VIRGINIA

PROCUREMENT

LAW STUDY

INTERIM REPORT

TO

THE GENERAL ASSEMBLY OF VIRGINIA

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VIRGINIA PROCUREMENT LAW STUDY

INTERIM REPORT

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Office of the Secretary of Administration and Finance
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Richmond, Virginia 23219

Introduction

A study of the laws on public procurement in Virginia was authorized by Senate Joint Resolution 148, adopted at the 1979 Session of the General Assembly. That resolution directed the Secretary of Administration and Finance to establish a Task Force which would consider and report to the Committees on General Laws of the Senate and House of Delegates on the desirability or feasibility of public contract legislation applying uniformly to the State and cities, counties, and other political subdivisions. It would evaluate current and proposed procurement legislation in light of requirements for the handling of federal grants. It could compare the Virginia law with legislation adopted in other states and with the Model Procurement Code approved by the American Bar Association. The resolution required an Interim Report by December 1, 1979, and a Final Report by November 1, 1980.

Across the nation, much attention has been devoted during the last decade to the adequacy of the statutory structures within which public procurement activities are conducted. In the early 1970's, for example, the Commission on Federal Procurement published a report which led to the establishment of the Office of Federal Procurement Policy. In 1974, the Council of State Governments published a lengthy study of State and local government procurement. Shortly thereafter, the American Bar Association, with

funding from the Law Enforcement Assistance Administration, undertook the development of a Model Procurement Code, a model state statute encompassing both State and local government procurement. The American Bar Association's House of Delegates approved the Model Procurement Code early in 1979. The federal government has also announced that the procurement systems of recipients of federal grants would have to meet certain standards. The final version of these standards was published in August, 1979, as Attachment O to OMB Circular A-102.

Thus, in embarking on this study, Virginia is participating in a national development, rather than merely reacting to deficiencies identified within the last year in the Division of Purchases and Supply, which is only one of several agencies with State procurement responsibilities. This study is more comprehensive, for it involves not a review of the procedures and policies of one agency, but an examination of the statutes under which all public agencies purchase materials, services, and construction.

Procurement Defined

Throughout this study, "procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award

of contract, and all phases of contract administration.

Present Virginia Procurement Statutes

Virginia's procurement statutes are sprinkled throughout the Code, rather than located within one Title. Frequently, procurement policies are interwoven with statutes establishing the administrative organization of a government agency. The following are the major procurement or procurement related statutes in the Virginia Code:

§§ 2.1-64.32-2.1-64.38

These sections establish the State Office of Minority Business Enterprise, and articulate a public policy encouraging development of minority business enterprises (a business enterprise "owned or controlled by one or more socially or economically disadvantaged persons.")

§§ 2.1-223.1-2.1-223.6

These sections provide for an administrative review by the Comptroller of pecuniary claims against the Commonwealth. Such review is apparently a prerequisite to a legal action. The claim must be filed within five years after the right to the claim arose, and the legal action must be brought within three years after

disallowance of the claim in whole or in part. See · § 8.01-255.

§§ 2.1-347-2.1-358

The Virginia Conflict of Interests Act contains prohibitions and restrictions upon contracting with public bodies.

§§ 2.1-374-2.1-376

The Virginia Fair Employment Contracting Act articulates a public policy of eliminating discrimination on account of race, color, religion, sex, or national origin from the employment practices of, among others, government contractors. The Act requires contracts or subcontracts in excess of $10,000 to include certain assurances of nondiscrimination.

§§ 2.1-435-2.1-468

These sections address the Division of Purchases and Supply, Department of General Services, the centralized purchasing authority of the State. The Division is responsible for procurement of material, equipment, supplies and printing, but not services or construction. Section 2.1-451 and § 2.1-452 contain exemptions from centralized purchasing.

§§ 2.1-480-2.1-527

These sections address the Division of Engineering and Buildings, Department of General Services. This Division must recommend approval of all contracts for capital outlay expenditures to the Governor, which enables it to prescribe the provisions in State agency construction contracts. In addition, the Division of Engineering and Buildings is the ontracting party for projects in or adjacent to the City of Richmond. This Division also contracts for utility services for State buildings within the master site plan for Capitol Square, and may procure insurance for State-owned properties.

§§ 9-6.14:1-9-6.14:20

The Administrative Process Act is applicable to the promulgation of regulations, including procurement regulations, by an agency. The Act does not apply to "money or damage claims against the State or agencies thereof as well as the award or denial of State contracts including decisions with respect thereto as to compliance therewith or the location, design, specifications, or construction of public buildings and other facilities."

§§ 11-17 - 11-23.5

These sections address contracts for the construction, improvement or repair of buildings and other structures. Some of the sections apply only to the State, others to localities, and some to both.

§§ 15.1-103 - 15.1-113

These sections provide for a county purchasing agent and require this officer to procure supplies, materials, equipment and contractual services for the county. "Contractual services" includes telephone, electric light and power, and similar services. Construction is not addressed.

§§ 15.1-127 - 15.1-129

These sections authorize the governing body of counties having an executive secretary to provide for the centralized competitive purchasing of materials and equipment.

§ 22-166.12

This section requires adherence to §§ 11-17 et seq. when State aid is received for the construction of or substantial additions to any building for school purposes.

§§ 33.1-185 - 33.1-192.1

These sections require competitive bidding in highway construction contracts.

§§ 33.1-341 - 33.1-343

These sections prohibit anti-competitive conduct by highway contractors, and require an affidavit of noncollusion to accompany each bid submitted by a member of any highway contractors' association.

§§ 33.1-386 - 33.1-389

These sections provide a claims procedure for highway construction contracts.

§ 42.1-82

This section authorizes the State Library Board to prescribe the specifications for papers, photographic materials, ink, typewriter ribbons, carbon papers, stamping pads or other writing devices for different classes of public records, and provides that only those so approved may be purchased.

§§ 53-61 - 53-75

These sections require that articles and services needed by State agencies produced by

the Department of Corrections must be purchased from that Department, but allow the Division of Purchases and Supply to make exceptions where the article does not meet the reasonable requirements of the State agency, or cannot be supplied in a timely manner.

§§ 59.1-9.1 - 59.1-9.18

The Virginia Antitrust Act, while not limited to public contracts, prohibits restraints of trade and monopolistic practices that act or tend to act to decrease competition.

In addition to these sections, the Uniform Commercial Code, found in Titles 8.1-8.10 of the Code, applies to commercial transactions by public bodies unless there are contrary provisions elsewhere.

Plan of Study

In May, 1979, the Secretary of Administration and Finance approved the plan for the study of Virginia procurement laws. Robert P. Kyle, a former Assistant Attorney General who was then heading the Governor's Management Team in the Division of Purchases and Supply, was selected to direct the study. The Secretary appointed an Advisory Committee, made up of State and local officials, as well as private citizens, to assist in the examination. The Advisory

Committee includes the following:

Mr. H. Douglas Hamner, Jr., Chairman
Director
Department of General Services

Dr. James B. Kenley
Commissioner
Department of Health

Mr. Edward A. House
Director of Purchasing and General
Services, Department of Health

Mr. T. M. Deadmore
Purchase Manager
Division of Purchases and Supply
(formerly Director of Purchasing
and General Services, Department
of Health)

Mr. Harold C. King
Commissioner
Department of Highways and Transportation

Mr. T. Ashby Newby
Director of Administration
Department of Highways and Transportation

Mr. Archer L. Yeatts, Jr.
Commissioner
Department of Alcoholic Beverage Control

Mr. Bernard L. Overton
Director of Auxiliary Services
Department of Alcoholic Beverage Control

Mr. J. D. Sims
Purchasing Officer
University of Virginia

Mr. Edward V. Allison, Jr.
Comptroller
Mary Washington College

Mr. Paul N. Proto
Director, Administrative Services and
Purchasing
Henrico County

Mr. Robert C. Lee
Quality Control Coordinator
Division of Purchases and Supply
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City of Petersburg)

Mr. J. Stuart Barret
Director
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Mr. Sidney L. Wells
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Former Chief of Management Support
Office of Procurement and Production
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As directed by the resolution, Virginia's laws were to be compared with the laws of other States, the Model Procurement Code, and Attachment O to OMB Circular A-102 (procurement requirements for recipients of federal grants). The laws of Georgia, North Carolina, Tennessee, Texas and

Pennsylvania were selected for examination.

The plan for the study described three phases. During the first phase, which culminates in the Interim Report, the procurement systems were compared. Differences were noted, but no effort was made by the Advisory Committee as a group to form conclusions concerning comparative value of the differences. During the second phase, the evaluation of the differences is the paramount objective for the Advisory Committee. The third phase will culminate in a final report and suggested legislation. Of course, the phases are not as discrete as this description implies.

In undertaking the study, certain topics have been identified which appear to be major considerations in all procurement systems. This interim report will identify those topics, relate them to the various jurisdictions or procurement systems being examined, and indicate some of the questions each topic raises which must be addressed before the final report is submitted.

Coverage of State Statutes

As defined for the purposes of this study, procurement includes the acquisition of materials, services and construction by public bodies. In Virginia, legislation addresses the procurement of materials by both the State's centralized purchasing agency, the Division of Purchases and Supply (§§ 2.1-435 et seq.), and by counties (§§ 15.1-103

et seq.) No legislation addresses the procurement of materials by agencies exempt by statute from centralized purchasing. No legislation covers the procurement of materials by school divisions where such procurement is not done through the locality's purchasing agent. The city charters are the only state legislation addressing the purchase of material by the cities, and as described in another section of this Interim Report, they do not contain uniform procurement provisions. No state legislation addresses the acquisition of leased equipment.

In Virginia, the only legislation addressing the procurement of services applies to counties, and is limited by the statutory definition in § 15.1-106 to utility services. The Code is silent on the acquisition of "work performed by an independent contractor requiring specialized knowledge, experience, expertise, or similar capabilities" (the North Carolina definition), or "the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance" (the Model Procurement Code definition). The Appropriations Act restricts expenditures for certain services, such as automated data processing services, but does not address the procurement. See § 4-9.03, Ch. 850, (1978) Acts of Assembly.

The acquisition of construction (other than highway

construction) is addressed in Chapter 4 of Title 11 (§§ 11-17 et seq.) of the Code. These sections clearly apply to the State and her agencies and institutions. The procurement of construction is not centralized; each agency may contract in its own right. The Division of Engineering and Buildings of the Department of General Services does exercise some administrative control when the construction involves capital outlay funds.

The applicability of the entire chapter to local government is less clear. In 1975, the Attorney General took the view that:

> "[A] general requirement that contracts be awarded to the lowest responsible bidder is applicable to both State and local government contracts. As to each category of contracts, Chapter 4, Title 11, requires the contracting authority to take steps to obtain competitive bids. This procedure is required to be formal advertising for bids in the case of State contracts, but is not so restricted in the case of local governments." See Report of the Attorney General (1975-1976) at p. 72.

A number of local governments have rejected that view, reading the applicable sections as stating certain requirements for bonding when the locality or school board elects to use competitive bidding, but not requiring competitive bidding.

Chapter 4 of Title 11 does not apply to the procurement of highway construction, which is addressed in §§ 33.1-185 et seq. of the Code. One noteworthy difference is that

while § 11-20 requires both payment and performance bonds from the contractor, § 33.1-187 requires only the performance bond for highway construction contracts.

In examining the procurement systems of other States, the focus has been on procurement by the State rather than by localities. Where the legislation referred to herein is applicable to localities, it will be noted.

In Georgia, state statutes address the procurement of material (GA Code, § 40-1902, § 40-1906.1), construction (§ 40-192.1) and services other than professional or personal employment services (§ 40-1902, § 40-1906.1). Unlike Virginia, all of these procurement activities are undertaken by one agency, the Department of Administrative Services. Like Virginia, a separate agency, the Department of Transportation, contracts for highway construction (§95A-801 et seq.)

In North Carolina, the statute addresses the procurement of materials and services, which are the responsibility of the Department of Administration (NC Gen. Stat. § 143-49). As noted previously, "contractual services" is defined in the statute as "work performed by an independent contractor requiring specialized knowledge, experience, expertise or similar capabilities wherein the service rendered does not consist primarily of acquisition by this State of equipment or materials and the rental of equipment, materials

and supplies." In North Carolina, the procurement of construction, whether by the Department of Administration, other state agencies or institutions, or political subdivisions, is governed by statute (§ 143-128). Highway construction is addressed separately (§ 136-18 et seq.), and is procured by the Department of Transportation. Any construction procured by that Department other than the construction of roads, bridges and their approaches, however, must be procured under the provisions of the general statute (§ 143-134).

Pennsylvania, which has by far the most detailed procurement statutes of the jurisdictions examined, establishes the Department of General Services as the centralized purchasing agency (71 Pa. Cons. Stat. § 187). The procurement of supplies is one function of this Department (71 Stat. § 639). So is the procurement of construction (71 Stat. § 631.1), but the Department must comply with procurement statutes located elsewhere in the Code (e.g., 71 Stat. § 1618; 73 Stat. § 1601 et seq.) The procurement of services is not addressed, with one noteworthy exception: Pennsylvania has a statutory procedure for the selection of architects and engineers on non-transportation projects (73 Stat. § 631.1). The procurement of highway construction is again addressed elsewhere in the Code (670 Stat. § 404).

Tennessee has a Department of General Services, which handles the procurement of materials (Tenn. Code Ann. § 12-304), utility services (§ 12-309), and other services (§ 12-

315), but excluding personal services, professional services and consultant services. These are addressed in § 12-450. It is noteworthy that architectural and engineering services are included in this statute, except that the state architect must also approve the contract (§ 12-451). The section does not apply, however, to engineering contracts entered into by the Department of Transportation (§ 12-450). The procurement of construction is addressed in § 4-1504, and highway construction is covered in § 54-513 et seq.

In Texas, the State Board of Control is the centralized purchasing agency for materials and services (Tex. Rev. Civ. Stat. Ann. Art. § 664-3). The statute is unclear on what services are subject to centralized procurement, for it contains only the following definition:

> "Services includes only services of the type heretofore contracted for by the State Board of Control and it is not intended by the use of this term to enlarge in any manner the authority of the State Board of Control to contract for personal or business services for any state agency, institution, board or commission." [Art. 664-3, § 3(b)].

Texas does, however, have a Professional Services Procurement Act covering accounting, architecture, optometry, medicine and profesional engineering (Art. 664-4). The State Building Commission is charged with the procurement of state construction (Art. 678m). In so doing, it must comply with the procedures set forth for highway construction, which is governed by Art. 6674.

The Model Procurement Code covers the centralized procurement of materials, services, and construction, including highway construction (§ 2-204), although the authority to contract for highways is delegated. (§ 2-303).

Attachment O to OMB Circular A-102 establishes standards and guidelines for the procurement of supplies, equipment, construction and services wherever federal funds are involved.

In summary, the statutes of all states being examined cover the procurement of material, equipment and supplies by a centralized purchasing agency, and the procurement of construction either in a general statute or in the enabling legislation of a state agency. In all states examined, highway construction was addressed separately. Two states (Virginia and Pennsylvania) do not address the procurement of most contractual services. Among the other states, Tennessee has the most comprehensive approach, followed by North Carolina and Georgia. Texas is the only state studied which specifically addressed professional services other than architectual or engineering services. In two states, Georgia and North Carolina, one state agency was responsible for all procurement except highway construction.

One of the major features of the Model Procurement Code is the creation of a policy office which has no operational responsibilities. This office establishes the procurement policies and procedures for all purchasing, whether done through a centralized agency or not. The Advisory Committee

must consider whether such centralization of procurement policy making is desirable in Virginia, and if so, whether the policy making body should be separate from an operational agency.

Virginia statutes do not address the procurement of contractual or professional services or the acquisition of equipment by lease. The Advisory Committee must consider whether these omissions are desirable.

The Advisory Committee must also consider the desirable detail of any state procurement legislation, and whether its scope should include localities, as well as whether all public procurement statutes should be located in one Title.

Statutory Exemptions from Centralized Procurement

As noted previously, each procurement system examined in this study has a centralized purchasing agency. In each system, the statutes exempt commodities and/or agencies from the requirement of purchase through the centralized purchasing agency. The Model Procurement Code, for example, exempts the following from centralized procurement:

"(a) bridge, highway, or other heavy or specialized construction;

(b) works of art for museum and public display;

(c) published books, maps, periodicals, and technical pamphlets; and

(d) architect-engineer and land surveying services as defined in § 5-101." (§ 2-303).

It is important to recognize, however, that this exemption is not total. Under the Model Procurement Code, the procuring agency must still comply with the statute and with regulations promulgated by the Policy Office.

In Virginia, there are a number of statutory exemptions. Two agencies, the State Highway and Transportation Commission, and the Virginia Alcoholic Beverage Control Commission, are exempt except for office stationery and supplies, coal and fuel oil for heating purposes. (In these agencies, administrative regulations or practices govern purchasing activities.) In addition, certain commodities are exempt. These include technical instruments and supplies designated by the Division of Purchases and Supply, and technical publications; manuscripts, maps, audio-visual materials, books, pamphlets and periodicals purchased by a state-supported library; perishable articles, and license plates (§ 2.1-451, § 2.1-452). Where exempt by statute, there are no provisions governing the procurement of these items in the Virginia Code.

In Georgia, purchases of the following are excluded from the purview of the Department of Administrative Services: technical instruments, supplies, books, and other printed matter on technical subjects; manuscripts, maps, books, pamphlets and periodicals for state libraries; livestock for slaughter, perishable articles such as fresh vegetables, meat, fish, oysters, butter, eggs, poultry, etc.; emergency

supplies of drugs, chemicals, sundries, dental supplies and equipment; and purchases under $100 if authorized by the Department of Administrative Services (§ 40-1916).

In North Carolina, only the purchase of published books, manuscripts, maps, pamphlets, periodicals, and perishable foodstuffs are exempt by statute (§ 143-56).

In Pennsylvania, only perishable foodstuffs are exempt from centralized purchasing. The statute does, however, have an interesting provision: any department or institution which is able, after competitive bidding, to purchase any article for less than the centralized purchasing agency, may purchase the article directly [71 Stat. § 633(e)].

In Tennessee, no commodities are exempt by statute, but a host of agencies are:

> "Purchases by and for the following departments, institutions and agencies of the state government shall be exempt subject to the policies of the board of standards and purchases, from the operation of this chapter: the general assembly of the state of Tennessee; the University of Tennessee; the state university and community college system of Tennessee; the state technical institutes; the division of services for the blind; West Tennessee Tuberculosis Hospital, Memphis; East Tennessee Tuberculosis Hospital (Chattanooga); Middle Tennessee Tuberculosis Hospital, Nashville; the novelty shops and the food facilities with the approval of the board of standards and purchases, operated by the division of state parks; except that in those cases where the department of general services executes term contracts for materials, supplies,

> and equipment for an amount less than can be bought by such department, institution, or agency, such exemption shall not apply; provided, however, that all such institutions shall insofar as may be practicable observe the standards and procedures of purchasing established and set forth in this chapter; provided, further, that any or all of such institutions named in this section shall be entitled to purchase and contract for the purchase of any materials, supplies and equipment and services through the department of general services under the provisions of the chapter.
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> The special schools (Alvin C. York Agricultural Institute, Tennessee School for the Blind, Tennessee School for the Deaf and Tennessee Preparatory School) and the area vocational-technical schools are exempt from the requirements of this chapter for purchases of one thousand dollars ($1,000) or less, but shall be subject to the requirements of this chapter for purchases exceeding one thousand dollars ($1,000). Purchases made within this exemption shall be governed by the rules and regulations adopted by the department of education and approved by the board of standards." (§ 12-336).

Note, however, that while these agencies may purchase independently, they remain subject to the policies established by the Board of Standards and Purchases.

In Texas, river authorities, conservation and reclamation districts and other political subdivisions are not required to purchase through the Board of Control (Art. 664-3, § 3). In addition, purchases of material, equipment and supplies for resale, for auxilliary enterprises, for organized activities relating to instructional department of institu-

tions of higher learning, and for similar activities of other state agencies, and purchases made from gifts and grants may be made directly by state agencies (Art. 664-3, § 5).

In 1974, the Report on State and Local Government Purchasing published by the Council of State Governments stated:

> "Some States provide blanket exemptions from central purchasing for designated agencies, commodities, or both. Some agencies have been exempt for historical reasons--traditionally they have been highly autonomous organizations with segregated funding. Other agencies have been permitted to purchase highly technical items on the grounds that they have the program expertise. Neither of these types of exemptions is consistent with the concept of central purchasing. The tradition of long-standing, autonomous, and politically powerful agencies is difficult to overcome, yet it should not override the fundamentals of a sound public purchasing program.
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> Purchasing management and the executive and legislative branches must constantly review exemptions and delegations. The valid rationale of yesteryear may well have become today's impediment to effective purchasing and good government. Blanket statutory exemptions jeopardize the integrity of the purchasing program because they diffuse control. If central purchasing is to be effective, it must manage or supervise all purchasing operations. This management and control should include the authority to delegate purchasing activities and thereby effectively eliminate the need for blanket statutory exemptions."

In light of the above, one task which remains before the Advisory Committee is the evaluation of the statutory exemptions in Virginia. If the exemptions remain, the Committee must determine whether the statute should specify the manner or method of procurement.

Methods of Procurement

There is a popular notion that all public contracts are let after competitive bidding. While this is true in the majority of public contracts, it may not be because a statute requires competitive bidding. In Virginia, until 1979, the Division of Purchases and Supply was not required to use competitive bidding at all, although it did so in the vast majority of cases. In 1979, the General Assembly directed that the Division use competitive bidding wherever practicable, with the exceptions to be listed in the purchasing plan of the Division (§ 2.1-442).

Since Virginia law does not address the procurement of contractual services, no method of source selection is prescribed.

Chapter 4 of Title 11 requires state contracts for construction, improvements, or repairs of real property to be based upon competitive bids if the contract is for more than $2,500. For highway contracts, however, the figure is $25,000. (§ 33.1-185).

The Alexandria City Charter requires competitive bid-

ding for city improvements exceeding $5,000. It also mandates competitive bidding for other materials, but allows the Council to make general exceptions. The city code therefore, requires competitive bidding only when the purchase exceeds $200 (§ 2-87), and requires newspaper advertisements if the purchase exceeds $5,000. The city code applies the same procedure to contractual services, but defines contractual services to include only the outside repair or maintenance of equipment or machinery (§ 2-74).

The Fredericksburg City Charter is silent on competitive bidding, and the city code states only that "Contracts for work or material shall be let only after due advertisement and bidding, where practicable...." No dollar figure is stated.

The Newport News City Charter requires competitive bids on city improvements exceeding $5,000, (§ 8.12) but is silent on other purchases. The city code, however, requires competitive bidding for all purchases of material and contractual services whenever possible (§ 2-293). If the purchase exceeds $5,000, a more formal procedure, including newspaper advertisement, is required (§ 2-304).

The Norfolk City Charter enjoins the city purchasing agent to give "opportunity for competition" before making any purchase of supplies (§ 77), but neither the Charter nor the city code enunciates a dollar figure. Public improve-

ments over $5,000 must be advertised and competitively bid (Charter, § 80).

In Roanoke, the City Charter requires competitive bidding when the purchase, public work, or improvement exceeds $10,000.

The City Charter of Staunton contains no provisions on purchasing, but the city code requires the purchasing agent "to solicit competitive quotations on items to be purchased...." No dollar figure is stated.

For counties in Virginia, § 15.1-108 requires all purchases of supplies, materials, equipment and contractual services to be based wherever feasible upon competitive bids. Sealed bids and newspaper advertisements are required if the purchase exceeds $2,500, unless the board of supervisors provides otherwise.

A similar variety exists among the States examined. In Georgia, purchases of material less than $100 need not be competitively bid at all (§ 40-1914.1), while purchases exceeding $5,000 require sealed bids (§ 40-1909). Neither of these sections apply to services, but Georgia must competitively bid services (§ 40-1902A). Construction is procured in accordance with the procedures used for material (§ 40-1911.1). Highway construction contracts exceeding $5,000 must be let by public bid [§ 95A-802 (d)]. The Department of Transportation may, however, negotiate the

procurement of "business, professional, or other services." (§ 95A-802D).

In North Carolina, the statute requires competitive bidding where the purchase of material exceeds $2,500. (§ 143-52). The Advisory Budget Commission prescribes the routine for securing bids for purchases of lesser amounts [§ 143-53(2)]. Contractual services are procured "by sealed competitive bidding or other suitable means." [§ 143-49(3)]. The same section also provides:

> "When the award of any contract for contractual services exceeding a cost of one hundred thousand dollars ($100,000) requires negotiation with prospective contractors, the Secretary shall request and the Attorney General shall assign a representative of the office of the Attorney General to assist in negotiation for the award of the contract. It shall be the duty of such representative to assist and advise in obtaining the most favorable contract for the State, to evaluate all proposals available from prospective contractors for that purpose, to interpret proposed contract terms and to advise the Secretary or his representatives of the liabilities of the State and validity of the contract to be awarded..."

All construction exceeding $10,000 must be competitively bid. (§ 43-129). In addition, for all projects exceeding $50,000, the public body must have prepared separate specifications for each of the following subdivisions or branches of work to be performed:

> "(1) Heating, ventilating, air conditioning and accessories (separately or combined into one conductive system) and/or refrigeration

for cold storage (where the cooling load is 15 tons or more of refrigeration), and all work kindred thereto.

(2) Plumbing and gas fittings and accessories, and all work kindred thereto.

(3) Electrical wiring and installations, and all work kindred thereto.

(4) General work relating to the erection, construction, alteration, or repair of any building above referred to, which work is not included in the above-listed three subdivisions or branches.

All such specifications must be so drawn as to permit separate and independent bidding upon each of the subdivisions or branches of work enumerated above. The above enumeration of subdivisions or branches of work shall not be construed to prevent any officer, board, department, commission or commissions from preparing additional separate specifications and awarding additional separate contracts for any other category of work when it is deemed in the best interest of such officer, board, department, commission or commissions to do so.

All contracts hereafter awarded by the State or by a county or municipality, or a department board, commissioner, or officer thereof, for the erection, construction, alteration or repair of buildings, or any parts thereof, shall award the respective work specified separately to responsible and reliable persons, firms or corporations regularly engaged in their respective lines of work. When the estimated cost of work to be performed in any single subdivision or branch is less than five thousand dollars ($5,000), the same may be included in the contract for one of the other subdivisions or branches of the work, irrespective of total project cost." (§ 143-135.3).

All highway construction contracts must be bid; those under $10,000 may be let on the basis of informal bids without

advertising.

In Pennsylvania, commodities are apparently on term contracts, and a detailed competitive bidding procedure is set forth (71 Stat. § 639). For items below $50 which are not included in the term contracts, no bidding is required. Otherwise, proposals must be invited from at least two responsible bidders. No statutory provision prescribes the procurement of services. All construction over $1,500 must be competitively bid (71 Stat. § 1618). Incidentally, this provision requires multiple contracts for separate branches of a project similar to the North Carolina statute.

In Tennessee, competitive bidding is required for all purchases of materials, although the Board of Standards may allow the director of purchases authority to establish an informal procedure for purchases below $500. (§ 12-323). The Board of Standards may approve rules and regulations for the procurement of goods and services which are available from only one source or are proprietary (§ 12-350). Personal services, professional services and consultant services must be procured in accordance with regulations promulgated by the commission of finance and administration. These regulations "require to the greatest practicable extent evaluation and consideration of vendors qualifications and cost in the award of the contracts." (§ 12-450). All highway construction contracts, regardless of the amount, must be competitively bid (§ 54-514).

Although the Texas statute sets forth in some detail the procedure for both "contract" (term) and "open market" (spot) purchases, the statute leaves it to the Board of Control to determine "the purchasing methods to be used in buying any supplies, materials, services, and equipment." [Art. 664-3(7)]. For professional services (accounting, architecture, optometry, medicine and professional engineering), however, the Texas statute specifically prohibits competitive bidding; "demonstrated competence and qualifications...at reasonable and fair prices" are the criteria (Art. 664-4). Competitive bidding is required for all construction over $2,000 (Art. 2368a), and for all highway construction, regardless of the amount (Art. 6674h).

The Model Procurement Code establishes a preference for competitive bidding for material, equipment, supplies, services and construction. (§ 3-201, § 3-202). It then exempts "small purchases" which are purchases below an amount to be set in regulations promulgated by the Policy Office (§ 3-204). It exempts sole source items and emergency procurements. (§ 3-205, § 3-206). (All States examined, including Virginia, allowed purchases without competitive bidding in emergencies.) The Model Procurement Code exempts specified services, setting up one procedure for procuring the services of accountants, clergy, physicians, lawyers, and dentists, (§ 3-207) and another for architects and

engineers (§ 5-501). Separate provision for architectural and engineering services has been challenged by some supporters of the Model Procurement Code. See, e.g., Zemansky, ABA's Model Procurement Code: The Fatal Flaw, Government Executive, June, 1979.

One feature of the Model Procurement Code absent in every State examined is a statutory procedure for "competitive sealed proposals." (§ 3-203). This procedure allows face-to-face negotiation after sealed proposals are submitted; it also allows factors other than responsiveness, responsibility and price to be considered. This method would probably be used if a State wished to engage a design-build, or turn-key, contractor.

Attachment O allows what it terms "small purchase procedures" when the procurement of material, services or construction does not exceed $10,000. Compliance with applicable state or local procedures is expected. Quotations must be obtained "from an adequate number of qualified sources." Above $10,000, competitive sealed bids are required if adequate specifications can be furnished to two or more suppliers, and the selection can appropriately be made principally on the basis of price. Otherwise, "competitive negotiation" may be used, which allows consideration of factors other than price. If the material, service or construction is available from only one source, "noncompetitive negotiation", or sole source procurement, is authorized.

Prior to its final report, the Advisory Committee must determine whether methods of procurement are adequately described in the Virginia statutes, whether the present emphasis on competitive bidding is the most economical form or is otherwise justified, whether alternative methods and the conditions for their use should be specified, whether "competitive bidding" should be defined to identify its salient features, whether statutory authorization for prequalification of bidders is desirable, and whether the State and its many political subdivisions should be adhering to the same policies.

Remedies

Statutorily prescribed administrative remedies for dissatisfied bidders and for parties with contractual disputes are limited in the states considered in this study. While some of the states provide for various forms of relief in Purchasing Manuals or administrative practice, only those procedures which are statutorily required are described herein.

In Virginia, parties who have unsuccessfully bid for contracts for the procurement of goods or supplies or who have been disqualified or suspended by the Division of Purchases and Supply from bidding upon or receiving such contracts may appeal to the Purchases and Supply Appeal Board. The former must do so within ten days after notice of intent

to award the contract is announced by the Division. The latter must file an appeal with the Board within thirty days after receipt of notice of disqualification or suspension (§ 2.1-437.1). Judicial reivew of the Board's decision is available (§ 2.1-437.2). This is the only pre-award remedy available for any procurement in Virginia. Note that it does not provide for a protest of the solicitation.

In Virginia, a contractor with a pecuniary claim (including contractual claims) against the Commonwealth may present the claim to either the head of the Department responsible or to the State Comptroller (§ 2.1-223.1). All claims shall then "...be examined by the person to whom it is presented and forwarded...without unreasonable delay to the Comptroller, who shall promptly allow so much on account thereof as may appear to be due." (§ 2.1-223.3). Presumably this remedy would be available to any dissatisfied party who had supplied materials, equipment, supplies or construction (other than highway construction) to the State. However, this has apparently never been used as an administrative appeals procedure in the formal sense, for it provides for no hearing or fact finding. The Administrative Process Act exempts such claims (§ 9-6.14:20).

Virginia law also provides administrative relief for parties with contractual claims against the State Highway Department. Within certain time limitations, the protestant

must submit a written claim to the Highway Department. The Department then investigates the claim, and notifies the claimant of the outcome. If dissatisfied with the initial determination by the Department, the claimant may notify the Highway Commissioner that he desires to appear before him. The Commissioner is then charged with making an investigation and notifying the claimant as to its outcome (§ 33.1-386). Exhaustion of this procedure is a prerequisite to an action at law.

Virginia statutes make no provision for appeals by parties providing services to the State of Virginia.

The Georgia Code prescribes no form of administrative relief for dissatisfied bidders or for parties with contractual claims against the State.

While North Carolina law provides no administrative remedies for parties providing or seeking to provide materials, equipment, supplies or services, it does provide relief, albeit limited, for construction contractors with claims against the State. Upon completion of any contract for construction or repair work, if a contractor fails to receive the amount of settlement to which he feels entitled under the terms of the contract, he may submit a claim to the Secretary of Administration within sixty days. In addition, "...the claimant, either in person or through counsel, may appear before the Secretary of Administration

and present any additional facts and arguments in support of his claim..." (§ 143-135.3). Within 90 days of receipt of the claim, the Secretary must make an investigation and notify the contractor of the outcome. If dissatisfied with the Secretary's determination, the claimant may then institute a civil suit (§ 143-135.3).

In Pennsylvania, no pre-award administrative remedy is provided for dissatisfied parties furnishing materials, equipment, supplies, services or construction to the State. However, a Board of Claims is created by statute to arbitrate all contractual claims against the State involving more than $300. This Board is composed of an attorney, a registered civil engineer, and a Pennsylvania citizen and resident. It has exclusive jurisdiction over all contractual claims against the State. The claim must be filed within six months of its accrual. A claim is commenced by filing a written statement with the secretary of the Board, giving notice to the State department involved. Within thirty days of filing by the claimant, the State must file an answer with the Board. The Board then hears the case.

In Tennessee, there is no pre-award remedy for parties providing or seeking to provide materials, equipment, supplies, services or construction to the State. However, here too, there is a Board of Claims "... vested with full power and authority to hear and determine all claims against

the State based upon, or arising out of, any written contract..., and its awards, if any, under this section are to be paid out of funds of the department in each case available for the performance of the contract." (§ 9-812). All claims must be presented to this Board withon one year of their accrual.

Texas provides no administrative remedies for either pre-award controversies or contractual disputes.

The Model Procurement Code provides two forms of administrative relief for parties with either pre-award disputes or contractual claims against the State. Parties contesting the manner of solicitation of a contract, the award of a contract, disbarment or suspension may present their protest to the Chief Procurement Officer (or his designee), to the Procurement Appeals Board, or to both. (§ 9-101). Protest to the Procurement Appeals Board may be direct or subsequent to an unfavorable determination by the CPO. (§ 9-505). This procedure is available to parties seeking to provide materials, equipment, supplies, services and construction to the State. Contractors with contractual disputes may first appeal to the CPO. If dissatisfied with the outcome, they may then appeal to the Procurement Appeals Board. By implication, no direct appeal to the Board is possible in contract cases. (§ 9-505). The administrative steps are not a prerequisite to legal actions.

Suggested protest procedures in Attachment O are quite

limited, dealing with pre-award protests only. The federal agency making the grant may develop administrative proceedings to handle contractor complaints concerning contractor selection actions by grantees. However, no protest may be accepted prior to exhaustion of any recourse offered by the grantee agency. Review is limited to violations of federal law or the grantee's protest procedures, if any exist. Attachment O does not require a grantee to develop pre-award protest procedures, nor does it require an administrative forum for contractual claims.

In summary, Virginia is the only State prescribing a statutory administrative pre-award remedy and it is available only to protest actions of the Division of Purchases and Supply. Although Virginia has a procedure to be used for contractual claims against the State (filing a claim with the Comptroller), it has never been used as an administrative appeals procedure in the formal sense. Georgia and Texas provide no statutory form of administrative appeal. In North Carolina, there is an administrative appeals mechanism for construction contractors with claims against the State. In Pennsylvania and Tennessee, Boards of Claims have been created to arbitrate all contractual claims against the State. The Model Procurement Code advocates both pre-award and contractual relief for parties providing and seeking to provide materials, equipment, supplies, services and construction. Attachment O suggests only a limited pre-award

appeals mechanism.

The Advisory Committee must determine whether the statutory remedies available to contractors are adequate, and if additional procedures are desirable, indicate the conditions for such remedies. Implicit in this is the question of whether remedies are better left to the agency's regulations. The Advisory Committee must consider the relief available if a remedy is successfully invoked. It must also determine whether statutory sanctions against fraudulent or spurious claims are appropriate.

Ethics in Public Contracting

Virginia's primary statute on ethics in public contracting is the Conflict of Interests Act, which prohibits officers and employees of governmental agencies from contracting, subcontracting or having a material financial interest in any contract or subcontract with their employing agency [§ 2.1-349(a)(1)]. A governmental employee may contract with a government agency other than the one employing him only if he gives prior written disclosure of his interest and either the contract is given after competitive bidding or the contract is let only after the governing body or agency head determines in writing that competitive bidding is not in the public interest [§ 2.1-349(a)(2)].

A key to Virginia's conflict of interests provision is the definition of "material financial interest" set forth

in § 2.1-348(8). "Material financial interest" means a personal and pecuniary interest accruing to any government official or employee, his spouse, or any other relative residing in his household, but ownership of less than five per cent of a business, or aggregate annual income, excluding interest and dividends, of less than $5,000 from a business is not deemed to be a material financial interest.

Virginia's definition of material financial interest probably does not satisfy the requirements of Attachment O, which provides that employees of grantees may not participate in the selection, award, or administration of such contracts if they, their partners, members of their immediate families or an organization employing or about to employ any of those named have a financial or other interest in the firm selected for award. Clearly Attachment O is broader than the Virginia statute, for it is not limited by dollar amount or to relatives living in the same household.

Virginia prohibits government employees from disclosing or using for personal gain any information obtained by virtue of their office [§ 2.1-351(b)]. Violation of the conflict of interests provisions is a misdemeanor and results in forfeiture of both office (§ 2.1-354) and money or value received (§ 2.1-355).

The Virginia Conflict of Interests Act does have a requirement for annual disclosure of financial interests, but this section was amended in 1979, and no longer requiress

disclosure by all persons exercising substantial power and discretion in the performance of procurement duties [§ 2.1-353.2A(2)].

Prior to enactment of the Conflict of Interests Act in 1970, § 2.1-238 read:

> "Interest in Contracts, Etc., Forbidden.--Neither the Director of the Department of Purchases and Supply, nor any assistant or employee of his, shall be financially interested, or have any personal beneficial interest, either directly or indirectly, in any contract for printing, binding, ruling, advertising, lithographing, engraving, and so forth, let out by him, in any contract for paper or stationery purchased for the use of the State, in any profits arising therefrom, in the purchase of any materials, equipment or supplies under this chapter, or in any firm, corporation, partnership or association furnishing any such services, materials, equipment and supplies; nor shall such Director, assistant or employee accept or receive, directly or indirectly, from any person, form or corporation to whom any contract may be awarded, or from whom any purchase may be made, by rebate, gift, or otherwise, any money or other thing of value whatsoever, or any promise, obligation or contract for future reward or compensation."

This section was repealed when the Conflict of Interests Act was passed.

Virginia bribery statutes prohibit the giving to or acceptance of gifts, gratuities or pecuniary benefits with the intent to influence a public official's judgment or exercise of official discretion. (§§ 18.2-438, 18.2-447).

Georgia's conflict of interests provisions can be found in its Code of Ethics for Government Service (§ 89-925), in

several narrow provisions regulating purchasing ethics, and in several penal provisions. The Code of Ethics is broadly stated:

> "Any person in government service shall...
> VII. Engage in no business with the government, either directly or indirectly, which is inconsistent with the conscientious performance of his governmental duties.
> VIII. Never use any information coming to him confidentially in the performance of governmental duties as a means for making a private profit." (§ 89-925).

One provision permits members of state boards or commissions to contract with the State only if it is on a competitive bid basis, (§ 89-914), while another provision absolutely prohibits such members from engaging in any transaction with the board or agency of which they are a member. (§ 89-916). This is similar to Virginia's law, distinguishing between the employing agency and the non-employing agency. Georgia does not seem to prohibit state contracts with relatives of employees, unless the Code of Ethics is construed to include such transactions.

All bids and contracts must include a certificate assuring compliance with the above provisions. Violation of the provisions will result in discharge from any position with the State and a prohibition on future business with the State. There is no such provision in Virginia law.

The Georgia Code has a section prohibiting bribery, which is defined as to give or offer to give, solicit or

receive any benefit or consideration for the purpose of influencing one in the performance of his official functions. (§ 26-2301). The Code of Ethics also contains a bribery section providing that a governmental employee shall never accept favors or benefits for himself or his family under circumstances which might be construed by reasonable persons as influencing the performance of his duties (§ 89-925). Another provision requires that members of State boards, commissions, and authorities should never solicit or accept gifts, loans, gratuities, discounts, favors, hospitality or services from any individual or business association from which it could reasonably be inferred that the donor's major purpose is to influence the performance of his official duties (§ 89-953).

Under North Carolina's conflict of interests provisions, the Secretary of Administration, his assistant, members of the Advisory Budget Commission, or the Standardization Committee may not have a personal or financial interest--either directly or indirectly--in the purchase of or contract for supplies for the State, nor in any business association furnishing supplies to the State or its agencies. Nor may such persons accept value, promise, obligation or contract for future reward from one to whom a contract has been awarded (§ 143-63). Directors of State institutions are

forbidden from trading, directly or indirectly, with or amongst themselves, or with any concern in which they are interested, for any supplies (§ 143-113).

Another North Carolina conflict of interests provision applies to engineers, architects, draftsmen or design firms providing services to any city, county or State. Under this provision, it is a misdemeanor for such a person to knowingly specify any supplies, equipment or material manufactured, distributed or sold by any business in which the specifier has a financial interest (§ 133-1). Furthermore, such person may not employ or allow any manufacturer to write plans, draw or make specifications for any work on which such person is employed (§ 133-2). Virginia does not have such a provision, although Virginia does prohibit the purchase of materials for state buildings from the architect or engineer in charge (§ 2.1-449).

Bidders are required to certify that each bid is submitted competitively and without collusion. False certification is punishable as in cases of perjury. (§ 143-54). In Virginia, such certification is not required by statute except on highway contracts (§ 33.1-343).

The North Carolina bribery statute prohibits any person holding a state office from receiving, consenting to receive, indirectly or directly, any thing of value or personal advantage, or promise thereof with the express or implied

understanding that it is to influence the performance of his official duties (§ 14-217). An elected or appointed person is guilty of a misdemeanor if he is interested in, makes or is in any matter concerned under his authority, with a contract. This applies to employees of political subdivisions, with exceptions for certain individuals in towns with populations of 7500 or less [§ 14-234(3)]. It does not apply if the contract is authorized by a governing board on which the public official does not vote or if the transaction involves a bank, savings and loan, or public utility in the regular course of business [§ 4-234(a)].

North Carolina has an unusual provision prohibiting state employees from participation in any business transaction involving public funds with any business organization or individual with whom the employee had a financial association in the preceding two year period [§ 14-234(c)]. This, however, does not apply to those situations governed by the regular conflict of interests provision [§ 14-234(d)].

In Pennsylvania, public employees, their immediate families or businesses in which they are associated as director, officer, owner or shareholder with more than 5% of its equity value may not enter into contracts of $500 or more with a government body unless the contract is awarded through an open and public process [170 Stat. § 3(c)]. State advisors and consultants may not have interests in

contracts which are the subject of their employing agency's actions (71 § 776.3). No state employee may influence the making of a contract in which he has an interest, (71 Stat. § 776.4), nor may a state employee have adverse interest in any contract with his employing agency (71 Stat. § 776.5). Finally, the secretary of General Services may not have interest in state contracts for printing, supplies, materials or stationery (71 § 1647).

The Pennsylvania statute prohibits conflict of interest in local government, requiring that a person holding an appointive office in a political subdivision not have an interest in any contract entered into or subject to an interest of the political subdivision [170 Stat. § 3(h)].

Pennsylvania law contains an extensive provision requiring disclosure of financial interests. The requirement of a written statement of financial interest applies to employees of the State or its political subdivisions and to each candidate nominated to public office (170 Stat. § 4).

Pennsylvania's Conflict of Interests Act includes provisions regulating the "revolving door." One provision prohibits any former state employee from representing with or without compensation, a person on any matter before the governmental body with which he was associated for one year after he leaves that body [170 Stat. § 3(e)].

The Pennsylvania Code also makes it a misdemeanor for a

government employee to acquire a pecuniary interest in any property or transaction on the basis of contemplated official action by himself or the agency with which he is associated, or on the basis of information gained by virtue of his office (18 Stat. § 3302). It is a misdemeanor for such an architect or engineer employed by the government to award any contract to himself or to have an interest in or receive value from a person interested in the public contract.

A person who benefits financially from a violation of this act must pay into the State Treasury a sum of three times the amount of the illicit financial gain [170 Stat. § 9(d)]. Virginia does not have such a provision.

Under the Pennsylvania bribery statute, it is bribery, a felony, if a person offers, confers or agrees to confer on someone, or solicits, accepts or agrees to accept from another any pecuniary benefit in return for influencing a government employees' official exercise of discretion or any benefit in return for the employee's violation of a known public duty. An interesting provision, not found in other states' statutes, provides that the threat to commit harm upon the employee to obtain influence is also bribery.

In Pennsylvania, there is a State Ethics Commission charged with the responsibility to issue opinions concerning an individual's duties, to institute an inquiry when it reasonably believes that a conflict exists, to issue written

advice, to provide advisory opinions to state employees as to the application of the revolving door provision and to investigate alleged violations of this act on complaint or on its own motion [170 Stat. § 7(9)]. When a person acts in reliance on the opinion of the commission, he is not subject to civil or criminal sanctions or penalties [170 Stat. § 7(9)]. The Commission is empowered to hold hearings, subpoena witnesses, and recommend prosecution or dismissal of criminal charges. [170 Stat. § 7(10-13)].

Tennessee does not have a separate conflict of interests Act in its Code. Instead, § 12-334, applicable to those involved with procurement, prohibits the acceptance or receipt, directly or indirectly, of anything of value from an individual or business association to whom a state contract has been awarded.

Tennessee's bribery statute contains the usual provisions prohibiting anyone from giving anything of value to a government officer to influence him in the exercise of his discretion and prohibiting the government officer from accepting value or promises under such conditions. Additionally, it is a misdemeanor under Tennessee law, to give or promise, directly or indirectly, any valuable consideration to induce a person who is <u>not</u> a state employee to use his interest or influence to procure a position of trust in the State for the giving individual. Virginia's bribery statute does not

contain such a provision.

Texas' statutes include a provision dealing with conflict of interests. No members or employee of the State Purchasing and General Services Commission may be interested in or in any manner connected with a contract or bid. Nor may such person, under penalty of dismissal, accept or receive from one to whom any contract may be awarded, directly or indirectly, and gift, rebate or any other value or any promise, obligation or contract for future reward or compensation. (Art. 601b, § 3.19).

A broader standard of conduct, applicable to all Texas state employees, is set forth in Art. 6252-9(b) § 8. Essentially, it requires that state employees may not accept gifts, employment, compensation or any benefit that would affect the independent exercise of his judgment.

Texas requires all high-level state employees to file an annual financial statement [6262-9(b) § 3(a)]. The reporting employee must also include the financial activities of his spouse and dependent children. The Texas purchasing statute also requires a state employee having a financial interest in a firm that is a private consultant offering services to the state or which is related to the employee within the second degree of consanguinity or by affinity to report such interest to his agency head within 10 days after the offer is made (Art. 601b § 6A).

The Texas statute defines bribery as to knowingly offer or promise, or to receive, solicit or accept any pecuniary benefit in exchange for influence in the public official's exercise of discretion, or in exchange for the official's violation of his legal duty (Art. 36.02). The Texas statute provides that it is official misconduct, if a public servant with intent to obtain a benefit for himself or to harm another goes beyond his authorized exercise of power, refrains from doing that which his office requires or violates a law relating to his employment. This is a misdemeanor.

Texas has opted for a limited revolving door provision that requires only disclosure. A former employee of a state agency who, within two years of his termination, offers consulting services to an agency must disclose certain information in the offer regarding his prior state employment. (Art. 601b, § 6B).

Texas is the only state that requires a bidder to certify that his business or other organization has not violated state or federal antitrust laws. (Art. 635).

Article 12 of the Model Procurement Code describes six ethical standards. The first is similar to most of the conflict of interests acts examined. It does not distinguish between contracts with employing agencies and nonemploying agencies. The second standard requires disclosure of any benefits received from any state contract with a business in

which the employee has a financial interest.

The third standard prohibits gratuities and kickbacks. The standard includes giving or receiving, and applies to both present and former employees. In addition, kickbacks from a subcontractor to the prime contractor or higher tier subcontractor are prohibited.

The fourth standard prohibits retaining a person to solicit or secure a State contract in return for a percentage or contingent fee. A certification to this effect must be submitted as a condition to the award.

The Model Procurement Code suggests the most elaborate "revolving door" provisions of any system examined. These provisions prohibit contemporaenous employment, disqualify former employees either permanently or for one year depending upon the degree of involvement in the particular matter, and prohibit selling to the State for one year by a former employee.

The final standard prohibits use of confidential information for personal gain, or for the personal gain of another person.

The Model Procurement Code suggests both administrative and civil remedies for enforcement of the standards. An Ethics Commission is empowered to render advisory opinions, terminate, suspend or reprimand employees, and suspend or disbar contractors.

The statutes of the states examined vary widely in scope and wording, even though they are aimed at the same abuses. In evaluating the Virginia ethics provisions, the Advisory Committee must consider whether the definition of "material financial interest" is sufficiently comprehensive, whether the distinction between contracts with the employing agency and contracts with the nonemploying agency is valid, and whether the Virginia law, as it relates to procurement activities, is sufficiently comprehensive. It must consider the desirability of affidavits of noncollusion in public bidding, as well as "revolving door" restrictions on former employees. Lastly, are the present enforcement mechanisms adequate?

Adoption of the Model Procurement Code

The Model Procurement Code is a model, not a uniform, act. It is intended to be tailored by the adopting jurisdiction. The Advisory Committee will be considering what provisions, if any, of the Model Procurement Code should be adopted in Virginia.

Arkansas, Louisiana and Kentucky have adopted statutes derived from the Model Procurement Code. In none of these States was a Policy Office established as suggested in the Model Procurement Code. In Louisiana, regulations are promulgated by the supervisor of the Chief Purchasing Officer, in Arkansas by the Chief Purchasing Officer with

the approval of his supervisor, and in Kentucky by the Chief Purchasing Officer.

In none of these States was the suggested Procurement Appeals Board created. Arkansas deleted Articles 5 (Procurement of Construction, Architect-Engineer and Land Surveying Services), 11 (Assistance to Small and Disadvantaged Businesses) and 12 (Ethics in Public Contracting). Louisiana also deleted Articles 5 and 12, along with 7 (Cost Principles) and 8 (Supply Management). Kentucky deleted Articles 8 and 11.

Socioeconomic Considerations

State procurement laws are frequently used as vehicles to accomplish socioeconomic objectives. Such legislation is enacted on the premise that the additional cost it inevitably imposes is offset by the benefits of the socioeconomic objective. A common example is the "In-State Preference" law. In some States, statutes actually provide for a percentage differential to be applied in favor of the in-State vendor. Most states, however, now provide for a preference only without loss of quality or price. Among the States covered in this study, only Tennessee and Pennsylvania had no in-State preference statute. Georgia (§ 40-1954), North Carolina (§ 143-59), and Texas (Art. 664-2) had such laws, but all provided that the cost and quality had to be equal before the preference was applied. Virginia has two such

statutes. Section 2.1-448 requires that the Division of Purchases and Supply give preference "so far as may be practicable" to materials produced in Virginia or sold by Virginia firms. When read with § 2.1-442, this preference is invoked only when price, quality, and times of delivery are equal. Section 11-20.1, which applies to construction contracts, takes a slightly different tack:

> "Whenever any bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a preference measured by a percentage of the difference between the bid submitted by such contractor and the bid submitted by a contractor who is a resident of another state, a like preference may be allowed to the lowest responsible bidder who is a resident of the State of Virginia."

This is a reciprocity statute.

Another common socioeconomic objective is the gainful employment of the handicapped. Pennsylvania (71 Stat. § 639.1), Tennessee ($ 14-646), Texas (Art. 664-6), and Virginia (§ 2.1-450, & § 2.1-450.1) all have statutes requiring purchases from State or private nonprofit agencies for the handicapped.

In recent years, there has been much legislative interest in assistance to small businesses and minority-owned businesses. Only one of the states in this study, Texas, had a small business set aside (10%). (Art. 5190.3). Georgia law declares that it is public policy "to ensure

that a fair proportation of the total purchases or contracts or subcontracts for property, commodities or services for the State be placed with small businesses, so long as the commodities and services of small businesses are competitive as to price and quality." (§ 40-1950). None of the states studied have a minority set-aside statute.

The interest in such legislation is not likely to abate. Congress passed the Public Works Employment Act of 1977, which required recipients of funds under that Act to give satisfactory assurances that at least 10 per centum of the amount of each grant was spent for minority business enterprises. This legislation is now being challenged before the United States Supreme Court. If sustained, more federal legislation along this line could be expected. The Advisory Committee has been requested by the State Office of Minority Business Enterprise to consider a system of "sheltered markets" for small and minority businesses. Under the proposal, certain commodities would be reserved, and bids accepted only from small and minority businesses. And Attachment O states:

> "a. It is national policy to award a fair share of contracts to small and minority business firms. Accordingly, affirmative steps must be taken to assure that small and minority businesses are utilized when possible as sources of supplies, equipment, construction and services. Affirmative steps shall include the following:

(1) Including qualified small and minority businesses on solicitation lists.

(2) Assuring that small and minority businesses are solicited whenever they are potential sources.

(3) When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation.

(4) Where the requirement permits, establishing delivery schedules which will encourage participation by small and minority business.

(5) Using the services and assistance of the Small Business Administration, the Office of Minority Business Enterprise of the Department of Commerce and the Community Services Administration as required.

(6) If any subcontracts are to be let, requiring the prime conbractor to take the affirmative steps in 1 through 5 above.

B. Grantees shall take similar appropriate affirmative action in support of women's business enterprises."

Requirements for bid, performance and payment bonds on public contracts are frequently perceived as adversely affecting access to public contracts by smaller businesses which may have difficulty obtaining such bonds. The Advisory Committee must consider whether that freedom of access outweighs the protection of the public body and the contractor's materialmen and suppliers.

The Advisory Committee must consider what socioeconomic objectives are appropriately advanced through public pur-

chasing, and which requests for statutorily favored treatment cannot be justified.

Conclusion

The areas indicated herein are submitted by way of example, not limitation, for in the course of its examination, the Advisory Committee may select additional topics. These topics were identified during the five meetings, of the full Advisory Committee, which included one public hearing advertised Statewide. During the coming months, public hearings on several of the specific topics will be scheduled to ensure that input from the public is considered. This has been an Interim Report, and is intended only to indicate some issues and areas of inquiry which must be addressed prior to the submission of the final report in November, 1980.