

CHAPTER 5
PROCUREMENT

Table of Contents

Section 5.1	Scope of this Chapter
Section 5.2	General Provisions and Applicability of the Procurement Code
5.2.1	Scope of the Procurement Code
5.2.2	Department of Administration's Responsibility for Procurement and Disposal
5.2.2.1	State Procurement Administrator
5.2.2.2	Delegation of Department of Administration's Authority to State Governmental Units
5.2.2.3	Agency Chief Procurement Officer
5.2.3	State Governmental Unit's Responsibility for the Procurement of Services of Clergy, Certified Public Accountants, Lawyers, Physicians, and Dentists
5.2.3.1	State Governmental Unit's Procurement of Legal Services
5.2.3.2	State Governmental Unit's Procurement of Services of Certified Public Accountants
5.2.3.3	State Governmental Unit's Procurement of Information Technology Purchases
5.2.4	Procurement by State Governmental Units Exempted from the Procurement Code and Separately Authorized to Purchase
5.2.5	Specific Procurements Exempted from the Procurement Code
5.2.5.1	State Lottery Commission
5.2.5.2	Arizona Health Care Cost Containment System Provider Contracts

- 5.2.5.3 Arizona Industries for the Blind's Procurement of Finished Goods and Raw Materials
- 5.2.5.4 Arizona Correctional Industries' Procurement of Raw Materials
- 5.2.5.5 Construction of Transportation and Highway Facilities
- 5.2.5.6 Arizona Highways Magazine
- 5.2.5.7 Publication and Sale of Administrative Code
- 5.2.5.8 Professional Witnesses in Judicial Proceedings
- 5.2.5.9 Adoption of Rules, Procedures or Policies by Head of State Governmental Unit
- 5.2.5.10 Settlement of Litigation
- 5.2.5.11 Department of Economic Security Provider Contracts
- 5.2.5.12 Department of Health Services Mental Health, Drug and Alcohol, and Domestic Violence Services Subcontracts
- 5.2.5.13 Physician Services at Arizona State Hospital
- 5.2.5.14 Public Safety Personnel Retirement System
- 5.2.5.15 Department of Agriculture Cotton and Cotton Stubble Plow-Up Contracts
- 5.2.5.16 State Parks Board Purchases of Certain Supplies and Items for Resale at Tonto Natural Bridge State Park
- 5.2.5.17 Arizona State Parks Board
- 5.2.5.18 State School for the Deaf and Blind
- 5.2.5.19 Morale, Welfare and Recreational Fund
- 5.2.5.20 State Department of Corrections; Contracts with Local Medical Providers
- 5.2.5.21 Department of Environmental Quality
- 5.2.5.22 Motor Vehicle Division; Third Party Authorizations

- 5.2.5.23 State Forester
- 5.2.5.24 Cotton Research and Protection Council
- 5.2.5.25 Agricultural Protection Fund
- Section 5.3 Procurement Code Procedures
 - 5.3.1 Source Selection Method; Materials and Services under Existing Arizona State Contracts
 - 5.3.2 Procurements Not Exceeding \$50,000 in the Aggregate; Small Business Set Aside
 - 5.3.2.1 Simplified Construction Procurement Program
 - 5.3.2.2 Purchases of \$5,000 and Less
 - 5.3.3 Sole Source Procurement
 - 5.3.4 Emergency Procurement
 - 5.3.5 Competition Impracticable Procurements
 - 5.3.6 Unsolicited Proposals
 - 5.3.7 Demonstration Projects
 - 5.3.8 General Procurement of Materials and Services
 - 5.3.8.1 Competitive Sealed Bidding
 - 5.3.8.1.1 Contents of the Invitation for Bids (IFB)
 - 5.3.8.1.2 Bid Evaluation and Award
 - 5.3.8.1.3 Multistep Sealed Bidding
 - 5.3.8.2 Competitive Sealed Proposals
 - 5.3.9 Procurement of Professional Services of Clergy, Physicians, Dentists, Legal Counsel, and Certified Public Accountants

- 5.3.10 Procurement of Professional Services of or for Architects, Construction-Managers-at Risk, Design-Build Construction, Job-Order-Contracting Construction, Engineers, Assayers, Geologists, Landscape Architects, and Land Surveyors
 - 5.3.10.1 Request for Qualifications
 - 5.3.10.2 Evaluation and Negotiation
 - 5.3.10.3 Alternative to A.R.S. § 41-2578(E)
- 5.3.11 Procurement of Information Systems and Telecommunication Systems
- 5.3.12 Procurement of Earth-Moving, Material Handling, Road Maintenance and Construction Equipment
- 5.3.13 Public-Private Partnership Contracts
- Section 5.4 General Procurement Requirements
 - 5.4.1 Responsible Bidder
 - 5.4.2 Prequalification of Contractors
 - 5.4.3 Requests for Information
 - 5.4.4 Conformity of Invitation for Bids (IFB) or Request for Proposals (RFP) to Specifications
 - 5.4.5 Bid and Contract Security
 - 5.4.5.1 Construction and Construction Services Contracts
 - 5.4.6 Cost or Pricing Data
 - 5.4.7 Written Contracts
 - 5.4.8 Indemnity Agreements in Construction and Architect-Engineer Contracts
 - 5.4.9 Modification, Correction, and Withdrawal of Bids
 - 5.4.10 Solicitation Amendments

5.4.11	Cancellation of Solicitation
5.4.12	Multi-term Contracts
5.4.13	Right to Inspect Plant and Audit Records
5.4.14	Conflict of Interest
5.4.15	Personal Use Prohibition
5.4.16	Prohibition Against Discrimination
5.4.17	On-line Bidding
Section 5.5	Materials Management
5.5.1	Disposition of Surplus Materials
Section 5.6	Legal and Contractual Remedies
5.6.1	Exclusive Remedy
5.6.2	Protested Solicitations and Awards
5.6.2.1	Procurement Officer
5.6.2.2	Appeals to the Director
5.6.3	Contract Claims and Controversies Between a Contractor and the State
5.6.3.1	Claims Initiated by the Contractor
5.6.3.2	Claims Initiated by the State
5.6.4	Debarring or Suspending a Person from Participating in State Procurements
5.6.5	Hearings Under the Procurement Rules
5.6.6	Rehearing
5.6.7	Judicial Review of Administrative Decisions

Section 5.7	Intergovernmental Procurement
5.7.1	Cooperative Purchasing
5.7.1.1	Compliance with Procurement Code
5.7.1.2	Controversies
5.7.2	Purchasing from the Arizona Industries for the Blind and from Arizona Correctional Industries
5.7.3	General Services Administration Contracts
Section 5.8	Violation of the Procurement Code
5.8.1	Enforcement of the Procurement Code
5.8.2	Civil Penalty
5.8.3.	Criminal Penalty
5.8.4	Reporting of Anticompetitive Practices
Section 5.9	Procurement and the Antitrust Laws
5.9.1	The Procurement Officer's Function
5.9.2	Objectives of the Antitrust Laws
5.9.3	Federal Antitrust Laws
5.9.3.1	The Sherman Antitrust Act
5.9.3.2	The Clayton Antitrust Act
5.9.3.3	The Federal Trade Commission Act
5.9.4	State Antitrust Laws
5.9.4.1	Uniform State Antitrust Act
5.9.4.2	Bid-Rigging Statutes
5.9.5	Conduct Illegal Under the Antitrust Laws

- 5.9.5.1 Price Fixing
- 5.9.5.2 Bid Rigging
- 5.9.5.3 Division of Markets - Territorial Market Allocation
- 5.9.5.4 Tying Arrangements
- 5.9.5.5 Group Boycotts - Horizontal Refusals to Deal
- 5.9.5.6 Monopolization
- 5.9.5.7 Other Unlawful Acts
- 5.9.6 Exemptions
 - 5.9.6.1 State Action Exceptions and Immunities
- 5.9.7 Enforcement of Antitrust Laws
- 5.9.8 Detecting Antitrust Violations in Bidding
 - 5.9.8.1 Identical Bids
 - 5.9.8.2 Simultaneous Price Increases and Price Maintenance
 - 5.9.8.3 Bid Rotation
 - 5.9.8.4 Customer Allocation
 - 5.9.8.5 Territorial Allocation
 - 5.9.8.6 Other Suspicious Bidding Practices
- 5.9.9 Application of the Antitrust Laws to State Employees Engaged in Purchasing
- 5.9.10 Antitrust Attorney's Fees

CHAPTER 5

PROCUREMENT

5.1 Scope of this Chapter. This Chapter generally reviews the law applicable to the expenditure of public monies by the State and its agencies to acquire materials, services, and construction and the law applicable to the disposal of state materials. This chapter also reviews exemptions to the Procurement Code. This Chapter does not consider acquisitions by school districts or other political subdivisions of the State and does not resolve all technical questions that may arise in the procurement process. This Chapter also does not discuss the procurement of real property or the leasing of space. This Chapter will focus principally on the Arizona Procurement Code, A.R.S. §§ 41-2501 to -2673, and the Department of Administration Rules, A.A.C. R2-7-101 to -1301, implementing the Code.

5.2 General Provisions and Applicability of the Procurement Code.

5.2.1 Scope of the Procurement Code. Absent a specific statutory exception, the Procurement Code applies to any expenditure of public monies by any state governmental unit under any contract for the procurement of materials, services, construction, or construction services. A.R.S. § 41-2501. In the context of the Procurement Code, public officers or employees should consider any money that is in their custody in their official capacity to be public money.¹ The Procurement Code itself provides definitions of its key terms.

The term “state governmental unit” is defined as “any department, commission, council, board, bureau, committee, institution, agency, government corporation or other establishment or official of the executive branch or corporation commission of this state.” A.R.S. § 41-2503(35).

The term “contract” is defined as “all types of state agreements, regardless of what they may be called, for the procurement of materials, services or construction or the disposal of materials.” A.R.S. § 41-2503(7).

The term “procurement” is defined as “buying, purchasing, renting, leasing or otherwise acquiring any materials, services, construction or construction services.” A.R.S. § 41-2503(31)(a). Procurement also includes “all functions that pertain to obtaining any material, services, construction or construction services, including description of

¹ See Chapter 4 for discussion of public monies.

requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.” A.R.S. § 41-2503(31)(b).

The term “materials” is defined as “all property, including equipment, supplies, printing, insurance and leases of property,” but “[d]oes not include land, a permanent interest in land or real property or leasing space.” A.R.S. § 41-2503(26)(a) and (b).

The term “services” is defined as “the furnishing of labor, time, or effort by a contractor or subcontractor which does not involve the delivery of a specific end product other than required reports and performance.” Services “[d]oes not include employment agreements or collective bargaining agreements.” A.R.S. § 41-2503(34)(a) and (b).

“Construction” is defined as “the process of building, altering, repairing, improving or demolishing any public structure or building, or other public improvements of any kind to any public real property.” Construction does not include “the routine operation, routine repair or routine maintenance of existing facilities, structures, buildings or real property.” Further, construction does not include “the investigation characterization, restoration or remediation due to an environmental issue of existing facilities, structures, building or real property.” A.R.S. § 41-2503(4)(a) and (b).

“Construction Services” means either of the following for construction-manager-at-risk, design-build, and job-order-contracting project delivery methods:

- (a) Construction, excluding services, through the construction-manager-at-risk or job-order-contracting project delivery methods.
- (b) A combination of construction and, as elected by the purchasing agency, one or more related services, such as finance services, maintenance services, operations services, design services and preconstruction services, as those services are authorized in the definitions of construction-manager-at-risk, design-build, or job-order-contracting in this section. A.R.S. § 41-2503(6).

5.2.2 Department of Administration’s (DOA’s) Responsibility For Procurement and Disposal. Except as specifically provided otherwise by statute, the Legislature has delegated to the Director of DOA the sole authority and responsibility for procurement and management of all materials, services and construction, and disposal of materials. A.R.S. § 41-2511. Pursuant to this directive, the Director adopted rules governing (a) the procurement of all materials, services, and construction needed by the State; (b) the management of all inventories of materials belonging to the State; (c) the sale, trade, and other disposal of surplus materials belonging to the State; and (d) the inspection, testing, and acceptance of materials, services, and construction. A.A.C. R2-7-101 to -1009, R2-15-301 to -310.

5.2.2.1 State Procurement Administrator. The Director shall hire a state procurement administrator who shall administer the procurement of materials, services and

construction needed by the state. A.A.C. R2-7-201(A) and (B). The state procurement administrator shall delegate procurement authority under R2-7-202 and shall maintain a record of each contract awarded under A.R.S. §§ 41-2536, 41-2537 that exceeds the amount prescribed in A.R.S. § 41-2535(A). A.A.C. R-2-201(C). The state procurement administrator shall resolve procurement disputes between a purchasing agency and its agency chief procurement officer. A.A.C. R2-7-207.

5.2.2.2 Delegation of Department of Administration's (DOA's) Authority to State Governmental Units. The Director of DOA is authorized to delegate procurement authority to any state governmental unit. A.R.S. § 41-2512. The Director has done so pursuant to A.A.C. R2-7-202. The delegations have been both general and limited depending upon the capabilities and past experience of the state governmental unit and the impact of the delegation on procurement efficiency and effectiveness. Delegations must be in writing. *Id.* § (B). Delegated procurement authority must be exercised according to the terms of the delegation, the procurement rules, and the Procurement Code. *Id.* § (D).

5.2.2.3 Agency Chief Procurement Officer. An agency chief procurement officer may further delegate procurement authority within the purchasing agency. A.A.C. R2-7-203. A procurement officer shall perform all procurement duties in accordance with the AZ Proc-Code and within delegated authority. A.A.C. R2-7-206.

5.2.3 State Governmental Unit's Responsibility for the Procurement of Services of Clergy, Certified Public Accountants, Lawyers, Physicians, and Dentists. The Legislature has delegated to each state governmental unit the authority to contract on its own behalf for the services of clergy, lawyers (when authorized by A.R.S. § 41-192(E)), certified public accountants, physicians, and dentists, A.R.S. § 41-2513(A). A state governmental unit's procurement of such services must comply with the Procurement Code and the rules of the Director of DOA. *Id.*

5.2.3.1 State Governmental Unit's Procurement of Legal Services. With few exceptions, state governmental units are prohibited from procuring legal services from anyone other than the Attorney General. A.R.S. § 41-192(E). See Sections 1.3.3 and 1.9.5 to 1.9.5.4. When a state governmental unit is authorized to procure legal services outside of the Attorney General's Office, see, e.g., A.R.S. § 41-192(F), (G), the Legislature has provided that the state governmental unit may do so only in compliance with the Procurement Code, A.R.S. § 41-2513(A), and with the approval of the Attorney General. *Id.* § (B).

5.2.3.2 State Governmental Unit's Procurement of Services of Certified Public Accountants. Unless a statute provides otherwise, a state governmental unit may procure the services of a certified public accountant for financial and compliance auditing only upon approval of the Auditor General. A.R.S. § 41-2513(C). The Auditor General is required to ensure that contract audits are conducted in accordance with generally accepted

governmental auditing standards. "An audit shall not be accepted until it has been approved by the auditor general." *Id.*

5.2.3.3 State Governmental Unit's Procurement of Information Technology Purchases. The government information technology agency established by A.R.S. § 41-3502 may approve all information technology purchases exceeding twenty five thousand dollars for a budget unit. A.R.S. § 41-2513(D).

5.2.4 Procurement by State Governmental Units Exempted from the Procurement Code and Separately Authorized to Purchase. The Legislature has exempted the Arizona Board of Regents and the legislative and judicial branches of state government from the Procurement Code, A.R.S. § 41-2501(D); however, the Legislature has directed the Arizona Board of Regents and the judicial branch to adopt procurement rules substantially equivalent to the Procurement Code prescribing procurement policies and procedures for themselves and the institutions under their jurisdiction. *Id.* § (E). A state governmental unit that is exempt from the Procurement Code and is authorized to engage in procurement without complying with any other procurement procedure nevertheless has a fiduciary obligation to the citizens and taxpayers of the State to conduct procurements in utmost good faith and in the best interests of the State. *See Brown v. City of Phoenix*, 77 Ariz. 368, 375, 272 P.2d 358 (1954); *Osborn v. Mitten*, 39 Ariz. 372, 376, 6 P.2d 902, 904 (1932).

In the opinion of the Attorney General, competitive bidding should be employed in most procurements; the Attorney General's experience is that lack of competition in procurement generates abuse, results in favoritism, and usually results in higher costs. Ariz. Att'y Gen. Op. 75-11.

5.2.5 Specific Procurements Exempted from the Procurement Code. The Legislature has exempted from the Procurement Code certain specific procurements enumerated in A.R.S. § 41-2501 and described in Sections 5.2.5.1 to 5.2.5. With respect to those exempted procurements, "[t]he head of any state governmental unit . . . has the same authority to adopt rules, procedures or policies as is delegated to the [D]irector [of the Department of Administration in the Procurement Code]." A.R.S. § 41-2501(N). *See* Section 5.2.4 respecting a state governmental unit's fiduciary duty and the Attorney General's opinion regarding procurements that are exempt from statutory procedures.

5.2.5.1 State Lottery Commission. The Legislature has exempted from the Procurement Code procurements relating to the design and operation of the lottery and the purchase of lottery equipment, tickets, and related material. It has, however, directed the Executive Director of the Lottery Commission to promulgate rules respecting procurement that are substantially equivalent to the Procurement Code. A.R.S. § 41-2501(F).

5.2.5.2 Arizona Health Care Cost Containment System Provider Contracts.

The Legislature has exempted from the Procurement Code the procurement of Arizona Health Care Cost Containment System provider contracts authorized in A.R.S. § 36-2904(A), and Arizona Long-Term Care System contracts for goods and services (including program contractors authorized in A.R.S. §§ 36-2931 *et seq.*, and Qualified Medicare Beneficiary program contractors authorized in A.R.S. §§ 36-2971 *et seq.*). A.R.S. § 41-2501(G)).

5.2.5.3 Arizona Industries for the Blind's Procurement of Finished Goods and Raw Materials. The Legislature has exempted from the Procurement Code the Arizona Industries for the Blind's procurement of finished goods from members of National Industries for the Blind and the purchases of raw materials to be used in manufacturing products for sale under programs operated or supported by the Department of Economic Security for training and employing blind persons. A.R.S. § 41-2501(H).

5.2.5.4 Arizona Correctional Industries' Procurement of Raw Materials. The Legislature has exempted from the Procurement Code the Arizona Correctional Industries' procurement of raw materials, components and supplies to be used in manufacturing products for sale to the State, a political subdivision, or the public. A.R.S. § 41-2501(I).

5.2.5.5 Construction of Transportation and Highway Facilities. The Legislature has exempted from the Procurement Code procurement by the state transportation board and the director of the Department of Transportation for engineering services, construction, and reconstruction relating to transportation and highway facilities and other related services. A.R.S. § 41-2501(J).

5.2.5.6 Arizona Highways Magazine. The Legislature has exempted from the Procurement Code contracts for the production, promotion, distribution, and sale of Arizona Highways Magazine and related products and for sole source creative works. A.R.S. § 41-2501(K).

5.2.5.7 Publication and Sale of Administrative Code. The Legislature has exempted from the Procurement Code contracts entered into by the Secretary of State for the printing and sale of the Administrative Code. A.R.S. § 41-2501(L).

5.2.5.8 Professional Witnesses in Judicial Proceedings. The procurement of services of professional witnesses is exempt from the Procurement Code if the purpose of the procurement is to obtain professional services relating to an existing or probable judicial proceeding in which the State is or may become a party or to contract for special investigative services for law enforcement purposes. A.R.S. § 41-2501(M).

5.2.5.9 Adoption of Rules, Procedures or Policies by Head of a State Governmental Unit. The head of a state governmental unit may adopt rules, procedures, or policies in relation to any exempted contract. A.R.S. § 41-2501(N).

5.2.5.10 Settlement of Litigation. The Legislature has exempted from the Procurement Code agreements negotiated by legal counsel representing the State to settle litigation or threatened litigation. A.R.S. § 41-2501(O).

5.2.5.11 Department of Economic Security Provider Contracts. The Procurement Code is not applicable to the Department of Economic Security's procurement of state-licensed or state-certified providers of child day care services or family foster care services. A.R.S. § 41-2501(P). The Procurement Code also does not apply to Department of Economic Security contracts with area agencies on aging created pursuant to the Older American Acts of 1965, Pub. L. 89-73, 79 Stat. 218 (codified in scattered sections of 42 U.S.C.), or to contracts for Arizona Long-Term Care System services. *Id.*

5.2.5.12 Department of Health Services Mental Health, Drug and Alcohol, and Domestic Violence Services Subcontracts. The Department of Health Services may *not* require that persons with whom it contracts follow the Procurement Code when subcontracting for the provision of mental health services pursuant to A.R.S. § 36-189(B), services for the seriously mentally ill pursuant to A.R.S. §§ 36-550 to -550.08, drug and alcohol services pursuant to A.R.S. § 36-141, and domestic violence services pursuant to A.R.S. §§ 36-3001 to -3009. A.R.S. § 41-2501(Q).

5.2.5.13 Physician Services at the Arizona State Hospital. The procurement of contracts for physicians' services at the Arizona State Hospital is exempt from the Procurement Code. A.R.S. § 41-2501(R).

5.2.5.14 Public Safety Personnel Retirement System. Contracts for goods and services approved by the board of trustees of the public safety personnel retirement system are exempt from the Procurement Code. A.R.S. § 38-848(M); A.R.S. § 41-2501(S).

5.2.5.15 Department of Agriculture Cotton and Cotton Stubble Plow-Up Contracts. The Department of Agriculture is exempt from the requirements of the Procurement Code with respect to contracts for private labor and equipment to plow up cotton and cotton stubble, pursuant to rules adopted as authorized in A.R.S. §§ 3-201 to -218. A.R.S. § 41-2501(T).

5.2.5.16 State Parks Board Purchases of Certain Supplies and Items for Resale at Tonto Natural Bridge State Park. The State Parks Board is exempt from the requirements of the Procurement Code with respect to purchases of guest supplies and various items for resale at facilities located in the Tonto Natural Bridge State Park. A.R.S. § 41-2501(U).

5.2.5.17 Arizona State Parks Board. The State Parks Board is exempt from the Procurement Code for the purchase, production, promotion, distribution, and sale of

publications, souvenirs, and sundry items obtained and produced for resale. A.R.S. § 41-2501(V).

5.2.5.18 State School for the Deaf and Blind. The State Schools for the Deaf and Blind are exempt from the provisions of the Procurement Code if products are purchased through a cooperative which operates in accordance with state law, and the products meet certain legal requirements. A.R.S. § 41-2501(W).

5.2.5.19 Morale, Welfare and Recreational Fund. The expenditures of monies in the morale, welfare, and recreational fund established by A.R.S. § 26-153 are exempt from the Procurement Code provisions. A.R.S. § 41-2501(X).

5.2.5.20 State Department of Corrections; Contracts With Local Medical Providers. Notwithstanding A.R.S. § 41-2534, the director of the Department of Corrections may contract with local medical providers in counties with a population of less than four hundred thousand persons to acquire hospital and medical services for inmates incarcerated in those counties and to ensure medical services for inmates in all counties by contracting with the closest medical facility that offers emergency treatment and stabilization. A.R.S. § 41-2501(Y).

5.2.5.21 Department of Environmental Quality. The Department of Environmental Quality is exempt from the Procurement Code for contracting for procurements relating to the water quality assurance revolving fund program. The Department may contract for remedial actions with a single selection process. The exclusive remedy for disputes or claims relating to contracting pursuant to this subsection shall be as prescribed by A.R.S. § 41-2611 *et seq.* A.R.S. § 41-2501(Z).

5.2.5.22 Motor Vehicle Division; Third Party Authorizations. The Motor Vehicle Division of the Department of Transportation is exempt from the Procurement Code for third party authorizations if certain statutory conditions exist. Public monies cannot be paid to a third party and exclusivity cannot be granted to a third party. The director of the Department of Transportation shall comply with the requirements in Title 28, Ch. 13, when selecting a third party. A.R.S. § 41-2501(AA). Third party authorizations pursuant to title 28, Chapter 13 are not exempted from any other applicable law. A.R.S. § 41-2501(BB).

5.2.5.23 State Forester. The state forester is exempt from the Procurement Code for purchases and contracts relating to wild land fire suppression and propositioning equipment resources and other activities related combating wild land fires and other unplanned risk activities. A.R.S. § 41-2501(CC).

5.2.5.24 Cotton Research and Protection Council. The cotton research and protection council is exempt from the Procurement Code for procurements relating to its aflatoxin control program and for contracts for research programs related to cotton production of protection. A.R.S. § 41-2501(DD).

5.2.5.25 Agricultural Protection Fund. Expenditures of monies in the agricultural protection fund established by A.R.S. § 3-3304 are exempt from the Procurement Code. A.R.S. § 41-2501(EE).

5.3 Procurement Code Procedures. This section reviews several procedures and requirements applicable to Arizona state contracts, procurements not exceeding \$50,000, sole source procurements, emergency procurements, competition impracticable procurements, unsolicited proposals, demonstration projects, competitive sealed bids, competitive sealed proposals, and procurement of certain professional services, information and telecommunications systems, and specified construction materials. Unless otherwise authorized by law, all state contracts shall be awarded by competitive sealed bidding as provided in A.R.S. § 41-2533, except as provided by other statutes set forth in A.R.S. § 41-2532.

5.3.1 Source Selection Method; Materials and Services under Existing Arizona State Contracts. State governmental units must use existing state contracts to purchase the materials and services that are covered by such contracts. A.A.C. R2-7-A301(A). If a particular Arizona state contract does not satisfy a governmental unit's needs, the governmental unit may not otherwise procure the required material or service without first obtaining written approval from the State Procurement Administrator. A.A.C. R2-7-A301(B). A governmental unit should consult the State Procurement Office if questions arise. The agency chief procurement officer shall determine the applicable source selection method. *Id.* § (C). A contract shall not be awarded and an obligation shall not be incurred on behalf of the state if sufficient funds are not available. *Id.* § (D).

5.3.2 Procurements Not Exceeding \$50,000 in the Aggregate; Small Business Set Aside. The Director of DOA has authority to promulgate rules governing a procurement that does not exceed an aggregate dollar amount of \$50,000. A.R.S. § 41-2535(A). Those rules require the agency chief procurement officer to issue a request for quotation, following the procedures set forth in A.A.C. R2-7-D302 through –D304, in order to satisfy the statutory requirement that purchases not exceeding \$50,000 be made with “such competition as is practicable under the circumstances.” *Id.*

The Administrative Code provides specific procedures for handling purchases estimated to cost between \$5,000 and \$50,000. See A.A.C. R2-7-D302 through –D304. These procedures do not need to be followed if the purchase can be made from an existing state or agency contract or from a set-aside organization as defined in A.A.C. Chapter 2, Title 7, Article 10 (intergovernmental procurement), if the purchase is not expected to exceed \$5,000 or is made as a sole-source procurement under A.R.S. § 41-2536, or if the agency chief procurement officer makes a written determination that competition is not practicable under the circumstances. See A.A.C. R2-7-D301.

The purchaser should make a good faith estimate of a procurement's aggregate cost in order to determine whether the procurement is governed by the DOA rules on purchases not exceeding \$50,000. Procurements shall not be artificially divided or

fragmented to circumvent the procedures required for purchases exceeding \$50,000. See A.R.S. § 41-2535(C). A procurement that does not exceed an aggregate amount of less than \$50,000 shall be restricted, where practicable, to small businesses as defined in the rules promulgated by the Director of DOA. See A.R.S. § 41-2535(B); A.A.C. R2-7-D302(B), –D303, and –D304(B). The request for quotation must include those items identified in A.A.C. R2-7-D302, and must be issued by posting on the state procurement office’s centralized electronic system or distributed to at least three small businesses in accordance with A.A.C. R2-7-D303.

5.3.2.1 Simplified Construction Procurement Program. Section 41-2535(D), A.R.S., provides that “[a] procurement involving construction not exceeding [\$100,000] may be made pursuant to the rules adopted by the [D]irector.” The minimum rule requirements are in the statute.

5.3.2.2 Purchases of \$5,000 and Less. For purchases of \$5,000 or less, the agency chief procurement officer may, but is not required to, use a request for quotation. The agency chief procurement officer shall use reasonable judgment in awarding contracts for \$5,000 or less and in determining that such contracts are advantageous to the state. A.A.C. R2-7-D305.

5.3.3 Sole Source Procurement. A contract for a material, service, or construction item may be awarded without competition if the Director of DOA determines in writing that there is only one source for the required material, service or construction item; however, sole source procurements shall be avoided except when no reasonable alternative sources for the material, service, or construction item exist. A.R.S. § 41-2536. The Director of DOA may require the submission of cost or pricing data in connection with a sole source procurement award. *Id.*

The agency chief procurement officer must provide written evidence to support a sole source determination, including documentation that the price is fair and reasonable per A.A.C. R2-7-702 and a description of the efforts made to find other sources. A.A.C. R2-7-E301. A written determination of the basis for the sole source procurement must be included in the contract file. A.R.S. § 41-2536.

5.3.4 Emergency Procurement. The Director of DOA may make, or authorize others to make, emergency procurements “if there exists a threat to public health, welfare, or safety or if a situation exists which makes compliance with section 41-2533, 41-2534, 41-2578, 41-2579, or 41-2581 impracticable, unnecessary or contrary to the public interest as defined in rules adopted by the director, except that such emergency procurements shall be made with such competition as is practicable under the circumstances.” A.R.S. § 41-2537. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. *Id.*

An “emergency” means “any condition creating an immediate and serious need for materials, services, or construction in which the state’s best interests are not met through

the use of other source-selection methods. The condition must seriously threaten the functioning of state government, the preservation or protection of property, or the health or safety of a person.” A.A.C. R2-7-E302(A).

The rules set forth in A.A.C. R2-7-E302 apply only to emergency procurements for purchases above the \$50,000 threshold. A.A.C. R2-7-E302(B). For such emergency purchases, the agency chief procurement officer must obtain the approval of the Director of DOA before engaging in an emergency procurement unless the emergency requires an immediate response. A.A.C. R2-7-E302(E). The agency must limit the procurement to such actions necessary to address the emergency, and must employ maximum competition, given the circumstances. A.A.C. R2-7-E302(F) and –E302(G).

5.3.5 Competition Impracticable Procurements. “Competition impracticable” means a procurement requirement exists which is not an emergency under A.A.C. R2-7-E302, but it is one where compliance with A.R.S. §§ 41-2533, 41-2534, 41-2538 or 41-2578 would be impracticable, unnecessary, or contrary to the public interest. See A.A.C. R2-7-E303(A). The agency chief procurement officer must obtain the approval of the State Procurement Administrator before proceeding, and must provide, among other things listed in the rule, an explanation of the competition impracticable need and the unusual or unique situation that makes compliance with A.R.S. §§ 41-2533, 41-2534, 41-2538, or 41-2578 impracticable, unnecessary, or contrary to the public interest. A.A.C. R2-7-E303(C)(1).

5.3.6 Unsolicited Proposals. A contract may be awarded based on an unsolicited proposal (*i.e.*, a proposal submitted at the proposer’s initiative and not in response to a solicitation) only if the Director of DOA determines in writing that the conditions for a sole source or an emergency procurement exist and that the unsolicited proposal satisfies the statutory requirements. A.R.S. § 41-2557; A.A.C. R2-7-G303. An agency chief procurement officer must obtain written approval from the State Procurement Administrator prior to proceeding with an unsolicited proposal. A.A.C. R2-7-G303(E)(1).

5.3.7 Demonstration Projects. If the Director of DOA determines in writing that a project is innovative and unique, a demonstration project may be undertaken. A.R.S. § 41-2556(A). A demonstration project may not continue longer than two years. *Id.*; A.A.C. R2-7-G302(F). The state is not required to pay for a demonstration project and may only do so upon written determination from the Director of DOA that doing so is in the best interests of the state. *Id.*; A.A.C. R2-7-G302(C). An agency chief procurement officer must obtain written approval from the state procurement administrator prior to proceeding with a demonstration project. A.A.C. R2-7-G302(B).

5.3.8 General Procurement of Materials and Services. The principal method provided in the Procurement Code for the general procurement of material and services is competitive sealed bidding. A.R.S. §§ 41-2532, -2533. See Sections 5.3.8.1 through 5.3.8.1.3. See A.A.C. R2-7-A301 for a discussion of the determination factors of a source selection method for a procurement. The Director of DOA may specify in writing that "competitive sealed bidding is either not practicable or not advantageous to this state," in

which case competitive sealed proposals may be solicited. A.R.S. § 41-2534(A); see Section 5.3.8.2. Generally, competitive sealed proposals are used to obtain commodities and outside professional services not governed by A.R.S. § 41-2538. See Section 5.3.9 for a discussion of A.R.S. § 41-2538. The competitive sealed proposal method cannot be used for procurement of construction or construction services, which are governed by A.R.S. §§ 41-2537, -2578 or -2579 and are discussed in Section 5.3.10. A.R.S. § 41-2534(A).

5.3.8.1 Competitive Sealed Bidding. Section 41-2533, A.R.S., and A.A.C. R2-7-B301 through –B316 describe the procedures to be followed in competitive sealed bidding. Either the State Procurement Administrator or an agency chief procurement officer, if authorized, issues an Invitation for Bids (IFB) describing what is to be purchased, all contractual terms to be entered into by the successful bidder, and the conditions of the procurement. A.R.S. § 41-2533(B). The public must receive notice of the IFB at least fourteen days before the bid is opened, A.A.C. R2-7-B301(A), and such notice may include publication one or more times in a newspaper of general circulation. A.R.S. § 41-2533(C). If the IFB is for procurement of services other than those described in A.R.S. §§ 41-2513 and 41-2578, the notice must be published in one or more newspapers within the state. *Id.* The notice may also be posted at a designated site on a worldwide public network of interconnected computers (*i.e.*, the world-wide-web). The purchasing authority is also required to mail or otherwise furnish written notice of the IFB to all “prospective suppliers that have registered with the state procurement office for the specific material, service, or construction solicited.” A.A.C. R2-7-B301(B)(2). The bids must be opened in public at the time and place designated in the IFB, and the name of the bidders and amounts of the bids shall be recorded. A.R.S. § 41-2533(D); A.A.C. R2-7-B306. That record must be open to public inspection, but no bid may be inspected by the public or by other bidders until an award has been made. *Id.*

5.3.8.1.1 Contents of the Invitation for Bids (IFB). An IFB must contain the information listed in A.A.C. R2-7-B301(C), which includes instructions, evaluation criteria, specifications and applicable contract terms and conditions. A.R.S. § 41-2533(B); A.A.C. R2-7-B301(C).

An IFB must include specifications, *i.e.*, descriptions of the “physical or functional characteristics, or of the nature of a material, service or construction item.” A “[s]pecification may include a description of any requirement for inspecting, testing or preparing a material, service or construction item for delivery.” A.R.S. § 41-2561. Bid specifications are required to “promote overall economy for the purposes intended and encourage competition in satisfying this state's needs and shall not be unduly restrictive.” A.R.S. §§ 41-2565, -2566. Because of this philosophy, proprietary specifications -- those specifications that identify a product by brand name or that are so restrictive as to exclude all but a brand name product -- are prohibited. See A.A.C. R2-7-401 to -403. As specifically stated in A.A.C. R2-7-B301(C)(2)(b):

If a brand name or equal specification is used, instructions that use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition. The solicitation shall state that products substantially equivalent to the brands designated qualify for consideration.

Neither familiarity with a particular product, a brand name product's past success, or the inconvenience of drawing specifications justifies the use of proprietary specifications. Ariz. Att'y Gen. Op. 75-11.

5.3.8.1.2 Bid Evaluation and Award. Under the competitive sealed bidding procedures, a state governmental unit must award a contract to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and evaluation criteria set forth in the IFB. A.R.S. § 41-2533(G). A bidder who takes exception to a mandatory specification in an IFB is not a responsive bidder and the procuring governmental unit must reject that bidder's nonresponsive bid. A.A.C. R2-7-B312(B). The chief procurement officer shall evaluate bids "to determine which offer provides the lowest cost to the state in accordance with any objectively measurable factors set forth in the solicitation." A.A.C. R2-7-B312(A). Only those evaluation criteria that are set forth in the IFB shall be applied in evaluating bids. A.R.S. § 41-2533(E). A record showing the basis for determining the successful bidder shall be retained in the procurement file. A.A.C. R2-7-B314(B).

5.3.8.1.3 Multistep Sealed Bidding. Multistep sealed bidding may be used when specifications are inadequate to ensure full competition and technical evaluations are necessary to ensure mutual understanding of the state's procurement needs. A.R.S. § 41-2533(H); A.A.C. R2-7-B316(B). Multistep sealed bidding may not be used for construction contracts. A.R.S. § 41-2533(H). An agency chief procurement officer may use multistep sealed bidding only after written approval from the State Procurement Administrator. *Id.* Multistep sealed bidding requires two phases: first, an agency chief procurement officer issues an invitation to submit unpriced technical offers in accordance with the procedures set forth in A.A.C. R2-7-B316(C). *Id.* Second, the agency chief procurement officer issues an IFB, in accordance with the procedures set forth in A.A.C. R2-7-B301 to –B315, to those offerors whose offers were selected in phase one. *Id.*

5.3.8.2 Competitive Sealed Proposals. Competitive sealed proposals may be solicited if the Director of DOA determines in writing that "competitive sealed bidding is either not practicable or not advantageous to this state." A.R.S. § 41-2534(A); A.A.C. R2-7-C301(A). Competitive sealed proposals may not be used for construction, construction services, or specified professional services. A.R.S. § 41-2534(A). At least fourteen days before a Request for Proposals (RFP) is issued, adequate public notice must be given in the same manner as that provided for competitive sealed bidding, as described in Section 5.3.8.1. A.R.S. § 41-2534(C); A.A.C. R2-7-C301(C). An RFP must include the items listed in A.A.C. R2-7-C301(E), and must state the relative importance of price and

other evaluation factors. A.R.S. § 41-2534(E); A.A.C. R2-7-C301(E). Proposals must be opened in public; however, their contents, including price, must remain confidential until an award is made. A.R.S. § 41-2534(D); A.A.C. R2-7-C306.

Discussions may be held with those offerors deemed reasonably susceptible to being selected for award, but all offerors must be accorded fair treatment with respect to an opportunity for discussions. A.R.S. § 41-2534(F); A.A.C. R2-7-C314. Such discussions may be held “for the purpose of clarification to ensure full understanding of the solicitation requirements and to permit revision of offers.” A.R.S. § 41-2534(F). During such discussions, there shall be no disclosure of information from competing offerors. *Id.*; A.A.C. R2-7-C314(A). After discussions are held, all offerors shall be invited to submit final revised proposals. *Id.*; A.A.C. R2-7-C315.

The award shall be made to the responsive and responsible offeror whose proposal is determined to be the "most advantageous to this state" based upon the RFP evaluation factors. A.R.S. § 41-2534(G); A.A.C. R2-7-C317. Proposals shall be evaluated based solely on the evaluation criteria contained in the RFP, and the agency chief procurement officer cannot modify those evaluation criteria or their relative order of importance. A.A.C. R2-7-C316(A).

5.3.9 Procurement of Professional Services of Clergy, Physicians, Dentists, Legal Counsel, and Certified Public Accountants. A state governmental unit in need of the services of clergy, certified public accountants, attorneys, physicians or dentists must procure such services in accordance with A.R.S. § 41-2538. *See also* A.A.C. R2-7-F302. That section requires that the procurement of such services follow statutory standards unless the services do not exceed \$50,000. (A.R.S. § 41-2535; *see* Section 5.3.2); are sole source procurements (A.R.S. § 41-2536; *see* Section 5.3.3); or are emergency procurements (A.R.S. § 41-2537; *see* Section 5.3.4). The procuring state governmental unit must give notice of its need for such services through an RFP that describes the needed services and lists the type of information and data required of each offeror. A.R.S. § 41-2538(C); A.A.C. R2-7-F302(B). The RFP also must contain the evaluation criteria that the procuring unit will apply when it makes an award. A.R.S. § 41-2538(E). The procuring unit may conduct discussions with offerors to determine their qualifications for further consideration, but cannot disclose information derived from competing proposals. *Id.* § (D); A.A.C. R2-7-F308. The award must be made to the offeror determined in writing to be the best qualified based on the evaluation factors contained in the RFP. *Id.* § (E); A.A.C. R2-7-F309. There must also be a written determination that the compensation is fair and reasonable. *Id.* An award may be made without requiring priced proposals; however, if price is included in the proposals submitted, an award may not be made solely on the basis of price. *Id.*; *see* A.A.C. R2-7-F309(A).

5.3.10 Procurement of Professional Services of or for Architects, Construction-Managers-at Risk, Design-Build Construction, Job-Order-Contracting Construction, Engineers, Assayers, Geologists, Landscape Architects, and Land Surveyors. Except as provided in A.R.S. § 41-2535 for procurements not to exceed \$50,000, A.R.S.

§ 41-2536 for sole source procurements, and A.R.S. § 41-2537 for emergency procurements, procurements for the professional services listed in this paragraph must be conducted pursuant to A.R.S. §§ 41-2578 and 41-2579 and A.A.C. R2-7-501 to -511. A purchasing agency may procure these services using any of the following project delivery methods: design-bid-build; construction-manager-at-risk; design-build; or job-order-contracting. A.R.S. § 41-2579. For all four project delivery methods, the design services must be procured under A.R.S. § 41-2578. Construction services for the design-bid-build project delivery method may be procured under A.R.S. § 41-2533. Construction services for construction manager at risk, design-build, or job-order contracting project delivery methods must be procured using A.R.S. § 41-2578.

5.3.10.1 Request for Qualifications. A.R.S. § 41-2578 details the specific requirements for a Request for Qualifications (RFQ) for such services, and the procurement officer should carefully examine the statutory requirements. Adequate public notice of the solicitation must be provided in the same manner as that set forth in A.R.S. § 41-2533. A.R.S. § 41-2578(C)(2); see also Section 5.3.8.1. For procurements exceeding \$50,000, such notice must include at least one advertisement in a newspaper of general circulation or an industry trade publication, with such notice published at least fifteen days before the RFQ offer due date. A.A.C. R2-7-504. Awards of contracts for such services shall be based on demonstrated competence and qualifications for the type of services required and at fair and reasonable prices. A.R.S. § 41-2578(B).

5.3.10.2 Evaluation and Negotiation. For an RFQ for the professional services listed in this section, a selection committee, established in accordance with A.A.C. R2-7-505, must evaluate the qualifications of the offerors and conduct interviews, if possible, in accordance with A.R.S. § 41-2578(C). The selection committee must evaluate the offerors using the criteria in the RFQ, looking only at qualifications, competency, and experience. A.R.S. § 41-2578(C). The selection committee must then create a list of at least three offerors, ranking them based on qualifications. *Id.* Neither the selection committee nor the purchasing agency shall request or consider fees, price, man-hours or any other cost information at any point in the selection or evaluation process, including in the selection or ranking of offerors. *Id.*

After the selection or evaluation process prescribed in A.R.S. § 41-2578(C), the procurement officer shall enter into negotiations for a fair and reasonable contract price with the highest ranked offeror. A.R.S. § 41-2578(E). Such negotiations must include “consideration of compensation and other contract terms that the procurement officer determines to be fair and reasonable” *Id.* If the procurement officer is unable to negotiate a satisfactory contract with the most qualified person or firm, the procurement officer may negotiate with the next most qualified person or firm in sequence until an agreement is reached or all proposals are rejected. *Id.*

5.3.10.3 Alternative to A.R.S. § 41-2578(E). As an alternative to A.R.S. § 41-2578(E), the procurement officer may award design-build construction services or job-order-contracting construction services as prescribed in A.R.S. § 41-2578(F). After the

selection committee creates a final list and ranks the offerors, in accordance with A.R.S. § 41-2578(C), the procurement officer then issues an RFP to those offerors and follows the requirements set forth in A.R.S. § 41-2578(F), including the requirement that the offerors submit separate technical and price proposals. A.R.S. § 41-2578(F)(e). The selection committee must evaluate the technical proposals before opening any of the price proposals. A.R.S. § 41-2578(F)(f).

5.3.11 Procurement of Information Systems and Telecommunications Systems.

A contract for information systems or telecommunications systems may be procured either by IFB or by RFP. A.R.S. § 41-2553. The IFB or RFP evaluation criteria must include “total life cycle cost and application benefits” to the using agency. *Id.* See A.R.S. § 41-2553(D) for definitions.

5.3.12 Procurement of Earth-Moving, Material Handling, Road Maintenance and Construction Equipment.

A contract for earth moving, material handling, road maintenance or construction equipment may be procured either by IFB or by RFP. A.R.S. § 41-2554. The IFB or RFP evaluation criteria must include “total life cycle cost including residual value.” *Id.* See A.R.S. § 41-2544(D) for definitions.

5.3.13 Public - Private Partnership Contracts. The Director of DOA may enter into public - private partnership contracts to finance the technology needs of a purchasing agency. A.R.S. § 41-2559. “[A] public-private partnership contract is a government contract and not a partnership.” A.A.C. R2-7-G305(A). The procedures for the solicitations and the terms of the contracts are in A.R.S. § 41-2559 and A.A.C. R2-7-G305. The requesting agency chief procurement officer must obtain written approval from the State Procurement Administrator before entering into a public-private partnership contract. A.A.C. R2-7-G305(B) and –G305(C). Such contracts must be procured in accordance with the procedures set forth in A.R.S. §§ 41-2533 (competitive sealed bidding), 41-2534 (competitive sealed proposals), 41-2535 (procurements not exceeding \$50,000), 41-2536 (sole source procurements) or 41-2537 (emergency procurements). *Id.* at § (D).

5.4 General Procurement Requirements.

5.4.1 Responsible Bidder. Irrespective of the applicable procurement procedure, a contract may be awarded only to a responsible bidder or offeror. See A.R.S. §§ 41-2533(G), -2534(G); A.A.C. R2-7-B313, -C314. A responsible bidder is one who has the capability to perform the contract requirements and the integrity and reliability to assure good faith performance. *Brown v. City of Phoenix*, 77 Ariz. 368, 373, 272 P.2d 358, 361 (1954); *Osborn v. Mitten*, 39 Ariz. 372, 376, 6 P.2d 902, 904 (1932). Considerations for determining whether an offeror is responsible include: the offeror's financial, business, personnel, and other resources, including its proposed subcontractors; record of performance and integrity; legal qualification to contract with the State; whether the offeror has been debarred or suspended; whether all necessary information concerning responsibility has been supplied; and whether the offeror meets all responsibility criteria

specified in the solicitation. A.A.C. R2-7-B313(B), -C312(B). An unreasonable failure to supply information is grounds for determining that the offeror is not responsible. A.R.S. § 41-2540(A). Information on responsibility supplied by an offeror is confidential and may not be disclosed to any other person or entity, except for law enforcement agencies, without prior written consent of the bidder or offeror. A.R.S. § 41-2540(B); A.A.C. R2-7-B313(D), -C314(D).

Responsibility determinations shall be made by the agency chief procurement officer. A.A.C. R2-7-B313(A), -C312(A). Before a bidder or offeror is disqualified from receiving an award on the ground that he or she is not responsible, the decision-making authority should contact the Attorney General's Office for legal guidance.

5.4.2 Prequalification of Contractors. Prospective contractors may be prequalified for various types of contracts. A.R.S. § 41-2541. Prequalified contractors have a continuing duty to inform the State of material changes that might affect prequalification. *Id.* Prequalified contractors shall be included on solicitation mailing lists of potential contractors. *Id.*

5.4.3 Requests for Information. An agency chief procurement officer may issue a Request for Information (RFI) seeking information on available materials and services. A.R.S. § 41-2555; A.A.C. R2-7-G301. A response to an RFI is not an offer and cannot be used to form a binding contract. A.A.C. R2-7-G301.

5.4.4 Conformity of Invitation for Bids (IFB) or Request for Proposals (RFP) to Specifications. Bids and proposals must conform in all material respects to the IFB or RFP, and the specifications included therein, in order to be considered for award of a contract. A.R.S. §§ 41-2533(G), -2534(G), -2538(E), -2553(A), -2553(B); A.A.C. R2-7-B312, -C316. Minor or insignificant variations from specifications do not prohibit the awarding of a contract, but a variation from a specification designated as mandatory ("shall") may not be considered as insignificant or minor and may require invalidation of the bid or proposal. Ariz. Att'y Gen. Op. I78-94.

5.4.5 Bid and Contract Security. Depending upon the nature of the performance, the need for future protection to the State, and specific statutory requirements, various forms of bid and contract security may be required. See, e.g., A.R.S. §§ 41-2542, 41-2573, 41-2574; A.A.C. R2-7-506, -508, -509, and -510. The requirement for security must be included in the invitation for bids or request for proposals. A.R.S. § 41-2542; A.A.C. R2-7-506. Noncompliance with the bid security provisions in an IFB or an RFP is grounds for rejection of the bid or proposal. A.R.S. § 41-2573(D).

5.4.5.1 Construction and Construction Services Contracts. Bidding, awarding, and performance of construction and construction services contracts are governed by the following statutory and rule security requirements.

A bid for construction or construction services exceeding the amount set forth in A.R.S. § 41-2535 must be accompanied by bid security. A.R.S. § 41-2573(A); *but see* A.A.C. R2-7-506 (requiring bid security provisions in all state construction solicitations). Upon award, a contract performance bond and a payment bond must be provided as specified in A.R.S. § 41-2574. At the option of the contractor, the contractor may provide substitute security in a form authorized by the Director of DOA. *Id.* See also A.A.C. R2-7-506(C), -508(A), -509 and -510; *but see* A.R.S. § 41-2576(D) (substitute security acceptable only if contractor waives right to offset). With certain exceptions, "[t]en percent of all construction contract payments shall be retained by this state [to ensure] proper performance." A.R.S. § 41-2576(A). When a construction contract is fifty percent completed, and if the contractor is progressing satisfactorily, one half of the amount retained shall be paid to the contractor and only five percent of subsequent progress payments shall be retained. *Id.* § (B). Progress payments under a construction contract can be made only on the basis of a "duly certified and approved estimate of the work performed during a preceding period of time." A.R.S. § 41-2577(A).

5.4.6 Cost or Pricing Data. When it is in the best interest of the State and under other circumstances, contractors may be required to submit certified cost or pricing data so that it can be determined if the costs are fair and reasonable. A.R.S. § 41-2543; A.A.C. R2-7-701 to -705. For contracts or contract modifications that exceed \$100,000, the agency chief procurement officer shall determine in writing that the price is fair and reasonable only if the price is based on adequate competition, supported by established catalog or market prices, set by law or rule, or supported by relevant historical price data. A.A.C. R2-7-702(A). Failure of an offeror to submit cost or pricing data may be grounds for rejection of a bid or offer. A.A.C. R2-7-704.

For contracts that provide for the reimbursement of costs, the allowability of those costs shall be governed by the cost principles set forth in the Code of Federal Regulations, 48 C.F.R. 31 (September 2001). A.A.C. R2-7-701.

5.4.7 Written Contracts. A bid in response to an Invitation for Bids (IFB) or a proposal in response to a Request for Proposals (RFP) or a Request for Qualifications (RFQ) is an offer to contract upon the terms contained in the IFB, RFP, or RFQ and does not become a contract unless and until it is accepted by making an award. *Universal Constr. Co. v. Ariz. Consol. Masonry & Plastering Contractors Ass'n*, 93 Ariz. 4, 8, 377 P.2d 1017, 1019 (1963). "[A] public agency that accepts a bid on a public contract is not bound until a formal contract exists." See *Ry-Tan Constr., Inc. v. Washington Elementary Sch. Dist. No. 6*, 210 Ariz. 419, 421, ¶ 13, 111 P.3d 1019, 1021 (2005).

Payment for services shall be made only pursuant to a written contract. A.R.S. § 41-2513(E). Generally, any type of contract that promotes the state's interests may be used, except that cost-plus-percentage-of-cost contracts are prohibited. A.R.S. § 41-2544. "The agency chief procurement officer shall include in solicitations and contracts all contract clauses necessary to ensure the state's interests are addressed." A.A.C. R2-7-601. The State Procurement Administrator shall publish uniform terms and conditions for

use in solicitations and contracts. A.A.C. R2-7-606. The form of the contract that the successful contractor will be required to sign should be attached to the IFB or RFP, and offer terms and conditions must be included in the solicitation. A.A.C. R2-7-B301(C)(3) and –C301(E)(3).

A provision in a construction contract that makes the contract subject to the laws of another state or requires any litigation, arbitration, or other dispute resolution proceeding to be conducted in another state is void and unenforceable. A.R.S. § 41-2583.

5.4.8 Indemnity Agreements in Construction and Architect-Engineer Contracts Void. Agreements in construction and architect-engineer contracts or subcontracts that purport to indemnify, hold harmless, or defend the promisee from or against any liability for loss or damage resulting from the promisee’s own negligence are against public policy and are void. A.R.S. § 41-2586(A). Notwithstanding subsection A, a contractor may indemnify an entity for whose account the construction contract or subcontract is not being performed and who enters into an agreement with the contractor that permits the contractor to enter on or adjacent to its property to perform the construction contract or subcontract for others. A.R.S. § 41-2586(B).

5.4.9 Modification, Correction, and Withdrawal of Bids. A bidder or offeror may modify or withdraw its bid or proposal in writing any time before the time and date set for bid or proposal opening. A.R.S. §§ 41-2533(F), -2534(F); A.A.C. R2-7-B304, –C304, and -F306. If an offer, modification or withdrawal is received after the time and date set for bid opening, it is late and will be rejected unless it would have been timely received but for the action or inaction of state personnel. See A.A.C. R2-7-B307, –C307, –F306(C), and –F307. In multistep sealed bidding, an offeror may withdraw its offer any time during phase one of the multistep sealed bidding process. A.A.C. R2-7-B316(J); see Section 5.3.8.1.3.

If a mistake in an offer is discovered after bid opening and before award, the agency chief procurement officer may permit the offeror to correct the mistake or withdraw the offer if correction or withdrawal is consistent with fair competition and not prejudicial to the interests of this state. A.A.C. R2-7-B310, -C315(C), –C315(D), and -507. “After bid opening, no corrections in bid prices or other provisions of bids prejudicial to the interest of this state or fair competition shall be permitted.” A.R.S. § 41-2533(F). If a mistake is discovered after award, the agency chief procurement officer, considering the best interests of the state and of fair competition, may allow correction so long as the dollar amount remains less than the nearest bid or offer, may cancel all or part of the award, or may deny the request for correction or withdrawal. A.A.C. R2-7-B315, –C318, and –F310.

5.4.10 Solicitation Amendments. An agency chief procurement officer shall issue a solicitation amendment when necessary to make changes in the solicitation, correct defects or ambiguities, provide additional information or instruction, or extend the solicitation deadline. A.A.C. R2-7-B303, -B316(E), -C303, and -F303. The agency chief procurement officer must notify all persons or firms to whom the IFB, RFP or RFQ was distributed. *Id.*

5.4.11 Cancellation of Solicitation. Before or after bid opening, the agency chief procurement officer may cancel the procurement solicitation or reject any or all bids or proposals, in whole or in part, as specified in the solicitation, if doing so is in the best interests of this state. A.R.S. § 41-2539. Each solicitation shall state that it may be cancelled or bids or proposals rejected. A.A.C. R2-7-B301(C)(j) and –C301(E)(j). Notice of the cancellation must be sent to all persons who received or responded to the solicitation and the reasons for cancellation or rejection must be made a part of the contract file. A.R.S. § 41-2539; A.A.C. R2-7-B305, -B308, -C305, and –C308.

5.4.12 Multiterm Contracts. If the term of the contract and any conditions of renewal or extension are included in the solicitation and money is available for the initial fiscal year of the contract term, contracts for materials or services may be awarded for a period up to five years. A.R.S. § 41-2546(A). Contracts for job-order-contracting construction services may also be entered into for a period up to five years, if in the best interests of this state. *Id.* Contracts for materials or services may be for more than five years if the Director of DOA determines in writing that it would be advantageous to the state. *Id.*; A.A.C. R2-7-605. Payment and performance obligations of a contract beyond the fiscal year in which the contract first is executed are subject to the availability and appropriation of money. *Id.* A multiterm contract should contain a clause providing for its automatic termination without liability beyond that authorized by statute whenever the Legislature fails to authorize the expenditure of monies to continue the term of the contract beyond the current fiscal year. See A.R.S. § 41-2546(C); A.A.C. R2-7-605(C).

5.4.13 Right to Inspect Plant and Audit Records. The state retains the right, at any reasonable time, to inspect the plant or the place of business of any contractor or subcontractor related to a contract awarded by the state. A.R.S. § 41-2547. The state is entitled to audit the books and records of any contractor or subcontractor under any contract awarded by the state to the extent that the books and records relate to the performance of that contract. A.R.S. § 41-2548(B). The state may, at reasonable times and places, audit the books and records of any person who submits cost and pricing data, as provided in A.R.S. § 41-2543, to the extent that the books and records relate to the cost and pricing data. A.R.S. § 41-2548(A). All contracts shall provide that all records relating to the contract are subject to inspection and audit by the state for five years after completion of the contract and that such records must be produced at the state offices designated in the contract. A.R.S. §§ 35-214, 41-2548.

5.4.14 Conflict of Interest. It is a conflict of interest for a public officer or employee of a public agency who has a substantial interest in any contract, sale, purchase, service or decision of that public agency to participate in any manner in that contract, sale, purchase, service or decision. A.R.S. § 38-503; see *also* Ariz. Att’y Gen. Op. 103-005 (“The prohibition against participating in a decision or a contract, sale, or purchase . . . applies with equal force to participating in any way in the process leading up to a decision.”). Substantial interests means a pecuniary or proprietary interest, direct or indirect, other than

one of the ten remote interests defined in A.R.S. § 38-502(11). A.R.S. § 38-502(11).

No public officer or employee of a public agency shall supply any equipment, materials, supplies, or service to that public agency except pursuant to a contract awarded through public competitive bidding. A.R.S. § 38-503(C); *see also Maucher v. City of Eloy*, 145 Ariz. 335, 701 P.2d 593 (App. 1985). Except as noted in A.R.S. § 38-503(C)(2), the requirement for competitive bidding applies to all contracts regardless of amount, including contracts not exceeding the amount prescribed in A.R.S. § 41-2535 and contracts for purchases of \$5,000 or less. *See* Ariz. Att’y Gen. Op. 106-002 (purchases from employees must follow procurement code procedures regardless of the procurement’s total cost).

A person who violates these prohibitions may be guilty of a felony (intentional or knowing violation) or a misdemeanor (reckless or negligent violation) and shall forfeit public office or employment. A.R.S. § 38-510; *see* Sections 5.8.2 and 5.8.3. A public agency may void any contract entered into in violation of these prohibitions. A.R.S. § 38-506(A). The State may cancel any contract if any person significantly involved in the contract on behalf of the State is an employee or consultant of the contractor at any time while the contract or any extension of the contract is in effect. A.R.S. § 38-511.

5.4.15 Personal Use Prohibition. “State employees and public officers shall not purchase materials or services for their own personal or business use from contracts entered into by the state unless authorized in writing by the Director [of DOA].” A.A.C. R2-7-204.

5.4.16 Prohibition Against Discrimination. Contractors must agree to comply with Chapter 9, Title 41, Arizona Revised Statutes (Civil Rights) and Executive Order No. 99-4 (amending Executive Order No. 75-5; current version at Historical and Statutory Notes, A.R.S. § 41-1463).

5.4.17 On-line Bidding. If an agency chief procurement officer determines that on-line bidding is more advantageous than other procurement methods, then the procurement officer may use on-line bidding to obtain bids electronically. A.R.S. § 41-2672; A.A.C. R2-7-1301. Before an agency chief procurement officer can proceed with on-line bidding, he or she must submit a written request and receive written approval from the State Procurement Administrator. A.A.C. R2-7-1301.

5.5 Materials Management. DOA is charged with managing all state materials during their entire life cycle, including disposing of excess and surplus materials. A.R.S. § 41-2602; A.A.C. R2-15-301 to -310.

5.5.1 Disposition of Surplus Materials. No using agency, except the Department of Public Safety, the Arizona Exposition and State Fair Board, and the Arizona Correctional Industries may transfer, sell, trade-in, condemn, or otherwise dispose of materials owned by the State without written authorization of the Surplus Property Administrator at DOA. A.R.S. §§ 3-1007(A)(1), 41-1623(E), 41-1624(B), 41-1713(B)(6); A.A.C. R2-15-303(B).

Using agencies must notify the Surplus Property Administrator of all excess and surplus materials in the manner prescribed by the Surplus Property Administrator. A.A.C. R2-15-303(C). The Surplus Property Administrator shall then dispose of the excess and surplus materials through competitive bidding or one of the other methods identified in A.A.C. R2-15-303(E).

5.6 Legal and Contractual Remedies.

5.6.1 Exclusive Remedy. Any solicitation or contract claim or controversy made by any bidder, offeror, or contractor may be asserted against the State or an agency of the State only under the procedures set forth in Article 9 of the Arizona Procurement Code and the rules promulgated thereunder. A.R.S. § 41-2615; see A.A.C. R2-7-A901 to –A911, -B901 to -B905, -C901 to -C911, and -D901 to -D902. Under no circumstances may a state governmental unit settle a claim or make a payment to a bidder, offeror, or contractor making a claim or protest without complying with the applicable rules and procedures. The statutes authorizing actions against the State (A.R.S. §§ 12-820 to -826) and the Uniform Arbitration Act (A.R.S. §§ 12-1501 to -1518) do not apply to a claim against the State relating to a procurement governed by the Procurement Code. *Id.* A claim or controversy arising from a procurement not governed by the Procurement Code is addressed in Section 13.6.5.

5.6.2 Protested Solicitations and Awards.

5.6.2.1 Procurement Officer. The procedure for resolving protested solicitations and awards is authorized by A.R.S. §§ 41-2611 through 41-2617 and found in A.A.C. R2-7-A901 to –A911. A protest is commenced when an "interested party," *i.e.*, an offeror or prospective offeror whose economic interest is affected (*see* A.A.C. R2-7-101(31)), files a written protest with the agency chief procurement officer, with a copy to the State Procurement Administrator. A.A.C. R2-7-A901(B). The written protest must contain, among other things, a detailed statement of the legal and factual grounds of the protest and the form of relief requested. *Id.* In most cases, absent a written extension of time from the agency chief procurement officer, protests of the terms of a solicitation must be filed *before* the applicable bid opening or the closing date of the solicitation. A.A.C. R2-7-A901(C) and –A901(E); *see also Arizona's Towing Prof'ls, Inc. v. State*, 196 Ariz. 73, 76, ¶ 15, 993 P.2d 1037, 1040 (App. 1999) ("Requiring protests related to errors apparent on the face of the bid to be filed before the bid opening protects the integrity of the bid process."). In the remaining cases, absent an extension, protests must be filed within ten days after the agency chief procurement officer makes the procurement file available to the public. A.A.C. R2-7-A901(D) and –A901(E). The agency chief procurement officer may consider untimely protests only for good cause. A.A.C. R2-7-A901(F). "The agency chief procurement officer shall immediately give notice of a protest to all offerors." A.A.C. R2-7-A901(G). If a protest is filed before the solicitation due date, the contract award, or performance of the contract, the agency chief procurement officer or the State Procurement Administrator may stay all or part of a procurement if there is a reasonable possibility that the protest will be upheld or that a stay is in the best interests of the state, or

may permit the solicitation, award or contract performance to proceed. A.A.C. R2-7-A902.

“The agency chief procurement officer has the authority to resolve a protest.” A.A.C. R2-7-A903(A). Within fourteen days after a protest has been filed, unless extended for a period not to exceed thirty days, the procurement officer must issue a written decision explaining the reasons for the decision, and if the protest is sustained in whole or in part, select one of the remedies in A.A.C. R2-7-A904. A.A.C. R2-7-A903. The decision must be accompanied by a statement that the protesting party may appeal the decision to the Director of DOA within thirty days from the receipt of the decision. A.A.C. R2-7-A903(B). If the agency chief procurement officer fails to issue a decision within these time limits, the protestor may proceed as if the agency issued an adverse decision. A.A.C. R2-7-A903(E).

5.6.2.2 Appeals to the Director. An interested party who is dissatisfied with a decision of the agency chief procurement officer may file an appeal with the Director of DOA within thirty (30) days from the date the decision is received. A.A.C. R2-7-A905(A). The appeal must contain the information listed in A.A.C. R2-7-A905(B). The Director of DOA may consider untimely appeals for good cause. A.A.C. R2-7-A905(C). Within fourteen days after the appeal is filed, the agency chief procurement officer must file a complete report responding to the appeal. A.A.C. R2-7-A908(A). The response must include the information listed in A.A.C. R2-7-A908(A). The appellant may file comments to the procurement officer's report within ten days of receiving that report. A.A.C. R2-7-A908(C). If the Director does not dismiss the appeal pursuant to A.A.C. R2-7-A910, a hearing shall be conducted. A.A.C. R2-7-A911. See Section 5.6.5. If the Director of DOA sustains the appeal, in whole or in part, the Director shall implement the remedies in A.A.C. R2-7-A904. A.A.C. R2-7-A909.

5.6.3 Contract Claims and Controversies Between a Contractor and the State. All contract claims and controversies arising under a contract subject to the Procurement Code shall be resolved as provided in A.A.C. R2-7-B901 to -B905. A.R.S. §§ 41-2611, -2612, -2615. The first step in resolving a controversy is for a claimant to file a claim with the agency chief procurement officer within 180 days after the claim arises. A.A.C. R2-7-B901(A). The claim shall include, among other things, a detailed statement of the legal and factual grounds of the protest and the form and dollar amount of relief requested. *Id.* The agency chief procurement officer has the authority to settle the problem by mutual agreement, subject to prior written approval by the State Procurement Administrator for claims in excess of the amount prescribed in A.R.S. § 41-2535. *Id.* § (B). If the claimant and the agency chief procurement officer cannot settle the claim, the procedures discussed in Sections 5.6.3.1 and 5.6.3.2 must be followed.

5.6.3.1 Claims Initiated by the Contractor. Once the contractor determines that it cannot reach a settlement with the procurement officer, the contractor may request a written final decision of the agency chief procurement officer. A.A.C. R2-7-B902(A). The agency chief procurement officer must issue the decision within sixty days, and the decision must include the items listed in A.A.C. R2-7-B902(B). If the agency chief procurement officer fails to issue a decision within the time prescribed, the contractor may

proceed as if the agency chief procurement officer had issued a decision adverse to the contractor. A.A.C. R2-7-B903.

If the contractor disagrees with the decision of the agency chief procurement officer, the contractor has thirty days from receipt of the decision to file an appeal with the Director of DOA. A.A.C. R2-7-B904(A). The appeal shall contain "[t]he precise factual or legal error in the decision of the agency chief procurement officer." A.A.C. R2-7-B904(B)(3). The agency chief procurement officer then has fourteen days after the appeal is filed to file a complete report on the appeal with the Director of DOA and mail a copy of the report to the claimant. A.A.C. R2-7-B904(C). Hearings are conducted as contested cases pursuant to the Administrative Procedure Act. A.A.C. R2-7-B904(D). See Section 5.6.5.

5.6.3.2 Claims Initiated by the State. When an agency chief procurement officer determines that a claim asserted by the State will not be resolved by mutual agreement, the agency chief procurement officer must promptly refer the claim to the Director of DOA for a hearing. A.A.C. R2-7-B905. See Section 5.6.5.

5.6.4 Debarring or Suspending a Person from Participating in State Procurements. The Director of DOA has the sole authority to debar or suspend contractors. A.A.C. R2-7-C901. Section 41-2613, A.R.S., and A.A.C. R2-7-C901 to –C911 establish the authority and procedures for the Director of DOA to suspend or debar a contractor from participating in state procurements. The Director of DOA may suspend a contractor for up six months and may debar a contractor for up to three years. A.R.S. § 41-2613(A); A.A.C. R2-7-C903. The grounds for suspension or debarment include, but are not limited to, conviction of a criminal offense arising from obtaining or attempting to obtain a contract; embezzlement; theft; fraudulent schemes, artifices and practices; bid rigging; perjury; forgery; bribery; falsification or destruction of records; receiving stolen property; any offense indicating a lack of business integrity or honesty, violation of antitrust statutes, violations of contract provisions, or debarment by another governmental entity. A.R.S. § 41-2613(B).

Any suspension of more than 35 days requires written notice that includes the items listed in A.A.C. R2-7-C910. A.A.C. R2-7-C909. A contractor must file a request for hearing within 30 days of receipt of a notice of suspension. A.A.C. R2-7-C910(C). If debarment is proposed, the Director must provide written notice to the contractor within seven days. A.A.C. R2-7-C904(A). The person to be debarred has ten days from the receipt of the Director's notice of proposed debarment to file a request for hearing. A.A.C. R2-7-C904(B). During the period when debarment is pending, the Director shall not suspend the contractor absent compelling reasons necessary to protect state interests. A.A.C. R2-7-C908(C). The hearings required for debarment and suspension must be conducted as provided in Section 5.6.5. A.A.C. R2-7-C904(C).

The Director of DOA shall maintain a master list of persons debarred or suspended. A.A.C. R2-7-C911. Upon a written determination that participation of a debarred person is advantageous to the state, the Director of DOA may allow a debarred person to participate

in state contracts on a limited basis. A.A.C. R2-7-C907. The Director of DOA may also reinstate a debarred person or rescind the debarment upon written determination that the cause for the debarment no longer exists. A.A.C. R2-7-C906(A). The Director's reinstatement decision is not subject to administrative review. A.A.C. R2-7-C906(E).

5.6.5 Hearings Under the Procurement Rules. Hearings conducted pursuant to the Procurement Code are governed by the Arizona Administrative Procedure Act (A.R.S. § 41-1092 through § 41-1092.12) and A.A.C. R2-7-D901 and –D902. A.R.S. § 41-2611. The Director of DOA may direct the parties to engage in settlement negotiations or alternative dispute resolution procedures before scheduling a hearing. A.A.C. R2-7-D901. Generally, the Director of DOA refers the matters to the Office of Administrative Hearings where a hearing officer conducts prehearings, hearings, and related matters. At the conclusion of the hearing, the hearing officer prepares and submits proposed findings of fact and conclusions of law, and a recommended decision to the Director of DOA. A.A.C. R2-7-D901. The Director of DOA may accept, modify, or reject the recommendation in whole or in part. A.R.S. § 41-1092.08(B).

5.6.6 Rehearing. Any party aggrieved by the Director's decision, including an agency chief procurement officer, may file a written request for rehearing of a decision within thirty days after receipt of the decision. A.R.S. § 41-1092.09(A); A.A.C. R2-7-D902(A).

5.6.7 Judicial Review of Administrative Decisions. Within thirty-five days of the Director of DOA's final decision, any party to the proceeding before the Director may file a complaint in Maricopa County Superior Court seeking judicial review of the Director's decision. A.R.S. § 41-2614. Judicial review is governed by A.R.S. §§ 12-901 to -914. *Id.*

5.7 Intergovernmental Procurement.

5.7.1 Cooperative Purchasing. Any public procurement unit² may participate in, sponsor, conduct, or administer a cooperative purchasing agreement with one or more public procurement units to procure any materials, services, professional services, construction or construction services. A.R.S. § 41-2632(A). Such an agreement is exempt from A.R.S. § 11-952(D) concerning intergovernmental agreements. *Id.* Before participating in a cooperative purchasing agreement, agency chief procurement officers must submit a written request to the State Procurement Administrator. A.A.C. R2-7-1001(B). Agency chief procurement officers may use Arizona state contracts without a cooperative purchasing agreement. A.A.C. R2-7-1001(A).

² A “[p]ublic procurement unit” means either a local public procurement unit, the department [of Administration], any other state or an agency of the United States.” A.R.S. § 41-2631(4). A “local public procurement unit” means any political subdivision and any agency, board, department or other instrumentality of such political subdivision and any nonprofit corporation created solely for the purpose of administering a cooperative purchase . . .” A.R.S. § 41-2631 (2).

Parties under a cooperative purchasing agreement may cooperatively use materials or services; commonly use or share warehousing facilities, capital equipment, and other facilities; provide personnel; and make available to other public procurement units informational, technical or other services or software that may assist in improving the efficiency or economy of procurement. A.R.S. § 41-2632(A). A public procurement unit requesting personnel or services must pay the public procurement unit providing the personnel or services the costs of providing the personnel or services. *Id.* An agency chief procurement officer administering a cooperative purchasing agreement must ensure that the cooperative purchasing agreement includes the required provisions set forth in A.A.C. R2-7-1002(A).

5.7.1.1 Compliance with Procurement Code. "If the public procurement unit administering a cooperative purchase complies with [the Procurement Code], any public procurement unit participating in such a purchase is deemed to have complied with [the Procurement Code]." A.R.S. § 41-2634. "Public procurement units may not enter a cooperative purchasing agreement for the purpose of circumventing [the Procurement Code]." *Id.*

5.7.1.2 Controversies. Controversies arising under a cooperative purchasing agreement in which the State is a party must be resolved pursuant to A.R.S. § 41-2611 through § 41-2617. A.R.S. § 41-2635; see *also* Section 5.6.

5.7.2 Purchasing from the Arizona Industries for the Blind and from Arizona Correctional Industries. A committee appointed by the Director of DOA designates the materials and services provided by the Arizona Industries for the Blind, certified nonprofit agencies for disabled individuals (as defined in A.R.S. § 41-2636(G)(1) and A.A.C. R2-7-1004 and -1005), and the Arizona Correctional Industries that satisfy state governmental unit requirements and establishes the purchase price for such materials and services offered for sale. A.R.S. § 41-2636(A); A.A.C. R2-7-1003 through -1009. State governmental units must purchase these materials and services if they are readily available. A.R.S. § 41-2636(C); Ariz. Att'y Gen. Op. 179-35. Purchases of approved materials and services directly from the Arizona Industries for the Blind, certified nonprofit agencies for disabled individuals, and the Arizona Correctional Enterprises are exempt from competitive bidding. *Id.* § (D); A.A.C. R2-7-1008.

5.7.3 General Services Administration Contracts. The Director of DOA or the director's designee may evaluate general services administration (GSA) contracts and may authorize agencies to purchase materials and services from approved GSA contracts. A.R.S. § 41-2558; A.A.C. R2-7-G304. If the agency chief procurement officer makes a written determination that use of the GSA contract is in the best interests of the state, such a contract may be used so long as it satisfies the criteria set forth in A.A.C. R2-7-G304(A). *Id.*

5.8 Violation of the Procurement Code.

5.8.1 Enforcement of the Procurement Code. The Attorney General enforces the Procurement Code on behalf of the State. A.R.S. § 41-2616(D).

5.8.2 Civil Penalty. "A person who contracts for or purchases any material, services, construction or construction services in a manner contrary to the requirements of [the Procurement Code], [and] the rules adopted pursuant to [the Procurement Code] . . . is personally liable for the recovery of all public monies paid plus twenty percent of such amount and legal interest from the date of payment and all costs and damages arising out of the violation." A.R.S. § 41-2616(A).

A person serving on an evaluation committee who fails to disclose unauthorized contact with a competing vendor or who fails to provide accurate information on the required disclosure statement is subject to a civil penalty of at least one thousand dollars but not more than ten thousand dollars. A.R.S. § 41-2616(C).

5.8.3 Criminal Penalty. "A person who intentionally or knowingly contracts for or purchases any material, services, construction or construction services pursuant to a scheme or artifice to avoid the requirements of [the Procurement Code or the] rules adopted pursuant to [the Procurement Code] . . . is guilty of a class 4 felony." A.R.S. § 41-2616(B).

5.8.4 Reporting of Anticompetitive Practices. "If for any reason collusion or other anticompetitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the director [of DOA] and the attorney general." A.R.S. § 41-2549.

5.9 Procurement and the Antitrust Laws.

5.9.1 The Procurement Officer's Function. The procurement officer is in the best position to detect and prevent anticompetitive activity, and should therefore be familiar with the antitrust laws and be able to recognize anticompetitive practices. The procurement officer has three responsibilities under antitrust law: first, to prevent claims that he or she or the agency he or she represents has engaged in unlawful anticompetitive conduct; second, to detect anticompetitive conduct by vendors; and third, to ensure that all procurement procedures protect and enhance competition.

The following sections discuss state and federal antitrust laws with an emphasis on their application to the operations of state government. The sections will identify some of the conduct prohibited under antitrust laws, discuss remedies available to those injured by restraints of trade, and generally assist government employees in understanding antitrust laws and recognizing unlawful or anticompetitive practices.

5.9.2 Objectives of the Antitrust Laws. The objectives of the antitrust laws are to maintain competition, to protect consumer choice, and to reduce the concentration of inordinate wealth and economic resources in too few firms. Competition exists when a large number of firms are striving to attract customers.

In a competitive market, the consumer, including the government purchaser, attains the highest quality goods at the lowest possible prices. Where vendors must compete, they cannot elevate prices and reduce quality without suffering a loss of customers. Only if there are readily available alternative sellers can customers switch suppliers. This ability to switch drives the market and keeps downward pressure on price and upward pressure on quality. Competition also promotes free access to the marketplace, induces new firms to enter, promotes better market performance, encourages new technology and high productivity, and conserves resources.

Because public procurement is a large component of all purchasing in any economy, diligent procurement officers promote competition and provide an important public service.

5.9. Federal Antitrust Laws.

5.9.3.1 The Sherman Antitrust Act. The Sherman Antitrust Act was passed in 1890 and has remained virtually unchanged since its enactment. Sherman Antitrust Act, Ch. 647, §§ 1-8, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7) (Sherman Act). The Sherman Act is the primary federal antitrust law and prohibits contracts and conspiracies in restraint of trade, conspiracies to monopolize, and attempts to monopolize. Section 2 of the Sherman Act proscribes monopolization. It applies to all "persons," including governments and their employees. 15 U.S.C. § 15. Both the United States Department of Justice and the Arizona Attorney General may enforce the Sherman Act in federal court, and injured private parties may also sue for treble damages. 15 U.S.C. §§ 15, 15a, 15c. Although the Sherman Act, and all federal antitrust law, applies only to interstate commerce, the courts have found interstate commerce to be present in virtually every commercial transaction. *See, e.g., Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976).

Because every contract is in a sense a restraint of trade, the courts have construed the Sherman Act to prohibit only unreasonable restraints of trade and competition. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

Since 1974, a violation of the Sherman Act has been a felony, prosecutable by the United States Department of Justice. 15 U.S.C. §§ 1-3. An offense carries a maximum fine of \$10 million for corporations and \$350,000 for individuals. *Id.* Individuals found guilty can be imprisoned for up to three years, fined, or both. *Id.* Highway construction bid-rigging cases have typically been prosecuted criminally.

5.9.3.2 The Clayton Antitrust Act. The Clayton Antitrust Act was enacted in 1914 to supplement the Sherman Act. Clayton Act, ch. 323, §§ 1-8, 11-16, 20, 26-27, 38 Stat.

730 (1914) (current version at 15 U.S.C. §§ 12, 13, 14-19, 21-27); 29 U.S.C. § 52, 53 (Clayton Act). It prohibits price discrimination (Robinson-Patman Price Discrimination Act, ch. 592, § 2-4, 49 Stat. 1526 (1936) (current version at 15 U.S.C. §§ 13-13b, 21a), tying arrangements, certain mergers and acquisitions, interlocking directorates between competing companies, and certain exclusive deals and refusals to deal where their effect is to substantially lessen competition or to tend to create a monopoly in interstate commerce.

The Clayton Act permits private parties to sue for treble damages and costs including attorney's fees. 15 U.S.C. § 15. Private litigants and state Attorneys General can recover three times the actual damages from an unlawful trade restraint. 15 U.S.C. § 15c. The Clayton Act addresses the relationship between private and public lawsuits and gives the state Attorneys General the right to sue as *parens patriae*, a representative of consumers in their state. *Id.*

5.9.3.3 The Federal Trade Commission Act. The Federal Trade Commission Act, which prohibits unfair competition, was passed in 1914 and amended in 1994. Federal Trade Commission Act, ch. 311, §§ 1-26, 38 Stat. 717 (1914); Pub. L. 103-312, § 2, 108 Stat. 1691 (1994) (current versions at 15 U.S.C. §§ 41-58) (FTC Act). It created the Federal Trade Commission (FTC). The FTC Act is not on its face an antitrust law, but has been used to prosecute, through administrative action, conduct that restrains trade. 15 U.S.C. § 45. The FTC is an administrative body that issues cease and desist orders, which are enforceable in federal courts. *Id.* Private persons cannot sue under the FTC Act. *Fulton v. Hecht*, 580 F.2d 1243, 1248 (5th Cir. 1978).

5.9.4 State Antitrust Laws.

5.9.4.1 Uniform State Antitrust Act. The Uniform State Antitrust Act, A.R.S. §§ 44-1401 to 1416, was adopted by the Arizona Legislature in 1974 pursuant to a provision in art. XIV, § 15 of the Arizona Constitution requiring the Legislature to enact laws prohibiting monopolies, trusts, and certain direct or indirect anticompetitive conduct. The Legislature added A.R.S. § 44-1416 in 1993. The Act forbids contracts, combinations, and conspiracies "in restraint of, or to monopolize, trade or commerce, any part of which is within [Arizona]." A.R.S. § 44-1402. It also prohibits "[t]he establishment, maintenance or use of a monopoly" and an attempt to monopolize Arizona trade or commerce for the purpose of excluding competition or of fixing prices. A.R.S. § 44-1403. The Act is to be construed uniformly with other states having similar Acts, and in construing the Act, Arizona courts may use federal legal precedent as a guide. A.R.S. § 44-1412.

The Attorney General, or a County Attorney with the Attorney General's permission, may enforce the Act and seek injunctions and civil penalties of up to \$150,000 per violation. A.R.S. § 44-1407. The Attorney General has the power to investigate violations of the Act and may issue Civil Investigative Demands (CIDs) seeking testimony and documents, and may enforce the CIDs in state court. A.R.S. §§ 44-1406, 1414.

The State, a political subdivision, or any agency may sue for injunctions, damages, costs, and attorney's fees. A.R.S. § 44-1408(A). A private party may sue for the same and, if the violation is "flagrant," the private party may recover up to three times the damages sustained. *Id.* § (B).

An action to enforce the Act must be brought within four years of the violation, A.R.S. § 44-1410, but a private party has one year after the conclusion of a state prosecution within which to bring an action for damages. *Id.* § (B).

For most contracts, combinations, or conspiracies, the Act does not provide a criminal penalty. In 1993, however, the Legislature made it a Class 4 felony for a person to enter a contract, combination, or conspiracy to restrain trade in connection with a government contract or subcontract. A.R.S. § 44-1416(C). Furthermore, criminal liability for bid-rigging can be found in the bid-rigging statutes, A.R.S. §§ 34-251 to 258, specifically at § 34-252.

5.9.4.2 Bid-Rigging Statutes. Sections 34-251 to 34-258, A.R.S., are sometimes referred to as the bid-rigging statutes. The Attorney General or a county attorney may enforce these statutes. A.R.S. § 34-258.

It is a class 4 felony for any person to enter into a contract, conspiracy, or other trade restraint that violates the Uniform Antitrust Act if the transaction involves a government contract for the purchase of equipment, labor, or materials or a contract for the construction, repair, or alteration of highways, buildings, or structures. A.R.S. § 34-252(A). The statute applies to any illegal subcontract with a contractor or "proposed" contractor for a governmental agency. *Id.* §§ (A) (1) and (A) (2). See also A.R.S. § 44-1416(C).

The government agency that has entered into or been the "subject" of an unlawful anticompetitive contract may sue the parties to the contract to recover damages. A.R.S. § 34-254(A). The agency may recover treble damages or ten percent of the contract price. *Id.* § (B). The cause of action accrues only when the illegal act is discovered. *Id.* § (C).

Persons (including corporations) convicted under the bid-rigging statutes are barred from further contracts with any governmental agency, either directly or indirectly, A.R.S. § 34-255(A), for up to three years, and can for that time period also be barred from employment by any corporation engaged in public works contracting or public works supplying. *Id.* § (B). An agency can suspend any person convicted of antitrust violations under Arizona law, federal law, or the law of another state, or any officer, employee, or affiliate of that person, from bidding to that agency. A.R.S. § 34-257. A person convicted of a violation of A.R.S. §§ 34-252 or 44-1401 *et seq.* cannot serve as a registrar of contractors or on the contractors' recovery fund board. A.R.S. § 34-256.

5.9.5 Conduct Illegal Under the Antitrust Laws. Various types of conduct may violate the antitrust laws. If an activity restrains trade, is anticompetitive, excludes competing vendors, limits consumer choice, favors dominant firms, creates barriers to entry

by new competitors, protects existing market shares, forces purchase of unwanted goods, involves economic coercion, or reduces price competition, it may be unlawful.

Every contract is in a sense a restraint of trade. However, the courts have construed the antitrust laws to proscribe only *unreasonable* restraints of trade and competition. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). Two types of restraints have been identified. First, there are *per se* type restraints, which are illegal on their face without proof of actual harm to competition. *Wedgewood Inv. Corp. v. Int'l Harvester Co.*, 126 Ariz. 157, 613 P.2d 620 (App. 1979). These include price fixing, bid rigging, territorial market allocation, some types of tying arrangements, and some horizontal boycotts. See, e.g., *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (price fixing); *Nat'l Soc'y. of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (ban on competitive bidding); *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) (market division).

Per se cases almost always involve horizontal trade restraints. Horizontal restraints are those that are implemented by members of, and harm competition at, the same level of distribution. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Thus, agreements between retailers or between manufacturers are horizontal. *Per se* conduct is illegal regardless of whether the participants intend to harm competition and whether competition is in fact harmed. *Id.* The mere formation of the contract or conspiracy is illegal. *N. Pac. Ry. v. United States*, 356 U.S. 1 (1958). Even a well-intentioned activity that has the effect of stifling price can be price fixing. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978). In recent years, however, courts have used the *per se* analysis less frequently. *United States v. Bestway Disposal Corp.*, 724 F. Supp. 62, 66 n6 (W.D.N.Y. 1988).

The second, and most common, type of trade restraint falls into the "rule of reason" category, where the restraints are unlawful only if, in fact, competition is unreasonably restrained. *Id.* Vertical restraints are often found to be governed by the rule of reason. *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). An anticompetitive arrangement between a manufacturer and a retailer is a vertical restraint usually judged by the rule of reason; if competition in the general market is not harmed, the restraint is not unreasonable and not unlawful. Some vertical relationships can be *per se* illegal, if they include "some agreement on price or price levels." *Bus. Elect's Corp. v. Sharp Elect's Corp.*, 485 U.S. 717, 735-36 (1988). Some conduct that restrains trade can be justified under the rule of reason by procompetitive efficiencies that result from the conduct. *Cont'l T.V., Inc.*, 433 U.S. at 54.

5.9.5.1 Price Fixing. Any arrangement between competitors that interferes with the free market determination of price of any product is illegal. *United States v. Serta Assocs., Inc.*, 296 F. Supp. 1121 (N.D. Ill. 1968), *aff'd mem.*, 393 U.S. 534 (1969). These arrangements are *per se* unlawful, even if the purpose of the agreement is to lower prices. *Id.* If the prices are set by agreement between parties who, in a competitive market, would

make independent price decisions, and who are not driven by the laws of supply and demand, the arrangement violates antitrust law. *Ariz. v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332 (1982).

A vertical form of price-fixing agreement arises when a manufacturer coerces its distributors from reselling the goods below a minimum price set by the manufacturer. *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207 (9th Cir. 1983). Such arrangements have been held to be *per se* illegal, even though they involve vertical trade restraints. *Id.*

Agreements to set minimum prices, or ranges of prices; to manipulate bid prices; to determine when prices rise or fall; or to stabilize prices and stop price wars are *per se* illegal. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Ariz. v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332 (1982). Vertical agreements to set maximum prices, however, are not *per se* violations of antitrust law and are analyzed instead under the “rule of reason.” *State Oil Co. v. Khan*, 522 U.S. 3 (1997). Sometimes price manipulation occurs through third parties, as where the trade press is used as a vehicle to arrange coordinated price moves. *In re: Petroleum Prods. Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990) (court found publisher of trade magazine that published price lists did not violate antitrust laws). *But see, State ex rel. La Sota v. Ariz. Licensed Beverage Ass'n, Inc.*, 128 Ariz. 515, 627 P.2d 666 (1981). A government procurement officer can be used as a price-fixing vehicle if prices are quoted to him or her and he or she communicates these to competing vendors prior to bidding. Procurement officers should not engage in any activity that would aid vendors in learning their competitors' bid prices.

Price fixing can be prosecuted criminally under federal law. See Section 5.9.3.1.

5.9.5.2 Bid Rigging. Horizontal agreements among competitors to manipulate the competitive bidding process are *per se* illegal. *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991); *Harkins Amusement Enters. v. Gen. Cinema Corp.*, 850 F.2d 477 (9th Cir. 1988). Bid rigging can involve agreements not to bid, to bid at set prices, to rotate bidding, to allocate customers, to manipulate the general contractor/subcontractor relationships, to give kickbacks to procurement officials, to give special favors for special treatment, and any other arrangements that interfere with free competitive bidding. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). On the other hand, joint ventures among entities that would not be able to bid independently can in some instances be seen as procompetitive if they have the effect of increasing the number of competitive bids.

Rigged bids result in higher prices and lower quality and service for the agency buyers because they eliminate the risk to the vendor of losing the bid by charging too much or offering inferior products or services.

Procurement officers should be alert for signs of bid rigging. Some ways of detecting bid rigging are described below. Government employees involved in any aspect of procurement should be careful in their contacts with vendors to prevent vendors from obtaining inside information or receiving special favors, such as bid specifications favorable

to individual firms.

Bid rigging usually is prosecuted criminally by both federal and state officials.

5.9.5.3 Division of Markets - Territorial Market Allocation. Like price fixing, a horizontal agreement among competitors to eliminate competition by allocating markets is *per se* unlawful. *United States v. Topco Assocs. Inc.*, 405 U.S. 596, 608 (1972). "Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990). These agreements usually divide markets territorially, by geographic regions. They can, however, divide markets by product type or brand or by type of customer. Rotating bids can be a form of market allocation.

Franchises, or exclusive rights to sell in a territory, are often part of distribution systems imposed by manufacturers in a vertical relationship. These can result in a lack of competition both between manufacturers and among distributors of the same manufacturer's products. Most garden variety exclusive franchises and exclusive distributorships are lawful. Some of these relationships have been held to promote competition, as where each different brand has its own exclusive distribution network. *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

5.9.5.4 Tying Arrangements. "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461 (1992) (quoting *N. Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958)). Such an arrangement may violate § 1 of the Sherman Act "if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Id.* at 504 U.S. 462 (citing *Fortner Enters., Inc. v. U. S. Steel Corp.*, 394 U.S. 495, 503 (1969)).

This type of restraint can increase costs for government buyers because it might require the purchase of another product in order to acquire the desired one. This frequently happens where computer or technological systems are being purchased and the bid ties the product to various other products and services, such as maintenance and repair.

Forcing a buyer to use the service organization of a seller instead of allowing the buyer to bid service and maintenance separately from the equipment is a tying arrangement and can be illegal. *Eastman Kodak Co.*, 504 U.S. at 463. This is especially important where a buying agency is required to buy a particular brand of expensive equipment, but can get much better prices by separately bidding service and maintenance contracts to competitors in the service and repair markets.

Tying the price at which a bidder sells equipment to the purchase of service is not always unlawful. *Id.* Thus a vendor who bids equipment at a lower price if a service contract is also purchased, and a higher price if it is not, may not be unlawfully tying the products and services because the vendor is not refusing to sell unless the tied product is also purchased. However, depending on the availability of alternatives, this could be an unlawful trade restraint to the extent competition is actually harmed.

5.9.5.5 Group Boycotts - Horizontal Refusals to Deal. A group boycott occurs when horizontal competitors agree to refuse to do business with a third party. *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Group boycotts are employed to reduce the number of competitors in a market or to preclude new competitors from entry. Group boycotts are also utilized to coerce sellers to raise their prices.

In procurement, group boycotts often take the form of a group of competitors refusing to bid or to enter contracts unless prices are raised, or all competitors are offered the same contract terms, or contract terms are made more favorable. Boycotts are usually coercive and involve the threat that if the victim agency does not comply, none of the competitors will do business with it.

Boycotts are usually horizontal, but can be vertical. A buyer may threaten the seller with a refusal to deal unless the seller ceases selling to a competitor. Such cases are usually analyzed under the rule of reason. If a group of horizontal competitor-buyers engages in such an action, the boycott becomes horizontal, and in some instances may be *per se* illegal. *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). The *per se* approach applies to cases in which firms with market power boycott suppliers or customers to discourage them from doing business with a competitor. *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*, 885 F.2d 313 (6th Cir. 1989). *Per se* treatment has generally been given to joint efforts of competitors to disadvantage a competitor or competitors by pressuring suppliers or customers to deny relationships the competitor or competitors need to compete. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co.*, 472 U.S. 284 (1985).

5.9.5.6 Monopolization. When a single firm has such control over a market that it can initiate a price increase without fear of losing any significant amount of business to any competition or it can “force a purchaser to do something he would not do in a competitive market”, it is said to have market power. *Eastman Kodak Co., Inc.*, 504 U.S. at 464 (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984)). A firm that possesses and uses market power or has acquired it in some deliberate way that restrains trade, is guilty of monopolization. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). To determine if a monopoly exists, the market must be defined, both by product and by territory. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). What constitutes monopoly power in a product or geographic market depends on the circumstances of each case, including barriers to entry, profit levels, economies of scale, pricing patterns, and product differentiation. *United States v. Syufy Enters.*, 903 F.2d 659 (9th Cir. 1990); *Metro*

Mobile CTS, Inc. v. NewVector Commc'ns Inc., 892 F.2d 62 (9th Cir. 1989); *Ball Mem'l. Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986). Ninety percent of a market generally implies monopoly power, *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); whereas a market share of less than forty percent generally precludes a finding of monopoly power. *United Air Lines v. Austin Travel Corp.*, 867 F.2d 737 (2d Cir. 1989).

It is not illegal to have a monopoly if it was obtained by a patent, superior product, skill, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). A monopoly will usually be unlawful if it is obtained by exclusionary tactics. One wrongful way to obtain monopoly power is through predatory pricing, which occurs where a firm prices its products at below-marginal-cost levels to obtain market share and drive out rivals with the intent of later recouping its short term losses through artificially high prices after it has attained monopoly power. Very low bid prices, coupled with an increase in market share, can indicate predatory pricing. On the other hand, it is not unlawful for a business to use one product it sells as a loss leader in order to attract customers to its stores to purchase other products.

Government grants of exclusive franchises and long-term contracts can create monopolies in products or areas. In certain circumstances, however, government officials are immune from antitrust liability. See Sections 5.9.6, 5.9.6.1.

5.9.5.7 Other Unlawful Acts. State and federal antitrust laws may also be used to prevent unlawful mergers and acquisitions (15 U.S.C. § 18, A.R.S. § 44-1403), interlocking directorates between competing corporations (15 U.S.C. § 19), and discrimination in price between different purchasers (15 U.S.C. § 13).

5.9.6 Exemptions. There are both express and implied exemptions from the application of the antitrust laws. For example, human labor is expressly exempted by both state and federal antitrust statutes because it is not considered a commodity or article of commerce. 15 U.S.C. § 17; A.R.S. § 44-1404. In addition, some federal agencies have express authority to regulate and confer antitrust immunity on certain industries. See, e.g., 49 U.S.C. § 10706; Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). The "business of insurance" is also exempt under Section 1012 of the McCarran-Ferguson Act. 15 U.S.C. §§ 1011 to 1015.

The courts have implied an exemption for bona fide efforts to influence governmental action when the government is acting as a policy maker. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965). This is commonly referred to as the "Noerr-Pennington" doctrine. On the other hand, sham petitioning that is objectively baseless and intended to impair competition is not immune from antitrust scrutiny. *Noerr Motor Freight*, 365 U.S. at 144. In a very few circumstances, the courts have found a unique professional activity (such as baseball) to be exempt. *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

5.9.6.1 State Action Exceptions and Immunities. The federal antitrust laws do not apply to the anticompetitive conduct of a state acting through its legislature. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). This is known as the "state action exemption."

State agencies, officials, and employees are entitled to antitrust immunity if their actions are authorized by state law, even if suppression of competition is the foreseeable result of what the State is authorizing. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991). See also *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984) (indicating that for immunity purposes, a state agency is equivalent to a municipality, and not the legislature itself). If a state agency denies a license because the applicant has not met a regulatory requirement, for example, the agency may be engaging in anticompetitive conduct. However, if the regulation is authorized by statute and suppression of competition is a foreseeable result of the statute that authorized the regulation, the conduct is exempt from the antitrust laws.

The state action exemption does not permit a state to authorize or approve -- and thus immunize -- the anticompetitive conduct of private parties who violate the antitrust laws. *Parker*, 317 U.S. at 351. Moreover, it does not provide immunity to state officials who participate in a purely private agreement or conspiracy in restraint of trade where the "State acts not in a regulatory capacity but as a commercial participant in a given market." *Omni Outdoor Advertising, Inc.*, 496 U.S. at 374-375. Only true "state action" is immunized.

Where state statutes permit private parties to set prices, the State action exemption is not available unless the State actively supervises the private parties to ensure that the price-setting activity is reasonable. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). The Supreme Court clarified the active supervision element of the test with respect to private actors in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992). Under *Ticor*, private actors will not be granted immunity under a regulatory scheme unless the State has actively exercised its power to regulate the activity.

Unilateral governmental action may be immune from antitrust liability, even if it does not meet the state action exemption tests. No violation of the Sherman Act occurs if a governmental entity imposes an anticompetitive measure on the private sector, such as a rent stabilizing ordinance, because there is no concert of action and therefore no conspiracy. *Fisher v. City of Berkeley*, 475 U.S. 260, 270 (1986).

5.9.7 Enforcement of Antitrust Laws. In Arizona, the Attorney General, or a county attorney with the permission of the Attorney General, may enforce the Uniform State Antitrust Act. A.R.S. § 44-1407. Both the Attorney General and the County Attorney can prosecute the bid-rigging statutes criminally (A.R.S. §§ 34-252, -258), seek civil penalties (A.R.S. § 34-254), and recover for the State and its entities (A.R.S. § 41-192). Private parties may also enforce the law by bringing suit for damages or injunctive relief against alleged violators. A.R.S. § 44-1408(B). See Sections 5.9.3.1, 5.9.3.2, 5.9.4.1.

In the federal courts, the United States Department of Justice and the State Attorney General enforce the Sherman and Clayton Acts. 15 U.S.C. §§ 15a, 15c. Only the State Attorney General may bring federal *parens patriae* consumer litigation, 15 U.S.C. § 15c. Only the Antitrust Division of the Department of Justice can bring criminal enforcement or seek civil penalties, 15 U.S.C. § 15a; 15 U.S.C. §§ 1-3. Private parties also enforce federal law through private litigation, 15 U.S.C. § 15. The FTC enforces the Federal Trade Commission Act as it is applied to anticompetitive conduct. 15 U.S.C. § 45. See Section 5.9.3.3.

5.9.8 Detecting Antitrust Violations in Bidding. The bidding process is a fertile field for anticompetitive conduct. Procurement personnel risk being implicated in an anticompetitive combination if a vendor seeks direct influence in writing the specifications, seeks removal of a competitor from a vendor list, seeks inside information about competitors' bids before a bid award, asks about competitors' prices, seeks special treatment where considerations other than price are factors in bid awards, or seeks modifications to the contract after the bid is awarded.

If a procurement officer gives a vendor special treatment or inside information or accepts gifts or favors from the vendor, the officer may have entered into a conspiracy in restraint of trade. Even the appearance of special treatment, by repeated contact and communications with a single vendor during the bidding process, can create the appearance to the losing bidder that collusion has occurred. Although not an antitrust problem, avoiding this appearance can reduce bid protests.

In addition to resisting vendor influence, procurement officers can do much to enhance competition, for example, by writing specifications so that the largest number of firms qualify to bid and maintaining long vendor lists. In addition, avoiding brand-specific specifications and not requiring terms that only large firms can meet will open the market place to new and smaller firms. Bidding contracts, even when not required by the Procurement Code, may also enhance competition.

The first level of detection of antitrust violations, therefore, is an internal one. Government officers engaged in procurement should police themselves to avoid even a hint of special favors or too-close associations with vendors. And procurement personnel should endeavor to promote competition through their policies and practices.

The second level of detection involves identifying the signs of collusion or other unlawful anticompetitive conduct among bidders. Procurement officers are in a unique position to detect suspicious bidding patterns indicating anticompetitive practices. If any of the following is observed, the procurement officer should alert the Antitrust Unit of the Attorney General's Office immediately. The Attorney General's Office can then investigate and take appropriate action to prevent threatened illegality or to remedy anticompetitive conduct that has already taken place.

5.9.8.1 Identical Bids. Identical bids submitted by competitors can indicate a possible illegal trade restraint. Although identical bids do not always indicate unlawful collusion by suppliers, they show a lack of price competition and deserve the scrutiny of the procurement officer. Identical bidding is sometimes the result of agreements among competitors to adhere to a published price list, which is illegal. See Sections 5.9.5.1. Public officials should note when vendors change from competitive prices to identical prices and be alert to references to "association" or "industry" prices.

5.9.8.2 Simultaneous Price Increases and Price Maintenance. A procurement officer should watch for simultaneous price increases. It is not necessary that all competitors charge the same for an item to indicate a conspiracy; an agreement to raise prices by a certain percentage increment may also violate the law.

The existence of resale price maintenance may come to a procurement officer's attention when bidders complain that suppliers require them to charge fixed markups or minimum prices. Refusals to bid may also be an indication that vertical price fixing is taking place; sometimes a vendor who will not go along with vertical price fixing finds itself unable to procure the products for which the bid is being solicited. A call from a procurement agent to those who decline to bid may elicit indications of illegal activities on the part of those who have submitted bids.

5.9.8.3 Bid Rotation. Bid rotation is a scheme in which all vendors participating in the scheme submit bids, but by agreement take turns being the low bidder. A strict bid rotation is incompatible with normal free market operation and should alert the purchaser to possible collusion.

Bid rotation between general and subcontractors also occurs. If unsuccessful bidders frequently receive subcontracts from the successful bidder, the subcontracts may be a reward from the successful bidder for the subcontractor's submitting a noncompetitive bid. Extremely close bids on construction projects or non-standardized items may also be an indication that bid rigging is occurring. Rotation according to contract size is another danger signal. Bid rigging has occurred where designated vendors or contractors are awarded contracts valued at an amount in excess of a certain figure, while others are awarded the contracts valued below the figure.

5.9.8.4 Customer Allocation. The unlawful allocation of customers is another technique used for bid rigging. Under this scheme, customers are divided among contractors or vendors with the understanding that one contractor or vendor will not bid on the contracts of a certain class of potential customers; in return, competitors will not bid on the class of customers previously allocated to the other contractor or vendor. The procurement officer occasionally should check with other purchasing agents who procure the same services or commodities to see if vendors are selling to some agencies but not to others.

5.9.8.5 Territorial Allocation. Territorial allocation is a scheme similar to customer allocation; the difference is that territories are allocated instead of customers. Thus, the agreement may demand that vendors not bid outside the boundaries of a certain county or section of a city or state.

Detection of this technique is similar to the detection of a customer allocation scheme: the procurement officer should become acquainted with bidders in other areas on similar construction projects or contracts for the sale of commodities or services to determine if vendors are bidding in some areas but not in others. Refusals to bid are also an indication of a territorial allocation. On several occasions bid solicitations have been returned with notations such as, "I cannot bid on this because I am not your distributor. Contact John Smith in Phoenix." Such responses are obviously suspect.

5.9.8.6 Other Suspicious Bidding Practices. Other antitrust violations can be detected just by being alert. For example, procurement officers should watch for sudden changes in bidding conditions. If a group of vendors or contractors suddenly eliminates or cuts back the period of warranty or the discount on the objects installed or sold, a conspiracy may have prompted the action. Finally, purchasing agents at all levels of government should maintain a well-established network of communications with each other.

5.9.9 Application of the Antitrust Laws to State Employees Engaged in Purchasing. The antitrust laws apply to all "person[s]," a term defined in A.R.S. § 44-1401. A.R.S. § 44-1403. State procurement personnel are not necessarily immune from antitrust liability by virtue of the fact they are employees of the State. See Section 5.9.6.1.

To avoid antitrust claims or accusations, procurement personnel should remain independent from vendors and their representatives. See Section 5.9.8. Those who buy and sell on behalf of the State should make their decisions on the basis of their independent analysis of the products and services needed, with a view toward maximizing competition among those who supply them.

5.9.10 Antitrust Attorney's Fees. The prevailing party in an antitrust case is entitled to recover reasonable attorney's fees and costs under both state and federal law. 15 U.S.C. § 15(a); A.R.S. § 44-1408.

Section 15(a) of the Clayton Act permits attorney's fees incidental to the statutory right of damages and thus, fees are not available in actions seeking only injunctive relief. *Twin Cities Sportservice v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1314 (9th Cir. 1982). An award of attorney's fees as part of the cost of a successful antitrust suit is mandatory. *Id.* at 1312. Under Arizona antitrust laws, however, a prevailing party in both an action for damages and for injunctive relief is entitled to attorney's fees. A.R.S. § 44-1408.

A prevailing antitrust plaintiff is entitled to recover reasonable attorney's fees for every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect the client's pursuit of antitrust damages. *Twin Cities Sportservice*, 676 F.2d at 1313. Generally, the starting place for determining a reasonable award is to calculate the lodestar figure: the product of reasonable hours times a reasonable hourly rate. See, e.g., *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1423 (11th Cir. 1987).

If an antitrust settlement results in a common fund for the benefit of a plaintiff class, a court may exercise its equitable powers to award attorney's fees pursuant to the common fund doctrine. *Florida v. Dunne*, 915 F.2d 542, 544-55 (9th Cir. 1990). Under this doctrine, fees may be calculated on a lodestar or percentage of the fund basis, provided the fees are reasonable under the circumstances. *Id. at 545*. Twenty-five percent of the recovery is the benchmark where fees are calculated by using the percentage of the fund method. *Paul, Johnston, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Morganstein v. Esber*, 768 F. Supp. 725, 726 (C.D. Cal. 1991). The percentage can then be adjusted upward or downward to account for any unusual circumstances involved in the case. *Gaulty*, 886 F.2d at 272-73.