# The Model Procurement Code Revision Project: Revising Article 12 for a Procurement-Specific Ethics Framework

BY MICAELA FISCHER

Article 12 of the Model Procurement Code (MPC) for State and Local Governments stands unchanged since the Code's original publication in 1979. For nearly half a century, it has served as the MPC's primary ethics framework for state and local procurement, addressing conflicts of interest, gratuities and kickbacks, contingent fees, restrictions on current and former employees, and the use of confidential information.[1]

But the legal landscape around public ethics has changed considerably since Article 12 was originally published. State and local governments now operate alongside ethics commissions, inspector general offices, procurement policy offices, disclosure regimes, public records laws, and post-employment restrictions that were far less developed when Article 12 was first drafted. The American Law Institute (ALI) also has developed Principles of the Law, Government Ethics,[2] and federal procurement law has evolved through the Federal Acquisition Regulation,[3] the 1988 Procurement Integrity Act,[4] and the 1986 Anti-Kickback Act.[5]

Against that backdrop, the Article 12 Drafting Committee of the MPC Revision Project, led by Melissa Copeland (Graves & Davis, LLC) and Ellen H. Daley (State of Illinois Chief Procurement Officer for General Services), has been working through the difficult question: **What should a model procurement code say about ethics when so much general ethics law already exists?**

The committee's answer was that Article 12 should function as a focused procurement ethics overlay, not a general-purpose ethics code. Where existing state law, local law, or general ethics principles already govern a state or local governmental entity, the MPC should generally defer. When a state or local government entity is confronting distinctly procurement-related risks, such as distorted competition, restricted access to information, kickbacks, contingent-fee-fueled influence peddling, vendor communications during active solicitations, or conflicts arising from financial interests in active procurements, the MPC should speak precisely and practically.

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## Situating the Article 12 Work Within the Broader MPC Revision Project

The Model Procurement Code Revision Project is a collaborative effort by the American Bar Association's Public Contract Law Section, the National Association of State Procurement Officials, and Partners for Public Good to modernize the MPC for State and Local Governments so it better reflects contemporary procurement practice, legal developments, and the evolving role of procurement as a strategic public function. The Article 12 work is one part of that larger effort, the broader strokes of which are outlined at www.modelprocurementcode.com. If you are interested in learning more about the MPC Revision Project, joining in to help with the rewrite, and/or following the Article 12 public comment process, please email me at Micaela.Fischer@partnersforpublicgood.org.

## Forthcoming Redlines and an Opportunity to Provide Feedback

Since the Article 12 subcommittees completed their initial revisions, the chairs of the full Article 12 Drafting Committee and its subcommittees have formed a small "Tiger Team" to review the article as an integrated whole. The goal is not to reopen every policy choice. It is to make sure the provisions harmonize with one another, use consistent terminology, and operate coherently before the revised article returns to the full committee for approval. This write-up summarizes the current direction of the Article 12 update. The work is far enough along to show the shape of the proposed revisions, but the committee is still fitting the pieces together. This summary is, therefore, less a victory lap than a progress report.

The Tiger Team continues to review the consolidated Article 12 revisions and will bring back recommended harmonized edits to the full Article 12 Drafting Committee and the project's Steering Committee. Both committees then will have an opportunity to review the Tiger Team's changes, raise objections, and approve the article before it advances to broader review.

When ready for public comment, the Article 12 draft will represent many months of research, deliberation, and consensus-building by volunteer experts from state and local government, private practice, academia, and professional associations. The draft draws on federal procurement law, ALI principles, state and local ethics rules, and the direct experience of practitioners who work within and alongside public procurement systems every day.

The goal is to make Article 12 more precise, more useful, and more honest about how procurement actually works today. If the committee succeeds, the revised Article 12 will give governments a clearer framework for protecting procurement integrity while preserving the flexibility needed to run real procurements in real jurisdictions. That balance—between guardrails and judgment, between public confidence and administrative workability—is at the heart of the entire MPC Revision Project.

### Keeping Article 12 Specific to Procurement

The committee's work has been animated by a clear organizing principle that the MPC should target ethics issues uniquely tied to procurement, not replicate rules likely already in place in state and local law or dictate general government conduct.

The 1979 Article 12 was a product of its time. The years surrounding the drafting of the original Code coincided with heightened sensitivity to government ethics in the aftermath of Watergate and the passage of the federal Ethics in Government Act of 1978.[6] At that time, many state and local governments were still developing the basic architecture of their ethics regulations. The MPC's broad provisions helped fill a real gap.

That gap has largely closed. Today, the danger is not only under-regulation. It is also duplication, conflict, and unnecessary compliance complexity. A model procurement code should not try to become a full ethics code, criminal code, personnel manual, and public records statute all at once.

The committee therefore has treated Article 12 as an overlay: a focused set of model statutes that address how public procurement creates opportunities for improper influence, unfair competitive advantage, distorted source selection, and diminished public confidence. In this framing, an ethics violation is not just a moral failing in the abstract. It is a harm to the procurement process itself and the citizens that process is designed to serve.

The committee also has kept an eye on adoptability. A rule that works for a large state procurement office may be unworkable for a small municipality. The proposed revisions tend to favor clear statutory rules where procurement integrity requires them, commentary where examples and judgment are more useful than mandates, and bracketed or regulatory language where states and localities need flexibility.

### The Tiger Team's Harmonization Work

The Article 12 Drafting Committee worked through five subcommittees: Employee Conduct; Vendor Conduct; Gifts and Gratuities; Remedies, Criminal Sanctions, and Ethics Commissions; and an Ad Hoc Subcommittee. Each subcommittee examined a different set of ethics problems and developed proposed revisions. That division of labor was necessary because Article 12 touches on too many issues for one group of dedicated volunteers to handle all at once.

But subcommittee work creates its own challenges. A provision drafted to address employee conflicts of interest may use a term differently from one drafted to address confidential information. A vendor endorsement rule may raise questions about who counts as a government actor. The Tiger Team is now working through those cross-cutting questions. In practical terms, this has meant reviewing Article 12 line by line, asking whether the same words mean the same thing throughout the article, whether a term is too broad in one provision and too narrow in another, and whether a proposed rule belongs in Article 12 at all or should be referred to another article of the MPC for further review.

The most significant is the committee's work around whom Article 12 should cover. The existing MPC relies heavily on the term "Employee," which is both broader and in one important sense narrower than it may first appear. Article 1, containing general provisions and definitions, defines an employee to include salaried governmental personnel, elected officials, and noncompensated individuals performing personal services for a governmental body. The 2002 Recommended Regulations further clarify that "'[State] employee' includes elected officials, appointed or selected personnel, and noncompensated or minimally compensated individuals performing personal services for the State." But the same regulation also excludes independent contractors who provide professional, scientific, technical, or advisory services to a state agency.

That exclusion poses a real problem for a modern procurement ethics code. Procurement decisions are no longer shaped only by salaried procurement officials. Consultants may help design solicitations. Outside counsel may advise on procurement strategy. Technical experts may shape specifications. Program staff and advisory committee members may influence evaluation criteria or source selection. In short, people who are not traditional employees may still have access to confidential information or exercise meaningful influence over a procurement.

The Tiger Team has therefore been using the new term "Procurement Participant" in places where the relevant inquiry should relate to the function of the person in question rather than who signs their paycheck. The working definition is as follows:

> *Procurement Participant means an individual who participates substantially in a Procurement, and*
> *(a) is elected, appointed, or holds a [State] office;*
> *(b) performs for, under the control of, or on behalf of a governmental body for wages or other remuneration, including but not limited to stipends, grants, fellowships, allowances, or other form of consideration; or*

*(c) is a non-compensated individual performing personal service for any governmental body.*

The commentary to this definition notes that "Procurement Participant" covers a broad range of people, but only when they participate substantially in a procurement. It may include W-2 employees, contractors, interns, fellows, task force members, and elected officials (such as a governor or mayor) when they are materially involved in a procurement. The term also includes government "agents" as defined in the federal theft and bribery statutes.[7]

This shift attempts to capture whether a person substantially participates in a procurement, not merely whether that person appears on the government payroll, while not going so far as to convert Article 12 into a general ethics code for every person who interacts with government. At the same time, the Tiger Team has recognized that "Procurement Participant" cannot simply replace "Employee" everywhere. At the latest Tiger Team meetings, members flagged Model Procurement Code § 12-208, governing employment restrictions, as requiring further redrafting because the group has not yet resolved whether post-employment restrictions should apply to procurement participants, employees, or some narrower category. The team also has agreed, at least for now, that vendor endorsement rules should remain limited to employees because of enforceability concerns with contractors and consultants for the government.

## New and Expanded Definitions Provide Precision and Workability

One of the most important changes to Article 12 is also one of the least glamorous. The definitions section has been substantially expanded and refined. The original Article 12 defined only a handful of terms. The proposed revision adds and revises defined terms needed to make the article usable in modern procurement practice.

In addition to "Procurement Participant," the Tiger Team has focused on the definitions of "Material Financial Interest" and "Participate Substantially." These terms carry much of the article's weight. "Material Financial Interest" is designed to capture interests that could reasonably affect impartiality or public confidence, such as an ownership stake in a company responding to a solicitation, without sweeping in remote or trivial holdings, like interests held through a diversified mutual fund. The draft also contemplates regulatory safe harbors for interests that should not trigger conflicts or disclosure duties, including certain retirement plans, federal government securities, and de minimis holdings. These safe harbors generally mirror those applicable to federal employees, as set forth in 5 C.F.R. Part 2640, Subpart B, with the important exception that the Tiger Team recommends a regularly updated formula tied to median household income to quantify de minimis holdings, rather than a set dollar limit that may become stale in times of high inflation.

This definitional work may seem like inside baseball, but it is central to whether the revised article will be usable. Overbroad ethics rules are difficult to administer and easy to disregard. Clear rules like the safe harbor provisions help procurement officials and other participants know when they can proceed without unnecessary risk, recusal, or disclosure. The wrong definition could make Article 12 both overinclusive and underinclusive, burdening people who have no real influence over procurement while overlooking people who do.

## Refocusing Conflict Rules on Substantial Participation and Material Financial Interest

The conflict of interest provisions in Model Procurement Code § 12-204 have been substantially reworked. The original language prohibited "direct or indirect participation" in a procurement by an employee with a financial interest. The committee found that standard both too broad and too imprecise. It could capture people with no meaningful influence over the procurement, while failing to account for the many nontraditional actors who now participate in procurement decisions.

The proposed revision focuses instead on "Procurement Participants" and "Material Financial Interests." In simplified terms, a person who participates substantially in a procurement should not do so when that person, or a person associated with that person, has a material financial interest that may be directly and predictably affected by the procurement.

The committee also has worked to capture prospective employment discussions earlier than a formal job negotiation, specifically lowering the employment trigger in § 12-204(1)(c) from formal "negotiating" to having "discussed" an arrangement concerning prospective employment. This change recognizes that even informal conversations about future employment can affect judgment during an active procurement.

The Tiger Team also has refined the recusal language. Rather than saying a Procurement Participant must "withdraw," the current recommendation for § 12-204(3) now uses "refrain from further participation." That may seem like a minor drafting change, but it reflects an important practical point. A person may need to pause participation while seeking an advisory opinion or waiver but may be able to return if the conflict is waived or determined not to exist.

The related disclosure provision also has been rewritten. Proposed § 12-205 would require a Procurement Participant to disclose any Material Financial Interest that the participant, or a person associated with the participant, has in an existing or prospective state contract. The committee debated where disclosures should be directed. In many cases, disclosure to the procurement officer and inclusion in the procurement file may be more operationally useful than disclosure only to an ethics commission. The latest redline would require disclosure to the contracting agency or, if the enacting jurisdiction uses that structure, to the ethics commission, simultaneously allowing the disclosure to be open to public inspection.

The timing language also has been tightened. A failure to disclose is a breach if the Procurement Participant knew or should have known of the Material Financial Interest and failed to disclose it in writing "as soon as practicable, but no later than 30 days." That change reflects the Tiger Team's concern that a flat 30-day period may be too slow for fast-moving procurements, while still giving jurisdictions a hard outer deadline.

## Tightening and Clarifying Kickback and Contingent Fee Rules

The committee has recommended removing the general gratuities provision from Model Procurement Code § 12-206 because gifts to individual employees are typically addressed by broader ethics law. Kickbacks are different. Procurement kickbacks—especially those involving prime contractors and subcontractors—distort subcontract awards, inflate contract prices, and create performance risks ultimately borne by taxpayers. The federal Anti-Kickback Act and the FAR's subcontractor-kickback rules provide useful reference points.[8]

The Tiger Team identified this section as needing additional work. In particular, members raised concerns that the draft was overly focused on prime-subcontractor kickbacks and did not adequately address kickbacks involving vendors and government agents—two categories that might not necessarily qualify as "subcontractors." The group also has discussed whether the MPC should more directly incorporate concepts from the federal Anti-Kickback Act.

The contingent fee prohibition in § 12-207 has been revised to better distinguish improper influence-peddling from legitimate business development. The original provision banned contingent arrangements to solicit state contracts, with exceptions for bona fide employees and bona fide established commercial selling agencies. The proposed revision retains that general structure but updates the terminology and commentary to make the rule more practical.

The core concern is a "pay-for-success" arrangement in which a vendor hires a well-connected person or entity to secure a government contract and pays only if the effort succeeds. Those arrangements can create powerful incentives to use improper influence rather than compete on merit. At the same time, the committee has been careful not to sweep in ordinary employee bonuses, legitimate marketing arrangements, or professional representation in bid protests or contract negotiations. The Tiger Team has flagged remaining questions about whether the exceptions are too loose. Those and other questions are still being processed.

## A Work in Progress: Restrictions on Current and Former Employees

The restrictions on current and former employees in Model Procurement Code § 12-208 remain one of the most complex parts of the Article 12 revision. The original MPC restricts contemporaneous employment, imposes permanent disqualification for certain matters in which a former employee was personally involved, imposes a one-year restriction for matters within a former employee's official responsibility, and prohibits certain former employees from selling to the state for one year.

The initial subcommittee draft attempted to modernize these provisions and soften aspects that could be oppressive in small jurisdictions. The Tiger Team has since identified a deeper question: Should these restrictions apply to the category of Procurement Participants (which includes employees, consultants, and any others as long as they are substantially involved in a procurement) or only to Employees (which is inclusive of *all* public officials regardless of their involvement in the relevant procurement, but never contractors)?

There are strong arguments on both sides. On the one hand, consultants, advisors, and agents may have access to sensitive procurement information or may help shape a procurement in ways that create obvious post-engagement conflict risks. On the other hand, applying employee-style post-employment restrictions to every contractor or consultant involved in a procurement may raise enforceability concerns and may stray into organizational conflict-of-interest territory that may be better addressed elsewhere within the MPC.

For that reason, the updated version of § 12-208 is not as fully baked as some of the other sections. The Tiger Team has identified it as needing further discussion, likely requiring a redrafting before the full committee is asked to approve the final language.

## Use of Confidential Information

The confidential information provision in Model Procurement Code § 12-209 has been substantially modernized. As an initial matter, the subcommittee recommended refining the definition of "confidential information" in § 12-101(2). The original definition was somewhat vague, designating as "confidential information" anything *"which is available to an employee only because of the employee's status as an employee of this [State] and is not a matter of public knowledge or available to the public on request."*

The committee recommended a more tailored definition that always includes trade secrets or other information that requires protection under applicable law or policy. The new definition also includes a list of criteria that confidential information must meet, including that it must be identified as confidential by the disclosing party. This reflects common practice among state and local jurisdictions.

The original restriction applied to employees and former employees using confidential information for actual or anticipated personal gain. The revised draft instead prohibits current or former Procurement Participants from knowingly using or disclosing confidential information, except for the benefit of the state or as otherwise required by law.

The committee also added a separate prohibition on intentionally obtaining restricted vendor bid or proposal information or source selection information before award, except for Procurement Participants with a need for access. This is meant to address conduct that threatens the integrity of a competitive procurement even if the person does not ultimately use the information for personal financial gain.

The commentary is expected to clarify that the provision is aimed at intentionally seeking, accepting, or using restricted information, not inadvertent receipt. If someone inadvertently receives restricted information, the appropriate response is prompt disclosure, not concealment or opportunistic use. The provision also recognizes the temporal boundary created by public records laws: After award, disclosure questions are generally governed by applicable open records regimes.

### A New Provision Addresses Gifts That Could Skew Future Procurements

The Article 12 Drafting Committee recommended a new section to Article 12 regarding gifts to government. General gift rules for individual employees often are covered by existing state ethics laws and ALI principles. The procurement-specific concern here is different, however: Whether a business may give something of value to a governmental body in a way that creates a competitive advantage or undermines confidence in future procurements.

The proposed provision prohibits a governmental body from accepting or soliciting a gift from a donor if there is a reasonable basis to believe the donor has or is seeking a contractual or other business or financial relationship with the governmental body, or if the gift would otherwise raise a reasonable concern regarding its effect on procurement integrity. Before accepting a gift, the procuring body would need to conduct an investigation and make a written determination regarding whether acceptance would provide the donor with an undue competitive advantage in future procurements.

This issue is more practical than it may first appear. Governments may receive offers of donated funds, equipment, repairs, technology, services, or other benefits. Some gifts may serve real public purposes. Others may function as a way for a vendor to build goodwill, shape specifications, gain access, or create an advantage in a later procurement. The committee has discussed whether to include a de minimis exception, but the better current framing may be to address de minimis personal gifts through general ethics law while keeping Article 12 focused on gifts to government that could affect procurement integrity.

### Separating Prohibited Endorsements from Permitted Performance Communication

A new proposed vendor endorsement provision addresses a problem that is both common and oddly undertheorized. Government employees are often reluctant to provide performance references to other governmental entities, even though those same governments routinely require vendors to submit references as part of solicitations. The result is a procurement system that asks for past performance information but sometimes discourages the very communications needed to make that information available.

The revised provision seeks to draw a line between endorsement and truthful performance communication. In short, a government employee should not endorse a vendor in the discharge of official duties. In turn, a vendor should not publicize promotional materials that state or imply governmental endorsement of its products, services, or views. But truthful communications between government employees regarding a vendor's current or past performance should not be treated as an endorsement.

The Tiger Team has continued to refine this section, including whether it should apply only to employees rather than the broader category of Procurement Participants. That narrower approach reflects practical enforceability concerns. It may be difficult to regulate every statement made by a contractor in the same way the government regulates its own employees. But the core idea remains that governments should be able to share performance information without becoming marketing tools for vendors.

### A New "Cone of Silence" Provision Channels Solicitation Communications Through the Procurement Officer

One of the most significant new provisions to Article 12 is a restricted communications period. Many jurisdictions already use some version of a "cone of silence" during active solicitations, but these rules vary widely and can raise both practical and constitutional concerns if drafted too broadly.

The current Article 12 draft takes a procurement-control approach. After advertisement of a solicitation and before award, communications regarding the procurement must be directed to and controlled by the responsible procurement officer, unless otherwise provided by law. A bidder or offeror that violates the restriction may be disqualified from further participation unless it is determined that the violation does not justify disqualification. The Tiger Team wanted to avoid a strict "did or did not undermine" test, instead preserving procurement officer discretion where a communication creates no material risk to procurement integrity.

The associated commentary will do a great deal of work here. It recognizes that some communications must be permitted, including communications required by law; reports to Inspectors General, auditors, law enforcement, or ethics officials; bid protests or challenges submitted to appropriate officials; and legitimate efforts to seek redress from government. It also acknowledges that incumbent contractors still must be able to communicate with the government regarding existing contracts, provided that such communications are not used to influence the current solicitation or to gain an unfair competitive advantage.

This provision reflects a recurring theme in the Article 12 work, which is that procurement officials need sufficient control over communications to protect fairness, confidentiality, source selection integrity, and public confidence. But the rule must be written with enough care to avoid shutting down legitimate oversight, legal compliance communications, and constitutional rights.

## What the Committee Proposes to Remove or Relocate

The Article 12 revisions are not only additive. In addition to deleting the gratuities provisions in Model Procurement Code § 12-206, several other provisions are proposed for removal or relocation because they do not belong in a modern, procurement-specific ethics article.

The criminal sanctions provisions in § 12-203 will likely be removed because criminal penalties for ethics violations belong in a jurisdiction's criminal code, not in a model procurement statute. Civil and administrative remedies against employees in § 12-301 also will likely be removed because employee discipline is generally better handled through existing ethics commission authority, personnel systems, and state law.

Civil and administrative remedies against nonemployees in § 12-302, along with recovery of value transferred or received in breach of ethical standards in § 12-303, are expected to be moved to Article 9, which addresses legal and contractual remedies. The committee determined that Article 9 would be a better home for vendor-facing enforcement tools, including suspension, debarment, contract termination, and recovery.

The committee also has recommended removing the existing Ethics Commission provisions in Part D of Article 12, as the current language does not meaningfully create or empower an ethics commission. The revised article generally uses bracketed references to the appropriate state official, governmental body, Chief Procurement Officer, or ethics commission, allowing jurisdictions to map the model language onto their own institutional structures more seamlessly.

Finally, organizational conflicts of interest (OCI) have been studied but are expected to be handled primarily outside of Article 12. OCI concerns often arise from a vendor's structure, relationships, prior work, or access to information and are more naturally treated as source selection, qualification, competition, or contract administration issues, rather than ethical issues. The Article 12 committee's work on that topic is expected to inform the Article 3 process, relating to source selection and contract formation, when that committee begins its work.

## Final Reflections—Why Process Matters in Public Procurement

As a facilitator of this work, I have been struck by how often the hardest questions are not the obvious ones. It is easy to say that procurement law should prevent conflicts of interest, kickbacks, improper influence, and misuse of confidential information. It is much harder to write rules that do so without making ordinary procurement administration impossible.

The Article 12 process has required the committee to ask basic but difficult questions: Who exactly should be covered by procurement ethics rules? What risks are unique to procurement, and what risks belong to general ethics laws? When should a rule appear in statutory text, and when is commentary more useful? How can a model code provide meaningful guidance without assuming every jurisdiction has the same staffing, oversight bodies, or administrative capacity?

The Tiger Team's work also has underscored the importance of humility in drafting a model law. A provision can make perfect sense in isolation and still create problems when applied in conjunction with another provision. A definition can solve one problem and create another. A rule can be both normatively attractive and practically unenforceable. The point of the Tiger Team is to catch those problems before the draft is released more broadly.

Because the Tiger Team is still reconciling several cross-cutting issues—most notably the scope of Model Procurement Code § 12-208 (relating to restrictions on contractors employing present and former government employees)—the committee's next step is to return harmonized revisions to the full Article 12 Drafting Committee before soliciting broader public comment. Once drafts are available, they will be posted to www.modelprocurementcode.com with instructions for public feedback.

Until then, any thoughts on the Article 12 revision based on this write-up can be emailed to me at Micaela.Fischer@partnersforpublicgood.org for committee consideration. PL

## Endnotes

1. Model Procurement Code for State & Local Gov'ts art. 12 (Am. Bar Ass'n 1979); Model Procurement Code for State & Local Gov'ts art. 12 (Am. Bar Ass'n 2000), https://publicprocurementinternational.com/wp-content/uploads/2019/04/2002_Model-Procurement-Regulations.pdf.
2. Principles of the Law, Gov't Ethics (Am. L. Inst. 2023).
3. Federal Acquisition Regulation, 48 C.F.R. ch. 1, part 3; *see also* FAR 3.104, 3.401–3.406, 3.502.
4. Procurement Integrity Act, 41 U.S.C. §§ 2101–2107.
5. Anti-Kickback Enforcement Act of 1986, 41 U.S.C. §§ 8701–8707; FAR 3.502.
6. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.
7. *See*, e.g., 18 U.S.C. § 666(d)(1).
8. *See* 41 U.S.C. §§ 8701–8707; FAR 3.502. FAR 3.502-2 describes the Anti-Kickback Act as directed at payments made to improperly obtain or reward favorable treatment in connection with a prime contract or subcontract.