

The Model Procurement Code Revision Project: Modernizing Public Procurement Law for a New Era

BY MICAELA FISCHER



More than four decades have passed since the American Bar Association (ABA) first released the Model Procurement Code for State and Local Governments (MPC) in 1979.¹

At the time, the MPC was a groundbreaking effort to harmonize state and local procurement law and introduce transparent, modern procurement processes.

Since then, about half of the states and many local governments have adopted at least some MPC language into their own laws and ordinances.

The ABA issued a targeted update in 2000, but the procurement landscape has changed considerably even since then. What does it even mean to open bids “publicly in the presence of one or more witnesses” in an age when proposals are emailed as Docusigned PDFs?

Recognizing the need for a systematic, forward-looking update, the ABA Section of Public Contract Law (PCL), the National Association of State Procurement Officials (NASPO), and Partners for Public Good have jointly undertaken the Model Procurement Code Revision Project. The goal of the project is not to replace the MPC wholesale but to thoughtfully revise and augment its provisions in ways that (1) center procurement as a strategic function in state and local government, (2) balance risk mitigation with efficiency, and (3) champion transparency and accountability when spending taxpayer dollars.

This article will be the first of several ongoing updates from the Model Procurement Code Revision Project. If you are interested in learning more about the project or in serving on a drafting committee, please email the MPC revision project manager, Micaela Fischer, at Micaela.Fischer@partnersforpublicgood.org.

Overview of the Model Procurement Code

The Model Procurement Code is designed to give state and local governments an off-the-shelf framework that can be used to implement modern, best practices when it comes to public contracting—easily adaptable to meet state and local statutory and regulatory procurement requirements. The MPC is organized as follows:

- Article 1, General Provisions
- Article 2, Procurement Organization
- Article 3, Source Selection and Contract Formation
- Article 4, Specifications
- Article 5, Procurement of Infrastructure Facilities and Services
- Article 6, Modification and Termination of Contracts for Supplies and Services
- Article 7, Cost Principles
- Article 8, Supply Management
- Article 9, Legal and Contractual Remedies
- Article 10, Intergovernmental Relations
- Article 11, Assistance to Small and Disadvantaged Businesses; Federal Assistance or Contract Procurement Requirements
- Article 12, Ethics in Public Contracting

The MPC also is supplemented by a series of suggested implementing regulations, aiming to help buyers implement in practice the principles included in the MPC.

The Revision Process

The current Model Procurement Code Revision Project represents the most significant, comprehensive reexamination of the MPC since its original publication. To manage a project of this scale, PCL, NASPO, and Partners for Public Good established a steering committee, led by former PCL Section Chair Eric Whytsell (Stinson LLP) and composed of leaders from each organization, alongside academic experts and seasoned procurement practitioners. The steering committee serves as the project’s central coordinating body. The steering committee sets priorities, resolves cross-cutting issues, ensures consistency across the various drafting committees, and ultimately determines when portions of the revised Code are ready for broader review.

The real muscle of the project lies within its all-volunteer drafting committees and reporters. Drafting committee members are tasked with conducting detailed research, analysis, and writing necessary to turn ideas into revised Articles within the Code. Each drafting committee, comprised of 15–40 members, focuses on a discrete portion of the Code or a thematic area that cuts across Articles. Separate committees are currently examining Articles 4, 5, and 12. A fourth committee is examining the code through the lens of IT procurement. In all cases, committees are comprised of a mix of state and local procurement officials, public- and private-sector attorneys, academics, professional associations, and subject matter experts.

Micaela Fischer is an assistant director at Partners for Public Good and the project manager for the Model Procurement Code Revision Project.

The drafting committees operate through an iterative, consensus-driven process. Committees begin by identifying key pain points in modern procurement practice, while gathering research and incorporating practitioner experiences. The committees then compare statutory approaches across jurisdictions and explore reforms adopted since the MPC's last revision. Almost as important as the model code language, the MPC also includes guiding commentary, which the drafting committees also are reviewing and revising. The robustness of this commentary is key as it provides a plain interpretation of the law and, at its best, permissive examples of how it might be applied.

Their work encapsulates one of the core challenges of the MPC Revision Project: designing a legal framework that is flexible enough to support innovation while structured enough to safeguard public resources.

Committees develop early conceptual drafts of recommended changes to language and commentary, along with accompanying justifications explaining the need for the revisions. These drafts undergo multiple rounds of internal review until all committee members reach a consensus on the recommended revisions.

Supporting the steering committee and each drafting committee is a team of three knowledgeable and enthusiastic volunteer reporters: Dan Schoeni (the University of Dayton School of Law), Paul Krivacka (State of Tennessee), and Eric Weisenburger (Dorsey & Whitney). These reporters play a central role in synthesizing input and recommendations from drafting committees, while working with one another to ensure consistent and high-quality updates to the Code.

Emerging Themes

As a facilitator of the drafting committees, I have been struck by how energizing it is to watch such a diverse range of stakeholders work toward consensus on meaningful procurement reforms. At the same time, the process has sparked passionate debates over several core topics, revealing the sometimes wide gap between theoretical approaches to procurement and the realities experienced by practitioners on the ground. Early discussions across committees reveal several themes that are starting to shape the revision effort.

The Persistent Tension Between Bureaucratic Discretion and Legal Prescription

Perhaps not a new observation, but one that has grown louder in recent years, is the concern that public procurement has become overly focused on process compliance at the expense of creating public value. If procurement processes are too often defined by rigid checklists rather than thoughtful professional judgment, it is natural to ask whether the law itself bears some responsibility.

It is easy to see that inflexible procurement laws that give government employees too little discretion can delay projects, stifle innovation, and produce “checkbox” compliance. In a recent law note, Yale Law student and Article 5 drafting committee member Anthony Potts argued that state and local procurement laws, and the MPC, have taken away the professional judgment of government staff to procure the most appropriate goods and services *primarily* by overemphasizing the importance of low bids versus less objective measures of value.² In a Model Procurement Code that runs over 100 pages, one might wonder whether a focus on price was the only area in which legal prescription has been unduly favored over professional judgment.

But the countervailing risk is equally real. Too much discretion risks corruption and unfair treatment of vendors. During a New Mexico State Bar CLE session earlier this year, as the conversation turned to bureaucratic discretion, one presenter provocatively asked: “*Why don’t we just throw out the entire procurement code except the ethics provisions?*” The idea was attention-grabbing, but the realities of the state and local procurement workforce—as steering committee member Keith McCook (General Counsel for the South Carolina State Fiscal Accountability Authority) often has reminded us—frequently are marked by high turnover, limited training resources, and uneven professionalization. These practical limitations likely make such drastic changes in state and local procurement law impracticable.

In his seminal book *The Regulatory Craft*, Kennedy School professor Malcom Sparrow argued that increased government discretion comes at a cost to the bureaucracy.³ Without prescriptive laws or rules defining processes for soliciting and contracting, government employees are left to muddle it out on their own. Public and perhaps political pressure would mean not only that they would have to define their own processes, but also that they would have to justify those processes and their resulting procurements without the backstop of “*I was simply following the law.*”

For each drafting committee, this tension between bureaucratic discretion and legal prescription is a constant undercurrent. Members must ask whether proposed revisions strike the right balance between enabling professional judgment and preserving clear and transparent processes. They also must consider the varying capacities of procurement offices across states and municipalities.

In Article 5, this tension has manifested in the work of a subcommittee co-chaired by David Innis (Deputy City Attorney for San Francisco) and Devin Kenney (Senior Assistant Attorney General for Wyoming). The subcommittee's mandate is to examine whether the Article's procurement methods are appropriately calibrated for both large, complex acquisitions and smaller quotidian procurements across jurisdictions of varying size. Their work encapsulates one of the core challenges of the MPC Revision Project: designing a legal framework that is flexible enough to support innovation while structured enough to safeguard public resources.

The Challenge of Tracing Pain Points in Public Procurement to Actual Changes in Procurement Law

One of the early lessons from the MPC Revision Project is that drafting committees cannot begin with wordsmithing. Before tackling specific sections of the Code, committees must identify the pain points practitioners and vendors encounter and trace those problems to their underlying legal or procedural causes. In other words, they must ask: *What problem are we trying to solve, and what in the MPC actually drives or enables it?* Even for experts steeped in procurement, drawing a straight line between practice and statute can be difficult.

A recent discussion in the nascent Article 4 drafting committee, chaired by the indomitable Kate Rotella (director of Fiscal Affairs and Acquisitions at Eastern Connecticut State University and current Institute for Public Procurement (NIGP) Governing Board Chair) illustrates this challenge. The group examined a familiar issue: procurement staff "over-writing" specifications or drafting requirements so restrictive that vendors have little room to propose innovative solutions. The problem is widely recognized; Partners for Public Good,⁴ NASPO,⁵ and NIGP⁶ have each documented how overly rigid specifications can inhibit competition and undermine value for taxpayers.

Yet when the committee turned to the Code, it found that the MPC already directs agencies to avoid overly prescriptive specifications. Regulation R4-201.01.1 instructs that "specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the [State],"⁷ encouraging agencies to articulate their principal needs and limit unnecessarily detailed descriptions.

This realization raised an immediate question: If the MPC already instructs agencies to avoid overly prescriptive specifications, why does the problem persist? And more importantly for the Revision Project: *What type of fix, if any, is appropriate?* Several possibilities emerged. Perhaps the language in R4-201.01.1 needs refinement or strengthening. Perhaps the recommended regulation requires additional commentary or examples to illustrate what well-tailored performance specifications actually look like in practice. Perhaps, instead, the regulation

should be elevated into the Code itself to signal its heightened importance. Or perhaps the regulation is substantively sound as written, and the real need is expanded training on the art and discipline of specification writing rather than a statutory amendment.

These kinds of questions are the starting point for many drafting committees. The challenge is not simply identifying procurement problems, but determining whether those problems are rooted in law, in organizational practice, in training, or in culture, and discerning how a model code can responsibly influence outcomes without overreaching.

The Unchanging Goals of Public Procurement Law

Drafting committees have generally begun their work with the conviction that public procurement could operate more effectively and that both processes and the laws that support them require reform. Yet, when examining the MPC closely, one idea has remained untested: Successful public procurement consistently aims to balance multiple goals simultaneously. These goals were clearly articulated in the 1979 MPC and have been altered very little since.⁸ In summary, the MPC seeks to

- Enhance public confidence in procurement procedures;
- Ensure fair and equitable treatment for all participants;
- Achieve greater economy and maximize the purchasing value of public funds;
- Foster broad-based competition within a free enterprise system; and
- Provide the goods, services, and construction needed for governments to better serve businesses and residents.

It is somewhat astonishing how evergreen these guiding goals are. To the great benefit of the project, the enduring nature of these goals has enabled drafting committee members, chairs, reporters, and the steering committee to continue using them to assess the quality of the proposed revisions.

Conclusion

The Model Procurement Code has provided a reliable foundation for state and local procurement law for more than 40 years. Yet the world in which it operates has transformed in ways the original drafters could not have predicted. The Model Procurement Code Revision Project represents a rare opportunity to rethink and modernize the legal architecture of public procurement, while still balancing fairness, competition, innovation, and flexibility.

When completed, the revised MPC may become one of the most influential procurement law documents of the coming decade. It promises to help governments harness the benefits of technological change, manage an increasingly complex risk environment, and advance public values of accountability, fairness, and efficiency. Most importantly, it will equip procurement professionals with

a coherent, principled framework to meet the challenges of a rapidly evolving public sector. 

Endnotes

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2. Anthony M. Potts, *Broken Buying: Adversarial Legalism and (In)Efficiency in Public-Procurement Law*, SSRN (Oct. 5, 2025), <http://dx.doi.org/10.2139/ssrn.5571060>.
3. MALCOM SPARROW, *THE REGULATORY CRAFT* (2000).
4. KAILEY BURGER AYOGU & ELENA HOFFNAGLE, *GUIDEBOOK: CRAFTING A RESULTS-DRIVEN REQUEST FOR PROPOSALS (RFP)*

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5. NAT'L ASS'N OF STATE PROCUREMENT OFFICERS, *STATE & LOCAL GOVERNMENT PROCUREMENT: A PRACTICAL GUIDE* (4th ed. 2024).

6. *NIGP Global Best Practices—Specifications: Principles and Practices of Public Procurement*, INST. FOR PUB. PROCUREMENT (2016), <https://www.nigp.org/resource/global-best-practices/Specifications%20Best%20Practices.pdf?dl=true>.

7. MODEL PROCUREMENT CODE RECOMMENDED REGS. FOR STATE & LOCAL GOV'TS reg. R4-201.01.1 (AM. BAR ASS'N 2002).

8. *See* MODEL PROCUREMENT CODE FOR STATE & LOCAL GOV'TS § 1-101(2) (AM. BAR ASS'N 2000).