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POSITION PAPER

TOPIC:

PROCUREMENT AUTHORITY IN PUBLIC ENTITIES

A position paper from
NIGP: The Institute for
Public Procurement on the
Meaning of Procurement Authority
and the Importance of its
Effective Delegation and Use.



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PROCUREMENT AUTHORITY IN PUBLIC ENTITIES

*A position paper from NIGP: The Institute for Public Procurement
on the Meaning of Procurement Authority and the Importance of its Effective
Delegation and Use.*

INTRODUCTION

Procurement authority is a foundational concept in the public sector and the administration of government. Agency procurement systems are the means through which critical and strategic services, supplies and construction are purchased to support essential public functions. In addition to acquiring what is needed, it is of the utmost importance that the government spends taxpayer dollars responsibly, protected from undue influence and in the best interest of its community. Procurement policies and processes are the means to achieve all of these goals.

Every public entity is encouraged to delegate procurement authority to a Chief Procurement Officer who is accountable to a governing body or chief executive. An exploration of what procurement authority is, why procurement authority is important, and who should hold procurement authority, will explain the case for the narrow, focused delegation of procurement authority to the Chief Procurement Officer.

POSITION

NIGP: The Institute for Public Procurement supports clear, narrow delegation of procurement authority in public entities for purposes of contract formulation and award, and post-award contract modification. Procurement authority, the legal capacity to make binding procurement awards, is bestowed upon agency executives by the governing legislature or empowered commission. Formal delegation of procurement authority to trained, public procurement professionals, through a Chief Procurement Officer, helps ensure that public funds are awarded for best value in a manner that is transparent and impartial, maintains the integrity of professional values and practices, and complies with public policy and law.

WHAT IS “PROCUREMENT AUTHORITY”?

Procurement authority is the power to award, or to approve the award of, legally binding procurement agreements (that is, contracts and purchases) on behalf of the public entity. In a post-award environment, procurement authority includes the power to modify (or amend) existing agreements. With this authority comes responsibility and accountability.

More fully, in addition to the power to award or modify a contract or purchase, procurement authority includes, among other things, the choice of sourcing methods, management of sourcing activities, contract negotiation and the drafting of contracts and other purchase instruments, as well as the preparation of contract modifications, and carries through to elements of contract

administration and closeout. A Chief Procurement Officer also issues procurement policies and regulations, or designs them for adoption by a chief executive or the governing body.

For a better understanding of procurement authority, one can compare and distinguish it from two other forms of authority in the business process of government.

Budget authority is created when a governing body appropriates funds to be spent on government programs, and specifies individuals authorized to approve expenditures within the budget. Budgets allocate resources that are intended to achieve organizational goals. An approved budget, however, does not produce a contract, nor does it authorize a particular procurement method or the award of a particular contract or purchase. That is reserved to the exercise of procurement authority.

Similarly, signature authority is limited to the authority to “execute,” or sign, a written, legally binding agreement on behalf of the entity. By itself, signature authority does not include the power to manage a procurement process or to approve a procurement selection and award. Sometimes, a public official may hold a delegation of both signature and procurement authority, but they are not the same.

Budget authority, procurement authority and signature authority are distinct, separate functions in a system of checks and balances in a governmental organization. The independent exercise of procurement authority is an important piece of the entity’s overall system of internal controls.

WHY IS PROCUREMENT AUTHORITY IMPORTANT?

To achieve a procurement process that delivers the most strategic, effective, ethical and economical expenditure of public funds, it is important to establish an independent professional procurement function led by a Chief Procurement Officer who is granted procurement authority and is allowed to delegate responsibilities to trained procurement staff within a centralized purchasing division. This approach maintains the benefits of best procurement practices conducted in a professional manner and, thereby preserves the transparency and accountability of practice necessary for effective organizational management and affirms[thereby affirms] the public’s trust.

By contrast, a decentralized procurement process, under the supervision of many people independently exercising divided procurement authority (especially by those who are not procurement professionals), is less likely to achieve the strategic procurement objectives of the organization while increasing its exposure to financial, legal and reputational risks.

The following examples illustrate how a decentralized approach to procurement inhibits an organization’s operational visibility and control over fraud, waste and corruption.

- The highway superintendent for a town in New York admitted to accepting \$2,000 in gift-card kickbacks from a vendor who sold him \$84,000 of overpriced and unnecessary highway supplies. In 2009, he was charged with felony official misconduct.

- Without central procurement oversight, program staff and executives within an agency of the federal General Services Administration were blasted for a scandal involving a wide range of contracting improprieties for a 2010 training conference. Over \$130,000 in “scouting trips” merely planning for the conference was found to be “excessive, wasteful, and in some cases impermissible”. Staff avoided contracting regulations, including disclosing a competitor’s proposal price to a favored contractor, awarding a contract to a large business in violation of small-business set-asides, promising the hotel an additional \$41,480 in catering charges in exchange for the “concession” of complying with the government’s lodging cost limit, providing free rooms to a contractor’s employees even though the contract excluded that, and disclosing the agency’s maximum budget for one day of training, then agreeing to pay the contractor that amount (\$75,000). Agency staff spent \$146,527.05 on catered food and beverages, found to be both excessive and impermissible, as were “miscellaneous expenses” for mementos for attendees, purchases of clothing for GSA employees, and tuxedo rentals. In response, the agency is establishing stronger central procurement oversight authority.
- The Seattle School District allowed one employee in charge of a small business development program for construction projects to also be in charge of all procurement and contracting for those projects. A 2011 state auditor's report revealed that up to \$1.8 million in losses occurred for work not done or for questionable public benefit. The auditor cited failures by the superintendent and other top officials for a poor system of oversight of the program, and the superintendent and program manager were fired.

Procurement authority and control should be designed with sufficient flexibility and by professionals well versed in the definition of controls. Periodic program reviews by an internal or external auditor are recommended to ensure that proper controls such as separation of duties, system authorizations, independent checks and proper documentation are in place. Financial auditors will focus on adequacy of financial controls, particularly for a client that has a disjointed arrangement of procurement authority. But unless conducting a program audit, auditors likely will not review procurement practices or offer recommendations to modify authority to improve workflow or outcomes. Periodic reviews of procurement authority are recommended to ensure that it is delegated and exercised according to best practice and the needs of the government. The review may reveal that earlier distributions of procurement authority were designed for a time when organizational priorities and sophistication differed.

PROCUREMENT AUTHORITY MODELS

Structured: This is a systemic approach to delegation that ranges in structure from broad to narrow.

- A **broad** delegation across the agency (horizontal), to all persons categorically residing in a particular position(s) (directors and managers, for example), at one or more levels in the organization.

- A **narrow** delegation down to only one person (vertical), with the authority to re-delegate further. With this approach, the selection is based on the particular expertise, role or duties of the single person, such as the Chief Financial Officer or Chief Procurement Officer.

Unstructured (or Ad Hoc): A case-by-case delegation of authority to one or more individuals, by name or position, based solely on the immediate needs, judgment and discretion of the holder of the authority. An ad hoc model is most frequently found in delegated authority to make purchases in response to an emergency situation, where a department head is empowered to engage contractor support to mitigate threats to human life or property.

THE CASE FOR A STRUCTURED AND NARROW DELEGATION OF PROCUREMENT AUTHORITY

The American Bar Association (ABA) extensively considered the advisability of central leadership for procurement activities. In 1979, the Model Procurement Code (MPC) for State and Local Governments was adopted by the American Bar Association and updated in 2000. The ABA Model Procurement Code created a template for transparent, competitive and reliable processes by which billions of dollars in public funds are expended through contracts with private sector businesses. The Code has been adopted in full or in part by more than half of the states and by thousands of local jurisdictions across the United States. The Model Procurement Code responded to the major changes in public procurement, including the dramatic rise in the volume of purchases, the changing nature of goods and services available (especially technology), the changing dynamics in the markets, the growing sophistication in procurement methods, and a need for more uniformity and fewer arcane procurement rules that raised costs and discouraged competition. To coordinate these changes and challenges, the Code cites the creation of the Office of the Chief Procurement Officer as a fundamental pillar for how public procurement activities are carried out.

[A]ll rights, powers, duties, and authority relating to the procurement of supplies, services, and construction, and the management, control, warehousing, sale, and disposal of supplies, services, and construction ... are hereby transferred to the Policy Office or the Chief Procurement Officer, as provided in this Code. MPC Section 2-301; also see Sections 2-201 and 2-202.

Duties of the Chief Procurement Officer (CPO) include, but are not limited to:

- a) procure or supervise the procurement of all supplies, services, and construction needed by the [public entity]; and
- b) ensure compliance with this Code and implementing regulations by reviewing and monitoring procurements conducted by any designee, department, agency or official delegated authority. MPC Section 2-204.

Ideally, the central role and authority of the Chief Procurement Officer is established through legislation as, for example, is found in the Code of Virginia:

The county purchasing agent shall, under the supervision of the board of supervisors, purchase or contract for all supplies, materials, equipment and contractual services required by any department or agency of the county, subject to the provisions set forth in Article 2 of Chapter 12; shall draw up, subject to the approval of the county board, and enforce standard specifications which shall apply to all supplies, materials and equipment purchased for the use of the county government; shall have supervision over all central storerooms now operated or hereafter established by the county; and shall transfer to or between county departments and agencies or sell supplies, materials and equipment which are surplus, obsolete, or unused. Section 15.2-1543.

A National Association of State Procurement Officials survey issued in July 2014 indicates that of the 49 respondents, a large majority have centralized regulatory authority for purchasing non-technology goods and services; 28 responding states have centralized authority for purchasing technology goods and services. The survey further revealed that 43 states have a single Chief Procurement Officer. Almost all of those single CPOs prescribe procurement rules and regulations, except for a few states where the final oversight authority resides in a different body such as a commissioner's office, procurement policy board or council. In a few others, responsibility is split with a Chief Information Officer or other CPOs. The CPO reports directly to state governors or governor's cabinet-level officials in 28 states. The survey confirms the growing best practice, nationwide, to capture the strategic value and benefits generated by a central procurement structure with delegated procurement authority.

HOW SHOULD PROCUREMENT AUTHORITY BE DISTRIBUTED?

In creating a central procurement official, the authors of the Model Procurement Code observed:

It is expected that the Chief Procurement Officer will freely delegate his or her authority considering the following factors:

- a) the expertise of the potential delegate in terms of procurement knowledge and any specialized knowledge pertinent to the authority to be delegated;
- b) the past experience of the potential delegate in exercising similar authority;
- c) the degree of economy and efficiency to be achieved in meeting the public body's requirements if authority is delegated;
- d) the available resources of the Office of the Chief Procurement Officer to exercise the authority if it is not delegated, and the consistency of delegation under similar circumstances. MPC Section 2-301; also see Section 2-205.

Delegated procurement authority should be established explicitly and documented properly. A delegation is made by the holder of procurement authority to the desired recipient, equal to or less than the authority possessed by the holder, for example, from the County Manager to the Chief Procurement Officer or from the Chief Procurement Officer to a procurement professional reporting to the Chief Procurement officer. The delegation document must describe all powers, limits and duties. The scope, duration, position title or name, any training or certification

conditions, dollar limits, ability to rescind, and permission to sub-delegate are all matters to be addressed. Delegations by a Chief Procurement Officer may also be for particularly defined small purchases or for procurement-card purchases. Such delegations are made to satisfy operational requirements efficiently and at acceptable risk. The procurement legislation or policy of a public entity should clearly articulate penalties, including personal liability, for individuals acting without procurement authority (unauthorized commitments).

CONCLUSION

Public entities should have a centralized procurement division and empower a Chief Procurement Officer with procurement authority, including the power to delegate authority to his or her staff or to other trained staff, to ensure procurement is conducted in a manner that is fair, transparent, responsible, and ethical. Structured, centralized, and narrow delegation of procurement authority to the professional procurement department provides the benefit of establishing a business unit that has specialized knowledge of public procurement principles, processes and best practices.

A professional staff dedicated to the sole purpose of procuring goods and services is the most effective institutional model for maximizing the value of expenditure while maintaining clear lines of authority, accountability and control. Procurement professionals with the proper training, certification, knowledge, and experience make a substantial contribution to the organization's bottom line by leveraging cost savings through, among other things, strategic procurement planning and the effective use of competition and negotiation practices. As dedicated stewards of the public trust, their contribution to the organization goes beyond costs savings and avoidance. Skilled risk management through liability allocation, contractor bonding, and negotiated software licenses provide additional examples of the added value that procurement professionals provide to their agency and its many stakeholders.