



AGENDA
State and Local Procurement Law Institute

August 16-18, 2015
Marriott Hotel at Champions Circle
Fort Worth, Texas

Sunday, August 16

2:00 - 6:00 pm
Trinity Ballroom Foyer

Registration

3:40 - 4:00 pm
Trinity Ballroom

Welcome & Program Overview
Speaker: Keith McCook, South Carolina

4:00 - 6:00 pm
Trinity Ballroom

Opening General Session
Topic: Procurement Principles
Speaker: Steven L. Schooner, The George Washington University Law School
Introduced by: Keith McCook, South Carolina

Summary: What does a government hope to achieve through its procurement system? Sometimes the simplest questions prove the most vexing. Professor Schooner will discuss the fundamental objectives for any procurement system, the tension among those objectives, and how our selection of those objectives influences the routine decisions involved in managing the acquisition process.

Materials:

- American Bar Association, Principles of Competition in Public Procurements, Recommendation and Report
- Anechiarico, Frank and Jacobs, James B. Purging Corruption from Public Contracting: The "Solutions" are Now Part of the Problem. New York Law School Review, Vol. 143, 1995
- Schooner, Steven, Desiderata: Objectives for a System of Government Contract Law, Public Procurement Law Review, Vol. 11, p. 103, 2002
- Values and Guiding Principles of Public Procurement, Adopted by NIGP, Oct., 2010

6:00 - 8:00 pm
Trinity Ballroom Foyer

Welcome Reception

Monday, August 17

7:15 - 8:00am
Trinity Ballroom

Breakfast

8:00 - 9:30 am
Trinity Ballroom

General Session
Topic: Limitation of Liability - Anatomy of a Clause
Speaker: Keith McCook

Introduced by: Richard Pennington, NASPO ValuePoint

Summary: This session will provide an overview of basic risk allocation strategies commonly used in commercial contracts, followed by a sentence-by-sentence analysis of a limitation of liability clause. The presentation will be followed by a lengthy Q&A session. Attendees will be invited to share their experience on negotiating such clauses, particularly the liability caps they have successfully negotiated.

Materials:

- Anatomy of a Limitations of Liability Clause - slides
- National Association of State Chief Information Officers, Issue Brief - Walking the Road to the Win-Win, 2004
- Pennington, Richard, and Sanchez, Corey, Negotiating Liability Allocation Terms: Risk, Indemnity, and Intellectual Property. Contract Management, Nov. 2007, pgs. 42-53
- Pennington, Richard, State and Local Procurement Liability Allocation: Constitutional and Statutory Limitations, McKenna Long & Aldridge, LLP, 2006
- State Public Policy Group, Limitation on Liability in Iowa IT Contracting, Report to Iowa Department of Administrative Services, 2008

9:30 - 10:00 am

Break

10:00 - 12:00 pm
Trinity Ballroom

General Session

Topic: Information Security in Government Outsourcing

Speaker: Ron S. Ross, Ph.D.

Fellow, National Institute of Standards and Technology

Introduced by: Keith McCook

Summary: This session will provide an overview of the Federal Government's

approach to imposing security controls on its contractors. The presentation will begin with an overview of NIST SP 800-53, the Federal Government's (and to a large extent, industry's) baseline catalogue of security controls. To help the audience understand what a security control is, how it works, what "tailoring" is, and what "overlays" are, the overview will include a discussion of, and examples from, Appendix F - the Security Control Catalogue. The session will address the different contexts in which security controls are addressed, e.g., cloud computing services, how some federal agencies are currently addressing security controls with their contractors, and an introduction to the Federal Government's project to publish a set of security controls specifically for outsourcing - draft NIST SP 800-171.

Materials:

- Miller, Jason, Confusion of FedRAMP? OFPP to clarify contracting language, Federal News Radio, 2014, <http://www.federalnewsradio.com/517/3764542/Confusion-over-FedRAMP-OFPP-to-clarify-contracting-language>
- National Institute of Standards and Technology, Security and Privacy Controls for Federal Information Systems and Organizations, NIST Special Publication 800-53, Revision 4

12:15 - 1:15 pm
Trinity Ballroom

Networking Lunch

1:30 - 3:00 pm

Breakout Sessions

Red River

Topic A: Cyber Liability Insurance: The 411

Speaker/Moderator: Rachel Whitesell, Connecticut

Panelists: Linda Kornfeld, Kasowitz, Benson, Torres & Friedman LLP; Barry Fleishman, Kilpatrick Townsend & Stockton LLP; Josh Ladeau, Allied World Insurance Company

Summary: This session will review the national issues, trends and concerns regarding cyber liability insurance needs for state government. Presenters will outline the importance of cyber liability insurance as well as tactics for ensuring effective procurement of protective policies.

Materials:

- Advisen Ltd, Cyber Liability Insurance Market Trends: Survey, 2014
- Beck, David L. and Siemens, Rene L., Cyber Insurance—Mitigating Loss from Cyber Attacks, Perspectives on Insurance Recovery Newsletter, 2012, <http://www.pillsburylaw.com/printfriendly.cfm?pageid=34&itemID=40579&printF=1>
- Center for Strategic and International Studies, Net Losses: Estimating the Global Cost of Cybercrime, McAfee, 2014
- Kostadinov, Dimitar, Cyber Insurance, Infosec Institute, 2014, <http://resources.infosecinstitute.com/cyberinsurance/>
- Lehr, Natalie, Cyber Security Practices Insurance Underwriters Demand, Information Weekly, Dark Reading, 2014, <http://www.darkreading.com/risk/cyber-security-practices-insurance-underwriters-demand/a/d-id/1318071?print=yes>
- Panzar, Javier, Spending on Cyberattack Insurance Soars as Hacks Become More Common, Los Angeles Times, 2015, <http://www.govtech.com/security/SpendingonCyberattackInsuranceSoarsasHacksBecomeMoreCommon.html>
- Sembhi, Sarb, An Introduction to Cyber Liability Insurance Cover, computerweekly.com, 2013
- Stone, Adam, Cyberinsurance: Do You Need It?, GovTech, 2014, <http://www.govtech.com/security/CyberinsuranceDoYouNeedIt.html>
- Taffae, Peter R. and Magnuson, M. Damien, What Every Insurance Professional Should Know about Network Security and Privacy Liability, International Risk Management Institute, Inc, 2012
- Williams, Matt, Are Governments Ready to be Buyers of Cybersecurity Insurance?, GovTech, 2013, <http://www.govtech.com/pcio/articles/AreGovernmentsReadytobeBuyersofCybersecurityInsurance.html>

Rio Grande

Topic B: Terminations for Cause & Convenience

Speaker/Moderator: Bill McAvoy, Massachusetts

Panelists: Maggie McConnell, NASPO Life Member; Barbara Wessinger, Assistant Chief Counsel, South Carolina Department of Transportation

Summary: This interactive panel discussion will delve into the contract termination options that are available in most contracts, including terminations for cause (breach/default), convenience (without cause) and non-appropriation. They will also engage the audience to discuss experiences with contract terminations in your own states.

Materials:

- American Bar Association, Model Procurement Code - Regulations, Terminations for Convenience Clauses, 2000
- Case Law Examples, compiled for 2015 NASPO State and Local Procurement Law Institute

3:00 - 3:30 pm

Break

3:30 - 5:00 pm

Breakout Sessions

Rio Grande

Topic A: Framing and Documenting Cooperative Procurements

Panelists: Richard Pennington, General Counsel, NASPO ValuePoint; Justin Kaufman, Attorney/Negotiations Manager, Minnesota Department of Administration; Martin Zelinsky, General Counsel, Texas Department of Information Resources.

Summary: From national cooperatives to state contracts used by political subdivisions, cooperative procurement has a variety of “faces.” This interactive presentation will discuss practical issues such as structuring the solicitation to accommodate later participation, the effect of participation by entities outside the state, drafting around issues of venue and choice of law, how cooperatives may frame traditional procurement issues like responsiveness and scope of contract, using solicitation language to manage open records/FOIA issues, handling varying socio-economic policy issues (and other differing state law requirements) in solicitations, special considerations when cooperatively contracting for services and information technology, and approaches to operating lease agreements and audit rights.

Materials:

- Cooperative Purchasing Agreement sample, Minnesota
- Cooperative Purchasing Venture Brochure, Minnesota
- Interlocal Cooperation Contract for Information Resources Technologies, Texas
- Master Operating Lease Agreement, Selected, Texas Department of Information Resources
- NASPO ValuePoint Master Agreement Terms and Conditions, Selected
- Nelson, James W. and LoBosco, Julia A., Understanding the WSCA-NASPO Cooperative Purchasing Organization: It’s Time to Invite the Elephant Out of the Corner, Public Contract Law Journal, American Bar Association, Vol. 44, No. 1, 2014
- Pennington, Richard, Kaufmann, Justin and Zelinsky, Martin, Framing and Documenting Cooperative Procurements, Prepared for 2015 NASPO State and Local Procurement Law Institute
- Request for Offer template, Texas Department of Information Resources
- Standard Terms and Conditions For Product and Related Services Contracts, Texas Department of Information Resources

Red River

Topic B: Software Licensing - Practical Approach to Streamlining & Standardization

Panelists: Linda Hamel, Massachusetts; Keith McCook; Rachel Whitesell

Summary: This session will address the “procurement” side of software licensing.

Each panelist will provide a short overview of their state’s approach to software licensing, both the practical issues of documentation and negotiation, but also how licensing with third parties dovetails (or not) with the competitive process that results in a “procurement” contract - often with someone other than the licensor. To foster discussion, the panelists will highlight differences between their states and offer comments on the comparative differences - strengths and weaknesses. Strong audience participation is encouraged.

Materials:

- Clauses for Software Licensing of Commercial Off-the-Shelf Software, South Carolina
- Licensing agreement samples, compiled for 2015 NASPO State and Local Procurement Law Institute
- Licensing Model Graphics, Prepared for 2015 NASPO State and Local Procurement Law Institute
- Operational Services Division (OSD): Standards for Negotiating Software Licenses, MassIT
- RFQ Template, Massachusetts
- Standard Amendment to End User License Agreements for Commercial Off-the-Shelf Software, South Carolina

6:00 pm

Meet for Dinner

Tuesday, August 18

7:15 - 8:00am
Trinity Ballroom

Breakfast

8:00 - 9:30 am
Trinity Ballroom

General Session

Topic: Cloud Services - Issues to Consider in Procurements and Contract Negotiations

Moderator: Bill McAvoy

Panelists: Linda Hamel, Massachusetts, Dugan Petty, NASPO Life Member

Summary: The various forms of Cloud Computing offer states the potential of enormous benefit, but getting the right model to match the state’s needs and creating the right framework of policy, procurement, security and controls that match the data hosted in a deployment model is critical and requires alignment between various functional areas involved - attorneys, procurement, business owners, auditors and CIOs to name a few. Given the amount of information that is currently or is projected to be stored in the cloud, it is imperative that all public procurement attorneys are knowledgeable about the cloud, its benefits and risks, how to procure cloud services, and a checklist of issues, terms and conditions and documents to consider when contracting for cloud services.

Materials:

- Center for Digital Government, Best Practice Guide for Cloud and As-A-Service Procurements, eRepublic, 2014
- Cloud Procurement Terms, MassIT, 2015

- Hamel, Linda, Legal Issues Related to State Procurement of Cloud Computing, American Bar Association State and Local Procurement Symposium, 2015
- State Government Practices for Cloud Implementation, National Association of State Procurement Officials, 2015

9:30 - 10:00 am

Break

10:00 am - 12:00 pm
Trinity Ballroom

General Session

Topic: Equipment Leasing: A programmed and practical approach to what the lessors

want, what we can give, how we can both win

Speaker: Barry Marks, Marks & Associates, P.C.

Introduced by: Keith McCook

Summary: A veteran equipment finance lawyer will walk participants through the concerns and priorities of banks and equipment leasing companies and how these may conflict with state legal restrictions. He will offer creative yet practical solutions to some of the most vexing issues. Audience participation is encouraged.

Materials:

- Marks, Barry, Equipment Leasing, What Do They Want from Us?, Prepared for 2015 NASPO State and Local Procurement Law Institute

12:15 - 1:15 pm
Trinity Ballroom

Networking Lunch

1:30 - 3:00 pm

Breakout Sessions

Red River

Topic A: An Anatomical Approach: Indemnity & Commercial General Liability Insurance

Panelists: Ben Bare, Connecticut; Justin Kaufmann, Minnesota; Dixon Robertson, South Carolina

Summary: Panelists will explore the intricacies of insurance coverage related to state contracts. What is covered? Who is covered? What does case law say? Let these contracting experts help you identify the best approaches to insurance coverage, procurement and contract requirements.

Materials:

- Comparative Review of State IT Procurement Practices, prepared for the NASPO IT Procurement Work Group, 2010
- Introduction, General Discussion on Indemnification, Prepared for 2015 NASPO State and Local Procurement Law Institute
- Sandgrund, Ronald M. and Tuft, Leslie A., Liability Insurance Coverage for Breach of Contract Damages, Colorado Bar Association, The Colorado Lawyer, 39, 2007
- Sandgrund, Ronald M. and Tuft, Leslie A., TCD and *Colorado Pool*—The Bogeyman Lurks, Colorado Bar Association, The Colorado Lawyer, 43, 2014

Rio Grande

Topic B: An Intersection of State and Federal Law: the Super Circular and State Procurement and Contracting

Panelists: Richard Pennington, General Counsel, NASPO ValuePoint; Nancy Hapeman, General Counsel, Office of Contracting & Procurement, District of Columbia; Barbara Wessinger

Summary: This panel will discuss the new federal Uniform Guidance (also known as the Super Circular), how it differs from the prior Office of Management Budget and Common Rules policies, its impact on preference programs and statutory requirements for business with certified business enterprises, the structure of state contracts using federal funds, how individual federal agency requirements affect procurements and contracting, and approaches to incorporating required federal terms and conditions in state solicitations and contracts.

Materials:

- CFR Part 200—Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Selected
- Clause Comparison, Selected, South Carolina Department of Transportation
- Pennington, Richard, Hapeman, Nancy, and Wessinger, Barbara, An Intersection of State and Federal Law: the Super Circular and State procurement and Contracting, Prepared for 2015 NASPO State and Local Procurement Law Institute

3:00 - 3:30 pm

Break

3:30 - 5:00 pm
Trinity Ballroom

General Session: An Ounce of Prevention...

Speaker/Moderator: Justin Kaufman

Panelists: Maggie McConnell, NASPO Life Member; Richard Pennington; Betsy Hayes, Minnesota

Summary: Thomas Edison stated, “I have not failed. I just found 10,000 ways that won’t work.” This interactive session will take advantage of the vast collective wisdom of the panelists and audience members who have experienced bumps in the road that can happen during the procurement process. The session will entail real-life scenarios relating to topics such as vendor communications and issues that arise during vendor selection and negotiation with a focus on offering lessons learned to prevent similar mishaps.

Materials:

- Contracting Tips for Smooth Sailing, Admin Minnesota Materials Management Division
- Pennington, Richard, An Ounce of Prevention...A (Former) Bid Protest Attorney’s View, NASPO ValuePoint