation positions taken by the State.

Judicial Review Procedures in States Other Than Nebraska

Unlike in Nebraska, judicial review of procurement decisions is specifically authorized and available in more than half of the states in the United States, as well as in the District of Columbia.²¹ Judicial review is authorized in many of Nebraska’s neighboring states, including Iowa, Colorado and Missouri. Judicial review of state procurement decisions is specifically authorized by statute in the majority of these states. Several of the states, including Idaho, Iowa, Maine, Maryland, Montana, Nevada, and Oklahoma, authorize judicial review of procurement decisions pursuant to those states’ respective Administrative Procedure Acts (“APAs”).²² Similarly, Nebraska has not adopted the American Bar Association State and Local Model Procurement Code.²³

CAVEAT VENDOR

One of Nebraska's neighboring states, Iowa, treats a protest as a "contested case" subject to its administrative hearing procedures.²⁴ As such, more formalized hearing procedures, such as discovery and an evidentiary hearing are utilized, as described below:

- **Written Notice of Appeal** – Must be received by Director within 5 business days after the date of award.
- **Request for Stay of Award** – Must be filed with notice of appeal, must identify basis for request to stay and include an appeal bond equal to 120% of the contract value.
- **Appeal Hearing** – Must be held within 60 days of the date the notice of appeal was received by the Director.
- **Discovery** – All discovery requests must be served at least 30 days prior to hearing date. All discovery responses must be served at least 15 days prior to hearing date.
- **Witnesses and Exhibits** – The parties must meet and confer to disclose anticipated witnesses and hearing exhibits at least 10 days prior to hearing date.
- **Amendments to Notice of Appeal** – Must be filed at least 15 days prior to hearing date.
- **Notice of Appeal/Objection to Proposed Decision** – An appeal or objection to the proposed decision must be received by the Director within 15 days after a proposed decision is mailed by the Department. Objection or appeal to the Director is required to exhaust administrative remedies prior to judicial review.
- **Brief in Support of Appeal/Objection** – A brief in support of an objection to/appeal of a proposed decision must be received by the Director within 15 days of mailing the notice of appeal.
- **Final Decision** – A final decision will be issued by the Director no less than 30 days after the notice of appeal is filed.²⁵

Thus, Iowa law authorizes an appeal in the form of a contested case, entitling an unsuccessful bidder to a formal hearing, discovery, submission of evidence and presentation of witnesses. Not only does Iowa law provide disappointed bidders with an effective appeal process, it also provides a disappointed bidder with a direct path to judicial review of the final procurement decision pursuant to Iowa's APA.²⁶ Nebraska permits none of the above, just a protest letter and a non appealable meeting.

Current Nebraska Law Fails to Clearly Confer Standing for Judicial Review of Procurement Decisions

As noted, Nebraska's protest procedures do not provide disappointed bidders a direct path to judicial review. Nebraska's

Attorney General, as noted, opposes any judicial review of contract awards made by state agencies.²⁷ Nebraska's failure to specifically authorize judicial review, with assurances of fair and impartial review by a coequal branch of state government, not only increases risks to Nebraska taxpayers and program beneficiaries, but also has a chilling effect that discourages disappointed bidders from challenging procurement decisions and from bidding in Nebraska in the first instance.

The lack of a specific right to judicial review, whether granted by separate statute or pursuant to Nebraska's APA, discourages legitimate challenges to bid awards because, instead of focusing on deficiencies in the procurement process, the disappointed bidder must first litigate its standing to challenge the decision in court in the first place. This procedural hurdle exists because Nebraska law remains unsettled as to whether a disappointed bidder has a right to bring its challenge in state or federal court, and because the State routinely takes the position that such challenges are not available, even for taxpayers.²⁸

As referenced earlier, in *ACS State Healthcare, LLC v. Heineman*,²⁹ ACS, an unsuccessful bidder for a contract to provide MMIS services to DHHS sought judicial review in federal court of the bid award to a competing bidder. ACS challenged the award on several grounds, including that an organizational conflict of interest disqualified the winning bidder, that the procurement process was arbitrary, and that the winning bidder was not responsible to perform the contract.³⁰

In ACS, the State defendants challenged the disappointed bidder's standing to pursue its claims, a threshold issue that must be resolved before reaching the merits. ACS asserted standing under 42 U.S.C. § 1983 and the federal Declaratory Judgment Act, 28 U.S.C. § 2201.³¹ Presiding Judge Lyle Strom noted, under Nebraska law, "[o]rdinarily an unsuccessful bidder for public work has acquired no legal right to protect, either in law or equity, since the letting of contracts to the lowest bidder is regarded as being for the benefit of the public and not for individual bidders."³² However, in ACS, the Court never reached the standing issue, but instead, found standing had been met for purposes of the preliminary injunction motion only.³³

In another recent case, *Coventry Health Care of Nebraska, Inc. v. Nebraska Department of Administrative Services, et al.*,³⁴ DHHS solicited proposals from contractors to serve as managed care organizations for Nebraska's Heritage Health program. DAS posted an initial Notice of Intent to Award, but later issued a Notice of Withdrawal of Intent to Award.³⁵ Then, after changing the scoring for one section of the RFP, choosing new evaluators, and rescoring, the DAS issued a new Notice of Intent to Award.³⁶

Two disappointed bidders, one of which had been declared a winner initially before the rescoring, sought judicial review of

CAVEAT VENDOR

the procurement process and decision, arguing, *inter alia*, “the award process was not open and fair as required by Nebraska law,” the unprecedented rescoring process exceeded the State’s legal authority, and the State violated the agency’s Vendor’s Manual in awarding the contracts.³⁷

In *Coventry Health*, the State defendants again sought to block judicial review of the state procurement decision, arguing the disappointed bidders did not have cognizable claims under Nebraska law.³⁸ Notably, the State defendants argued that the Vendor’s Manual, which was created and made publicly available by DAS itself, did not have the force and effect of law and was not a rule, regulation or standard subject to the APA.³⁹

Unlike in *ACS*, however, where the plaintiff sought standing solely as a disappointed bidder, the plaintiffs in *Coventry Health* also filed suit as a Nebraska taxpayers. Surprisingly, while the standing barrier may have been met, these entities’ status as taxpayers did not sway the State defendants, with the State taking the position that established Nebraska Supreme Court decisional law—which held that irreparable harm must be presumed in taxpayer cases involving illegal state action—did not apply in a Nebraska federal court.⁴⁰ Thus, argued the State, even if standing could be established by a taxpayer, irreparable harm could not be shown.⁴¹

As in *ACS*, Judge Rossiter in *Coventry Health* determined it unnecessary to reach the question of whether the disappointed bidders had standing to have their claims heard, but cast doubt on the disappointed bidders’ right to bring at least certain of their claims, stating: “The [State] defendants raise some legitimate questions about whether sovereign immunity bars at least some of the plaintiffs’ state law claims, but those issues need not be addressed in connection with these motions.”⁴² With respect to the disappointed bidders’ federal claims, the Court held the bidders “failed to establish the federal authority on which they rely unambiguously confers on an unsuccessful bidder a private right of action enforceable under 42 U.S.C. § 1983.”⁴³

Moreover, the State defendants’ insistence in *Coventry Health* that the Vendor’s Manual—which is the only guidance given to vendors when they respond to a State RFP—does not have the force and effect of law, further demonstrates the unbridled discretion the State agencies currently exercise in awarding state contracts, and the inequities caused when the State publishes formal guidance to vendors, but then claims that guidance does not limit their discretion.

Another procurement challenge is currently pending in Nebraska federal courts, this time involving a challenge to a municipal procurement decision. In *Reddick Management Corp. et al. v. City of Omaha et al.*,⁴⁴ a disappointed bidder has challenged the City of Omaha’s award of a contract to demolish the city’s Civic Auditorium. Because the plaintiff’s challenge in *Reddick* involves the enforceability of Omaha’s city

ordinance requiring a preference be given to “a certified small business or emerging small business,” Omaha, Neb., Mun. Code § 10 200.3, Judge Bataillon in *Reddick* found the contractor, who argued that it was such a “small business or emerging small business,” had standing to litigate whether that ordinance had been followed.⁴⁵ The Court did note, however, under Nebraska law, “[g]enerally, an unsuccessful bidder obtains no property right . . .”⁴⁶

Under current law, an unsuccessful bidder’s right to judicial review of procurement decisions in Nebraska is not clearly established, and is routinely disputed by the Attorney General’s office. Before even reaching the merits of a disappointed bidder’s challenge to a procurement decision, the disappointed bidder must establish that it has standing to bring its claims (which the State likely will oppose), that it has a cognizable claim (which the State likely will reject), that it has a recognized property interest that it seeks to protect (which the State likely will also deny), and that the State does not enjoy sovereign immunity from suit with respect to the bidder’s claims (which the State likely will deny). These obstacles ensure that only the most dedicated bidders, possessing the resources to mount the type of challenge necessary to overcome them, will ever have an opportunity to litigate whether State actors have complied with their duties under Nebraska law. A direct path of meaningful agency and judicial review through the APA would go far to cure these deficiencies, and should help to ensure not only that vendors responding in good faith to State solicitations receive fair treatment in compliance with statutory competitive bidding statutes, but also that State taxpayers receive the best value from State vendors, a critical objective in this era of ever-tightening State and federal budgets.

Conclusion

The Nebraska Unicameral has declared that procurements for goods and services must be accomplished through open, fair competitive bidding processes. That bedrock principle has been severely undermined by current procedures and enforcement practices, when the only decision maker empowered to evaluate whether Nebraska law has been satisfied is the very agency that made the arguably erroneous decision. Nebraska, by failing to implement procedures guaranteeing an avenue for independent judicial review of procurement decisions, does not follow the majority of states and risks alienating the high quality vendors that the State and its taxpayers deserve.

While the Unicameral could pursue various mechanisms to ensure a right to judicial review of State agency procurement decisions, the most efficient would be to modify applicable law to place such decisions within the scope of the Nebraska APA. In doing so, procurement decisions would receive the same type and level of scrutiny that thousands of other agency decisions regularly receive. Agency procedures and forums neces-

CAVEAT VENDOR

sary to provide for review under the APA, through a contested case procedure or some other method, are also already well established in Nebraska law. Application of those procedures and principles to agencies' procurement decisions—decisions which have profound effects on the State treasury and citizens' well being—would provide an effective balance between the State's appropriate discretion in making procurement decisions and the Nebraska citizens' interests in ensuring the State's money is well spent.

Endnotes

- ¹ See Vendor Manual: How to do Business With the State of Nebraska, Nebraska DAS State Purchasing Bureau, available at http://das.nebraska.gov/materiel/purchase_bureau/docs/manuals/Vendor%20Manual%20How%20to%20do%20Business%20with%20the%20State%20of%20Nebraska.pdf (last accessed May 22, 2017).
- ² See *infra*, at Note ____ (currently 15).
- ³ See generally Neb. Rev. Stat. §§ 84 901 et seq.
- ⁴ Nebraska Department of Administrative Services Materiel Division – State Purchasing Bureau, Standard Protest/Grievance Procedures for Vendors, available at: [http://das.nebraska.gov/materiel/purchase_bureau/docs/vendors/protest/ProtestGrievanceProcedureForVendors%20\(2\).pdf](http://das.nebraska.gov/materiel/purchase_bureau/docs/vendors/protest/ProtestGrievanceProcedureForVendors%20(2).pdf) (last accessed May 16, 2017).
- ⁵ As noted, DAS annually awards millions of dollars in state contracts, or even billions, as in the 2016 Heritage Health procurement. Moreover, these decisions—and arguably the absence of judicial review—profoundly impact whether major national and international business enterprises will seek to bid for state business in a jurisdiction where, according to the State, the procurement process is immune from judicial review.
- ⁶ Indeed, vendors bidding on complex RFP's, such as the managed care contract or other major contracts, spend hundreds of thousands of dollars, or more, to prepare detailed RFP responses and other procurement activities, such as oral presentations, best and final offers, and other costly undertakings.
- ⁷ See *ACS State Healthcare, LLC v. Fourthought Group, Inc.*, Case No. 4:08 cv 03021 LES FG3 (D. Neb. 2008).
- ⁸ See Nebraska Nixes Multimillion Dollar Contract, LINCOLN JOURNAL STAR, July 31, 2009, available at http://journalstar.com/news/local/nebraska_nixes_multimillion_dollar_contract/article_1b90dd1e_7e36_11de_83a2_001cc4c002e0.html (last accessed May 16, 2017).
- ⁹ Neb. Rev. Stat. § 73 501.
- ¹⁰ Neb. Rev. Stat. § 73 504(2).
- ¹¹ http://das.nebraska.gov/materiel/purchase_bureau/docs/manuals/2017%20Vendor%20Manual%20Final.pdf. While certain procurements may be handled by agencies themselves, using procedures established by DAS, the majority of relevant procurements are administered by DAS and its procedures will be the focus of this discussion.
- ¹² Neb. Rev. Stat. §§ 81 1118 and 81 1118.06.
- ¹³ See *supra* at Note 3.
- ¹⁴ DAS Materiel regulations do allow protestors to bypass the initial step of protesting solely to the Materiel Division Administrator, in favor of a joint protest to the Materiel Administrator and the Director of Administrative Services.
- ¹⁵ http://das.nebraska.gov/materiel/purchase_bureau/docs/manuals/2017%20Vendor%20Manual%20Final.pdf
- ¹⁶ See Neb. Rev. Stat. § 84 917(1) (entitling judicial review under the APA for “[a]ny person aggrieved by a final decision in a contested case”); Neb. Rev. Stat. § 84 901(3) (stating “[c]ontested case shall mean a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing” (emphasis added)).
- ¹⁷ See, e.g., Susan M. Ugai, *Contested Cases Under the Nebraska Administrative Procedures Act*, THE NEBRASKA LAWYER, Vol. 20 No. 2. March/April 2017 at 29.
- ¹⁸ See generally 465 Neb. Admin. Code, Chapter 6 (describing contested case hearings before DAS); see, e.g., 465 Neb. Admin. Code 6 009 (“Any person aggrieved by a final decision in a contested case is entitled to judicial review under the Administrative Procedure Act or to resort to such other means of review as may be provided by law.”)
- ¹⁹ Because protestors have no right to conduct formal discovery (i.e., document requests, depositions), they must seek supporting evidence through Nebraska’s ill suited open records laws. See Neb. Rev. Stat. §§ 84 712 et seq. Nebraska’s open records laws are an inadequate alternative to evidentiary discovery because it allows only discovery from the State, and because it is extremely slow and expensive. Indeed, in the Heritage Health procurement and protest discussed herein, DAS did not complete its Open Records responses until long after the protest was over
- ²⁰ See *Appeal of Levos*, 214 Neb. 507, 515, 335 N.W.2d 262, 267 (1983) (“The essence of procedural due process is simply that fundamental fairness which a person has the right to expect—even demand—and receive through our system of laws.”).
- ²¹ See National Association of State Procurement Officials 2016 Survey of State Procurement Practices, available at <http://www.naspo.org/Publications/ArtMID/8806/ArticleID/3416>; see also http://apps.americanbar.org/dch/thedl.cfm?filename=/PC500000/relatedresources/STATE_SURVEY_OF_BID_PROTEST_PROCEDURES.pdf (last accessed May 16, 2017).
- ²² 117 Iowa Admin. Code § 11—117.20(8A); Ok. Adm. Code § 580:15 4 13; Mont. Code Ann. § 18 4 242; Idaho Code § 67 7733; Nev. Rev. Stat. Ann. §§ 233B.130 and 333.370, Code of Md. Reg. 21.10.02.02; and <http://www.maine.gov/purchases/vendbid/appealinfo.shtml>.
- ²³ See Section of Public Contract Law: State and Local Model Procurement Code, American Bar Association, available at <http://apps.americanbar.org/dch/committee.cfm?com=PC500500> (last accessed May 22, 2017).
- ²⁴ Iowa Admin. Code r. 11 117.20(8A).
- ²⁵ *Id.*
- ²⁶ Iowa Code § 17A.19. See also *Medco Behavioral Care Corp. of Iowa v. State*, 553 N.W.2d 556, 560 (Iowa 1996); *Noridian Administrative Services, LLC v. Iowa Dep’t of Human Services*, CV 8960 – Ruling on Petition for Judicial Review (Polk Co. Dist. Ct. 12/7/12).
- ²⁷ See State Defendants’ Motion to Dismiss, *Coventry Health Care of Nebraska, Inc. v. Nebraska Dep’t of Admin. Servs.*, No. 4:16CV3094 (D. Neb. July 25, 2016)
- ²⁸ Indeed, the State’s opposition to jurisprudential taxpayer standing principles articulated by the Nebraska Supreme Court turn on their heads the hallowed words of Hartley Burr Alexander etched on the State Capitol (“THE SALVATION OF THE STATE IS THE WATCHFULNESS OF THE CITIZEN”).
- ²⁹ *ACS State Healthcare, LLC v. Heineman*, No. 4:08CV3021, 2008 WL 608638 (D. Neb. Feb. 29, 2008).
- ³⁰ *Id.* at *3.
- ³¹ *Id.*
- ³² *Id.* at *4 (quoting *Day v. City of Beatrice*, 101 N.W.2d 481 (Neb.1960)).
- ³³ *Id.* at *5. Ultimately, resolution was reached in ACS and the court was not required to ultimately rule on standing.
- ³⁴ *Coventry Health Care of Nebraska, Inc. v. Nebraska Dep’t of Admin. Servs.*, No. 4:16CV3094, 2016 WL 4435197 (D. Neb. Aug. 19, 2016) (“Coventry”).
- ³⁵ *Id.* at *2.
- ³⁶ *Id.* DAS conducted this “rescoring” even though such a process was authorized by neither the Vendor’s Manual, the RFP, appli-

CAVEAT VENDOR

cable law, nor agency precedent.

³⁷ *Id.* at *3.

³⁸ *Id.* at *7 9.

³⁹ 2016 WL 4258523 (D. Neb.).

⁴⁰ State Defendants' Consolidated Brief in Opposition to Plaintiffs' Motions for Preliminary Injunction at 27, *Coventry*, No. 4:16CV3094, Doc. No. 61 (D. Neb. July 25, 2016) ("Even assuming Plaintiffs' state taxpayer standing approach had any application in federal court, which it does not . . ."). *See also Rath v. City of Sutton*, 673 N.W.2d 869, 883 84 (2004) (Under Nebraska law, "the injury that flows from an illegal expenditure of public funds is inherently irreparable.").

⁴¹ It is also noteworthy that very few taxpayers will have the resources necessary to challenge procurement decisions, many of which involve significant national entities that may not other-

wise have a Nebraska presence. By seeking to limit any possible standing to taxpayers alone, the State essentially guarantees that no party with standing will have the resources or ability to litigate through the myriad of hoops the State will place in its path.

⁴² *Coventry*, 2016 WL 4435197 at *7.

⁴³ *Id.* at *10.

⁴⁴ Case No. 8:16 cv 99 (D.Neb. 2016).

⁴⁵ Order, *Reddick*, Case No. 8:16 cv 99, 2016 WL 1627608 at *5 (D. Neb. April 22, 2016) ("As a threshold matter, the court finds the plaintiffs have alleged a sufficient injury to confer jurisdiction on the court at this stage of the proceedings. They have alleged that they are covered under the ordinance, and the City has not challenged that contention.").

⁴⁶ *Id.* at *4.