

Findings and Recommendations Report



Ikaso Consulting

April 16, 2018

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Executive Summary and Recommendation Roster

Executive Summary

In September 2017, the Review Subcommittee (the Subcommittee) of the Arkansas Legislative Council (ALC) selected Ikaso Consulting LLC (Ikaso) to perform a review of the State's procurement laws and practices. This selection was made as a result of a competitive process pursuant to RFP Number BLR-170003.

After a detailed review of the State's statutes, rules, policies and procedures, interviews with multiple stakeholders, and an analysis of available data, Ikaso has identified recommendations for the Subcommittee's consideration. These recommendations range from broad paradigm shifts to very specific rule adjustments. A complete table of Ikaso's recommendations can be found beginning on the next page. These are ordered in broad alignment with the public procurement process cycle.

In isolating the most important content of this report for presentation to the Subcommittee during the scheduled April 19, 2018 meeting, we highlight the following 10 items for the Subcommittee's consideration:

- Encouraging more inter-agency collaboration to better leverage the State's purchasing power (*See Section I*).
- Improving Vendor Performance Reporting protocol (*See Section XIII*).
- Adjusting the composition of and instructions to proposal evaluation teams (*See Section VIII*).
- Better leveraging of AASIS to measure the procurement and contracting process to understand review cycle times and to predict downstream demands (*See Sections XI and XIII*).
- Refining the criteria which require contract review by the ALC Review Subcommittee (*See Section XII*).
- Better controlling the use of cooperative purchasing agreements (*See Section II*).
- Encouraging more contract negotiations through statutory and procedural changes (*See Section IX*).
- Better regulating protests from aggrieved vendors (*See Section X*).
- Formalizing a minimum percentage of an RFP's score for cost (*See Section VIII*).
- Saving State personnel time by adjusting or discontinuing certain labor-intensive reports which appear to not be used (*See Section XIV*).

We believe these changes, if enacted, could position Arkansas as a leader in state government procurement. The recommendations build a procurement process representing a more accountable government that better serves the citizens and taxpayers of the State.

Recommendation Roster

A complete list of Ikaso’s 62 recommendations is below.

- Each recommendation is numbered. The roman numeral of the number refers to the section in which the recommendation appears.
- Each recommendation within a section is individually numbered.
- The below table does not include sub-recommendations (which are listed in the recommendations at the end of each section).

The end of each section in this report reiterates each recommendation with greater detail and includes, where applicable, specific statutory and rule changes to implement the recommendations.

Recommendation Overview		Impact	Complexity
Section I – State Contracts and Strategic Purchasing			
I-1	Amend Ark. Code § 19-11-223 to eliminate barriers to State Contracts.	Medium	Low
I-2	Encourage OSP to pursue savings through targeted development and roll-out of more mandatory State Contracts.	High	High
I-3	Task OSP to measure savings through State Contracts.	Medium	Medium
I-4	Provide OSP with a reasonable amount of additional resources, if necessary, to achieve these goals.	High	Medium
Section II – Cooperative Purchasing			
II-1	Amend Ark. Code § 19-11-206 to exclude State Contracts from the scrutiny and hurdles associated with co-ops.	Medium	Low
II-2	Amend Ark. Code § 19-11-249 to require “substantial savings” to enter into a co-op.	High	Medium
II-3	Amend OSP Regulation R1:19-11-249 to require, in a review of a potential co-op, a validation of demonstrated savings (<i>i.e.</i> an economic justification).	High	Medium

Recommendation Overview		Impact	Complexity
II-4	Amend OSP Regulation R1:19-11-249 to empower a different entity than OSP to review OSP's request to enter into a co-op.	Medium	Medium
Section III – Vendor Education and Access			
III-1	Draft a new statute to enable pre-proposal and pre-bid conferences.	Medium	Low
III-2	Enhance vendor training locally and throughout the State.	Medium	Medium
III-3	Periodically poll vendors to improve the procurement process.	Medium	Low
Section IV – Delegation			
IV-1	Amend existing rules to require an expiration date, public posting, and central maintenance for a delegation order to be effective.	Medium	Low
IV-2	When delegating authority based on purchase type (<i>i.e.</i> delegation to buy a particular good or service) ensure that the delegation order is narrowly tailored.	Medium	Medium
IV-3	Consider linking delegation orders to the required completion of procurement training.	Medium	Medium
Section V – PCS/TGS/Commodities Distinction			
V-1	Eliminate the distinction between PCS and TGS contracts.	Medium	High
V-2	Revise the definition of “commodity” to avoid the risk of contract mischaracterization.	Medium	Low
Section VI – Procurement Instrument Selection, Preparation, and Control			
VI-1	Amend OSP Regulation R7:19-11-230(c) to allow clarification of proposals.	Medium	Low
VI-2	Amend OSP Regulation R9:19-11-229(3) to allow clarification of bids.	Medium	Low

Recommendation Overview		Impact	Complexity
VI-3	Amend OSP Regulation R1:19-11-233 to clarify emergency procurement protocol, including creating a definition of “critical emergency.”	Low	Low
VI-4	Create new statutes to enable the use of Requests for Information (RFI) and Negotiated Bids.	High	Medium
VI-5	Enhance training on specifications drafting.	High	Medium
VI-6	Formalize, in statute, OSP’s current rule-based practice of documentation and approval of RFQs (not including those administered under the authority of the Division of Building Authority).	Medium	Low
VI-7	Amend OSP Regulation R7:19-11-229 to regulate the use of cash and time discounts rather than prohibit them.	Medium	Low
Section VII – Proposal/Bid Disqualification			
VII-1	Validate bid and proposal rejections with applicable agencies.	Medium	Low
VII-2	Amend OSP Regulation R5(b):19-11-230 so that a vendor’s previous experience working with the State, if any, is evaluated in a proposal section where all competing vendors furnish references. This ensures that experience with Arkansas is evaluated on equal footing with competitors’ experience with other states and clients.	Medium	Low
Section VIII – Proposal Evaluation			
VIII-1	Correct agency-held misperceptions regarding evaluation team composition that are restricting the use of State expertise for proposal evaluation.	High	Low
VIII-2	Consider the use of private sector evaluators, provided that such use is optional, controlled for conflicts of interest, deployed strategically, and not utilized in any setting that may jeopardize the availability of federal funds.	Medium	High
VIII-3	Formalize, in statute, the percentage of proposal scores reserved for cost.	Medium	Low
VIII-4	Revise RFP training and templates to simplify the scoring process.	Medium	Low

Recommendation Overview		Impact	Complexity
VIII-5	Encourage more and better discussion at evaluation meetings.	High	Medium
Section IX – Negotiations			
IX-1	Amend negotiations-related statutes to allow for Best and Final Offers (BAFOs).	Medium	Low
IX-2	Amend negotiations-related rules to reduce the hurdles to negotiations.	Medium	Low
IX-3	Amend the rules which currently require negotiations training to also require OSP to furnish negotiations training and certification.	Medium	Medium
Section X – Protests			
X-1	Amend Ark. Code § 19-11-244(a)(3) to make award protests due a fixed number of days after the announcement of the anticipation to award.	High	Low
X-2	Amend Ark. Code § 19-11-244 to limit the grounds of a protest and require protestors to point to facts that support their grievances on those grounds.	Medium	Low
X-3	Amend Ark. Code § 19-11-244 to require a protest bond to file a protest.	High	Medium
X-4	Amend OSP Regulation R2:19-11-244 to discontinue the ability to award costs to successful protesters.	Low	Low
X-5	Adjust contracting practices during the pendency of a protest to continue negotiations and Executive branch review while a protest is being resolved.	Medium	Low
X-6	Amend Ark. Code § 19-11-244(a)(2) to clarify protest procedures for procurements which did not involve OSP.	Medium	Low
Section XI – Post Procurement Contract Process			
XI-1	Change contracting protocol to require vendor signatures on contracts after the completion of the review process to add clarity to when a contract is considered final and to make vendors share accountability in review process adherence.	Medium	Low

Recommendation Overview		Impact	Complexity
XI-2	Amend Ark. Code § 19-11-219 to create a program of attorney review for certain contracts.	Medium	Medium
XI-3	Use AASIS to measure and track the contract review process timing and performance. Report on actual, aggregate review process timing.	Medium	Medium
XI-4	Amend Ark. Code § 19-11-238(c) to allow longer initial contract terms (but maintaining the same total, potential contract length).	High	Low
Section XII – Subcommittee Review			
XII-1	Change what contracts are reviewed by the Subcommittee to materially reduce the total automatically sent for review.	High	Low
XII-2	For reviewed contracts, require a cover sheet with meaningful information about the contract and procurement process.	High	Medium
XII-3	Expand the contracts that are reported (but not automatically reviewed) to the Subcommittee. Enable members of the Subcommittee to “call” any reported contract for review.	Medium	Medium
XII-4	Develop a coversheet for the contract report with business rules that flag potential contracts to be “called” for review.	Medium	Medium
XII-5	Discontinue the review and approval of all vehicle leases.	Medium	Low
Section XIII – Vendor Performance Reporting			
XIII-1	Amend the statutory requirements regarding contract performance metrics to require that, for contracts over a certain size or type, such metrics must be customized to the contract and objective.	High	Medium
XIII-2	Amend the VPR requirements to only require VPRs when a vendor fails the objective metrics.	High	Medium
XIII-3	Make VPRs internally viewable.	Low	Low
Section XIV – Reporting			
XIV-1	Expand the number and type of contracts that are reported to the Subcommittee.	Medium	Medium






Recommendation Overview		Impact	Complexity
XIV-2	On co-op reports, shift the responsibility for gathering line item detail from State personnel to the vendors.	Medium	Low
XIV-3	Discontinue the obsolete recycled paper reports by eliminating the statute. Alternatively, require the reports from the State's vendors and not State personnel.	Medium	Low
XIV-4	Track and report on protests and their resolution.	Medium	Low
XIV-5	Track and report on negotiations and their outcomes.	Medium	Medium
XIV-6	Track and report on contract life cycle information in AASIS to project downstream procurement activities.	Medium	Medium
Section XV – Design Professional and General Contractor Procurement			
XV-1	Continue RFQ selection process for design professionals.	Low	Low
XV-2	Consider Statewide “on call” contracts for design professionals.	Medium	Medium
XV-3	Encourage DBA to consider including relevant experience as one of the qualifications agencies can evaluate as part of a construction bidder's “responsiveness.”	Medium	Low
XV-4	Develop a program similar to one in place at the Department of Transportation whereby contractors with other State engagements cannot bid on new State projects if there are material issues with their existing State projects.	Medium	Medium
XV-5	Correct obsolete “ABA” and “Arkansas Building Authority” references throughout the statutes and rules to “DBA” and “Division of Building Authority”.	Low	Low

Introduction and Methodology

As part of its rules adopted on May 19, 2017, the ALC assigned a study of procurement laws, regulations, and policies. Specifically, the Subcommittee has been asked to:

- Study current procurement processes and requirements, including without limitation the process and requirements for requests for qualifications and the process and requirements for evaluating responses to requests for proposals and requests for qualifications;
- Study the impact of procurement processes on the legal, architectural, engineering, construction management, and land surveying professions; and
- Recommend changes to the procurement laws, regulations, and processes in a report to the full Legislative Council at its December¹ meeting in each even-numbered year.

Ikaso was engaged, pursuant to RFP Number BLR-170003 to support the Subcommittee in the fulfillment of these duties. Prior to commencing this study, Ikaso and the Chairmen of the Subcommittee agreed upon a common “framework” that distilled the goals of this effort. The agreed upon framework is below.

Framework Criteria		Key Components
Process Transparency & Integrity		<ul style="list-style-type: none"> • Appropriate information is readily available to citizens and stakeholders • Procurement and contracting decisions adhere to established procedures
Optimized Oversight & Control		<ul style="list-style-type: none"> • Accountability to internal and external stakeholders • Appropriate information flows, including but not limited to information provided to the legislature in the execution of its duties
Thoughtful Vendor Selection Process		<ul style="list-style-type: none"> • Proposals and bids evaluated by capable, objective individuals • Evaluation of cost and quality appropriately balanced • Contracts that meet end-user needs, in terms of both quality and cost
Application of Best Practices		<ul style="list-style-type: none"> • Minimizing barriers and encouraging an enterprise mindset • Strategic, value-added procurement functions • Practices align with business needs • Contracts are optimized to include meaningful performance management tools • Process and tool optimization to mitigate protest risk
Consistent & Efficient Processes		<ul style="list-style-type: none"> • Consistent, efficient, and predictable practices utilized • Appropriate array of procurement methods and contract structures • Clear criteria for selecting appropriate procurement method and contract structure • Procurements launched and completed on schedule

¹ This meeting has since been rescheduled to November 16, 2018.

The above five criteria graphics appear above the recommendations at the end of each section. The grid of recommendations includes a check mark in each graphic's column indicating which framework goal(s) are furthered by the specific recommendation.

In preparing this report, Ikaso reviewed all applicable Arkansas procurement laws, rules, policies, forms, and procedures. A complete list of the materials reviewed can be found in Appendix 3. Within this report, unless otherwise noted, all statutory citations are to the Arkansas Code ("Ark. Code") and all rules cited are the Office of State Procurement Rules ("OSP Regulations").

Ikaso also interviewed a myriad of State and private sector stakeholders. A roster of those interviewed can be found in Appendix 4.

The report is broken into fifteen (15) sections numbered I through XV. Each section begins with a brief summary of the section's findings and recommendations. Each section then contains, as applicable, statutory and rule analysis, research on the conduct or policies of peer states, interview findings, analysis of State data, analysis of State conduct or policies, or other research. The end of each section contains a more fulsome description of each recommendation, proposed modifications to statute or rule language,² and observations regarding measurement or savings improvements, as applicable.

Ikaso wishes to mention that everyone at the State has been forthcoming, engaged and supportive of this project. In particular, both the Bureau of Legislative Research (BLR) and the Office of State Procurement (OSP) have been generous with their time, information and perspective. We would like to thank the Subcommittee for this opportunity, and we look forward to supporting the Subcommittee on its report later this year.

² A complete list of proposed statute and rule changes is also found in Appendix 1.

I. State Contracts and Strategic Purchasing

Section Summary:

The State, due in part to statutory restrictions, insufficiently collaborates across agencies to purchase common items through State Contracts (contracts available to all government and higher education users across the State, including political subdivisions). Although OSP has established a number of State Contracts, agencies are not required to use most of them (required contracts are “mandatory”), which means the State is not fully leveraging its purchasing power.

Leveraging the State’s overall purchasing power with mandatory State Contracts in common areas of spend is a strategic purchasing approach that many states have used to create significant, measurable savings. Quantifying the results of strategic purchasing efforts by measuring savings helps demonstrate the State’s efficient stewardship of taxpayer dollars.

Ikaso makes the following recommendations:

Section I Recommendation Overview		Impact	Complexity
I-1	Amend Ark. Code § 19-11-223 to eliminate barriers to State Contracts.	Medium	Low
I-2	Encourage OSP to pursue savings through targeted development and roll-out of more mandatory State Contracts.	High	High
I-3	Task OSP to measure savings through State Contracts.	Medium	Medium
I-4	Provide OSP with a reasonable amount of additional resources, if necessary, to achieve these goals.	High	Medium

Strategic Purchasing Overview:

- Pursuing savings and efficiencies by leveraging the State’s significant overall purchasing power is a strategy that has been adopted broadly by many states across the country. Buying together in larger quantities makes it easier to negotiate measurably lower prices.
- Mandatory State Contracts are not a universal solution and should not be pursued when good reasons can be presented that savings are not likely to result. However, the value of a mandatory State Contract is appropriately measured by the overall impact of leveraging the State’s buying power within a contract and not by comparing particular prices for individual items on the schedule with market alternatives.

- This type of strategic purchasing requires a proactive, thoughtful, and data-driven approach, as well as close collaboration with stakeholders across the State that use these contracts. Collaboration with contract stakeholders ensures their needs will be met by mandatory contracts, drives compliance with these contracts, and ultimately fosters a better relationship between OSP and end users.

Findings and Observations:

Statute and Rule Review

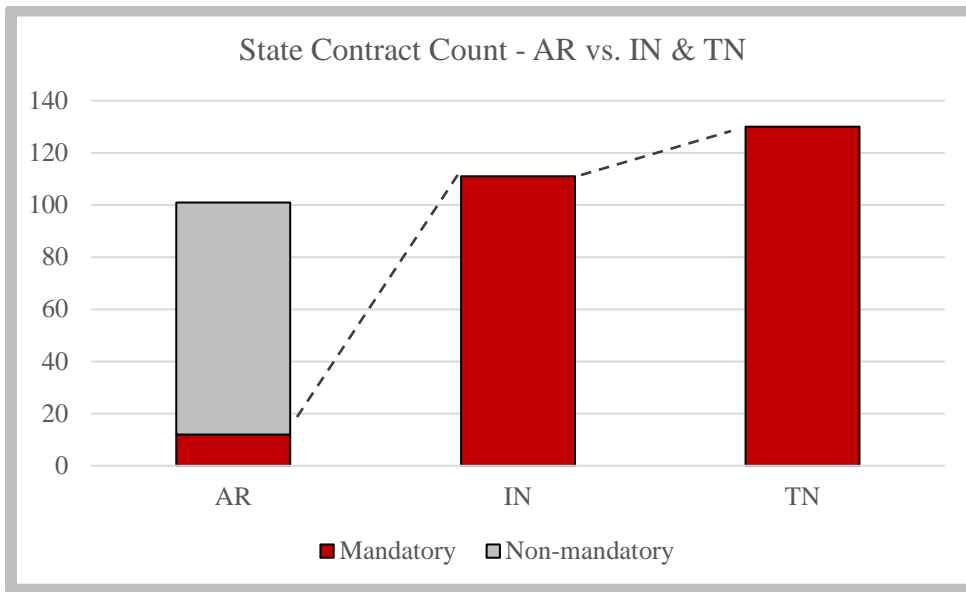
- The statutes governing State Contracts should encourage Statewide purchasing but, instead, hinder it.
 - Ark. Code § 19-11-223 discourages State Contracts, taking an inherently skeptical view by only allowing their use in instances of “substantial savings.”
 - The statute also actively invites State agencies with Agency Procurement Officials (APOs) to challenge and ultimately not participate in State Contracts. This aspect associated with APOs is tempered by the attendant rules that require written justification to, and determination by, the State Procurement Director.
- Currently there are certain areas where use of State Contracts is required pursuant to OSP’s authority under Ark. Code § 19-11-223. These include the commodities whose purchasing requirements are dictated by the 54th Amendment to the State Constitution (printing, stationery and supplies), as well as twelve (12) mandatory State Contracts.
 - Notably, office supplies are procured through a cooperative purchasing agreement, which may not align with the 54th Amendment’s requirement that such contract be awarded to the “lowest responsible bidder” given that no Arkansas-specific bid was conducted.

Interview Findings

- To use non-mandatory State Contracts, an agency or Institution of Higher Education must contact OSP for detailed information about the contract after locating them on a State website. This is to say that there can be active work involved to determine if these State Contracts are a good option, which can disincentivize their use.
- Agencies report that they do not have automatic access to State Contracts. Like co-ops, OSP needs to authorize their use and coordinate an agency-specific agreement (which provides another administrative hurdle to accessing State Contracts).

Comparison to Other States






- At the time of this report, OSP lists 12 mandatory State Contracts and 89 non-mandatory State Contracts. In comparison, the state of Indiana has over 110 mandatory State Contracts, and the state of Tennessee has 135. In practice, OSP has a comparable number of State Contracts, but their impact is muted by the fact that they are not mandatory.



Other Analysis

- OSP is organized and operates based on its current mandate. It primarily facilitates purchasing in reaction to the needs of the agencies it serves.
- Strategic purchasing, by contrast, requires a proactive approach – working with agencies and other parts of the State to identify commonality and promote collaboration. In short, going from “reactionary defense” to “proactive offense.”
- Taking on a strategic purchasing focus may require additional resources and/or operational alignment within OSP, both toward actively pursuing savings and toward measuring those savings.
- The specifics of any such needs are beyond the scope of this report, though to the extent additional resources are needed, the cost should be less than the value created by strategic purchasing initiatives.

Recommendations:

Rec. #	Details					
I-1	Amend Ark. Code § 19-11-223 to eliminate the discouragement of State Contracts as well as the incentive.				✓	✓
I-2	Encourage OSP to pursue savings through the targeted development and roll-out of more mandatory State Contracts.	✓	✓	✓	✓	✓

Rec. #	Details					
I-2.a	Identify and prioritize opportunities for mandatory State Contracts.		✓	✓	✓	✓
I-2.b	<p>Conduct mandatory State Contract procurements.</p> <ul style="list-style-type: none"> i. This should include recruiting stakeholders from all potentially impacted agencies to join in specification development and procurement evaluation to maximize buy-in of the resultant contracts. ii. This could also include utilization of cooperative purchasing options, so long as those options are more economically competitive than contracts the State could procure independently. 	✓	✓	✓	✓	✓
I-2.c	<p>Actively promote the use of State Contracts among local and county governments to better leverage the State's purchasing power. This would include making the detailed information about the contracts (<i>i.e.</i> what is available and at what price) more readily available and searchable, possibly through a website or catalog system. Presently, links to the entire contracts are posted online.</p> <ul style="list-style-type: none"> i. Local and county use of State Contracts is mutually beneficial. The State benefits because it gives the State higher purchasing power while local and county governments benefit because it gives them access to deeper discounts they could obtain on their own and relieves them of procurement administration burdens. 	✓	✓		✓	
I-3	Task OSP with measuring the savings from mandatory State Contracts by comparing new pricing and new leveraged-volume quantities against historical pricing under prior contracts. Periodic reporting of savings to the Subcommittee would allow committee members to point to real dollar savings achieved through procurement reform.	✓	✓		✓	
I-4	Provide OSP with a reasonable amount of additional resources, if necessary, to secure and achieve these goals.		✓		✓	✓

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per Recommendation I-1, amend Ark. Code § 19-11-223(a) as follows:

“...the director may award ~~a~~*mandatory-use* state contracts.”

- Per Recommendation I-1, delete the following text from Ark. Code § 19-11-223(a):

~~“in those instances when substantial savings may be effected by quantity purchasing of commodities, technical and general services, or professional and consultant services in general use by several state agencies”~~

- Per Recommendation I-1, delete Ark. Code §§ 19-11-223(b) and 19-11-223(c) in their entirety. Together these deletions, and the deletions from 223(a), end the discouragement of pursuing those savings that naturally come from leveraging the State’s purchasing power
- Per Recommendation I-1, amend Ark. Code § 19-11-223(d) as follows:

“Except ~~as authorized in this section~~ *under an exemption approved by the Director of the Office of State Procurement,*”

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per recommendation I-3, amend OSP Regulation R1:19-11-223(a) to include any conditions, reporting, or document retention standards that may be desired related to the promotion and measurement of State Contract use.
- Per Recommendation I-1, amend OSP Regulation R1:19-11-223(b) as follows:

“Approval ~~or denial~~ of exemption from a state contract shall be made in writing by the State Procurement Director prior to ~~issuance of the invitation for bids~~ *any purchase being made from an alternative source.*”

Improved Measurement

- Savings are readily measured and are a tangible demonstration of the State’s efficient stewardship of taxpayer dollars.

Capturing Savings

- The thoughtful development of mandatory State Contracts that are focused on the State's specific needs is a proven method for capturing savings and has been adopted by states all across the country.
- Given the broad range of non-mandatory State Contracts already held by OSP, it should be possible to readily calculate the increased savings created by leveraging the State's purchasing power.

II. Cooperative Purchasing

Section Summary:

Cooperative purchasing (“co-ops”) is a procurement method whereby the State is able to join a contract competitively procured by a third party (typically another state) provided certain protocols are followed and demonstrated. This procurement method is advantageous in certain circumstances as it can shorten the procurement timeline by utilizing an established contract and save money by pooling purchase volume. However, while OSP does currently screen requests to join co-ops, this screening does not require an economic justification (*i.e.* proof that the co-op will save the State money).

Ikaso makes the following recommendations:

Section II Recommendation Overview		Impact	Complexity
II-1	Amend Ark. Code § 19-11-206 to exclude State Contracts from the scrutiny and hurdles associated with co-ops.	Medium	Low
II-2	Amend Ark. Code § 19-11-249 to require “substantial savings” to enter into a co-op.	High	Medium
II-3	Amend OSP Regulation R1:19-11-249 to require, in a review of a potential co-op, a validation of demonstrated savings (<i>i.e.</i> an economic justification).	High	Medium
II-4	Amend OSP Regulation R1:19-11-249 to empower a different entity than OSP to review OSP’s request to enter into a co-op.	Medium	Medium

Co-op Overview:

- Cooperative purchasing occurs when a state or local government joins or utilizes another government entity’s contract instead of conducting its own procurement alone. An existing contract can be joined or a new contract can be collaboratively procured together.
- Co-ops are commonly contracts from other state governments which include common requirements of numerous states. The purpose of joining a co-op is theoretically twofold: time is reduced by not needing to conduct a full procurement and money is saved by pooling the purchasing volume of multiple entities.
- Although they serve similar purposes, cooperative purchasing is not necessarily the same thing as Statewide purchasing. Statewide purchasing occurs when different parts of the State join together to go to market with combined purchasing power. A co-op is when the State (or a

specific agency or part of the State) either joins a third party's existing contract or collaborates with that third party to go to market for a new contract.

Findings and Observations:

Statute and Rule Review

Statewide and Co-op Overlap



- Cooperative procurement is defined in Ark. Code § 19-11-206 as “procurement conducted by, or on behalf of, more than one public procurement unit or by a public procurement unit with an external procurement activity”.
- “Public Procurement Unit” is defined in Ark. Code § 19-11-205 to both include the State’s public procurement capabilities as well as those of other state or local governments.
- Accordingly, State Contracts (which necessarily entail multiple components of the State and their respective procurement units) are, under a strict interpretation, also co-ops. Thus, the barriers to entering a co-op (discussed below) are also enforceable barriers to Statewide purchasing. (*See* Section I for a discussion of the merits of enhancing and facilitating Statewide purchasing.)

Requirements for Co-op Use

- Approval from the Director of OSP is required for any State entity to enter into a co-op. OSP Regulation R:1:19-11-249. This includes Institutions of Higher Education.
- Historically, a request to enter into a co-op has been subject to a process-based “substantial compliance” review by OSP. *See* “OSP Policy – Cooperative Contracts.” However, this review has not included a demonstration of the economic purpose for co-op use (*i.e.* a demonstration of how the co-op would save money for the State and not just time for the party seeking to use the co-op).
 - Notably, as discussed in Section I, there is a requirement to show “substantial savings” when requesting a Statewide contract. *See* Section I.
 - Thus, the statutes presently require proof of savings when different parts of the State seek to join together, but require no proof when parts of the State seek to purchase off a third party’s contract.
- The Director of OSP reviews and approves OSP’s own use of co-ops.

Comparison to Other States






- Co-ops are commonly utilized as a successful procurement method in many states. However, policy among states differs regarding co-op approval. Many states have additional requirements in place to ensure co-ops are only used when in the best interest of the state.
- Notably, each of the profiled states below requires at least an economic justification for co-op use.

Profiled State	Cooperative Purchasing Details
<p>Arizona</p> 	<ul style="list-style-type: none"> • Extensive due diligence must be performed and documented, including analyzing costs, to ensure the cooperative contract is in the best interest of the state. <i>See</i> Arizona State Procurement Office Technical Bulletin No. 005. • Cooperative contracts may only address a one-time need and must be approved by the State Procurement Office. <i>Id.</i>
<p>Mississippi</p> 	<ul style="list-style-type: none"> • Cooperative purchasing agreements must be determined to be in the best interest of the governmental entity and an economically feasible transaction. <i>See</i> Miss. Code Ann. § 31-7-13. • Cooperative contracts must be approved by the Office of Purchasing, Travel, and Fleet Management. <i>Id.</i>
<p>Tennessee</p> 	<ul style="list-style-type: none"> • The potential for time and cost savings over the open market must be examined when choosing to use a cooperative purchasing agreement. <i>See</i> Tennessee Procurement Procedures Manual of the CPO, Section 6.8. • All cooperative purchasing agreement requests must be reviewed by the Chief Procurement Officer. <i>Id.</i>

Interview Findings

- Agencies find co-ops beneficial because they are easy to implement and save time during the procurement process. Due to this preference, agencies may sometimes pursue co-ops even if the co-op comes at a higher price than what the agency would get if it issued a solicitation.
 - When beginning a new procurement, agencies look for co-ops to use on the OSP website and some research co-ops on their own to see if any fit their procurement needs.
- Although agencies benefit from co-ops, the reporting requirements for using this procurement method, especially for Institutions of Higher Education, are complex and onerous. *See* Section XIV on Reporting.

Recommendations:

Rec. #	Details					
II-1	Amend Ark. Code § 19-11-206 to expressly exclude State Contracts from the scrutiny and hurdles associated with cooperative purchasing. Precise language is proposed below. Notably, this would not exclude procurements conducted by local or county governments to the extent that State level entities wished to join those procurements. These would remain (to the extent they exist or have ever existed) within the classification of co-ops.	✓	✓		✓	✓
II-2	Amend Ark. Code § 19-11-249 to limit cooperative purchasing contracts or agreements to commodities or services from which the State may realize substantial savings. This language is similar to what is included in Ark. Code § 19-11-223 for State Contracts.	✓	✓	✓	✓	✓
II-3	Amend OSP Regulation R1:19-11-249 to require, in the review of a proposed co-op, a validation of the demonstrated savings.	✓	✓	✓	✓	✓
II-3.a	Create a co-op review policy outlining how these savings could be demonstrated (<i>e.g.</i> a demonstration of current State contract pricing with co-op pricing, or a comparison of co-op pricing with RFI information).	✓	✓	✓	✓	✓
II-4	Amend OSP Regulation R1:19-11-249 to require another entity to review cooperative purchasing contracts or agreements conducted by OSP or DF&A. This entity (such as the Governor's office or another review agency) should review the suitability of OSP/DF&A's actions to eliminate any perception of self-policing.	✓	✓			

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per Recommendation II-1, amend Ark. Code § 19-11-206(1) as follows (adding the additional text to the definition of “Cooperative Procurement”):

“Notwithstanding this definition, cooperative procurement shall not include procurement conducted by a State public procurement unit.”

- Per Recommendation II-2, amend Ark. Code § 19-11-249(a) to add the following *italicized* text to the end of the existing language:

“(3) Cooperative purchasing contracts and agreements shall be limited to those commodities and services on which the state may realize substantial savings and/or material economic value.”

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per Recommendation II-3, amend OSP Regulation R1:19-11-249 to add the following text:

“The Director of the Office of State Procurement’s granting or withholding approval shall consider, but not be limited to, the economic justification for using the cooperative purchasing contract or agreement. In the event that the Office of State Procurement proposes to enter into a cooperative purchasing contract or agreement, such contract or agreement must be approved by [insert name of appropriate oversight entity].”³

Capturing Savings

- Requiring the potential for savings as a condition for entering a co-op should yield savings to the State. The existing co-op reporting requirements could be leveraged to track those savings relative to the projected savings analysis required at the request to enter the co-op.

³ Ikaso would propose the Governor’s office as this office currently approves certain requisitions and receives reports on certain contracts. Thus, this review would be an expansion of existing procurement oversight duties.

III. Vendor Education and Access

Section Summary:

A perception currently exists that it is difficult for vendors to do business with the State – namely, that the requirements and procedures are too onerous. Simple steps can mitigate these perceptions and encourage increased, local vendor participation (and, thus, increased competition).

Ikaso makes the following recommendations:

Section III Recommendation Overview		Impact	Complexity
III-1	Draft a new statute to enable pre-proposal and pre-bid conferences.	Medium	Low
III-2	Enhance vendor training locally and throughout the State.	Medium	Medium
III-3	Periodically poll vendors to improve the procurement process.	Medium	Low

Vendor Education and Access Overview:

- Statutes, rules, and practices surrounding vendor outreach typically exist within procurement policy to increase the accessibility of State contracts for underrepresented vendors. The ultimate goal of vendor education and access is to give the State a larger pool of vendors to compete for State business while also demonstrating an economic investment in local business.
- Vendors require education on two fronts:
 - The logistics and requirements of doing business with the State; and
 - Upcoming procurement opportunities that exist with the State.
- Regarding logistics/requirements, a combination of generalized training and opportunity-specific training can help vendors unfamiliar with public procurement to compete for State business.
 - Opportunity-specific training would take the form of conferences about a specific opportunity prior to the due date of the bid or proposal. These “pre-bid” or “pre-proposal conferences” would explain both the general requirements of doing business with the State as well as any requirements specific to that solicitation.
 - These conferences are intended to reduce the number of technical errors in submissions (errors which typically lead to bid or proposal disqualification) as well as informally answer any scope related questions (which can be answered officially in writing thereafter).

- Typically, states either hold these conferences at their discretion, or require them for procurements of a certain size or type.
- These conferences also offer businesses an opportunity to meet and network with potential subcontractors – an important pipeline in many states for utilizing local and small businesses who would not otherwise be large enough to compete for State business.
- Regarding the opportunities to do business with the State, general education and outreach efforts can continuously improve vendor knowledge in this area. For example, both Virginia and Georgia have supplier outreach conferences which combine networking with state procurement officials with training sessions on the states’ procurement process.

Findings and Observations:

Statute and Rule Review




- Limited statutes and rules surrounding vendor education and access exist. Specifically, pre-bid or pre-proposal conferences are only contemplated once: OSP Regulation R2:19-11-244 (which governs the award of costs to a vendor who prevails in a protest) discusses pre-bid conferences.
 - However, “pre-bid conference” is not defined.
- Ark. Code § 19-11-272 already expresses how it is in the State’s best interest to encourage new businesses and to seek out the most qualified vendors.
 - However, the statute does not offer opportunities to meet this desire outside of utilizing combined experience to fulfill procurement requirements.

Interview Findings






- Agencies note that pre-proposal or pre-bid conferences are rarely held for procurements within the State.
- OSP has limited opportunities available for vendor training purposes.
 - Currently outreach efforts are limited to small business association trade shows and similar events in the Little Rock area.
- The Division of Building Authority (DBA) actively polls its vendors to refine and enhance its procurement process. The polling takes the form of periodic roundtable discussions.
 - The DBA receives virtually no protests, routinely oversees procurements which engage local and small businesses, and is well regarded by agencies which utilize the DBA’s procurement support services.

Comparison to Other States

- Many other states encourage the use of pre-bid and pre-proposal conferences to educate potential vendors before bids and proposals are submitted. States also engage in other types of vendor education efforts including in-person recruiting sessions.

Profiled State	Vendor Education Details
<p data-bbox="289 426 440 457">Mississippi</p> 	<ul style="list-style-type: none"> • Procurement manual includes instructions for holding both pre-bid and pre-proposal conferences. <i>See</i> Mississippi Procurement Manual 3.106.07 and 3.107.08. • Includes requirements for the announcement and timing of the conference. <i>Id.</i> • A written amendment must be issued to make any change to the solicitation following the conference. <i>Id.</i> • Prospective bidder attendance at a pre-bid or pre-proposal conference is not mandatory. <i>Id.</i>
<p data-bbox="297 825 431 856">Tennessee</p> 	<ul style="list-style-type: none"> • Refers to these conferences as a “pre-response conference” within its procurement procedures manual. <i>See</i> Tennessee Procurement Procedures Manual 5.5.5. • Outlines information that must be included in a pre-response conference notification. <i>Id.</i> • Outlines certain items the solicitation coordinator and prospective respondents should prepare and bring to the conference including an agenda and all pertinent solicitation documents. <i>Id.</i> • The solicitation coordinator can make changes to the solicitation as a result of the conference. <i>Id.</i>
<p data-bbox="293 1188 435 1220">Oklahoma</p> 	<ul style="list-style-type: none"> • Has historically employed a person who, full-time, tours the state to educate and recruit local and small businesses to compete for state business.

Recommendations:

Rec. #	Details					
III-1	Create a new statute to provide express authority for procuring agencies to hold pre-proposal or pre-bid conferences. The statute or rule should include: <ol style="list-style-type: none"> Encouragement to hold conferences for high dollar procurements and procurements of strategic importance to the State; Allowance for virtual/online conferences; and Requirement of a sign-in of vendors in attendance (or registration to attend virtually), which signing/registration should be posted online among other documents related to that solicitation. 	✓		✓	✓	✓
III-2	Introduce the practice of developing and delivering non-procurement specific vendor training to inform interested businesses on how to do business with the State. This training should be delivered by OSP at locations throughout the State and through virtual training sessions.	✓	✓		✓	
III-3	Introduce the practice of periodically polling vendors to solicit procurement feedback and inform improvements to the vendor training. These vendors should be both those successful and unsuccessful in securing business with the State.	✓	✓		✓	

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per Recommendation III-1, amend Ark. Code § 19-11-229(d) as follows:⁴

“(3) (A) If a pre-bid conference is to be held before the opening of bids to provide information to prospective bidders, the notice inviting bids shall include an announcement of the date and time of the pre-bid conference.”

⁴ No amendment to the proposal statute regarding conferences is required because Ark. Code § 19-11-230(c) incorporates the notice requirements of Ark. Code § 19-11-229(d), which would include the added conference information.

(B) Nothing stated at the pre-bid conference shall change the invitation for bids unless a change is made by written amendment.

(C) Attending a pre-bid conference shall not be mandatory, unless otherwise indicated in the solicitation. A solicitation may list a pre-bid conference with approval of the director or agency procurement official.”

- Per Recommendations III-2 and III-3, amend Ark. Code § 19-11-272 as follows:

“(d) To fulfil the best interests of the state, vendor education and outreach efforts shall be made to encourage new business and seek out the most qualified people to provide products and services to the state.”

Capturing Savings

- Expanding the number of potential businesses prepared to do business with the State will lead to more competition and more negotiating leverage for the State.

IV. Delegation

Section Summary:

In addition to the delegation of purchasing authority made by statute (principally to Institutions of Higher Education), the Director of OSP also has the statutory authority to delegate purchasing authority to agencies. *See* Ark. Code § 19-11-218(3). In these instances, an agency may make purchases independently from OSP in accordance with the delegation order and still in compliance with all applicable statutes, rules, policies and procedures. In effect, a delegation order lets an agency do purchasing work itself, but does not give it any more rights or options.

At the time of this study, OSP had a delegation order delegating certain authority to the Department of Human Services, including special conditions in the procurement of commodities, equipment, and non-professional services. OSP also had a delegation order delegating Professional and Consultant Services (PCS) purchasing authority to all agencies, which given the flexible nature of the PCS definition (*See* Section V) makes this functionally a broad services delegation.⁵ As not all delegation orders have expiration dates, OSP is not able to determine if there are other active, open-ended delegation orders held-over from previous leadership which agencies may be operating under.

Ikaso makes the following recommendations:



Section IV Recommendation Overview		Impact	Complexity
IV-1	Amend existing rules to require an expiration date, public posting, and central maintenance for a delegation order to be effective.	Medium	Low
IV-2	When delegating authority based on purchase type (<i>i.e.</i> delegation to buy a particular good or service) ensure that the delegation order is narrowly tailored.	Medium	Medium
IV-3	Consider linking delegation orders to the required completion of procurement training.	Medium	Medium


Findings and Observations:

Comparison to Other States






- Arkansas statutes and rules are broadly in line with other states' delegation of authority to specific agencies (through statutory delegation) and in the authorization of the central procurement office to make discretionary delegations.






⁵ There are other, smaller delegation orders in place as well. These two orders are highlighted as the most substantial.

Profiled State	Delegation Details
<p data-bbox="293 470 435 499">Tennessee</p> 	<ul style="list-style-type: none"> • The chief procurement officer of the Central Procurement Office (“CPO”) may authorize any or all state agencies to independently procure goods or services following approval by the comptroller of the treasury. <i>See</i> TN Code § 12-3-401. • State agencies must apply for delegated authority, and if they fail to comply with State or Federal law or CPO rules, policies, and procedures, delegated authority shall be denied/revoked. Policy Number 2013-006 “Delegation of Authority Policy,” Central Procurement Office. • Delegated authority has a term of no more than twelve (12) months unless an approved Rule Exception Request is obtained. <i>Id.</i>
<p data-bbox="293 1157 435 1186">Louisiana</p> 	<ul style="list-style-type: none"> • The state chief procurement officer (of the central purchasing agency) may delegate authority to such designees or to any governmental body as the state chief procurement officer may deem appropriate within the limitations of state law and the state procurement regulations. Louisiana Revised Statutes 39:1566. • The central purchasing agency has the authority to grant purchasing authority delegations based on the needs, resources and abilities of the agencies. <i>See</i> Louisiana Policy and Procedure Memorandum (“PPM”) Number 56. §5307. • Public institutions of higher education, the Office of the State Bond Commission, and the Department of Transportation and Development (in some cases) are statutorily exempt from having to conduct procurements through the central purchasing agency but are still subject to the requirements and regulations promulgated by the commissioner. <i>See</i> Louisiana Revised Statutes 39:1572.

Profiled State	Delegation Details
<p>Oklahoma</p> 	<ul style="list-style-type: none"> • In Oklahoma's Central Purchasing Act, agency delegation is adjusted (increased or decreased) based on the needs of the agencies and the agency procurement officers' compliance with rules and regulation and his or her performance. <i>See</i> 74 O.S. 85.5. • State agencies' statutorily delegated authority is dependent on having certified procurement officers and internal purchasing procedures approved by the Director of State Purchasing. <i>See</i> 74 O.S. 85.3(H) and 74 O.S. 85.5(D). • To become certified, the procurement official must successfully complete training provided by the State Purchasing Director. <i>See</i> 74 O.S. 85.5(D). • Some state entities, such as higher education institutions and county governments, may maintain purchasing sections without approval from the Purchasing Division. <i>See</i> 74 O.S. 85.3(A).

Recommendations:

Rec. #	Details	    				
IV-1	Amend existing rules so that, for a delegation order to be effective, it must have an expiration date, be maintained centrally by OSP, and be publicly posted. Consider a maximum allowable length of one or two years for each delegation order.	✓	✓			✓
IV-2	If OSP wishes to delegate based on the item purchased, such delegation should be narrowly tailored. OSP may wish to consider delegation on the procurement-specific level so that it remains abreast of salient purchasing activity. As OSP defines the scope of its own delegation orders, this recommendation requires no change in statute, rule, or policy.		✓		✓	✓

Rec. #	Details	    				
IV-3	OSP could also consider issuing delegation orders which are contingent on Agency Procurement Officials or their designees completing certain procurement training. This has been successfully implemented in Oklahoma and Indiana.	✓	✓		✓	

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per Recommendation IV-1, amend OSP Regulation R1:19-11-218(a) to include a new section (b) with the following proposed language:

“(b) LIMITATIONS. For the written delegation order to be considered effective, it must include a date of expiration and be posted publicly on OSP’s website. Records of the issuance of delegated authority shall be maintained by the Office of State Procurement. All delegations of procurement authority shall remain in force according to the original terms thereof unless modified or until rescinded by the State Procurement Director.”

Improved Measurement

- By ensuring that all delegation orders have an expiration date, OSP can eliminate the risk for procurements to occur outside of its knowledge, i.e. through a delegation order for previous administrations that never expired.

V. PCS/TGS/Commodities Distinction

Section Summary:

State purchases are currently classified into three categories: Professional and Consultant Services (PCS), Technical and General Services (TGS), and commodities. These contracting categories are statutorily defined, but the definitions are not clear. The PCS and TGS definitions include statements that could be interpreted as overlapping, and agencies have reported inconsistent interpretations over time as to what constitutes a PCS vs. a TGS contract. With the PCS delegation order (*See* Section IV), the PCS/TGS definition also impacts what an agency can do without OSP's involvement.

The definition of commodity is also not clearly distinguishable from the two definitions of the two types of services.

Ultimately, these classifications drive what is subject to Subcommittee review: PCS and TGS have different contract values necessitating review, and commodities are not reviewed at all.

Ikaso makes the following recommendations:

Section V Recommendation Overview		Impact	Complexity
V-1	Eliminate the distinction between PCS and TGS contracts.	Medium	High
V-2	Revise the definition of "commodity" to avoid the risk of contract mischaracterization.	Medium	Low

Findings and Observations:

Overlap Between PCS/TGS Definitions

Statute and Rule Review

- For contracts with a total projected value between \$50,000 and \$100,000, a choice to classify something as PCS or TGS determines whether the contract is reviewed by the Subcommittee.
 - Legislative reporting for TGS and PCS contracts are handled in two separate procurement statutes, Ark. Code §§ 19-11-265 and 19-11-1006.
 - Each services contract category has a separate threshold for review: a \$50,000 threshold for PCS and a \$100,000 threshold for.
- According to the definitions included in Ark. Code § 19-11-203(34)(A), "Technical and General Services" means:

- Work accomplished by skilled individuals involving time, labor, and a degree of expertise in which performance is evaluated based upon the quality of work and the results produced;
- Work performed to meet a demand, including without limitation work of a recurring nature that does not necessarily require special skills or extensive training; or
- The furnishing of labor, time, or effort by a contractor or vendor, not involving the delivery of any specific end product other than reports that are incidental to the required performance.
- The TGS definition also specifically excludes professional services under Ark. Code § 19-11-801, a subsection which covers the procurement of design professionals (*See* Section XV) but does not have a direct connection/reference to the greater PCS category definition.
- Professional Services Contracts (which, when combined with “Consultant Services Contracts” and “Design Professional Contracts” are collectively referred to as PCS contracts) are defined in Ark. Code § 19-11-1001(6) to mean any contract in which:
 - The relationship between the contractor and the State agency is that of an independent contractor rather than that of an employee;
 - The services to be rendered consist of the personal services of an individual that are professional in nature;
 - The State agency does not have direct managerial control over the day-to-day activities of the individual providing the services;
 - The contract specifies the results expected from the rendering of the services rather than detailing the manner in which the services shall be rendered; and
 - Services rendered under a professional services contract are rendered to the State agency itself or to a third-party beneficiary.
- According to these statutory definitions, a TGS contract is based on either "results produced" or “not involving the delivery of any specific end product.” The “results produced” nature of TGS overlaps with the PCS definition of a contract that "specifies the results expected from the rendering of the services rather than detailing the manner in which the services shall be rendered.” TGS is a contract for “results produced” services while PCS is a contract for services with “specified... results,” both of which could amount to the same type of service, depending on interpretation.
- Furthermore, Act 557 moved language from the section on reporting PCS contracts (Ark. Code § 19-11-1006) to the section on reporting TGS contracts (Ark. Code § 19-11-265). The shifted language defined contracts under review as including the “the service of one or more individuals for regular full-time or part-time weekly work.” This exchange of language from one services type to another further obfuscates the distinction between PCS and TGS.

Interview Findings

- No interviews were able to explain what value is served through the PCS/TGS distinction other than review thresholds and budget line items.
- The definitions for PCS, TGS, and commodities has been a source of confusion. When asked to describe the differences between PCS and TGS, some agencies could provide an informal explanation of what they *believed* constituted each by mentioning specific example procurements, but overall, they lacked confidence in their ability to describe the distinction as prescribed by statutes, rules, and current practices.
- Some interviews remarked how the same thing purchased over time has been reclassified PCS or TGS based on changing leadership at OSP.
- Some interviews remarked how the same type of services currently exist in both PCS and TGS classifications (the cited example was contracts for actuarial services that have appeared in both classifications).

Other Analysis –AASIS Settings






- When agencies first submit requisition requests into AASIS, they must select the service or commodity they hope to procure from options available in the system. Those options have been hardcoded to correspond to TGS, PCS, or commodity contract paths.
 - These efforts do not benefit Institutions of Higher Education as they do not use AASIS.
- It is worth noting that the contract forms themselves are the same for TGS and PCS contracts. No special clauses or precautions are taken for one form of service contract over the other.

Commodity Definition

Statute and Rule Review

- Commodities are broadly defined to include all property (minus certain exclusions) but expressly excluding “services.” Ark. Code § 19-11-203(4).
- Commodity contracts are not reviewed by the Subcommittee. Furthermore, calling a co-operative agreement purchase a “commodity” could also avoid Subcommittee review for co-operative agreement use. *See* OSP Regulation R1:19-11-251.
- Services are defined as the “furnishing of labor, time or effort . . . not involving the delivery of a specific end product.” Ark. Code § 19-11-203(4) and (27(A)).
- The result of these interacting definitions is that, if one can characterize something as “property” (which would include intellectual property) then it can potentially be steered into the definition of “commodity” and away from PCS/TGS.
 - Potential risk areas for this strategic characterization would include, but are not limited to, software (the code ultimately being property acquired by the State, in ownership or licensing), creative work or anything eligible for copyright, etc.

Recommendations:

Rec. #	Details					
V-1	Eliminate the distinction between TGS and PCS and its use as a basis of Subcommittee review.		✓			✓
V-2	If the Subcommittee does not elect to review certain commodity contracts (<i>See</i> Section XII recommendation XII-1) revise the definition of commodity so that certain service contracts cannot be characterized as commodities to avoid Subcommittee review.		✓			✓

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

(The below statutory amendments suggested will require numerous changes throughout multiple subchapters. Ikaso will be glad to work with BLR and the Subcommittee to identify all the necessary changes required by the Subcommittee’s adoption of any of the below suggestions.)

- Per Recommendation V-1, amend Subchapter 10 of the Arkansas Code to apply to service contracts generally and not PCS contracts specifically.
- Per Recommendation V-1, create a stand-alone subchapter within the Arkansas Code dealing with Subcommittee reporting and review of contracts. (*See* Section XII for the description of what Ikaso proposes for review). Eliminate the scattered pockets currently governing this topic (Ark. Code § 19-11-1006, §19-11-265).
- Per Recommendation V-1, eliminate definition of “technical and general services” in Ark. Code § 19-11-203.
- Per Recommendation V-2, if the Subcommittee does not elect to review certain commodity contracts (*See* Section XII), revise the definition of commodity in Ark. Code § 19-11-203(4) to avoid evasive classifications. Specifically, add the following sentence:

“A commodity does not include intangible property when the State, in purchasing the intangible property, is primarily paying for services related to the generation, customization, configuration or development of that intangible property. This shall

include, but not be limited to, software for which the State is principally paying for coding, customization or configuration.”

Improved Measurement

- These recommendations will help reduce the risk of purchases going unreported as it eliminates the separate, arbitrary routes for contracts from procurement to Legislative review. It should also aid in the tracking of spend via services as it will ensure that a single service is not “lost” through inconsistent categorization.

VI. Procurement Instrument Selection, Preparation, and Control

Section Summary:

Small changes or additions could be made to the statutes, rules, and practices surrounding procurement instrument selection, preparation, and control to have a material and positive effect on State procurement. These changes would impact emergency procurements, training, public disclosure, and the availability of certain procurement instruments.

Ikaso makes the following recommendations:

Section VI Recommendation Overview		Impact	Complexity
VI-1	Amend OSP Regulation R7:19-11-230(c) to allow clarification of proposals.	Medium	Low
VI-2	Amend OSP Regulation R9:19-11-229(3) to allow clarification of bids.	Medium	Low
VI-3	Amend OSP Regulation R1:19-11-233 to clarify emergency procurement protocol, including creating a definition of “critical emergency.”	Low	Low
VI-4	Create new statutes to enable the use of Requests for Information (RFI) and Negotiated Bids.	High	Medium
VI-5	Enhance training on specifications drafting.	High	Medium
VI-6	Formalize, in statute, OSP’s current rule-based practice of documentation and approval of RFQs (not including those administered under the authority of the Division of Building Authority).	Medium	Low
VI-7	Amend OSP Regulation R7:19-11-229 to regulate the use of cash and time discounts rather than prohibit them.	Medium	Low

Findings and Observations:

Bid/Proposal Clarification

Statute and Rule Review

- Instructions for issuing questions to vendors to remedy errors in proposals exists in OSP Regulation R7:19-11-230. Questions not rooted in an error do not appear to be allowed.
- “Clarifications” are allowed for bids only if the State suspects an error. OSP Regulation R9:19-11-229(3). Clarifications not rooted in an error do not appear to be allowed.

Interview Findings

- Agencies have noted that procurement evaluators commonly have questions for vendors about their submitted proposals.
 - Allowing for proposal clarifications to be requested from vendors before award decisions are made is beneficial as it ensures the vendor and evaluators have a mutual understanding of the vendor’s proposal.
 - Controls can be placed on this clarification process to ensure that the vendor uses the answer to clarify proposal content and not alter or enhance it.

Emergency Procurements

Statute and Rule Review

- Ark. Code § 19-11-233 and its associated rules could be expanded to better clarify the emergency procurement process and requirements.
 - OSP Regulation R1:19-11-233 requires three (3) bids for emergency procurements unless an emergency is “critical”. However, the circumstances to make an emergency critical is not defined in the rule and there is no formal guidance on how it is determined.
 - When obtaining bids during an emergency, a “quotation abstract” must be kept, recording the names of the firms contacted. This quotation abstract could be improved to also include the prices quoted and other facts about the quote.

Interview Findings

- Agencies exercise discretion when choosing to conduct an emergency procurement but have commented on their confusion with the process and requirements. They have noted that waiting for OSP approval or direction cuts into the procurement timing that is already rushed in an emergency situation.


Missing Common Instruments: RFI and Negotiated Bid

Statute and Rule Review


- Certain useful procurement instruments are not available under statute. Specifically, the Request for Information (RFI)⁶ and Negotiated Bid.
 - The RFI allows for a structured, formal, and transparent means to learn about market offerings. An RFI could be a means of learning about a market to justify a sole-source request, to determine if a contract should be renewed or re-procured, to build a case about the economic justification for co-op pricing (*See* Section II, recommendation II-3) or to gather information on any range of subjects in a structured manner. RFIs do not, on their own, provide a basis to award a contract.
 - Negotiations are possible for bids currently, but only with the apparent winner. *See* Ark. Code § 19-11-229(h)(2). *See also* Section IX.

Comparison to Other States

- Arkansas does not expressly allow RFIs or Negotiated Bids. Other states have language in their statutes to create these procurement instruments without limiting the effectiveness of other common methods. Below is an example of each:

Profiled State	Procurement Instrument Details
<p>North Dakota</p> 	<ul style="list-style-type: none">• Administrative Code contains a section specifically for Request for Information as a specification method for commodities and services.• N.D.A.C. § 4-12-06-7: “A noncompetitive solicitation may be issued to obtain information, data, comments, or reactions from possible vendors preceding the issuance of solicitation for bids or proposals or a multistep bidding procedure. Information obtained as a result of a [R]equest for [I]nformation is subject to the state open records law.”• The instrument provides a structured, consistent and transparent method of gathering market data.

⁶ OSP has used RFIs in the past for conducting procurements. However, language does not exist in statute permitting or setting controls on this method.

Profiled State	Procurement Instrument Details
<p style="text-align: center;">Indiana</p> 	<ul style="list-style-type: none"> • Administrative Code contains a chapter specifically for Negotiated Bidding. <i>See</i> IC § 5-22-7.3. • The purchasing agency has the authority to negotiate, in a structured and uniform manner, with all bidders to achieve a lower bid price so long as all communication is recorded in a bid register and available for public inspection. • The bid prices received from all bidders during the bidding process, documentation of the purchasing agency's negotiating process with bidders, and the basis on which the award was made to the successful bidder all must be recorded. • The contract is ultimately awarded to the lowest responsible and responsive bidder following the negotiation process.

Enhance Training

Interview Findings

- Agencies report struggling to draft specifications for complicated procurements outside of their areas of expertise and requested enhanced training on how to draft specifications.

RFQ Control

Statute and Rule Review

- OSP Regulation R1:19-11-802 contemplates that RFQs may be used to obtain professional consulting service contracts outside of the design professional context subject to OSP approval.

Interview Findings

- OSP has been more restrictive over the use of RFQs,⁷ requiring a justification for why cost should not be factored in an evaluation. This control extends to RFQs conducted by Institutions of Higher Education.






⁷ This does not include controls of RFQs administered by the DBA or used by the Attorney General's office for the procurement of outside counsel, over which OSP does not have control.

Disallowed Discounts

Statute and Rule Review

- OSP Regulation R7:19-11-229 prohibits evaluating cash or time discounts. This policy is overly restrictive and could be replaced with language regulating how and when these discounts could be used. This is an opportunity for the State to save money if it is done on the State's terms.
 - This is not a recommendation to allow bidders to offer lower prices after a bid submission without a structured, State request. Any unsolicited offers of this nature should remain forbidden.

Recommendations:

Rec. #	Details					
VI-1	Amend OSP Regulation R7:19-11-230(c) to allow for clarifications of proposals.	✓	✓	✓	✓	✓
VI-2	Amend OSP Regulation R9:19-11-229(3) to allow clarifications of bids.	✓	✓	✓	✓	✓
VI-3	Amend OSP Regulation R1:19-11-233 to clarify emergency procurement protocol, including creating a definition of "critical emergency."	✓	✓		✓	✓
VI-4	Create new statutes within Subchapter 2 enabling the use of RFIs and Negotiated Bids.	✓	✓	✓	✓	✓
VI-5	Enhance training on specifications drafting.	✓	✓	✓	✓	✓
VI-6	Formalize, via statute, OSP's current rule-based practice of documentation and approval prior to the use of RFQs (not including those used to procure design professionals through the DBA or its analog in higher education).	✓	✓	✓	✓	✓
VI-7	Amend OSP Regulation R7:19-11-229 to regulate the use of cash and time discounts rather than prohibit them.	✓	✓	✓	✓	✓

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per Recommendation VI-4, create a statute in Subchapter 2 of the Arkansas Code for RFIs. This statute could read:

“The State Procurement Director, the head of a procurement agency, or a designee of either officer may make or authorize others to issue a noncompetitive solicitation to obtain information, data, comments, or reactions from prospective bidders or offerors preceding the issuance of an invitation to bid, a request for proposals, or a request for qualifications. These inquiries, which will be posted publicly with solicitations, will be called Requests for Information or RFIs. No contract may be awarded directly from an RFI – the instrument is for information gathering only.”

- Per Recommendation VI-4, create a statute enabling Negotiated Bids as a procurement instrument (like the Invitation to Bid or Request for Proposals). This statute could read:

“(a) “Negotiated bidding” means a method of procurement which requires:

- (1) Issuance of an invitation for bids with a purchase description and all contractual terms and conditions applicable to the procurement;*
- (2) Contemporaneous opening of bids at a predesignated time and place in front of a state witness and big register, but not open to the public;*
- (3) Negotiations with responsible bidders before an award is determined, as allowed below;*
- (4) Award to the responsive and responsible bidder who has submitted the lowest bid following negotiation that meets the requirements and criteria set forth in the invitation for bids; and*
- (5) Public notice.*

(b) Public notice of the Negotiated Bid shall be given in the same manner as provided in § 19-11-229(d), which refers to public notice of competitive sealed bidding.

(c) Bids shall be evaluated in the same manner as provided in § 19-11-229(f), which refers to the evaluation of competitive sealed bidding.

(d) Bids shall be corrected in the same manner as provided in § 19-11-229(g), which refers to the correction of patent or provable errors in competitive sealed bidding.

(e)

- (1) Before determining the lowest responsible bidder, negotiations shall be conducted with all responsible bidders who submit bids determined to be reasonably susceptible of being selected for award.*
- (2) Responsible bidders shall be allowed to submit a final bid price lower than their original bid price following communication with the State Procurement Director or the agency procurement official.*

(f) A bid register shall be prepared upon initial opening and following any negotiations. Such register shall contain:

- (1) A copy of all documents that are included as part of the Negotiated Bid.*
- (2) A list of all bids received including the name and address of each bidder, the dollar amount of all bid prices received during the bidding process, the name of the successful bidder and the dollar amount of that bidder's bid, and the basis on which the award was made.*
- (3) Documentation of the negotiating process with bidders including a log of the date and times of each meeting with a bidder, a description of the nature of all communications with each bidder, a copy of all written communications, including electronic communications, with each bidder, and the entire contents of the contract file except for proprietary information included with a bid.*

(g)

- (1) The contract shall be awarded with reasonable promptness by written notice to the lowest responsible bidder following negotiations whose bid meets the requirements and criteria set forth in the invitation for bids.*
- (2) All other bidders requesting to be notified of the award decision shall be promptly notified of the decision.*
- (3) The bid register and list of bidders shall be subject to public inspection only after the contract award.*
- (4) An invitation for bid may be cancelled or any or all bids may be rejected in writing by the director or the agency procurement official."*

(h) A vendor may not lodge a protest of under § 19-11-244 on the basis that it was not afforded the opportunity to negotiate a Negotiated Bid."

- Per Recommendation VI-6, formalize, in Ark. Code § 19-11-802(e), the current rule-based control over non-design professional RFQ use as follows:⁸

“(e) (1) Qualification statements can be used for certain procurements through the Request for Qualifications. The RFQ is, in the absence of sole-source justification, the

⁸ Please note, the elimination of PCS/TGS classifications per Recommendation V-1, if enacted, may necessitate a relocation and revision of this proposed statute.

procurement method recommended when contracting for architectural, engineering, land surveying, legal, and interior design services. It may also be used, with prior approval from the Office of State Procurement, as the selection method for other contracts when it is determined to be the most suitable method of contracting.”

The criteria used by OSP in making a determination on RFQ use should then be memorialized in the adjacent rule. (See below).

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Pursuant to Recommendation VI-1, amend OSP Regulation R7:19-11-230(c) to read:

“If there is a suspected proposal mistake, *or there is a question related to a submitted proposal*, the State Procurement Director or agency procurement official may request confirmation of a proposal and shall request the confirmation to be made in writing. *No written response by the offeror may add to or enhance the submitted proposal. If the offeror fails or refuses to clarify in writing any matter questioned about its proposal by the deadline to respond set by the state, the response shall be evaluated as is.* ~~The response of any bidder who fails or refuses to clarify in writing within a reasonable time any matter contained in his proposal shall be rejected.~~ The written clarification shall be *evaluated and* become a part of the contract awarded on the basis of that proposal.”

- Pursuant to Recommendation VI-2, amend OSP Regulation R9:19-11-229(3) to read:

“If there is a suspected bid mistake, *or there is a question related to a submitted bid*, the State Procurement Director or agency procurement official may request confirmation *or clarification* of a bid and shall request the confirmation *or clarification* to be made in writing. *No written response by the bidder may add to or enhance the submitted bid or change its terms. If the bidder fails or refuses to clarify in writing any matter questioned about its bid by the deadline to respond set by the state, the bid shall be evaluated as is or rejected in accordance with the instructions of the State Procurement Director or agency procurement official.* ~~The bid of any bidder who fails or refuses to clarify in writing within a reasonable time any matter contained in his bid shall be rejected.~~ The written clarification shall *be evaluated and* become a part of the contract awarded on the basis of that bid.”

- Per Recommendation VI-3, amend OSP Regulation R1:19-11-233 by adding a definition of “critical emergency” as follows:

“(1) An emergency is critical if human life or health is imminently endangered.”

This possible definition draws upon some, but not all, of the criteria that constitute an emergency in Ark. Code §19-11-204(4). This would imply that non-critical emergencies are those where there is danger to State property or State functional capacity, or a non-imminent danger to human life or health.

- Per Recommendation VI-3, amend the quotation abstract sentence to read as follows:

“The quotation abstract must show the names of at least three (3) firms contacted in attempting to obtain competition, the time of contact, the quoted price obtained (if one was obtained), and the method of contact (e.g. telephone, email).”

- Per Recommendation VI-6, amend OSP Regulation R1:19-11-802 to add the following:

“(a) If the RFQ is being requested as the selection method of other contracts besides architectural, engineering, land surveying, legal, and interior design services, the Director of OSP must consider the following (to be furnished by the entity requesting to use the RFQ):

- i) Why the RFQ is the most suitable method of solicitation,*
- ii) Why cost should not be considered in the procurement, and*
- iii) How cost will be controlled for the contract if it is not a factor in the solicitation.”*

- Per Recommendation VI-7, replace existing OSP Regulation R7: 19-11-229(2)(A) with the following:

“(A) Time discounts or cash discounts shall only be considered in the evaluation of a bid if the State specifically solicits pricing that requests that discount, and then only under the structured terms of that Invitation to Bid. If a bidder, on its own and without State solicitation, offers time or cash discounts as part of its bid, those discounts will not be considered.”

Capturing Savings

- Adding the Negotiated Bid procurement method will allow agencies to potentially lower bid prices that are currently accepted as is. This method will save the State money while achieving the same procurement outcome. Such savings from the original bid amount(s) should be tracked.
- Allowing previously disallowed discounts may afford the State opportunities for additional savings.

VII. Proposal/Bid Disqualification

Section Summary:

For procurements conducted through OSP, OSP determines whether a proposal or bid should be rejected⁹ without being scored. Rejection could be for:

- a) The proposal/bid's failure to meet a mandatory¹⁰ requirement; or
- b) A determination that the vendor is not "responsible" based on the State's past experience with the vendor.

OSP may not be the best-informed party for making either of these determinations in every case.

Also, the State is only allowed to look at its previous experience with a vendor as a basis to disqualify it prior to reviewing a bid or proposal. This is not a best practice among states.

Ikaso makes the following recommendations:

Section VII Recommendation Overview		Impact	Complexity
VII-1	Validate bid and proposal rejections with applicable agencies.	Medium	Low
VII-2	Amend OSP Regulation R5(b):19-11-230 so that a vendor's previous experience working with the State, if any, is evaluated in a proposal section where all competing vendors furnish references. This ensures that experience with Arkansas is evaluated on equal footing with competitors' experience with other states and clients.	Medium	Low

Findings and Observations:

Rejection Based on A Failure to Meet Mandatory Requirements

Statute and Rule Review

- The rules governing the rejection of bids or proposals (*See* OSP Regulations R8:19-11-229 and R6:19-11-230, respectively) do not specify the entity making the determination of compliance

⁹ The term used in OSP templates and general practice is "disqualify" whereas the term used in the applicable rules is "reject."

¹⁰ The term "mandatory" was used throughout interviews and is the term used in various reviewed OSP templates. The term used in the rules appears to be "essential." Ikaso recommends the rules be revised to reflect the widespread practice of calling non-optional requirements "mandatory" and not "essential". Essential suggests a value weighting (similar to the word "important" or "critical") while "mandatory" more clearly communicates the instructional intent.

with mandatory requirements or, in the case of bids, specifications. Thus, OSP's assumption of these responsibilities has developed as a business practice but not a legal requirement.

- The first ground specified in each of these rules allows for the rejection of a bid/proposal for its “failure . . . to conform to the essential requirements[.]” *See* OSP Regulations R8:19-11-229(1) and R6:19-11-230(1). As noted in footnote 10 above, the term used more generally throughout interviews and on all of OSP's standard forms was “mandatory” and not “essential.”

Interview Findings

- When OSP conducts a procurement OSP makes the decision to reject a bid or proposal based on a failure to adhere to mandatory requirements. Similarly, the decision to reject a bid for failure to adhere to specifications is made by OSP for bids conducted by OSP.
 - When a procurement is conducted by an entity with delegated authority or for an amount sufficiently low that OSP's involvement is not required, the decision to reject a bid or proposal is made by the entity conducting the procurement.
- Most mandatory requirements are clear and require no subject matter expertise (*e.g.* the vendor submitted the necessary forms with its bid).
- However, some mandatory requirements or specifications require a degree of subject matter expertise to determine if a vendor's submission is compliant. In these instances, some interviewed agency personnel expressed concern that OSP was making bid/proposal rejection determinations without adequate subject matter expertise. There appears to be no official or unofficial way for agencies to weigh in on the rejection determinations of OSP.






Factoring the State's Prior Experience with a Vendor






Statute and Rule Review

- OSP Regulation R5(b)(1)-(2): 19-11-230 limits the State's ability to factor its previous experience with a vendor to a pass/fail determination of whether the vendor is “responsible.” This determination is done prior to the scoring of a proposal and must be based on existing documentation. The determination is made by the “procurement agency.”
 - The procurement agency (which is OSP unless a procurement is being conducted by an entity with delegated authority) is not necessarily the same as the agency for whom the procurement is being conducted. Accordingly, this puts OSP in the position of evaluating other agencies' prior experiences with bidding vendors rather than the agencies who actually had these experiences.
 - The State often solicits references from other state and public-sector clients as a part of proposals. These references are scored by the evaluation team. In effect – the State is evaluating and scoring the experience of other states, but distilling its own experience down to a crucial all-or-nothing decision that provides no ability for vendors with good State track records to be scored accordingly.

- OSP Regulation R7(2)(E):19-11-229 provides the same “responsibility” determination for bids. However, unlike proposals which can assign relative weight to the scoring of past experience, bids are awarded to the lowest responsible bidder. Accordingly, a yes/no determination of responsibility prior to bid scoring is appropriate.
 - OSP could validate its determination of responsibility with the procuring agency in a manner analogous to the validation of bid rejection for specification adherence or complex mandatory requirements. The agency, and not OSP, may be better suited to speak to the responsibility of a vendor.

Recommendations:

Rec. #	Details					
VII-1	<p>When a bid or proposal rejection is being proposed by OSP, validate that decision with the agency for which the procurement is being conducted.</p> <ol style="list-style-type: none"> When OSP is conducting a procurement on behalf of another agency, OSP should validate a decision to reject a bid or proposal for failing to adhere to mandatory requirements with that agency. In the case of a bid, OSP should validate that decision with the agency contact for the procurement. In the case of a proposal, the validation should be with the evaluation team (as this is a body convened by the agency for the purpose of evaluating proposals). 	✓	✓	✓	✓	✓
VII-1.a	<p>This recommendation may be enacted without statute or rule change.</p> <ol style="list-style-type: none"> This recommendation does not warrant statute changes as bid/proposal rejection is governed by rule. If something more formal is desired, this validation process could be formalized in each rule regulating the rejection of a bid or proposal: OSP Regulations R8:19-11-229, R7(2)(E):19-11-229, and R6:19-11-230. This formalization could be prompted with the addition of a section in each rule which could read: “(b) Prior to a bid/proposal’s rejection under this rule, the decision to reject the bid/proposal may be validated with the agency for whom the procurement is being conducted.” However, the rules on the subject of bid/proposal rejection for mandatory requirement adherence do not stipulate the party making this determination. Accordingly, OSP could incorporate agency feedback and remain compliant with the present rules. Accordingly, this practice of validation does not specifically require rule amendment. 	✓	✓	✓	✓	✓

Rec. #	Details	    
VII-1.b	<p>Limitations to this recommendation:</p> <ol style="list-style-type: none"> This recommendation does <u>not</u> intend to provide agencies with the authority to overrule OSP's determination on clear mandatory requirements. To the extent that OSP and an agency disagree on a mandatory requirement adherence determination, a proper course of action should be to seek a clarification from the vendor to resolve the disagreement. This validation process should not be interpreted as a license for agencies to relax or ignore mandatory requirements. Also, in the case of State Contract procurements (<i>See</i> Section I) there will be no single agency from which OSP can seek bid rejection validation. In these instances, simplicity of process warrants vesting the determination of bid rejection solely with OSP. For State Contracts solicited through RFPs, the evaluation committee can still be consulted (as it will be convened with cross-agency representation). 	<div>✓</div> <div>✓</div> <div>✓</div> <div>✓</div> <div>✓</div>
VII-1.c	<p>Keep a record of bids and proposals rejected for failure to adhere to mandatory requirements. This information can be used to improve the training on the drafting of specifications and solicitations.</p>	<div>✓</div> <div></div> <div>✓</div> <div>✓</div> <div></div>
VII-2	<p>For proposals, replace the rule which restricts assessing prior State experience as a basis of proposal rejection with one that directs prior experience to be a factor in scoring references.</p>	<div>✓</div> <div></div> <div>✓</div> <div>✓</div> <div>✓</div>

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per Recommendation VII-1, add a clause similar to the clause below to rules: OSP Regulations R8:19-11-229, R7(2)(E):19-11-229, and R6:19-11-230.

“Prior to a bid/proposal’s rejection under this rule, the decision to reject the bid/proposal may be validated with the agency for whom the procurement is being conducted.”

- Per Recommendation VII-1, replace the term “essential” with “mandatory” in OSP Regulations R8:19-11-229 and R6:19-11-230.
- Per Recommendation VII-2, Amend OSP Regulation R5:19-11-230(b) to expressly allow (and limit) the consideration of the State’s prior experience with a proposing vendor to a scored reference section within the RFP as follows:

“(b) ~~(1) RESPONSIBILITY OF OFFEROR~~ SCORING PAST PERFORMANCE FOR ARKANSAS. Past performance *serving the state by* ~~of~~ an offeror may *only* be scored as part of a vendor’s proposal to the extent that it is requested, in the RFP, that all proposing vendors provide references. The State may consider its previous experience with a vendor when it scores that vendor’s references, provided the vendor’s past performance is ~~used by the procurement agency to determine whether the offeror is “responsible.”~~ No points for past performance may be used in the evaluation scoring criteria. ~~Past performance must be supported by written documentation not greater than three (3) years old. Documentation may be a formal Vendor Performance Report, an informal memo (signed and dated) or any other appropriate authenticated notation of performance to the vendor file. Reports, memos and files may be in electronic form. Past performance may be positive or negative.~~ However, in no event may the State require previous experience with Arkansas as a mandatory requirement for submitting a proposal.

~~(i) Past performance on contracts from other Arkansas State Agencies may also be used for evaluation. Supporting documentation should be provided.~~

~~(ii) Past performance evaluation should not take the place of suspension or debarment procedures.~~

~~(2) The awarding of points for references may be used as evaluation scoring criteria if set forth in the solicitation.”~~

Improved Measurement

- Keep a record of bids/proposals rejected for failure to adhere to mandatory requirements. This is instructive information to improve future specifications drafting. Specifically, it may inform a conclusion that the State is drafting its specifications too narrowly if many vendors are rejected outright.

VIII. Proposal Evaluation

Section Summary:

The process by which proposals are scored for cost and quality can be improved. Presently, the State is not consistently leveraging its subject matter expertise on evaluation teams because of long-held misperceptions about conflicts. Cost is only informally controlled as an RFP factor. Finally, RFP scoring tools and practices may be improved.

In the below section, Ikaso makes the following recommendations:

Section VIII Recommendation Overview		Impact	Complexity
VIII-1	Correct agency-held misperceptions regarding evaluation team composition that are restricting the use of State expertise for proposal evaluation.	High	Low
VIII-2	Consider the use of private sector evaluators, provided that such use is optional, controlled for conflicts of interest, deployed strategically, and not utilized in any setting that may jeopardize the availability of federal funds.	Medium	High
VIII-3	Formalize, in statute, the percentage of proposal scores reserved for cost.	Medium	Low
VIII-4	Revise RFP training and templates to simplify the scoring process.	Medium	Low
VIII-5	Encourage more and better discussion at evaluation meetings.	High	Medium

Findings and Observations:

Evaluation Team Composition and Training

Interview Findings

- There is a misperception among agencies that an individual's involvement in the drafting of an RFP automatically disqualifies that individual from serving on the evaluation team which scores proposals submitted in response to that RFP. Because subject matter expertise is needed to draft specifications, this has led many agencies to "disqualify" their in-house experts from serving on RFP evaluation teams.

- This misperception is rooted in the idea that involvement in the drafting of the RFP would somehow represent a conflict of interest for scoring the associated proposals.
- There is no statute, rule, policy, procedure or other documentation - express or implied - requiring this practice. However, the practice does exist across multiple agencies, so its root may be informal guidance provided by previous OSP leadership.
- Current OSP leadership does not promote or require this practice. Its most recent RFP training does the opposite – it suggests the use of the same people drafting specifications and serving on the evaluation team.
- Ikaso has not observed this type of restriction in any other state.
- There is a perception that engagement with an incumbent vendor creates an evaluation conflict for potential evaluators where that incumbent is competing for a new contract. These individuals are also often the State’s experts on the specific program or area where these vendors work.
 - Familiarity with an incumbent should not *de facto* disqualify an otherwise qualified evaluator. All evaluators should be subjected to the same screening and controls regarding conflicts of interest. These controls should include protections against bias due to financial, personal, familiar or other affiliations or relationships with competing vendors.
 - Interestingly, this claim of bias has been characterized by different people as both “too pro-incumbent” and “too anti-incumbent.”
- Agencies have requested enhanced evaluation training. In addition, agencies have requested that the evaluation training module be printed so that evaluators may take copies from the OSP-lead session.

Private Sector Evaluators

Subject Overview

- Ikaso researched the use of non-State employees as scoring proposal evaluators (hereinafter referred to as “private evaluators”). It bears noting that this is an irregular practice as most states restrict proposal evaluation to state employees.¹¹ A more common practice is to allow individuals from the private sector to advise or answer the questions of an evaluation team but with the scoring of proposals specifically reserved for state employees.¹²
- Importantly, the practice is expressly disallowed by the federal government. Federal Acquisition Regulation (FAR) 7.500 inventories “inherent government functions” which cannot be


¹¹ See, e.g., Tennessee, “Amended Procurement Procedures Manual of the Central Procurement Office Dated: December 14, 2017”, available at <https://www.tn.gov/generalservices/procurement/central-procurement-office--cpo-/local-units-of-governments-/procurement-information.html>. “All persons serving on an evaluation committee shall be state employees.”

¹² See, e.g., Nebraska, “State of Nebraska Procurement Manual – January 2017”, available at http://das.nebraska.gov/materiel/purchase_bureau/docs/manuals/2017%20Procurement%20Manual.pdf “Private consultants may also serve (without a vote) on the [evaluation] committee provided that they have the relevant knowledge, do not have a conflict of interest, agree to keep the evaluation and all information they view confidential, and agree to their name being made public upon the award of the contract.”

performed by private citizens. Among these functions is “Determining what supplies or services are to be acquired by the Government”. FAR 7.503(a)(12)(i).

- Certain State uses of federal funds may require the State’s procurement efforts to comport with the FAR, including this requirement.
- It follows that expressly requiring the use of private evaluators may result in the State losing federal dollars.
- Ikaso has identified three states which contemplate the use of private evaluators. In all three of these instances the use of private sector evaluators is never required. Instead, it is an optional practice used only when the state lacks specific expertise. Most private evaluators are unpaid volunteers.
- OSP’s Evaluation of Proposal policy, revised November 28, 2017, allows for the use of private evaluators.¹³ Previous iterations of this policy also allowed for the practice but required written approval from OSP (or Agency Procurement Official) to use a private evaluator.¹⁴


Review of States¹⁵


Profiled State	Private Evaluator Details
<p style="text-align: center;">Wisconsin</p> 	<ul style="list-style-type: none"> • The use of a private evaluator is never required. • The practice of private evaluators is allowed in the procurement manual, not in a statute or promulgated rule. The manual is under revision and this section may be revised (and restricted) in the near future. • Private evaluators are volunteers and never paid. If they incur inordinate out of pocket expenses (<i>e.g.</i> travel expenses for evaluation committee meetings) the state will reimburse those expenses in accordance with the state’s expense reimbursement policies for employees. • Private evaluators are typically used in the following kinds of circumstances: <ul style="list-style-type: none"> ○ The private evaluator is a retired state employee with significant experience. A furnished example included the retired head of the state’s 529 program returning to evaluate investment manager proposals. ○ The private evaluator is an individual from the industry/space with significant experience (and no conflict of interest). A furnished example included an academic with lottery expertise serving on the state’s lottery related RFP evaluation team.

¹³ See Arkansas, “Evaluation of Proposals”, available at <https://www.dfa.arkansas.gov/images/uploads/procurementOffice/PolicyEvaluationProposals.pdf> (“An agency may also use qualified evaluators from non-State government entities or the private sector.”)

¹⁴ See the 6/13/2017 version of the above policy.

¹⁵ The information in the below state profiles comes from interviews with the heads of procurement in the respective states.

Profiled State	Private Evaluator Details
<p data-bbox="269 1077 459 1108">North Dakota</p> 	<ul style="list-style-type: none"> ○ The private evaluator is a member of a community or group impacted by the procurement (e.g. an organization representing individuals served by a public program, or people who are members of a community served or regulated by a program). • Private evaluators are subject to the same controls for conflicts of interest as state employee evaluators. <ul style="list-style-type: none"> • The use of a private evaluator is never required. • The practice of non-state employee evaluators is allowed in the procurement department's evaluation guide and associated materials, not in a statute or promulgated rule. • Typically private evaluators are volunteers. If they incur inordinate out of pocket expenses (e.g. travel expenses for evaluation committee meetings) the state will reimburse those expenses in accordance with the state's expense reimbursement policies for employees. However, there have been instances where private evaluators were required for technology evaluations and these private evaluators were paid contractors. • Private evaluators are typically used in the following kinds of circumstances: <ul style="list-style-type: none"> ○ The private evaluator is an individual from the industry/space with significant experience (and no conflict of interest). A furnished example was a technology expert scoring a very technical portion of a proposal with the balance of the proposal scored by state employees. ○ The private evaluator is a member of a community or group impacted by the procurement. Two examples were furnished: <ul style="list-style-type: none"> ▪ When the state conducted a procurement for software related to trucking weigh stations members of the trucking industry were invited to serve on the evaluation committee. ▪ When the state conducted a procurement for food to be served in public school cafeterias, students were invited to taste test the food. • Private evaluators are subject to the same controls for conflicts of interest as state employee evaluators.

Profiled State	Private Evaluator Details
<p>Mississippi</p> 	<ul style="list-style-type: none"> • The use of a private evaluator is never required. • The practice of non-state employee evaluators is allowed in a newly effective statute (effective in 2018) but had historically been allowed in less formal ways. • Historically the practice was rarely used. • Private evaluators are subject to the same controls for conflicts of interest as state employee evaluators.


RFP Cost Scoring



Overview

- RFPs are scored by combining a qualitative score developed by the evaluation committee with a cost score that is typically calculated by comparing the cost among vendors, giving the lowest cost the maximum amount of points, and assigning fewer than the maximum points to all other proposals proportional to their cost's relationship to the lowest cost. This formula is articulated in the RFP.
- Members of the Subcommittee have observed that, in at least one instance, the percentage of these points allocated to the cost of a proposal has been unacceptably low.
- In November 2017, OSP instituted a policy to require a minimum of 30% of the total possible points be allocated to cost. The policy also stipulates a maximum weighting of 50%.
- Higher Education Institutions have historically followed a similar process of informally requiring 30% cost point allocation.

Comparison to Other States

- States with a minimum cost allocation typically land in the 30-35% range. The manner by which this control is enforced (statute, rule, policy) varies from state to state.

Profiled State	RFP Cost Evaluation
<p>Mississippi</p> 	<ul style="list-style-type: none"> • A recently enacted statute sets the cost point allocation of a proposal's scoring to 35% of the total. Miss. Code Ann. § 31-7-413(2)(a) (effective 1/1/2018). • Cost must also be the single highest weighted criteria. <i>Id.</i>

Profiled State	RFP Cost Evaluation
<p>West Virginia</p> 	<ul style="list-style-type: none"> Procurement department manual sets the cost point allocation to 30 out of 100 possible points. <i>See</i> West Virginia, “West Virginia Purchasing Division Procedures Handbook”, Section 6, available at http://www.state.wv.us/admin/purchase/handbook/2015R7/hand6.htm.
<p>Tennessee</p> 	<ul style="list-style-type: none"> Procurement policies mandate the use of specific templates. <i>See</i> Tennessee, “Amended Procurement Procedures Manual of the Central Procurement Office” dated December 14, 2017, section 11, available for download at https://www.tn.gov/generalservices/procurement/central-procurement-office--cpo-/local-units-of-governments-/procurement-information.html. Current templates include a default allocation of 30% of proposal evaluation points to cost. Deviation from this standard requires approval by oversight examiners.

Interview Findings

- Members of the Subcommittee, in light of previous experience, have expressed an interest in formalizing the cost point allocation through statute.

Technical Proposal Template Streamlining

Observations and Analysis

- In Ikaso’s experience conducting procurements for other state clients, there is value to limiting the number of individually scored attributes in a proposal. A good target number is 10-20 qualitative scored attributes, generally following broad sections of the scope or requirements. This allows an evaluation team enough time to meaningfully discuss each one while having a wide enough number of evaluation areas scored (and weighted) to allow for a probing inquiry into the important elements of a proposal.
 - A manageable number of scored attributes allows for a meaningful discussion for each attribute (*See* discussion below on consensus scoring). The higher the number, the less likely that meaningful discussion will occur.
 - A high volume of attributes is harder to weigh (*i.e.* assign a relative value).
 - A longer list of attributes to individually score does not equate with a more precisely scored proposal; in Ikaso’s experience we have observed scoring fatigue drives evaluators to assign average scores.

- More scored attributes also provide more opportunities for vendor protests as there are more scores to critique or identify potential errors.
- In a review of sample Arkansas RFPs currently posted, Ikaso has observed that many (but not all) of the RFPs have a high number of individually scored attributes. The following count of scored attributes is from RFPs posted on March 21, 2018:
 - SP 18-0059 Bundled Health Services (posted as a draft) – **279** scored attributes
 - SP 18-0099 Flexible Spending Account / Health Savings Accounts / Cafeteria Plan and COB – **95** scored attributes
 - SP 18-0087 SAP Hana Upgrade Services (posted as a draft) – **17** scored attributes.
 - Notably this is a manageable and meaningful number.






“Consensus” Scoring of Proposals






Policy Review and Analysis

- The “consensus scoring meetings” are misnamed. A consensus score would require unanimity among the evaluators as to a single score or outcome. As it stands, divergent scores among evaluators are averaged to form a single score. A more suitable name for the event would be “evaluation team meeting” or “scoring discussion meeting.”
- As a general matter, more discussion should be encouraged in these meetings. Discussion, even when the evaluation team agrees on a score, allows people with diverse expertise to share their perspectives. It also affords the team an opportunity to identify and correct any misperceptions which individual evaluators may have made.
 - Presently, a discussion of a scored attribute is only required by those facilitating the meeting when there is a sufficiently wide range among evaluators on the same scored attributes.¹⁶
 - No discussion is automatically triggered without the range necessitating conversation. Thus, many scored attributes are not discussed.
 - Not all evaluation members are required to participate in triggered discussions.

¹⁶ See Various RFP training materials, available here: <https://www.dfa.arkansas.gov/procurement/procurement-training/online-training> including the video of RFP “afternoon session” which explains this practice.

Recommendations:

Rec. #	Details					
VIII-1	Correct misperceptions held by agencies regarding evaluation team composition. These corrections should be (and in some cases are) formalized in OSP training materials.	✓		✓	✓	
VIII-1.a	Continue encouraging the same individuals who draft RFP specifications to serve on the evaluation committee.	✓		✓	✓	
VIII-1.b	Correct the misconception that involvement with an incumbent necessarily disqualifies an evaluator. The basis to disqualify a person as an evaluator for bias, interest, <i>etc.</i> are a sufficient screen and would disqualify someone who is incapable of objectivity.	✓		✓	✓	
VIII-2	Regarding private evaluators, if the State wishes to have a more formal avenue for their use beyond the permission granted by current OSP policies, the following controls should be observed:	✓		✓	✓	
VIII-2.a	The use of private evaluators should not be required. Whether one was used on particularly complex or high-profile procurements could, however, be something presented to the Subcommittee in the enhanced contract cover sheet proposed in Section XII (along with the names and qualifications of all State employee evaluators).	✓		✓	✓	
VIII-2.b	Private evaluators must be held to the same conflict of interest standards as State employees.	✓		✓	✓	
VIII-2.c	Where possible, private evaluators should be qualified volunteers (though travel reimbursement may be made available). Private evaluators should only be paid when it is determined that the State lacks the necessary expertise.	✓		✓	✓	
VIII-3	Given the interest of the Subcommittee, formalize a minimum cost weighting for RFP scores by adding a requirement to Ark. Code § 19-11-230.			✓	✓	✓
VIII-4	Revise RFP training and templates to encourage the use of fewer scored attributes.	✓		✓	✓	✓
VIII-5	Encourage more and better discussion at consensus meetings:	✓		✓	✓	✓

Rec. #	Details	    				
VIII-5.a	Require discussion of all scored attributes. Requiring participation makes the evaluator more invested in their score (and less able to backtrack on their numbers than if they had sat silently during the session).	✓	✓	✓	✓	✓
VIII-5.b	Utilize a round-robin method where different evaluators are specifically called upon to lead discussion on different scored attributes to ensure participation and engagement. An additional benefit to this method is that if evaluators know they will be called upon to discuss their scores, it may improve individual evaluators' preparation for the consensus meeting.	✓	✓	✓	✓	✓

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per Recommendation VIII-3, amend Ark. Code § 19-11-230(d) as follows:

“(d)(1) The request for proposals shall indicate the relative importance of price and other evaluation factors.

(2) Unless written permission is obtained to use a lower percentage from the State Procurement Director or the agency procurement official, cost must be weighted a minimum of thirty (30) percent of the evaluated score.”

IX. Negotiations

Section Summary:

The State is not fully leveraging its ability to negotiate price reductions or terms improvements for contracts. This is due, in part, to statutory constraints to negotiations coupled with a procurement culture that only recently began to embrace negotiations.

Ikaso makes the following recommendations:

Section IX Recommendation Overview		Impact	Complexity
IX-1	Amend negotiations-related statutes to allow for Best and Final Offers (BAFOs).	Medium	Low
IX-2	Amend negotiations-related rules to reduce the hurdles to negotiations.	Medium	Low
IX-3	Amend the rules which currently require negotiations training to also require OSP to furnish negotiations training and certification.	Medium	Medium

Findings and Observations:

Statute and Rule Review

- Neither the Invitation for Bids (IFB) nor RFP statutes and rules appear to allow BAFOs. Specifically, Ark. Code § 19-11-229(h)(2) and OSP Regulation R8:19-11-230(a) seem to only contemplate one-on-one negotiations with the apparent winning vendor.
 - A BAFO process would allow the State to solicit lower prices from all bidders/respondents, which can be done either through blanket requests for lower prices or by going to all entities with a target price (based on market research, budget availability, etc.).
 - The present limitation of only negotiating with a single vendor at a time gives the apparent winning vendors little to no incentive to lower their pricing.
 - BAFOs give each bidder an equal opportunity to improve its chances of winning the solicitation while increasing the State's potential savings.
- Current rules hinder the State's ability to negotiate bids. Specifically, OSP Regulation R15:19-11-229 places the following hurdles to State negotiations:
 - Only "procurement professionals" trained in negotiations may conduct negotiations.
 - Those professionals must prepare written and specific justification supporting the negotiations for inclusion in the bid folder prior to negotiations beginning. This written

- justification and plan must outline the negotiations, including any desired contract modifications to price, quality, quantity, *etc.*
- Notably, the analog rule for negotiating proposals (OSP Regulation R8:19-11-230) has the similar justification hurdles but does not require training.

Interview Findings

- OSP has recently begun prioritizing negotiations.
 - They have rolled out generalized negotiations training for procurement professionals.
 - OSP has conducted targeted negotiations in certain instances, reporting material savings to date.
- The agencies interviewed were less aware of negotiations options.
 - Many were not aware of the requirement for negotiations training, nor were they aware of the availability of negotiations training. Some agencies thus may have conducted negotiations without the required training and without observing the documentation requirements of the above-discussed rule.
 - Some agencies also view negotiations (and thus the present limits to negotiations) more broadly than intended. For example, one agency mentioned that “clarification questions” could constitute negotiations and could only be issued to the anticipated winner of the solicitation.

Recommendations:

Rec. #	Details	    				
IX-1	Amend existing negotiations laws to allow for BAFOs.			✓	✓	✓
IX-2	Reduce regulatory hurdles to negotiations. Specifically, expand the allowable purposes of negotiations with anticipated winners to include: <ul style="list-style-type: none"> i. Lowering the total contract price of a bid/proposal without change to solicitation specifications; or ii. Adding to specifications without change to the bid/proposal price (this would not include modifications to the existing specifications). 	✓	✓	✓	✓	✓
IX-3	Amend the rule that requires negotiations training to also require that OSP furnish negotiations training and certification. Require that this training be specific to the State’s processes, needs, and goals.	✓	✓	✓	✓	✓

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Pursuant to Recommendation IX-1, amend Ark. Code § 19-11-229 to allow BAFOs. Specifically, add a new section (h) as follows:

“(h) The director or head of a procurement agency (or designee) may request Best and Final Offers (BAFOs) from all bidders deemed responsive and responsible prior to the notice of award. In responding to a BAFO request, bidders may choose to resubmit their bids with lower prices in accordance with the specifications of the IFB, or bidders may submit in writing that their original bids, including pricing, remain unchanged. Any and all bids submitted in response to BAFO requests shall be evaluated for award by the State.”

- Pursuant to Recommendation IX-1, amend Ark. Code § 19-11-229 section (h) to be section (i), amend (i)(1) (formerly (h)(1)) to read:

“(h)(1) Upon conclusion of a BAFO pursuant to section (h) if applicable, ~~The~~ the contract shall be awarded with reasonable promptness by written notice to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids.”

- Pursuant to Recommendation IX-1, amend Ark. Code § 19-11-229 section (i) to be section (j)
- Pursuant to Recommendation IX-1, amend Ark. Code § 19-11-230 to allow BAFOs. Specifically, add a new section (f) as follows:

“(f) The director or head of a procurement agency (or designee) may request Best and Final Offers (BAFOs) from all vendors deemed responsive to the RFP and responsible prior to the notice of award. In responding to a BAFO request, vendors may choose to resubmit their proposals with lower prices in accordance with the specifications of the RFP request, or vendors may submit in writing that their original proposal pricing remains unchanged. If a BAFO is issued, the BAFO pricing shall be the evaluated proposal cost.”

- Pursuant to Recommendation IX-1, amend old section (f) to be section (g), amend (g)(1) (formerly (f)(1)) to read:

“(f)(1) Upon conclusion of a BAFO pursuant to section (f) if applicable, award ~~Award~~ shall be made to the responsible offeror whose proposal is determined in writing to be the

most advantageous to the state, taking into consideration price, the evaluation factors set forth in the request for proposals, and the results of any discussions conducted with responsible offerors.”

- Pursuant to Recommendation IX-1, amend old section (g) to be section (h).

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Pursuant to Recommendation IX-2, amend OSP Regulation R15:19-11-229(a) as follows:

“(a) Negotiation of Competitive Sealed Bids should be used ~~only~~ in those cases where the best interests of the State are served, *which would include but not be limited to instances where the state can obtain a lower price without changes to the terms or specifications of the invitation to bid, or an improvement to the terms or specifications of the invitation to bid without an increase to the bid price.* Only those procurement professionals who are trained *and certified* in negotiation and procurement processes should conduct negotiations. *OSP shall furnish this negotiations training and certification and ensure that such training is specific to the requirements of the state.*”

- Pursuant to Recommendation IX-2, amend OSP Regulation R8:19-11-230 as follows:

“(a) Negotiation of ~~Request for Proposals~~^[17] *proposals* should be authorized in those cases where the best interests of the State are served. *This includes, but is not limited to, instances where the state can obtain a lower price without changes to the terms of the RFP or proposal, or an improvement to the terms or specifications of a proposal without an increase to the proposal’s price.*”

Improved Measurement

- Negotiation savings can be measured by comparing initial offers with the final offers (BAFOs) or the final contract price of a procurement. Agencies or OSP can be responsible for tracking and reporting these savings.

Capturing Savings

- Increasing the use of BAFOs and negotiations can be effective ways to realize direct savings for the State. To track these savings, agencies should record and report on the savings they have achieved over a specified reporting period by comparing the amount of the initial bids/cost proposals and the final contract costs.

¹⁷ The State issues RFPs, the responses thereto are proposals. It follows that proposals (which include what vendors propose to do and at what price) are what is negotiated, not the posted solicitation document.

X. Protests

Section Summary:

The State's procurement protest statute disadvantages the State. Because there are no clear limits on when a protest may be filed and on what grounds, a vendor may protest a procurement at any time for any reason without an associated cost. A protest can further unnecessarily halt contract negotiation and routing. In situations where a procurement is conducted by an Agency Procurement Official, it is unclear if a resulting protest should be resolved by the APO or OSP.

Ikaso makes the following recommendations:

Section X Recommendation Overview		Impact	Complexity
X-1	Amend Ark. Code § 19-11-244(a)(3) to make award protests due a fixed number of days after the announcement of the anticipation to award.	High	Low
X-2	Amend Ark. Code § 19-11-244 to limit the grounds of a protest and require protestors to point to facts that support their grievances on those grounds.	Medium	Low
X-3	Amend Ark. Code § 19-11-244 to require a protest bond to file a protest.	High	Medium
X-4	Amend OSP Regulation R2:19-11-244 to discontinue the ability to award costs to successful protesters.	Low	Low
X-5	Adjust contracting practices during the pendency of a protest to continue negotiations and Executive branch review while a protest is being resolved.	Medium	Low
X-6	Amend Ark. Code § 19-11-244(a)(2) to clarify protest procedures for procurements which did not involve OSP.	Medium	Low

Subject Overview:

Vendors have the ability to lodge formal “protests” when they have grievances related to the terms of a State solicitation or to the results of a contract award. Protests are intended to serve the laudable purpose of ensuring State accountability to a transparent and fair procurement process.

However, if protests are not adequately controlled they afford vendors the opportunity to frustrate an otherwise appropriate process. For example, protests by incumbent vendors who have lost State business

during a procurement could be lodged with the intention to drag out the contracting process and necessitate continued use of the incumbent vendor.

Accordingly, protest laws need to strike the right balance of affording opportunity to aggrieved vendors to hold the State accountable to its processes while also deterring protests with improper motives.

Findings and Observations:

Statute and Rule Review

Filing Time Limits

- For protests about the solicitation itself (*e.g.* specifications are improper), a protestor must file a protest seventy-two (72) hours prior to the solicitation's response deadline. Ark. Code § 19-11-244 (a)(1).
- Protests about an award, however, are due 14 calendar days "after the aggrieved person knows or should have known of the facts giving rise to the grievance." Ark. Code § 19-11-244(a)(2)-(3).
 - Without dictating any required grounds (see below) a protest can be based on any "fact." In effect, the due date for award protests can be reset an infinite number of times through the introduction of new "facts" regardless of their materiality or subject.

Protest Grounds

- The statutes and rules do not define any acceptable grounds for protests. This is unusual as most states prefer to limit the grounds of protest to ensure that vendors have a clear understanding of what constitutes a failure in the procurement process and to protect the State's time and process.
 - For example, Indiana only allows protests on the terms of a solicitation in the event that the vendor can point to specifications being "inadequate, unduly restrictive, or ambiguous." Award protests must be on grounds that the State misused its power or failed to comply with procurement process regulations and/or observe proper procedures. Additionally, the vendor may protest based on technical (*e.g.* calculation) mistakes, unequal treatment, or suspected collusion.

Delays Attributable to Protests

- If a protest has been filed, the State "shall not proceed further with the solicitation or with the award" until the Director "makes a written determination that the award of the contract without delay is necessary to protect the substantial interests of the state." Ark. Code § 19-11-244 (f).
- Proceeding with negotiations or proposal evaluations appears to be forbidden during the pendency of a protest.
- While the statute does permit the awarding of contracts while a protest is open, within the discretion of the Director, this is reportedly rarely done in practice.


Award of Costs



- OSP Regulation R2:19-11-244 allows for certain protestor costs to be reimbursed by the State in the event of successful protest and claim.
- This could create a monetary incentive for vendors to protest and an administrative burden on the State to administer.

Regulations

- There are two regulations associated with the protest statute: one establishes a vendor's involvement in responding to the procurement (or in some cases potentially responding) as necessary to qualify for protest rights; the other grants the Director authority to award costs to successful protestors. Since neither regulation deals specifically with how "the protestor" might respond to protest issues "according to the regulations," the statutory reference to the regulations should be clarified. Ark. Code § 19-11-244 (c)(1)-(2).

Comparison to Other States

Profiled State	Protest Details
<p>Tennessee</p> 	<ul style="list-style-type: none">• Protests on awards are due within 7 calendar days after the award notice is distributed. <i>See generally</i> Tennessee "Protest Procedures and Protest Bond Requirements" available for download at https://www.tn.gov/generalservices/procurement/central-procurement-office--cpo-/state-protest-committee-/protest-procedures.html.• Specified and limited grounds for protests. These are:<ul style="list-style-type: none">○ The contract award was arbitrary, capricious, an abuse of discretion, or exceeded the authority of the awarding entity;○ The procurement process violated a constitutional, statutory, or regulatory provision;○ The awarding entity failed to adhere to the rules of the procurement as set forth in the solicitation and this failure materially affected the contract award;○ The procurement process involved responses that were collusive, submitted in bad faith, or not arrived at independently through open competition; and○ The contract award resulted from a technical or mathematical error during the evaluation process. <i>Id.</i>• Requires a protest bond equal to 5% of the lowest bid, which is forfeited if the protest is found to be ungrounded or in bad faith. <i>Id.</i>






Profiled State	Protest Details
<p data-bbox="305 331 427 363">Louisiana</p> 	<ul style="list-style-type: none"> • Award protests due within 14 calendar days of award notice. LA Rule 39:1671. • Procurements and awards allowed to proceed despite protest if procurement director determines it to be in the best interest of the State. <i>Id.</i>
<p data-bbox="318 688 414 720">Florida</p> 	<ul style="list-style-type: none"> • Notice of award protest due within 3 business days of award, formal protests within 10 calendar days of notice. FL Stat. § 287.042 and Code 28-110. • Protest bond of 1% of contract, which the unsuccessful party pays in order to lodge the protest. <i>Id.</i> • Bid protests are reviewed to determine “whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious” while RFP protests are reviewed to determine whether an agency’s “intended action is illegal, arbitrary, dishonest, or fraudulent.” Fla. Stat. Ann. § 120.57.

Interview Findings

APO versus OSP Protest Resolution

- It is unclear whether protests for procurements conducted by Higher Education Institutions (or agencies with Agency Procurement Officials) should be directed to the institution/agency or directly to OSP. The “head of a procurement agency” has the authority to resolve protests, but the statute does not elaborate on whether the agency-level authority must field agency-specific protests instead of OSP.
 - At a minimum this allows vendors the opportunity to forum shop (unless the vendor is directed otherwise).
 - Anecdotally, we were referred to an instance in which a vendor who had been unsatisfied with a Higher Education Institution’s protest resolution then filed the same protest at OSP, which is not intended to be an appellate level protest option.

Recommendations:

Rec. #	Details	    				
X-1	Amend Ark. Code § 19-11-244(a)(3) to make award protests due a fixed number of days from the announcement of an anticipation to award.		✓		✓	✓
X-2	Amend Ark. Code § 19-11-244 to limit the grounds of protest and require protestors to point to facts that substantiate their grievances on those grounds.		✓		✓	✓
X-3	Amend Ark. Code § 19-11-244 to require a protest bond. This bond would require a would-be protestor to post a bond in order to file a protest. This bond could be forfeited if the State, in its discretion, concluded that the protest was frivolous, without merit, or was intended purely to delay a contract.	✓	✓		✓	✓
X-4	Amend OSP Regulation R2:19-11-244 to no longer allow the award of costs to successful protestors.				✓	
X-5	As a practice, continue the negotiation, routing and review of contracts following the posting of the anticipation to award. In accordance with statute, await protest resolution for final execution of the contract (unless the Director of OSP determines an award is in the best interest of the State).	✓	✓		✓	✓
X-6	Amend Ark. Code § 19-11-244(a)(2) to clarify the path for protests of procurements conducted by APOs. Ikaso suggests that the procurement protest must be directed to the Agency APO, but that the APO (and not the vendor) may elect to redirect the protest to OSP. If the APO elects to resolve the protest, no appeal or second chance should be available to the vendor through OSP. The appeal should proceed to the Claims Court (the same practice as protests resolved by the Director of OSP).	✓	✓		✓	✓

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Pursuant to Recommendation X-1, amend Ark. Code § 19-11-244(a)(3) as follows (with *italicized* text as new text and ~~strikethrough~~ text for removal)

“(3) The protest shall be submitted in writing within fourteen (14) calendar days after the ~~aggrieved person knows or should have known of the facts giving rise to the grievance~~ *award, anticipation to award, or notice of intent to award has been posted.*”

- Pursuant to Recommendation X-2, amend Ark. Code § 19-11-244(a) to add a section (4) which could be based on Tennessee procedures as a thoughtful best practice, and read as follows:

“(4) *The protest shall be limited to one or more of the following grounds:*

i)The contract award was arbitrary, capricious, an abuse of discretion, or exceeded the authority of the awarding entity;

ii)The procurement process violated a constitutional, statutory, or regulatory provision;

ii)The awarding entity failed to adhere to the rules of the procurement as set forth in the solicitation and this failure materially affected the contract award;

iv)The procurement process involved responses that were collusive, submitted in bad faith, or not arrived at independently through open competition; and

v)The contract award resulted from a technical or mathematical error during the evaluation process.”

- Pursuant to Recommendation X-3, amend Ark. Code § 19-11-244(a) to add a section (h) to require a protest bond, set its amount, and specify the basis for its forfeiture and return. (Given the myriad variables to be considered in this type of statute, Ikaso will gladly work with the Subcommittee to develop specifics of this recommendation, to feature the Subcommittee’s preferences).
- Pursuant to Recommendation X-6, amend Ark. Code § 19-11-244(a)(2) to clarify the path of a protest as follows:

“(2) Any actual bidder, offeror, or contractor who is aggrieved in connection with the award of a contract may protest to the: (A) Director; or *when a procurement has been conducted by an agency and not the Office of State Procurement*, (B) *the* Head of a procurement agency. *The head of a procurement agency may elect, at his or her discretion, to request the Director resolve a protest instead of its resolution by the procurement agency. The protestor may not elect to protest directly to the Director if a*

protest to the head of a procurement agency is applicable. A protest resolved by the head of a procurement agency has the same effect and finality of a protest resolved by the Director and no appeal to the Director is available.”

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Pursuant to Recommendation X-4, amend OSP Regulation R2:19-11-244 to eliminate clauses (b) and (c).

Improved Measurement

- With revisions to reporting requirements (*See* Section XII), protests will become a trackable item. Once tracking of protests is underway, the State may be able to see improvements in two areas with the implementation of the above recommendations: an overall reduction in the number of protests and an overall reduction in contracting delays as a result of protests.

Capturing Savings

- Protests often result in a loss of State time and energy, rather than measurable financial losses. For example, if a protest delays the award of a contract, the State may have to extend the payment of services under the incumbent until such time as a new vendor can be awarded the contract and transitioned in. The State cannot anticipate being able to track a direct dollar value associated with delays, but with the new recommendations, should a protestor needlessly waste State time, they may risk the forfeiture of their protest bond. Any money recouped from frivolous protestors can be tracked in a similar way to direct savings.

XI. Post Procurement Contract Process

Section Summary:

Following a procurement decision, a potential contract must undergo a complex review process before it can be finalized and awarded. While it is important to ensure all contracts are created correctly, the current review process is inconsistent and confusing for the procuring agency, lacks clarity from the vendor perspective, and creates legal risk with inconsistent oversight by counsel.

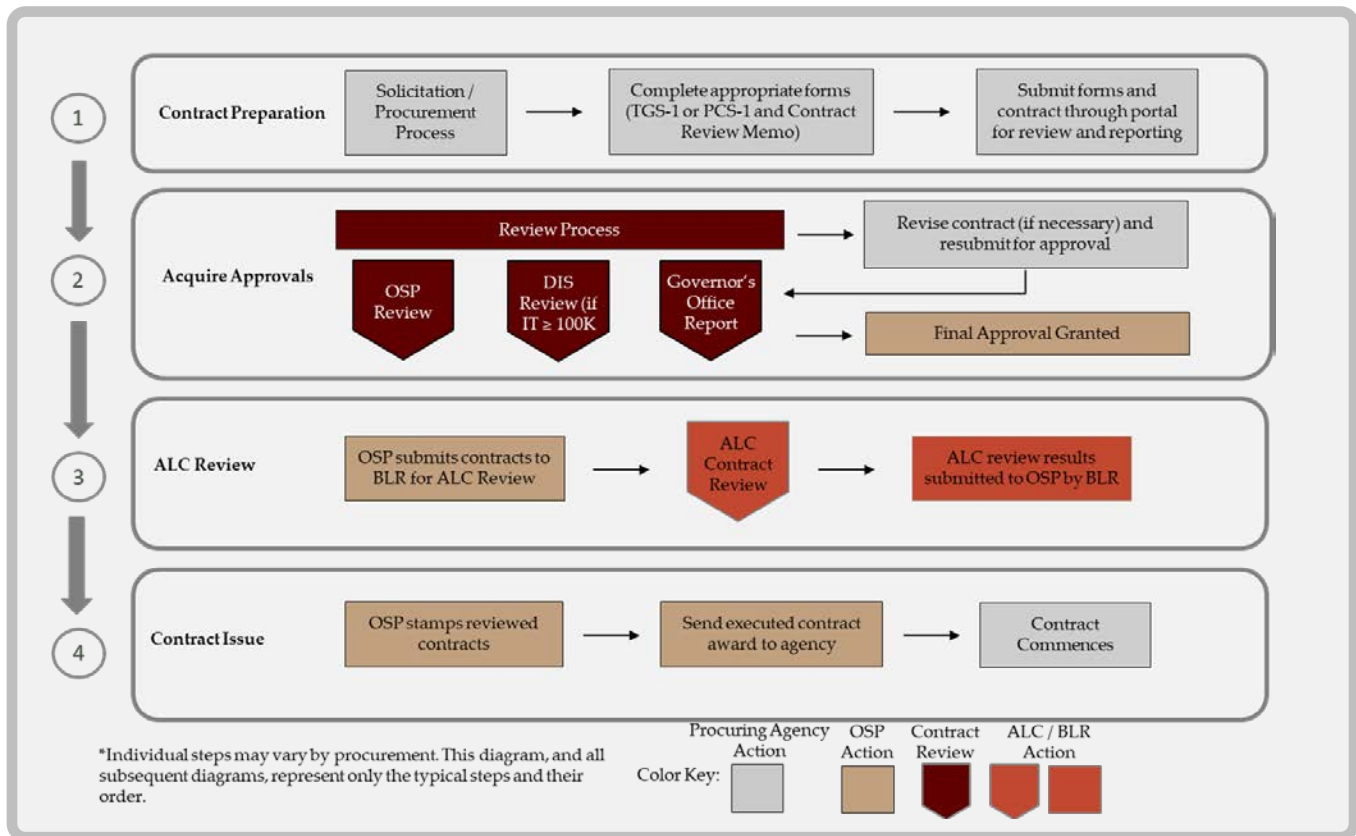
Ikaso makes the following recommendations:

Section XI Recommendation Overview		Impact	Complexity
XI-1	Change contracting protocol to require vendor signatures on contracts after the completion of the review process to add clarity to when a contract is considered final and to make vendors share accountability in review process adherence.	Medium	Low
XI-2	Amend Ark. Code § 19-11-219 to create a program of attorney review for certain contracts.	Medium	Medium
XI-3	Use AASIS to measure and track the contract review process timing and performance. Report on actual, aggregate review process timing.	Medium	Medium
XI-4	Amend Ark. Code § 19-11-238(c) to allow longer initial contract terms (but maintaining the same total, potential contract length).	High	Low

Post Procurement Contracting Process Overview:

Contracts of certain thresholds are required to undergo a multistep review process to gain approval from numerous procurement stakeholders. A process map for contract approval is depicted below. This process map applies to PCS contracts \geq \$50,000, TGS contracts \geq \$100,000, and IT service contracts \geq \$100,000.

Current Contract Approval Process






Findings and Observations:

Statute and Rule Review

- The requirements of contract review (notwithstanding Subcommittee review, discussed below in Section XII) are not codified in statute or rule.
- Department of Information Systems (DIS) has a statutory authority related to IT contracts, which it has enforced via a contract review process. *See* Ark. Code § 25-4-105(a)(2)(P) which provides that DIS may “Participat[e] in the development of information technology state contracts, including without limitation the identification of requirements, contract negotiation, and vendor evaluation[.]”
- Ark. Code § 19-11-238(c) restricts the term of contracts. Specifically, every contract’s term must end by the last day of the current biennium.
 - The total length for contracts is capped at 7 years. *Id.*
 - Contracts are required to carry termination for “any cause” and funding cancellation clauses which provide the State ability to terminate contracts should future legislatures choose to defund them. *Id.*

Comparison to Other States – Contract Length

- Most states have different contract length standards. These states address the issue of binding future legislatures by requiring the inclusion of termination for convenience and funding clauses (which the State already requires).






Profiled State	Contract Length Details
Indiana 	<ul style="list-style-type: none"> • Total length of contracts capped at 8 years. Indiana Code § 5-22-17-3,4, form contract. • Original term of contract may be up to 4 years; may not be renewed for a term longer than the initial term. <i>Id.</i>
Iowa 	<ul style="list-style-type: none"> • Total length of contracts capped at 6 years (10 for certain IT services contracts). 11 Iowa Administrative Code 118.11(3), DAS-CPB Manual. • Original term of contract may be up to 3 years; renewals at 1-year intervals. <i>Id.</i>
South Carolina 	<ul style="list-style-type: none"> • Total length of contracts capped at 5 years (10 with board approval). SC Code § 11-35-2030; form contract. • Original term of contract may be up to 1 year; renewals at 1-year intervals. <i>Id.</i>

Interview Findings






- A vendor's signature on a procurement submission (*i.e.* bid or proposal) functions for agencies as the vendor's signature on the ultimate contract unless the contract is later negotiated.
 - This practice creates potential uncertainty regarding the effective date of a contract.
 - This practice discourages further negotiation as altering the bid or proposal would complicate the normal treatment of solicitations post-award.
 - This practice disconnects the vendor from the review process.
- Agencies have commented that contracts are inconsistently reviewed by attorneys.

- However, DIS review of contracts at times reveals changes to legal contract terms. DIS admits this legal review component is not part of its technology review mandate but notes that it cannot simply pass on adjusted contract clauses which may be legally unacceptable to the State.
- Additionally, some Institutions of Higher Education already have a legal review requirement.
- Due to the short contract period and extensive contract renewal requirement, agencies are renewing all contracts around the same time when the end of the biennium occurs.¹⁸
 - This requirement encumbers the review process by sequencing many contracts at approximately the same time.
- Agencies have complained that the review process takes too long and contracts are unnecessarily held-up due to the large volume of contracts needing review. Agencies also fall behind with all the contracts they must renew and submit for review, leading to a rushed review process to renew the contract before expiration occurs.
- As revealed through interviews with members of OSP, AASIS has the ability to track the sequential review of contracts and how long each step takes. As of now, this information does not appear to be reported or analyzed. The length of time a contract is in review prior to being sent for Subcommittee review may be a contributing factor to the timing of what comes before the Subcommittee.

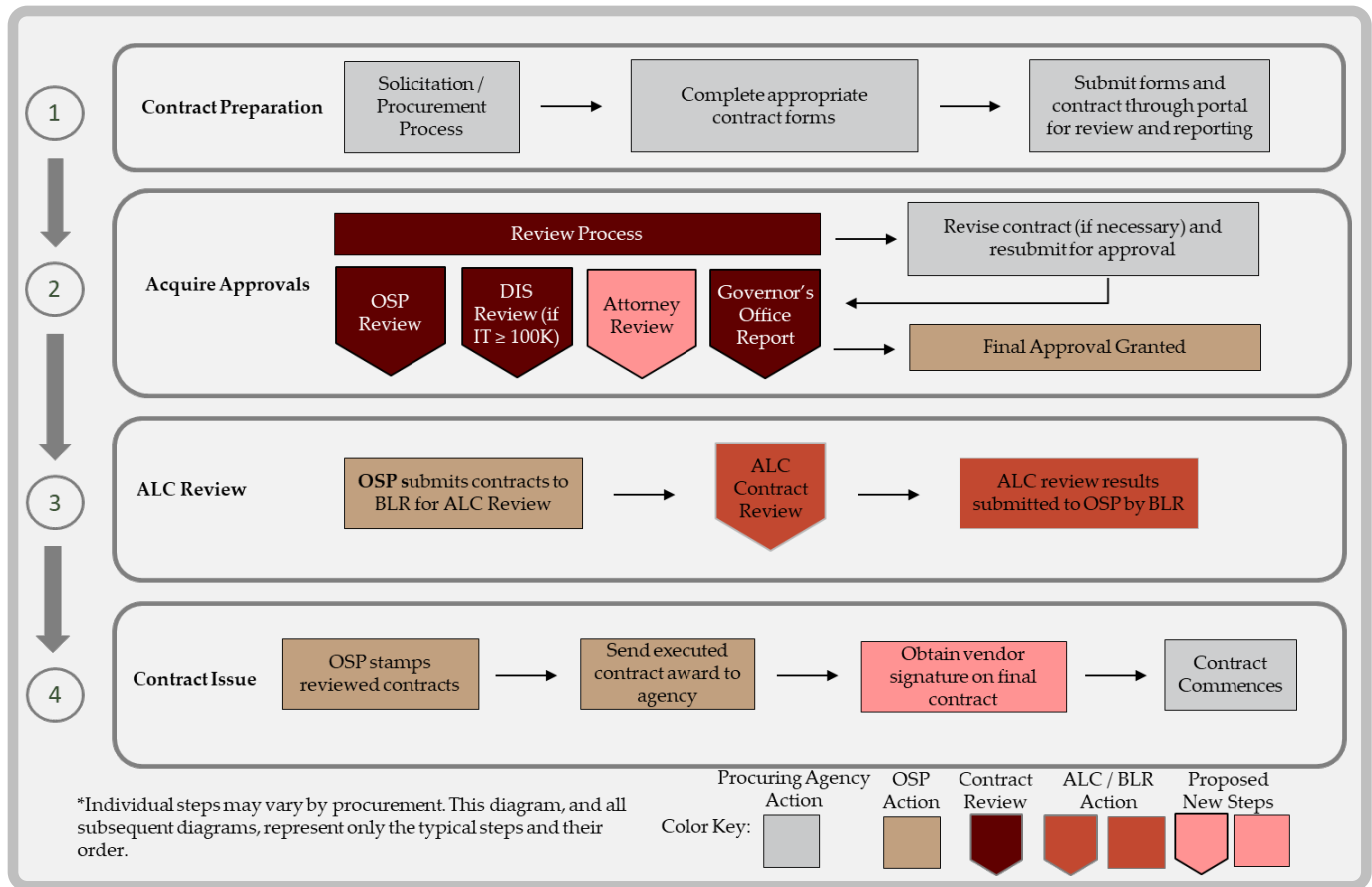
Recommendations:

Rec. #	Details	    				
XI-1	Require vendor signature of the final contract after the completion of the entire review process. This will add clarity to when the contract is complete, provide a final check on all contract steps, and make vendors additionally responsible for process adherence (including Subcommittee review). This practice can be memorialized in a vendor education bulletin. AASIS can also be formatted so a vendor signature is required in the system before a contract can become effective.	✓	✓	✓	✓	✓

¹⁸ There are instances where agencies have contracts with base periods longer than the biennium. These would appear to not strictly comply with statutory requirements.

Rec. #	Details	    
XI-1.a	Additionally, the requirement in Ark. Code § 19-11-249c for those doing business with the State to observe ethical standards can be expanded to hold the vendor accountable for following the contract approval process, as applicable, after their signature on a contract.	<div>✓</div> <div>✓</div> <div>✓</div> <div>✓</div> <div>✓</div>
XI-2	Amend Ark. Code § 19-11-219 to require attorney review of contracts under certain circumstances. This will also allow other review functions to focus on the purpose of their review (<i>e.g.</i> DIS may focus on technology.)	<div>✓</div> <div>✓</div> <div>✓</div> <div>✓</div> <div>✓</div>
XI-2.a	Set the criteria of which contracts should be reviewed by rule. These could include contacts over a certain dollar amount, contracts which have modified the State standard terms or conditions in the solicitation, or any other criteria.	<div>✓</div> <div>✓</div> <div></div> <div>✓</div> <div>✓</div>
XI-2.b	Note, in rule, that the attorney may be an attorney from OSP, the agency or Institution of Higher Education, the State Attorney General's Office, or any other attorney who is employed by the State and licensed to practice law in Arkansas.	<div></div> <div>✓</div> <div></div> <div>✓</div> <div>✓</div>
XI-3	Measure and track the contract routing process within AASIS to shed light upon which stakeholders may be contributing to the elongation of the review process. This practice should be taken on by OSP to collect and analyze the data collected in AASIS.	<div>✓</div> <div>✓</div> <div></div> <div>✓</div> <div>✓</div>
XI-4	Amend Ark. Code § 19-11-238(c) to lengthen the allowable initial term of contracts before a renewal is needed. We recommend the same total length (7 years) but allow a base term of 4 years with optional extensions.	<div></div> <div>✓</div> <div></div> <div>✓</div> <div>✓</div>

Proposed Contract Approval Process



Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Pursuant to Recommendation XI-1, amend Ark. Code § 19-11-249(c) as follows:

“(c)To achieve the purpose of this subchapter, it is essential that those doing business with the state also observe the ethical standards prescribed in this subchapter.

Additionally, those who enter into contracts with the state under this subchapter are co-obligated with the state to ensure that the contract adheres to the requirements of this subchapter, including mandatory clauses and review as required.”

- Pursuant to Recommendation XI-2, amend Ark. Code § 19-11-219 as follows:

“(a) The Attorney General shall act as counsel for the State Procurement Director in preparation of necessary contracts and in all legal matters.

(b) Certain contracts shall require review of a state attorney prior to their execution. OSP shall draft and promulgate regulations detailing the parameters of required attorney review of contracts.”

- Pursuant to Recommendation XI-4, amend Ark. Code § 19-11-238 as follows:

“(c) TERMINATION DUE TO UNAVAILABILITY OF FUNDS IN SUCCEEDING YEARS. Original terms of such multiyear contracts shall ~~terminate on the last day of the current biennium, and any renewals by the state based upon continuing appropriation shall not exceed the next succeeding biennium~~ *four (4) years*. When funds are not appropriated or otherwise made available to support continuation of performance in a ~~subsequent year of~~ a multi-year contract, the contract ~~for such subsequent year~~ shall be terminated and the contractor may be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the commodities or services delivered under the contract.”

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Pursuant to Recommendation XI-2, draft OSP Regulation R1:19-11-219 detailing the criteria for which contracts require attorney review.
- Pursuant to Recommendation XI-2, draft OSP Regulation R2:19-11-219 detailing which attorneys may perform this review.

Improved Measurement

- Tracking the contract review workflow in AASIS will provide actual insight into the length of time each review component takes. Currently complaints are driven by anecdotal observations.

XII. Subcommittee Review

Section Summary:

The Review Subcommittee reviews so many contracts that meaningful review is difficult. The goals of the Subcommittee may be better served by recalibrating what is reviewed and reported to the Subcommittee in a manner that maintains transparency and accountability while focusing the Subcommittee's efforts to maximize the value of its limited review time.

Ikaso makes the following recommendations:

Section XII Recommendation Overview		Impact	Complexity
XII-1	Change what contracts are reviewed by the Subcommittee to materially reduce the total automatically sent for review.	High	Low
XII-2	For reviewed contracts, require a cover sheet with meaningful information about the contract and procurement process.	High	Medium
XII-3	Expand the contracts that are reported (but not automatically reviewed) to the Subcommittee. Enable members of the Subcommittee to "call" any reported contract for review.	Medium	Medium
XII-4	Develop a coversheet for the contract report with business rules that flag potential contracts to be "called" for review.	Medium	Medium
XII-5	Discontinue the review and approval of all vehicle leases.	Medium	Low

Subject Overview:

- Presently, the Subcommittee reviews every PCS contract with a total projected value of over \$50,000 and TGS contracts with a total projected value of over \$100,000. This includes a review of extensions and amendments of contracts.
- Commodity contracts are not reviewed.

Findings and Observations:

Analysis of State Data

Review History Analysis

- Ikaso analyzed the Review Portal information from December 2015 through January 2018 (at the time, all of the available data from both the PCS and TGS review portals, hereinafter the “Analyzed Period”). This set profiled every contract reviewed during this 26-month period and included a total of 3,199 reviews.

Total Projected Value Distribution

- Half of the contracts reviewed during the Analyzed Period had a Total Projected Value of under \$500K. A more detailed breakdown of the Total Projected Value of the Review Period is below:

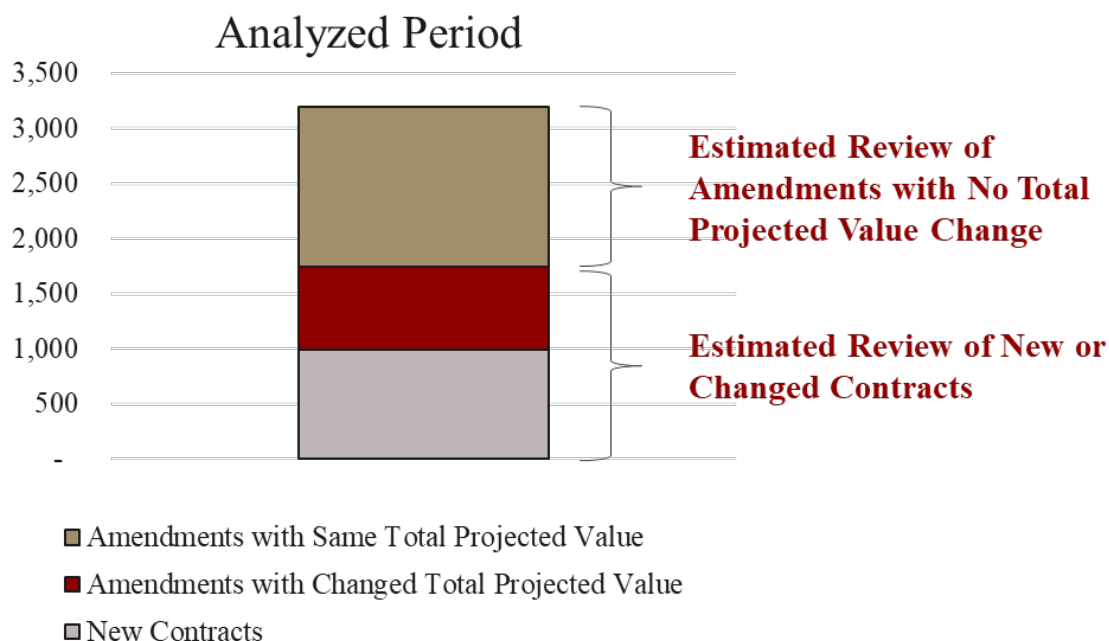
Contract Value	Count	% of Total	Contract Value (cont..)	Count	% of Total
Under \$100K ¹⁹	243	7.6%	\$1.7M to 1,799,999.99	30	0.9%
\$100K to 199,999.99	461	14.4%	\$1.8M to 1,899,999.99	29	0.9%
\$200K to 299,999.99	310	9.7%	\$1.9M to 1,999,999.99	23	0.7%
\$300K to 399,999.99	255	8.0%	\$2M to 2,099,999.99	21	0.7%
\$400K to 499,999.99	177	5.5%	\$2.1M to 2,199,999.99	40	1.3%
\$500K to 599,999.99	156	4.9%	\$2.2M to 2,299,999.99	26	0.8%
\$600K to 699,999.99	99	3.1%	\$2.3M to 2,399,999.99	22	0.7%
\$700K to 799,999.99	98	3.1%	\$2.4M to 2,499,999.99	23	0.7%
\$800K to 899,999.99	83	2.6%	\$2.5M to 2,599,999.99	17	0.5%
\$900K to 999,999.99	90	2.8%	\$2.6M to 2,699,999.99	12	0.4%
\$1M to \$1,099,999.99	77	2.4%	\$2.7M to 2,799,999.99	5	0.2%
\$1.1M to 1,199,999.99	31	1.0%	\$2.8M to 2,899,999.99	9	0.3%
\$1.2M to 1,299,999.99	46	1.4%	\$2.9M to 2,999,999.99	20	0.6%
\$1.3M to 1,399,999.99	53	1.7%	over \$3M under \$4M	132	4.1%
\$1.4M to 1,499,999.99	45	1.4%	over \$4M under \$5M	72	2.3%
\$1.5M to 1,599,999.99	59	1.8%	over \$5M under \$10M	167	5.2%
\$1.6M to 1,699,999.99	34	1.1%	over \$10M	234	7.3%

Review Repeating - Contract Amendments with No Change in Total Projected Cost

- The majority of contracts reviewed during the Analyzed Period were amendments to previously reviewed contracts. Of the 3,199 contracts reviewed, 2,209 (69%) were amendments to a contract (*i.e.* the Subcommittee had seen the contract before).

¹⁹ Given the present review threshold, the “Under \$100K” group contains only PCS contracts.

- As the Total Projected Value is required with each submission, Ikaso could identify which contracts were appearing again before the Subcommittee without a projected change in cost. Within the population of contracts appearing more than once during the Analyzed Period, approximately two thirds (65.7%) of these repeat-appearance contracts did not have a change in the Total Projected Value.
 - From this figure, Ikaso can extrapolate approximately how many of the contracts the Subcommittee reviews are contracts re-appearing without a change in the Total Projected Value.
 - Within the Analyzed Period, 1,079 reviews were contracts appearing for the second (or higher number) time during the Analyzed Period.²⁰
 - Of these repeat appearances, 370 (34.3%) were presented with an increased Total Projected Value, while 709 (65.7%) were presented without an increase to the total Projected Value.
- If one applies the finding that approximately two thirds (65.7%) of amendments appear without an increased Total Projected Value to the fact that the Analyzed Period contains 69% amendments, this suggests that approximately 45% of the contracts reviewed by the Subcommittee are contracts the Subcommittee has already reviewed without a change in the Total Projected Value. Please see the chart below for a visual depiction.



²⁰ This figure is a conservative estimation as it does not account for contracts presented for the first (or multiple) times prior to December 2015. This figure is only contracts appearing two or more times during the Analyzed Period. Thus, if a contract was first presented in November 2015 and then again in November 2016, this contract is not counted in the 1,079 figure as it only appears in the Analyzed Period once.

- Similarly, amendments are flagged within the Review Portal. These flags include a flag for “additional money” or “additional time”. Of the amendments in the Analyzed Period, 77.6% of these amendments have neither of these flags (*i.e.* only 22.4% of amendments flag a cost or time increase).
 - As this is a higher percentage than those with actually measured Total Projected Value increases (Ikaso measured 28.9% of amendments containing a Total Projected Cost Increase), Ikaso concluded that the amendment reason flag is potentially under-identifying the contracts sought for amendment with increased costs.
 - Accordingly, the estimates in Recommendation XII-1 below use the more conservative actual count vs. the amendment flag count.

Profiled Example: Contract 4600035911

Agency: Arkansas Geographic Information Systems Office

Purpose: Land Surveying Services

First Submission Date: 12/4/2015

First Submission Total Projected Value: \$70,000

Second Submission Date: 5/27/2015

Second Submission Purpose: To extend the contract (initially expired 6/30/2016)

Second Submission Total Projected Value: \$70,000

Third Submission Date: 4/7/2017

Third Submission Purpose: To extend the contract (set to expire on 6/30/2017)

Third Submission Total Projected Value: \$70,000

In this example, the Subcommittee looked at functionally the same contract three times

Contracts Not Reviewed

- Ikaso examined AASIS contract data for FY2017 and identified contracts which were not subjected to the Subcommittee’s review as they were neither PCS nor TGS over the review threshold.
- If the Subcommittee were to review all contracts with a Total Projected Value over a certain dollar threshold (*See* Recommendation XII-1) below is a breakdown of how many additional active 2017 contracts would have been reviewed by the Subcommittee (beyond the PCS and TGS contracts it already reviewed).

Review Trigger Dollar Amount	Active Contracts Not Previously Reviewed by Subcommittee - FY2017
\$250K	410
\$500K	293
\$750K	244
\$1M	200

Interview Findings






- Most interviewees believe Subcommittee review is unnecessary for renewed contracts with no material changes.
- Agencies and Institutions of Higher Education, as a matter of course, have taken to attending Subcommittee hearings when they have a contract up for review in case they are asked to speak to that contract.
 - The majority of those in attendance are not called to testify.
 - Their attendance comes at expense to the State both in terms of travel costs and time away from their primary job functions.

Review Analysis and Evaluation

- The population of contracts reviewed by the Subcommittee is simultaneously too large but also potentially missing large swathes of the State's spending.
- By reviewing so many contracts the Subcommittee is less able to identify and analyze contracts of true importance (large contracts, contracts with non-competitive procurements, renewals of contracts with material changes, and strategically important contracts).
 - Shifting more contracts to a report (while maintaining the right to call any "report contract" for review) would maintain the present level of insight and accountability while allowing the Subcommittee to apply its limited review time to more impactful contracts.
- Not reviewing commodity contracts leaves potentially large amounts of State spend un-reviewed. This includes co-op and technology contracts.
- The trigger for review is confusing, especially in light of the PCS/TGS/commodity ambiguity discussed in Section V. This confusion may have contributed to some of the contracts which recently came before the Subcommittee for ratification. Simplifying the trigger reduces the likelihood of ratifications and eliminates the excuse that a person did not know review was required.

Comparison to Other States






- A minority of states nationwide have any legislative contract review. In the southeast region the percentage with legislative review is higher, but still only around half. Below is an overview of what is reviewed by southeastern states that have any review.

Profiled State	Legislative Review Details
<p>Tennessee</p> 	<ul style="list-style-type: none"> • The legislature reviews certain non-competitive contracts (e.g. sole-source contracts) as well as amendments to contracts over a certain size (over \$250K). Tenn. Code Ann. § 4-56-107. • The state's Comptroller has approval rights for contracts, not just review. Tenn. Code Ann. § 4-56-108
<p>Louisiana</p> 	<ul style="list-style-type: none"> • The legislature reviews service contracts over \$50K. LA Rev Stat § 39:1590. • The legislature has approval rights in certain instances. LA Rev Stat § 39:1615.
<p>Texas</p> 	<ul style="list-style-type: none"> • The legislature reviews construction and service contracts over \$14K, major information systems contracts over \$100K, any non-competitive contract over \$1 million, and all contracts over \$10 million. TX Government Code §§ 2254.006, 2054.008, and 2166.2551, and General Appropriations Act, Article IX § 7.04. • The legislature only has a review right. General Appropriations Act, Article IX § 7.12.
<p>Alabama</p> 	<ul style="list-style-type: none"> • The legislature reviews service contracts with no minimum value. AL Code § 29-2-41 (2017). • The legislature only has a review right. <i>Id.</i>
<p>Kentucky</p> 	<ul style="list-style-type: none"> • The legislature reviews service contracts, tax incentive agreements, and memoranda of agreement with no minimum value. KY Rev Stat § 45A.700 and § 45A.705. • The legislature only has a review right. <i>Id.</i>

Vehicle Lease Approval

- The Subcommittee maintains the right to review and approve vehicle leases. Ark. Code § 22-8-102.
 - A vehicle is rented if it is sought for 30 days or fewer, a vehicle is leased if it is sought for over 30 days. Ark. Code § 22-8-102; OSP Regulation R3:19-11-229.
 - This is related to, but not discontinued by, Section 2 of Act 1004 which was intended to increase the number of qualified vendors for vehicles across the State but did not alter the Subcommittee's review of vehicle leases.
- Some interviewees reported a practice of stringing together consecutive 30-day rentals to avoid Subcommittee lease review.






Recommendations:

Rec. #	Details	    				
XII-1	Optimize the criteria requiring Subcommittee review.	✓	✓		✓	✓
XII-1.a	Make the primary trigger for Subcommittee review simply the total projected value of the contract regardless of the goods or services the State is purchasing through the contract. This includes a review of commodities and co-ops heretofore not reviewed.	✓	✓		✓	✓
XII-1.b	Review all procurements which were not competitively sourced. This would include sole-sources, special procurements, RFQs, ²¹ and emergency procurements. ²²	✓	✓		✓	✓
XII-1.c	Discontinue review or reporting of renewed contracts where there has been no Material Change (see below). ²³ If there has been a Material Change the renewal should be reviewed provided it triggers the above dollar or “non-competitive” triggers.	✓	✓		✓	✓

²¹ This should exclude RFQs conducted by DBA or under the authority of the Attorney General's Office for the procurement of outside counsel. However, these RFQs would be subject to the dollar amount review trigger in Recommendation XII-1.a. as this trigger would be universal for all contracts.

²² Emergency Procurements would still be eligible for the emergency review protocol contemplated by OSP Regulation R1:19-11-233(d), although that Rule would require modification as it utilizes the PCS/TGS review criteria.

²³ Alternatively, if the Subcommittee elects to adopt Recommendation XI-4 to allow longer contracts, this would automatically reduce the number of amendments and potentially obviate this recommendation.

Rec. #	Details	    
XII-1.c.i	<p>“Material Changes” to a contract upon renewal or extension should include (but not necessarily be limited to) any of the following changes:</p> <ul style="list-style-type: none"> i. A change in the contract’s face amount (the “Contract Amount”). ii. An increase in the contract’s Total Projected Value. iii. A change to any of the State boilerplate clauses, federal required clauses, or clauses negotiated specifically for the contract. iv. A change to any of the contract’s performance metrics (<i>See</i> Section XIII). v. Extension of the contract beyond the maximum extension date contemplated at the contract’s initial execution. 	<div>✓</div> <div>✓</div> <div></div> <div>✓</div> <div>✓</div>
XII-1.c.ii	A renewed contract without a Material Change should still be reported pursuant to Recommendation XII-3 below.	<div>✓</div> <div>✓</div> <div></div> <div>✓</div> <div>✓</div>
XII-1.c.iii	Make the intentional inclusion of a renewal without Material Change on this report the functional equivalent of providing false testimony to the Subcommittee. Provide Agencies and Institutions of Higher Education the option to submit amendments or renewals without Material Changes to the Subcommittee for review so that no one is forced to include a renewal or amendment on the report if they harbor doubts about whether the contract includes Material Changes.	<div>✓</div> <div>✓</div> <div></div> <div>✓</div> <div>✓</div>
XII-2	For reviewed contracts, require a cover sheet detailing certain critical information and context for the contract. The Subcommittee could review these sheets for the answers to their typical questions. This cover sheet should contain (in addition to the information presently collected such as Total Projected Cost) the information in the following sub-recommendations:	<div>✓</div> <div>✓</div> <div>✓</div> <div>✓</div> <div>✓</div>
XII-2.a	A description of the goods or services sought and their criticality to the State.	<div>✓</div> <div>✓</div> <div>✓</div> <div>✓</div> <div>✓</div>

Rec. #	Details	    				
XII-2.b	A description of the procurement process followed, including the instrument used (<i>e.g.</i> RFP).	✓	✓	✓	✓	✓
XII-2.c	A summary of the scoring from the procurement and the vendors that participated.	✓	✓	✓	✓	✓
XII-2.d	Whether there were any protests and their outcome.	✓	✓	✓	✓	✓
XII-2.e	For proposals, the qualifications of the evaluators and whether any private evaluators were engaged.	✓	✓	✓	✓	✓
XII-3	Expand the contracts reported to the Subcommittee. (<i>See also</i> Section XIV). Reserve the right to call any “reported” contract before the Subcommittee for review.	✓	✓	✓	✓	✓
XII-3.a	Require meaningful dashboards on the presented reports which facilitate identification and selection of “report” contracts for review. (<i>See</i> Recommendation XIV-1.b.)	✓	✓	✓	✓	✓
XII-4	Develop a cover page for the contracts reported to the Subcommittee.	✓	✓	✓	✓	✓
XII-4.a	This cover page should highlight trends or changes from report to report.	✓	✓	✓	✓	✓
XII-4.b	The cover page should also specifically list contracts which may warrant being raised to review. Business rules should be established to automatically identify potential contracts raised for review (<i>e.g.</i> a material change in total projected value).	✓	✓	✓	✓	✓
XII-5	Discontinue the review of all vehicle leases (not withstanding any leases which trip the review criteria discussed in recommendation XII-1.) The existing statutory requirements already contain a screen and review by DF&A.	✓	✓			✓

Ikaso estimates that, if recommendations XII-1.a, XII-1.b, and XII-1.c were in place during the Analyzed Period, the review from the Analyzed Period (26 month starting December 2015 through January 2018) could have been reduced from the 3,199 contracts reviewed as follows:²⁴

Automatic Review Dollar Trigger	Total Count Reviewed (Dollar Trigger + Noncompetitive) - (Renewals without a Material Change)²⁵	% Reduction vs. Actual Reviewed Amount of 3,199
\$250K	1,283	59.9%
\$500K	1,014	68.3%
\$750K	863	73.0%
\$1M	745	76.7%

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Recommendations XII-1 through XII-4 regarding Subcommittee review, if enacted, would require a great number of changes throughout the Arkansas Code and likely necessitate a new Subchapter dedicated exclusively to review and reporting to the Subcommittee. Ikaso would be pleased to work with the Subcommittee and BLR to thoroughly identify these changes and draft language to include any recommendations the Subcommittee wishes to consider.
- Pursuant to Recommendation XII-5, Amend Ark. Code § 22-8-102(b)(2)-(4) as follows:

“(2) Upon receipt, the director shall review the request to lease the motor vehicle, and if he or she determines that the lease is in the best interest of the State of Arkansas and that the agency has adequate funds to pay the lease, he or she may approve the request ~~but only if he or she has first received the approval of the Legislative Council.~~

(3) After receiving the approval of the ~~Legislative Council, the~~ director ~~shall stamp his or her approval on the request and return it to~~ the state agency, ~~which~~ may then proceed to enter into the lease as proposed and approved by the director.

~~(4) In emergency situations, the director may approve a temporary lease of a motor vehicle, not to exceed thirty (30) days, but only if he or she has sought the advice of the~~

²⁴ These figures do not include commodities contracts which have been historically not reviewed but are proposed for inclusion. It also does not include any “report” contracts called for Review pursuant to Recommendation XII-3.

²⁵ These figures were calculated by 1) counting all the reviewed contracts over the dollar threshold plus every non-competitive contract then 2) identifying which among this count were amendments, and 3) reducing the amendment population by the 65.7% discussed above as the estimated percentage of amendments which were presented without a Material Change (the original contracts in the count were not adjusted).

~~Chair of the Legislative Council and scheduled the temporary lease of a motor vehicle for consideration at the next meeting of the Legislative Council.”²⁶~~

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Recommendations XII-1 through XII-4 regarding Subcommittee review, if enacted, would require a great number of changes throughout the Arkansas Code and likely necessitate a new Subchapter dedicated exclusively to review and reporting to the Subcommittee. Ikaso would be pleased to work with the Subcommittee and BLR to thoroughly identify these changes and draft language to include any recommendations the Subcommittee wishes to consider.
- Pursuant to Recommendation XII-5, amend OSP Regulation R1:22-8-102(b) as follows (striking the strikethrough text):

“(b) All state agencies shall submit a written request to the State Procurement Director specifying all needed requirements for a lease of a vehicle. The Office of State Procurement will issue the solicitation based upon the criteria set forth by the agency to determine the lowest responsible and responsive bidder. ~~The Office of State Procurement will award the contract for the lease after review by the Arkansas Legislative Council, or Joint Budget Committee when the General Assembly is in session.”~~

Capturing Savings

- Reducing the number of contracts reviewed saves legislator and BLR time.
- Reducing the number of contracts also saves the travel expenses and lost work time associated with agency and Institution of Higher Education representatives attending Subcommittee meetings if they no longer have contracts selected for active review.

²⁶ Notably, clause (4) which currently allows the State Procurement Director to approve leases of less than 30 days without Subcommittee review but with counsel of the chair, has no current effect. By definition, an arrangement lasting 30 or fewer days is a rental and not subject to Subcommittee review or input.

XIII. Vendor Performance Reporting

Section Summary:

Arkansas statutes and procurement rules place an appropriate emphasis on developing performance-based contracts and reporting vendor performance. In this regard, the State is ahead of much of the nation. But more can be done to ensure this emphasis translates into strong contracts, active oversight, and reliable vendor performance.

The mechanism by which these statutes and rules have been implemented are too standardized, resulting in vendor performance reports (VPRs) that do not capture meaningful information and rarely, if ever, reflect negative performance. The statutes and rules also compel more reporting than is optimal, both in terms of a too low threshold for requiring reports and a too high frequency. The net result is a report generation process that requires a significant expenditure of State energy and resources (especially for non-AASIS using entities) while ultimately producing reports that are filed away and not deployed as a tool for active contract management.

Ikaso makes the following recommendations:

Section XIII Recommendation Overview		Impact	Complexity
XIII-1	Amend the statutory requirements regarding contract performance metrics to require that, for contracts over a certain size or type, such metrics must be customized to the contract and objective.	High	Medium
XIII-2	Amend the VPR requirements to only require VPRs when a vendor fails the objective metrics.	High	Medium
XIII-3	Make VPRs internally viewable.	Low	Low

Subject Overview:

The current VPR program does not appear to achieve the program's goals. VPR requirements came up as a top-of-mind subject in many of our interviews and was flagged by Institutions of Higher Education as their number one request for relief under current statutes. The volume of performance reporting required is a significant and material burden which appears to yield little or no value to the State.

The report template asks generic questions not tailored to the specific nature of the vendor's contract. The current VPR framework does not appear to have yielded any meaningful accountability or

uncovered any heretofore unreported poor vendor performance. Instead, users seem to go through the motions of fulfilling the requirement. No one interviewed could readily recall a poor VPR.

There is an opportunity for the State to focus on conducting VPRs for those contracts that are most critical, ensuring these contracts contain metrics that are tied to positive results, gathering and disseminating contract-specific data for these metrics, and drawing attention to measurable performance lapses when they happen.

Findings and Observations:

Interview Findings

- The current vendor performance report program requires the manual generation of vendor performance reports for all vendors of a certain type every three (3) months. Non-AASIS using entities (Higher Education Institutions) are not afforded the automation benefits of the current VPR platform, making the process more onerous.
- The volume of VPRs is very high, owing to a low dollar threshold (\$25,000) and a high frequency requirement (quarterly submission).
 - One agency reported having to submit 600 VPRs per quarter.
 - One interviewee reported having a team member whose only job was completing VPRs.
- Given the volume and effort that goes into VPRs, users are troubled by the fact that these reports do not seem to have a discernable application after they are submitted.
- Ikaso interviews indicate poor VPRs are very rare. This includes vendors who were later scored as having provided bad service to the State on previous engagements.
- One interviewee noted that, in projects with deliverables, sometimes the VPRs were requested at a point where it was premature to form a judgment. If those projects later experienced problems, these premature VPRs with adequate ratings could be pointed to by the Vendor as evidence of its satisfactory performance.

Analysis of Current VPR Form

- The report template asks contract owners to rate their satisfaction on “Customer Service,” “Delivery,” “Quality,” and “Pricing.” This is a view of the standard template:

VPR # _____

**DEPARTMENT OF FINANCE AND ADMINISTRATION
OFFICE OF STATE PROCUREMENT
VENDOR PERFORMANCE REPORT**

A vendor performance report must be completed by all state agencies for contracts that have a total initial contract amount or a total projected contract amount, including any amendments and possible extensions, of \$25,000 or more. The report must be completed at least one (1) time every three (3) months for the entire term of the contract and at the end of the contract.

Agency Number/Name: DA15 : Department of Finance and Administration

Bid Number: SP-16-5004 Contract Document Number: AR0007810
(OSP's SP# or Agency's bid number) (PO, OA, Other)

Contract Monitor Name: Randy Wright Vendor Name: Raso Consulting

Contract Monitor Email Address: randy.wright@dfas.arkansas.gov Vendor Tax ID: _____

Contract Monitor Phone Number: (501) 371-4067 Vendor Email Address: info@rasoconsulting.com

Date of Rating: 11/08/2016

Rating Categories	Below Standard	Standard	Above Standard
Customer Service	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Delivery	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Quality	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Pricing	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Overall Rating: Standard

A below standard rating requires explanation and documentation.

Comments:
The vendor met expectations for this rating period.

Signature: _____ Date: _____
(Director or Authorized Designee)

Name of Director or Designee: _____

Once the signed report has been submitted, it will be reviewed by OSP. OSP will submit the below standard vendor performance report to the vendor.

Rating Categories	Below Standard	Standard	Above Standard
Customer Service	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Delivery	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Quality	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Pricing	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Overall Rating: Standard

A below standard rating requires explanation and documentation.

- These scored attributes are the same regardless of what is being purchased and the point of the engagement.
- It is unclear how satisfaction with pricing would change during the course of a project in light of the pricing likely being fixed (with the exception of pricing in relation to market conditions which would be outside of the vendor's control).
- All of these metrics are subjective as they assess satisfaction, not performance in accordance with contract terms and conditions.

Statute and Rule Review

- We have noted duplication between Ark. Code §§ 19-11-267 and 19-11-1010 (Development and Use of Performance-based Contracts), as well as between Ark. Code §§ 19-11-268 and 19-11-1013 (Vendor Performance Reporting). This also applies to the OSP Regulations for each.

- These duplications are tied to the parallel-but-separate treatment of TGS and PCS contracts in statute.
- These rules could be amended to specifically require tailored performance metrics instead of the generalized ones in use.






Comparison to Other States






- Performance-based contracts are an emerging trend in state procurement, and Arkansas is ahead of the curve in requiring their use. That said, the current VPR processes do not translate into strong contracts, active oversight, or reliable vendor performance.
- Peer states that are leading in this area focus their efforts on large, risky, and/or strategically important contracts. The typical approach is to treat each contract as unique and develop performance standards and reporting specific to its targeted results. To aid tracking and reporting, performance standards that can be objectively measured are preferable.
- Some states have taken the additional step of systematizing the tracking and evaluation of contract performance through the use of contract monitoring and reporting tools. This is an example screenshot for one contract in such a tool Ikaso developed:

II. Contract Performance Standards and Guarantees									
Manual Input of Overall Contract Rating				Note: The performance standards and guarantees below ties to the Contract Monitoring plan. Details on CM standards, approaches, and responsibilities can be found in the full CM plan					
CM Category	Total Stds	Stds Met	Score (0-2)						
1. Quality - Internal	1	0	2						
2. Quality - Customer	0	0	1						
3. Timeliness	6	0	2						
4. Administration	1	0	1						
						Penalty/ Incentive Assessed			
Contract Std Measured	Type of Measure	CM Category	Required Std	Penalty/ Incentive	Freq and Approach (Data source or CM activity)	Last 30 days	To Date	Stds Met?	Findings/ Act Perf
1. Print and mail (production and delivery to post office)	Gen Contract Requir.	Timeliness	Within 24 hours of request	DSIT shall (a) attempt to correct and, (b) if requested, provide a report on root cause	Monitor quarterly with Contract Monitor sending a generic letter to an address to verify process is occurring on time and accurately				

- Some states employ private contractors specifically to evaluate vendor performance in accordance with objective contractual metrics for high-risk contracts. The federal Center for Medicare and Medicare Services requires this for certain technology procurements.

Recommendations:

Rec. #	Details					
XIII-1	Adjust the requirement to have performance metrics in contracts to require that, for contracts of a certain size or type, the metrics should be specifically tailored to the goods or services of those contracts and not the generalized metrics currently in place.	✓	✓	✓	✓	✓
XIII-1.a	These metrics should measure things objectively (<i>e.g.</i> , whether the delivery was made on time) and not subjectively (<i>e.g.</i> , whether the delivery was satisfactory).	✓	✓	✓	✓	✓
XIII-1.b	The statute should encourage, but not require, objective performance metrics in any other contract where the agency believes it serves the best interests of the State.		✓	✓	✓	✓
XIII-1.c	The agency or Institution of Higher Education who “owns” the contract must have the ability to actually monitor a vendor’s performance and adherence with these objective metrics. For State Contracts, OSP should perform this function.		✓	✓	✓	✓
XIII-1.d	These metrics could also be tied to financial consequences (<i>e.g.</i> withholding payments or liquidated damages) to promote performance.		✓	✓	✓	✓
XIII-2	Amend the statutes and rules which require VPR generation for contracts over a certain size to instead require VPR generation for contracts where the vendor(s) have failed to meet some or all of the metrics required by Recommendation XIII-1.		✓	✓	✓	✓
XIII-2.a	As only contracts over a certain size will be required to have objective tailored metrics, this will functionally raise the dollar threshold for contracts requiring VPR as VPR generation is linked to metric failure. (Notwithstanding any agency that elects to include performance metrics pursuant to Recommendation XIII-1.b above).		✓	✓	✓	✓
XIII-2.b	The reporting obligation could end after a certain period of satisfactory performance (<i>e.g.</i> 90 days).		✓	✓	✓	✓

Rec. #	Details					
XIII-3	Make VPRs searchable and available for State employees.	✓	✓	✓	✓	✓
XIII-3.a	The State could specifically allow VPRs to be used in assessing past vendor performance for future procurements. <i>See Section VII.</i>	✓	✓	✓	✓	✓

Specific Statutory Changes Suggested

- Pursuant to Recommendations XIII-1 and XIII-2, create a single VPR statute and analog rule. (Given the complex recommendations, Ikaso will gladly work with BLR and the Subcommittee to more precisely draft these items upon the Subcommittee's articulation of desired levels and requirements). These changes would necessarily involve amendments or potential deletions of portions of Ark. Code §§ 19-11-267, 19-11-268, 19-11-1010 and 19-11-1013 and their associated rules.
 - Regarding the requirement to create objective, tailored metrics, Ikaso recommends the following considerations:
 - The concept of critical and non-critical metrics (the former triggering VPR reporting immediately, the later triggering it only after repeated failures).
 - Contracts for commodities may lend themselves to more standardization than services. Accordingly, sample commodities metrics could be included.

Improved Measurement

- The recommended changes will create a repository that focuses on vendor performance lapses.
- The act of measuring and tracking should be expected to improve contract performance.
 - When performance failures do happen, the records will help understand how the circumstances came to pass, as well as how to prevent similar situations in the future.

Capturing Savings

- With the elimination of the VPR process as currently structured, there is the potential for agencies to redirect resources into more value-added roles. This redirection could be tracked or reported on.

Improved Efficiency

- Oversight bodies will be able to focus their attention on documented vendor performance lapses.
- Contract users will be able to redirect the time previously dedicated to processing large volumes of standardized VPR paperwork into thoughtful and targeted contract management.
- The act of measuring and tracking should also be expected to impact efficiency through improved contract performance.

XIV. Reporting

Section Summary:

Generally speaking, the procurement related reports presently required by statute, rule and practice are rosters of activity with no meaningful analysis. Some of these reports require manual collection of information and, in at least one instance, serve obsolete goals. Finally, Ikaso has observed gaps in measurement and reporting obligations.

Ikaso makes the following recommendations:

Section XIV Recommendation Overview		Impact	Complexity
XIV-1	Expand the number and type of contracts that are reported to the Subcommittee.	Medium	Medium
XIV-2	On co-op reports, shift the responsibility for gathering line item detail from State personnel to the vendors.	Medium	Low
XIV-3	Discontinue the obsolete recycled paper reports by eliminating the statute. Alternatively, require the reports from the State's vendors and not State personnel.	Medium	Low
XIV-4	Track and report on protests and their resolution.	Medium	Low
XIV-5	Track and report on negotiations and their outcomes.	Medium	Medium
XIV-6	Track and report on contract life cycle information in AASIS to project downstream procurement activities.	Medium	Medium

Findings and Observations:

Contract Report to Subcommittee

Statute and Rule Review

- Ark. Code § 19-11-1006(d) requires agencies and Institutions of Higher Education to compile a report of PCS contracts with a total projected value between \$10K and \$50K. This monthly report is presented as a roster of contracts and data points about each one.
- There does not appear to be an analog requiring the reporting of TGS contracts, nor commodity contracts.

Interview Findings

- One interviewee remarked that these reports do not meaningfully present information and that it was not clear how to gain any value from what is presently presented.

Co-op Use Report

Statute and Rule Review

- Ark. Code § 19-11-249(b) requires the State Procurement Director to prepare a quarterly report of co-op use for the Legislative Council or Joint Budget Committee. This report is to detail the contractor name, State agency using the co-op, costs and usage information.
- Neither the statute nor rule specify that agencies or Institutions of Higher Education need to prepare these reports.
- Neither the statute nor rule specify that line-item detail need be included in these reports.

Interview Findings

- Agencies using AASIS may complete these reports relatively easily as AASIS can auto-populate them with much of the information needed.
- Institutions of Higher Education, who do not use AASIS, must manually gather information down to the specific items purchased.
 - Given that one of the main (and mandatory) co-ops is for office supplies, this means procurement personnel at every Institution of Higher Education are manually researching their usage of individual pencils, paper clips, *etc.*

Other Analysis

- The vendors who sell these goods and services to the State should have a record of what they are selling to which parts of the State.

Recycled Paper Report

Statute and Rule Review

- Ark. Code § 19-11-260 tasks agencies and Institutions of Higher Education to gather information about their recycled paper use in support of reaching a use goal “by calendar year 2000.”

Interview Findings

- Multiple individuals reported that the gathering of this information at Institutions of Higher Education was extremely time consuming and manual.
- Multiple individuals reported that they had no idea who collected the information (which is sent to an email address) or how it is used.

- One interviewee did note that, in a month where they failed to submit the recycled paper information on time they were contacted about the late submission – so the email box is likely checked.

Other Analysis






- If monitoring the use of recycled paper is still a priority of the legislature (despite the initial report’s creation for an 18-years past goal), given the centralized nature of printing and paper purchases (*See* Section I regarding State Contracts) this information could be collected from the vendors and not manually generated by State employees.






Expanded Reporting

Interview Findings

- Protests and protest resolutions are not tracked, including protests which may be lodged with APOs and not directly with OSP. (*See also* Section X for a discussion about APO vs OSP handled protests).
- Negotiations and their effect are generally not tracked.
- AASIS tracks when contracts are set to expire. It may be possible to leverage this information to identify upcoming future procurement activity.

Recommendations:

Rec. #	Details	    				
XIV-1	Create a standard dollar threshold over which any contract (regardless of its subject) is reported to the Subcommittee. This “report” range would have a ceiling value over which contracts would automatically be called for review.	✓	✓	✓	✓	✓
XIV-1.a	This would necessitate the elimination of Ark. Code §19-11-1006(d) and the drafting of a new section specifically about reported contracts.	✓	✓	✓	✓	✓
XIV-1.b	Require, via rule, a meaningful coversheet for the total report that sorts and identifies contracts within the report which may be candidates to be called for review. <i>See</i> Recommendation XII-3. Have OSP prepare (and continuously approve) the template cover sheet and its associated instructions.	✓	✓	✓	✓	✓

Rec. #	Details	    				
XIV-2	Shift the responsibility of co-op line item use information from State employees to the vendors. This adjustment requires no statute or rule change.		✓		✓	✓
XIV-3	Discontinue the recycled paper report by eliminating the statute. Alternatively, shift the obligation to furnish recycled paper usage information to the vendors selling the paper to the State.				✓	✓
XIV-4	Track protests received (both at OSP and institutions with APOs or delegated authority) and their resolution.	✓	✓	✓	✓	✓
XIV-5	Centrally track the outcome of all negotiations.	✓	✓	✓	✓	✓
XIV-6	Track and report on the life cycle of a contract by drawing from available AASIS data.	✓	✓	✓	✓	✓
XIV-7	Leverage AASIS data to create a roster of expiring contracts for which there is no new requisition. Use this report to gain downstream insight into possible near-term procurement activity. <i>See</i> Recommendation XI-3 regarding AASIS measurement and reporting of contract review timing.	✓	✓	✓	✓	✓

Specific Statutory and Rule Changes Suggested

- Pursuant to Recommendation XIV-1, amend Ark. Code §19-11-1006(d) to reflect the desired expanded contract reporting requirements. (*See also* Section XII regarding the proposed shift from automatic review to report and on-demand review). Draft analog rule to require a coversheet for the report whose form and business rules should be approved by the Subcommittee once annually.
- Pursuant to Recommendation XIV-3, eliminate Ark. Code § 19-11-260 and its obsolete recycled paper goals.

Improved Measurement

- The entire Section XIV promotes the goals of improved measurement.
- Getting ahead of procurement needs by leveraging AASIS contract expiration information can result in fewer rush contracts.

Capturing Savings

- By measuring negotiation successes, the State can better hone its negotiations training and strategies to promote successful tactics and discourage unsuccessful tactics.

XV. Design Professional and General Contractor Procurement

Section Summary:

The process of procuring design professionals (including architects, engineers, and land surveyors) aligns with national best practices. The Request for Qualification (RFQ) process is appropriate and controlled in terms of cost and industry expectations. The Division of Building Authority (DBA) has supported its State agency clients and the vendor community by following procurement best practices. Arkansas should continue the RFQ selection process for design professionals and further adopt some of DBA's practices on a Statewide basis.

Ikaso makes the following recommendations:

Section XV Recommendation Overview		Impact	Complexity
XV-1	Continue RFQ selection process for design professionals.	Low	Low
XV-2	Consider Statewide "on call" contracts for design professionals.	Medium	Medium
XV-3	Encourage DBA to consider including relevant experience as one of the qualifications agencies can evaluate as part of a construction bidder's "responsiveness."	Medium	Low
XV-4	Develop a program similar to one in place at the Department of Transportation whereby contractors with other State engagements cannot bid on new State projects if there are material issues with their existing State projects.	Medium	Medium
XV-5	Correct obsolete "ABA" and "Arkansas Building Authority" references throughout the statutes and rules to "DBA" and "Division of Building Authority".	Low	Low

Subject Overview:

- "Professional services" covered in Ark. Code § 19-11-801 through § 19-11-807 and discussed in this subsection refer to legal, architectural, engineering, construction management, and land surveying professional consultant services. Statutes outline how these services shall be procured through the RFQ process rather than through competitive bidding, which is expressly restricted. Non-exempt agencies must follow the DBA's procedures and receive approval from the DBA at certain points in the procurement and subsequent contract.

- An RFQ is a method of procurement that allows the State to evaluate a vendor's qualifications independent of cost. Cost is not an evaluation factor in RFQs either because there are already strict cost controls (*i.e.* vendor pricing is dictated) and/or cost cannot be effectively evaluated from vendor to vendor (*e.g.* the scope of the project is so broad/unknown that vendors' interpretations and prices may vary too widely for direct comparisons). The RFQs in both instances have cost controls, as design professionals are typically paid a percentage of the total construction costs of the project. (Please see below for a more thorough description of how cost is controlled in design professional RFQs).
- Agencies have two methods of procuring professional services, both through RFQs:
 - Through project-specific RFQs (*e.g.* design a library); and
 - Through annual statements of qualifications (referred to informally as "on-call" contracts).
- "On-call" RFQs allows agencies to pre-select professionals without a specific project. These professionals would be available and under contract later should there arise an urgent need for their services (for example, selecting a mechanical engineer for boiler work when a boiler has problems) or when the agency anticipates sporadic minor projects for which it would be too cost- and time-intensive to procure separate vendors.
- Once an agency contracts with a design professional through the RFQ process, the architect (or engineer) develops plans for the construction project, which must be thoroughly reviewed and approved by DBA (or a Higher Education Institution, as applicable). In the State's typical "Design-Bid-Build" scenario, those plans and detailed specifications (developed during the "Design" phase) become the basis of the scope of an Invitation for Bid (IFB) for general contractors. DBA runs the procurement for contractors (the "Bid" phase), with the lowest responsible bidder winning the construction project. Finally, the awarded contractor uses the specifications to begin construction (the "Build" phase). The design professional remains involved with the project to manage any changes and advocate for the State in the construction process (*e.g.* manage and prevent on budget overruns).

Findings and Observations:

Statute and Rule Review

- The State's statutes and rules are broadly in line with other states' and the federal government's procurement of design professionals in a manner that does not factor cost in the evaluation. *See* "Comparison to Other States" below for more details.
- One minor area where the State's statutes and rules are inconsistent, however, is in their references to the Division of Building Authority. The DBA is often referred to by its former name the Arkansas Building Authority (ABA).

Interview Findings

The DBA was uniformly complemented by interviewed agencies. The DBA routinely conducts training for agencies, it convenes bodies of vendors to get their feedback on the procurement process, and rarely are there protests of procurements the DBA oversees.²⁷

- When design professionals were asked whether they perceived the current procurement process as fair, they remarked that the rarity of protests speak to the fairness achieved in the process. DBA's involvement in the RFQ process also helps ensure that less experienced agencies have expertise to draw on in the review of qualifications.
 - Design professionals remarked that the process treated new competitors equally and fairly.
 - Design professionals remarked that the fee schedule aligned with the cost for private sector work as well.
- Various interviewees mentioned that underqualified contractors sometimes emerge as the winner of a construction project by virtue of a low bid.
 - The DBA does not set minimum experience levels or a maximum distance from a contractor's place of business to a project when putting projects out to bid, but agencies may choose to evaluate the experience of the lowest bidder as part of their determination of "responsiveness," although this practice is not widely used or prescribed.
 - The Department of Transportation has a program where, if a contractor is currently paying liquidated damages on an ARDOT contract, that contractor is prohibited from bidding on another contract until the original contract's problems are resolved.
 - Section 3-324 "Qualifications of Construction Contractors" of DBA's Minimum Standards and Criteria Manual already allows for poor performance on other State contracts to be considered as a barrier to award; however, this appears to be up to the agency to investigate, rather than uniformly considered by DBA.
- The procurement of outside legal services is only conducted under the auspices and with the authorization of the Attorney General's office, who by statute is the State's attorney. *See* OSP's "Contracts for Legal Services" policy. Accordingly, when outside counsel is procured it is to supplement the existing legal infrastructure of the State and infrequently done.
 - The RFQ is the typical instrument for procuring outside legal services. This is appropriate because, typically, outside counsel are engaged for one of two reasons:
 - To work on a contingency fee of what counsel earns for the State, or
 - Because the outside counsel has particularly rare expertise not present in the Attorney General's office (*e.g.* retirement plan fiduciary counsel) making cost an inapt evaluation basis given the shortage of that expertise in the marketplace.
- When the RFQ is conducted by the Attorney General's office (which is typically the case), such exercise is statutorily exempt from the procurement laws. *See* Ark. Code § 19-11-203(13) (including "constitutional offices" among the "exempt agencies" not governed by most

²⁷ Notably, of all the interviewees on this subject, only one had heard of a protest ever occurring for a DBA led procurement.

procurement laws). Thus, procurement of outside legal services is rare and mainly done in a manner outside the scope of this report.

Other Analysis






Cost Controls






- The procurement of design professionals represents an appropriate use of the RFQ in this context because cost is controlled by other means (thus obviating the need to control cost through competitive price bidding). Specifically, the amount design professionals are compensated is determined by an industry standard cost calculation methodology pegged to the cost of the underlying project.
 - The exception to this is land surveyors, which are compensated in a manner that is driven by a thorough, controlled and audited cost calculation methodology which requires independent verification of the appropriateness of the cost of a given project.
- Notably, Interior Designers (a classification of design professional which Ikaso was not asked to specifically study) have similar cost protection factored in as their service fee is "not to exceed ten percent (10%) maximum of the total cost of all furniture, draperies, equipment, fixtures, paintings, artifacts, and the like" according to DBA's published Minimum Standards and Criteria Manual ("DBA Standards") § 2-206).
- The DBA's Fee Schedule provided below shows the maximum percentage of the total (final) construction cost including all adjustments that may be paid to design professionals for the provision of basic services. DBA Standards § 2-211. The DBA Standards further dictates that basic services must include "all the services of the architectural, landscape architect, civil, mechanical, electrical, and structural consultants under one (1) basic fee" and lists the expected services in detail. DBA Standards § 2-201. Below is a screen shot of the DBA's Fee Schedule:

CONSTRUCTION COST	BASIC FEE
Less than \$50,000	As Negotiated
\$50,001 to \$75,000	9.25%
\$75,001 to \$100,000	9.00%
\$100,001 to \$200,000	8.75%
\$200,001 to \$300,000	8.50%
\$300,001 to \$400,000	8.25%
\$400,001 to \$500,000	8.00%
\$500,001 to \$600,000	7.75%
\$600,001 to \$700,000	7.50%
\$700,001 to \$800,000	7.25%
\$800,001 to \$900,000	7.00%
\$900,001 to \$1,000,000	6.75%
\$1,000,001 to \$20,000,000	6.50%
\$20,000,001 to \$22,500,000	6.25%
\$22,500,001 to \$25,000,000	6.00%
\$25,000,001 to \$27,500,000	5.75%
\$27,500,001 to \$30,000,000	5.50%
\$30,000,001 to \$32,500,000	5.25%
\$32,500,001 to \$35,000,000	5.00%
\$35,000,001 to \$37,500,000	4.75%
\$37,500,001 to \$40,000,000	4.50%
\$40,000,001 to \$42,500,000	4.25%
\$42,500,001 to \$50,000,000	4.00%
Over \$50,000,000	As Negotiated

- The DBA also provides standard modifiers for the reductions of fees for projects that do not require the full scope of basic services (*e.g.* for parking lots there is a minimum of 1% deduction from the basic fee) as well as increases in fees for more onerous work (*e.g.* when “as-is” drawings are unavailable, there is a maximum of a 2% increase to the basic fee). *See* DBA Standards and Criteria Manual (*available at* <http://dba.arkansas.gov/standards-criteria-manual>). These standard modifiers protect the State from cost abuses and allow for more uniform negotiations.
- Cost is further controlled in the negotiation process with the vendor(s) selected for award. *Id.* The DBA maintains guidelines regarding the latitude and structure of these negotiations, and if the State determines that a given professional is not priced reasonably or competitively the State may elect to move to the second ranked vendor (and so on). *Id.*
- Cost is also an impractical evaluation consideration when procuring design professionals. For most projects, there are many unknowns at the point at which design professionals are engaged (*e.g.* unknown defects with a building to be remodeled, the condition of soil under a construction site) making bids at that juncture more of a guess than a cost. If cost became an evaluation factor, design professionals would be incented to make assumptions which could turn out to be false and require contract modifications. In effect, if the State analyzed bid costs from design professionals at this juncture, given the near uniformity of industry pricing, it would functionally be selecting the professional with the most aggressive (and, thus, possibly least realistic) assumptions.
 - Currently, design professionals play a key role in helping the State clarify these unknowns through the design process and address issues as they are discovered. If a design professional bid a fixed fee at the project inception the design professional would not be properly incented to thoroughly explore and remediate these unknowns.

Recommendations:

Rec. #	Details	    				
XV-1	Continue the RFQ selection program for design professionals.	✓	✓	✓	✓	✓
XV-2	Consider Statewide “on-call” contracts to hedge against what may be the emergency need for design professionals. This should not replace agency on-calls, but instead provide an on-call option for agencies who did not do their own on-calls and subsequently developed a need. (<i>See also</i> Section I above regarding Statewide contracts).	✓	✓	✓	✓	✓

Rec. #	Details	    
XV-3	Encourage DBA to consider including relevant experience in the “Qualifications of Construction Contractors” Section 3-324 of the Minimum Standards and Criteria to provide agencies greater ability to evaluate experience as part of a construction bidder’s “responsiveness.” This should balance maximizing competition with protecting the needs of the State. Evaluating minimum experience is already allowed and widely deployed on non-construction procurements and there does not appear to be a statutory basis preventing its application in construction bids. To the extent minimum experience will be evaluated for responsiveness, the standard being applied should be published in the invitation for bids.	<div>✓</div> <div>✓</div> <div>✓</div>
XV-4	Develop a program similar to ARDOT whereby contractors with other active State contracts cannot bid on additional State projects when there are issues (such as material delays, breaches, <i>etc.</i>) with their existing State contracts.	<div>✓</div> <div>✓</div> <div>✓</div> <div>✓</div>
XV-5	Fix the obsolete references to the “Arkansas Building Authority” throughout the statutes in light of its name change to the “Division of Building Authority.”	<div>✓</div>

Specific Statutory Changes Suggested

- Pursuant to Recommendation XV-6, amend Ark. Code §§ 19-11-203(14)(Y), 19-11-203(27)(B), 19-11-801(a)(1), 19-11-902(6)(B), 19-11-1001(3)(D)(i), and 19-11-1001(3)(E) to replace “Arkansas Building Authority” with “Division of Building Authority” to ensure consistency.

Appendix 1 – List of Proposed Statutory and Rule Changes

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per Recommendation I-1, amend Ark. Code § 19-11-223(a) as follows:

“...the director may award ~~a~~*mandatory-use* state contracts.”

- Per Recommendation I-1, delete the following text from Ark. Code § 19-11-223(a):

~~“in those instances when substantial savings may be effected by quantity purchasing of commodities, technical and general services, or professional and consultant services in general use by several state agencies”~~

- Per Recommendation I-1, delete Ark. Code §§ 19-11-223(b) and 19-11-223(c) in their entirety. Together these deletions, and the deletions from 223(a), end the discouragement of pursuing those savings that naturally come from leveraging the State’s purchasing power
- Per Recommendation I-1, amend Ark. Code § 19-11-223(d) as follows:

“Except ~~as authorized in this section~~ *under an exemption approved by the Director of the Office of State Procurement,*”

- Per Recommendation II-1, amend Ark. Code § 19-11-206(1) as follows (adding the additional text to the definition of “Cooperative Procurement”):

“Notwithstanding this definition, cooperative procurement shall not include procurement conducted by a State public procurement unit.”

- Per Recommendation II-2, amend Ark. Code § 19-11-249(a) to add the following *italicized* text to the end of the existing language:

“(3) Cooperative purchasing contracts and agreements shall be limited to those commodities and services on which the state may realize substantial savings and/or material economic value.”

- Per Recommendation III-1, amend Ark. Code § 19-11-229(d) as follows:

*“(3) (A) If a pre-bid conference is to be held before the opening of bids to provide information to prospective bidders, the notice inviting bids shall include an announcement of the date and time of the pre-bid conference.
 (B) Nothing stated at the pre-bid conference shall change the invitation for bids unless a change is made by written amendment.
 (C) Attending a pre-bid conference shall not be mandatory, unless otherwise indicated in the solicitation. A solicitation may list a pre-bid conference with approval of the director or agency procurement official.”*

- Per Recommendations III-2 and III-3, amend Ark. Code § 19-11-272 as follows:

“(d) To fulfil the best interests of the state, vendor education and outreach efforts shall be made to encourage new business and seek out the most qualified people to provide products and services to the state.”

- Per Recommendation V-1, amend Subchapter 10 of the Arkansas Code to apply to service contracts generally and not PCS contracts specifically.
- Per Recommendation V-1, create a stand-alone subchapter within the Arkansas Code dealing with Subcommittee reporting and review of contracts. (See Section XII for the description of what Ikaso proposes for review). Eliminate the scattered pockets currently governing this topic (Ark. Code §§ 19-11-1006 and 19-11-265).
- Per Recommendation V-1, eliminate definition of “Technical and general services” in Ark. Code § 19-11-203.
- Per Recommendation V-2, if the Subcommittee does not elect to review certain commodity contracts (See Section XII), revise the definition of commodity in Ark. Code § 19-11-203(4) to avoid evasive classifications. Specifically, add the following sentence:

“A commodity does not include intangible property when the State, in purchasing the intangible property, is primarily paying for services related to the generation, customization, configuration or development of that intangible property. This shall include, but not be limited to, software for which the State is principally paying for coding, customization or configuration.”

- Per Recommendation VI-4, create a statute in Subchapter 2 of the Arkansas Code for RFIs. This statute could read:

“The State Procurement Director, the head of a procurement agency, or a designee of either officer may make or authorize others to issue a noncompetitive solicitation to

obtain information, data, comments, or reactions from prospective bidders or offerors preceding the issuance of an invitation to bid, a request for proposals, or a request for qualifications. These inquiries, which will be posted publicly with solicitations, will be called Requests for Information or RFIs. No contract may be awarded directly from an RFI – the instrument is for information gathering only.”

- Per Recommendation VI-4, create a statute enabling Negotiated Bids as a procurement instrument (like the Invitation to Bid or Request for Proposals). This statute could read:

“(a) “Negotiated bidding” means a method of procurement which requires:

- (1) Issuance of an invitation for bids with a purchase description and all contractual terms and conditions applicable to the procurement;*
- (2) Contemporaneous opening of bids at a predesignated time and place in front of a state witness and big register, but not open to the public;*
- (3) Negotiations with responsible bidders before an award is determined, as allowed below;*
- (4) Award to the responsive and responsible bidder who has submitted the lowest bid following negotiation that meets the requirements and criteria set forth in the invitation for bids; and*
- (5) Public notice.*

(b) Public notice of the Negotiated Bid shall be given in the same manner as provided in § 19-11-229(d), which refers to public notice of competitive sealed bidding.

(c) Bids shall be evaluated in the same manner as provided in § 19-11-229(f), which refers to the evaluation of competitive sealed bidding.

(d) Bids shall be corrected in the same manner as provided in § 19-11-229(g), which refers to the correction of patent or provable errors in competitive sealed bidding.

(e)

- (1) Before determining the lowest responsible bidder, negotiations shall be conducted with all responsible bidders who submit bids determined to be reasonably susceptible of being selected for award.*
- (2) Responsible bidders shall be allowed to submit a final bid price lower than their original bid price following communication with the State Procurement Director or the agency procurement official.*

(f) A bid register shall be prepared upon initial opening and following any negotiations. Such register shall contain:

- (1) A copy of all documents that are included as part of the Negotiated Bid.*

(2) A list of all bids received including the name and address of each bidder, the dollar amount of all bid prices received during the bidding process, the name of the successful bidder and the dollar amount of that bidder's bid, and the basis on which the award was made.

(3) Documentation of the negotiating process with bidders including a log of the date and times of each meeting with a bidder, a description of the nature of all communications with each bidder, a copy of all written communications, including electronic communications, with each bidder, and the entire contents of the contract file except for proprietary information included with a bid.

(g)

(1) The contract shall be awarded with reasonable promptness by written notice to the lowest responsible bidder following negotiations whose bid meets the requirements and criteria set forth in the invitation for bids.

(2) All other bidders requesting to be notified of the award decision shall be promptly notified of the decision.

(3) The bid register and list of bidders shall be subject to public inspection only after the contract award.

(4) An invitation for bid may be cancelled or any or all bids may be rejected in writing by the director or the agency procurement official."

(h) A vendor may not lodge a protest of under § 19-11-244 on the basis that it was not afforded the opportunity to negotiate a Negotiated Bid."

- Per Recommendation VI-6, formalize, in Ark. Code § 19-11-802(e), the current rule-based control over non-design professional RFQ use as follows:

“(e) (1) Qualification statements can be used for certain procurements through the Request for Qualifications. The RFQ is, in the absence of sole-source justification, the procurement method recommended when contracting for architectural, engineering, land surveying, legal, and interior design services. It may also be used, with prior approval from the Office of State Procurement, as the selection method for other contracts when it is determined to be the most suitable method of contracting.”

The criteria used by OSP in making a determination on RFQ use should then be memorialized in the adjacent rule. (See below).

- Per Recommendation VIII-3, amend Ark. Code § 19-11-230(d) as follows:

“(d)(1) The request for proposals shall indicate the relative importance of price and other evaluation factors.

(2) Unless written permission is obtained to use a lower percentage from the State Procurement Director or the agency procurement official, cost must be weighted a minimum of thirty (30) percent of the evaluated score.”

- Pursuant to Recommendation IX-1, amend Ark. Code § 19-11-229 to allow BAFOs. Specifically, add a new section (h) as follows:

“(h) The director or head of a procurement agency (or designee) may request Best and Final Offers (BAFOs) from all bidders deemed responsive and responsible prior to the notice of award. In responding to a BAFO request, bidders may choose to resubmit their bids with lower prices in accordance with the specifications of the IFB, or bidders may submit in writing that their original bids, including pricing, remain unchanged. Any and all bids submitted in response to BAFO requests shall be evaluated for award by the State.”

- Pursuant to Recommendation IX-1, amend Ark. Code § 19-11-229 section (h) to be section (i), amend (i)(1) (formerly (h)(1)) to read:

“(h)(1) Upon conclusion of a BAFO pursuant to section (h) if applicable, ~~The~~ the contract shall be awarded with reasonable promptness by written notice to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids.”

- Pursuant to Recommendation IX-1, amend Ark. Code § 19-11-229 section (i) to be section (j).
- Pursuant to Recommendation IX-1, amend Ark. Code § 19-11-230 to allow BAFOs. Specifically, add a new section (f) as follows:

“(f) The director or head of a procurement agency (or designee) may request Best and Final Offers (BAFOs) from all vendors deemed responsive to the RFP and responsible prior to the notice of award. In responding to a BAFO request, vendors may choose to resubmit their proposals with lower prices in accordance with the specifications of the RFP request, or vendors may submit in writing that their original proposal pricing remains unchanged. If a BAFO is issued, the BAFO pricing shall be the evaluated proposal cost.”

- Pursuant to Recommendation IX-1, amend old section (f) to be section (g), amend (g)(1) (formerly (f)(1)) to read:

“(f)(1) Upon conclusion of a BAFO pursuant to section (f) if applicable, award ~~Award~~ shall be made to the responsible offeror whose proposal is determined in writing to be the

most advantageous to the state, taking into consideration price, the evaluation factors set forth in the request for proposals, and the results of any discussions conducted with responsible offerors.”

- Pursuant to Recommendation IX-1, amend old section (g) to be section (h).
- Pursuant to Recommendation X-1, amend Ark. Code § 19-11-244(a)(3) as follows (with *italicized* text as new text and ~~strike through~~ text for removal):

“(3) The protest shall be submitted in writing within fourteen (14) calendar days after the ~~aggrieved person knows or should have known of the facts giving rise to the grievance award, anticipation to award, or notice of intent to award has been posted.~~”

- Pursuant to Recommendation X-2, amend Ark. Code § 19-11-244(a) to add a section (4) which could be based on Tennessee procedures as a thoughtful best practice, and read as follows:

“(4) *The protest shall be limited to one or more of the following grounds:*

i)The contract award was arbitrary, capricious, an abuse of discretion, or exceeded the authority of the awarding entity;

ii)The procurement process violated a constitutional, statutory, or regulatory provision;

iii)The awarding entity failed to adhere to the rules of the procurement as set forth in the solicitation and this failure materially affected the contract award;

iv)The procurement process involved responses that were collusive, submitted in bad faith, or not arrived at independently through open competition; and

v)The contract award resulted from a technical or mathematical error during the evaluation process.”

- Pursuant to Recommendation X-3, amend Ark. Code § 19-11-244(a) to add a section (h) to require a protest bond, set its amount, and specify the basis for its forfeiture and return. (Given the myriad variables to be considered in this type of statute, Ikaso will gladly work with the Subcommittee to develop specifics of this recommendation, to feature the Subcommittee’s preferences).
- Pursuant to Recommendation X-6, amend Ark Code § 19-11-244(a)(2) to clarify the path of a protest as follows:

“(2) Any actual bidder, offeror, or contractor who is aggrieved in connection with the award of a contract may protest to the: (A) Director; or *when a procurement has been conducted by an agency and not the Office of State Procurement*, (B) *the* Head of a procurement agency. *The head of a procurement agency may elect, at his or her*

discretion, to request the Director resolve a protest instead of its resolution by the procurement agency. The protestor may not elect to protest directly to the Director if a protest to the head of a procurement agency is applicable. A protest resolved by the head of a procurement agency has the same effect and finality of a protest resolved by the Director and no appeal to the Director is available.”

- Pursuant to Recommendation XI-1, amend Ark. Code § 19-11-249(c) as follows:

“(c)To achieve the purpose of this subchapter, it is essential that those doing business with the state also observe the ethical standards prescribed in this subchapter.

Additionally, those who enter into contracts with the state under this subchapter are co-obligated with the state to ensure that the contract adheres to the requirements of this subchapter, including mandatory clauses and review as required.”

- Pursuant to Recommendation XI-2, amend Ark. Code § 19-11-219 as follows:

“(a) The Attorney General shall act as counsel for the State Procurement Director in preparation of necessary contracts and in all legal matters.

(b) Certain contracts shall require review of a state attorney prior to their execution. OSP shall draft and promulgate regulations detailing the parameters of required attorney review of contracts.”

- Pursuant to Recommendation XI-4, amend Ark. Code § 19-11-238 as follows:

“(c) TERMINATION DUE TO UNAVAILABILITY OF FUNDS IN SUCCEEDING YEARS. Original terms of such multiyear contracts shall ~~terminate on the last day of the current biennium, and any renewals by the state based upon continuing appropriation shall not exceed the next succeeding biennium~~ *four (4) years*. When funds are not appropriated or otherwise made available to support continuation of performance in a ~~subsequent year of~~ a multi-year contract, the contract ~~for such subsequent year~~ shall be terminated and the contractor may be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the commodities or services delivered under the contract.”

- Recommendations XII-1 through XII-4 regarding Subcommittee review, if enacted, would require a great number of changes throughout the Arkansas Code and likely necessitate a new Subchapter dedicated exclusively to review and reporting to the Subcommittee. Ikaso would be pleased to work with the Subcommittee and BLR to thoroughly identify these changes and draft language to include any recommendations the Subcommittee wishes to consider.

- Pursuant to Recommendations XIII-1 and XIII-2, create a single VPR statute and analog rule. (Given the complex recommendations, Ikaso will gladly work with BLR and the Subcommittee to more precisely draft these items upon the Subcommittee’s articulation of desired levels and requirements). These changes would necessarily involve amendments or potential deletions of portions of Ark. Code §§ 19-11-267, 19-11-268, 19-11-1010 and 19-11-1013 and their associated rules.
 - Regarding the requirement to create objective, tailored metrics, Ikaso recommends the following considerations:
 - i. The concept of critical and non-critical metrics (the former triggering VPR reporting immediately, the later triggering it only after repeated failures).
 - ii. Contracts for commodities may lend themselves to more standardization than services. Accordingly, sample commodities metrics could be included.
- Pursuant to Recommendation XIV-1, amend Ark. Code § 19-11-1006(d) to reflect the desired expanded contract reporting requirements. (*See also* Section XII regarding the proposed shift from automatic review to report and on-demand review). Draft analog rule to require a coversheet for the report whose form and business rules should be approved by the Subcommittee once annually.
- Pursuant to Recommendation XIV-3, eliminate Ark. Code § 19-11-260 and its obsolete recycled paper goals.
- Pursuant to Recommendation XV-6, amend Ark. Code §§ 19-11-203(14)(Y), 19-11-203(27)(B), 19-11-801(a)(1), 19-11-902(6)(B), 19-11-1001(3)(D)(i), 19-11-1001(3)(E) to replace “Arkansas Building Authority” with “Division of Building Authority” to ensure consistency.

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per recommendation I-3, amend OSP Regulation R1:19-11-223(a) to include any conditions, reporting, or document retention standards that may be desired related to the promotion and measurement of State Contract use.
- Per Recommendation I-1, amend OSP Regulation R1:19-11-223.(b) as follows:

“Approval ~~or denial~~ of exemption from a state contract shall be made in writing by the State Procurement Director prior to ~~issuance of the invitation for bids~~ *any purchase being made from an alternative source.*”
- Per Recommendation II-3, amend OSP Regulation R1:19-11-249 to add the following text:

“The Director of the Office of State Procurement’s granting or withholding approval shall consider, but not be limited to, the economic justification for using the cooperative purchasing contract or agreement. In the event that the Office of State Procurement proposes to enter into a cooperative purchasing contract or agreement, such contract or agreement must be approved by [insert name of appropriate oversight entity].”

- Per Recommendation IV-1, amend OSP Regulation R1:19-11-218(a) to include a new section (b) with the following proposed language:

“(b) LIMITATIONS. For the written delegation order to be considered effective, it must include a date of expiration and be posted publicly on OSP’s website. Records of the issuance of delegated authority shall be maintained by the Office of State Procurement. All delegations of procurement authority shall remain in force according to the original terms thereof unless modified or until rescinded by the State Procurement Director.”

- Pursuant to Recommendation VI-1, amend OSP Regulation R7:19-11-230(c) to read:

“If there is a suspected proposal mistake, ~~or there is a question related to a submitted proposal~~, the State Procurement Director or agency procurement official may request confirmation of a proposal and shall request the confirmation to be made in writing. ~~No written response by the offeror may add to or enhance the submitted proposal. If the offeror fails or refuses to clarify in writing any matter questioned about its proposal by the deadline to respond set by the state, the response shall be evaluated as is. The response of any bidder who fails or refuses to clarify in writing within a reasonable time any matter contained in his proposal shall be rejected.~~ The written clarification shall be ~~evaluated and~~ become a part of the contract awarded on the basis of that proposal.”

- Pursuant to Recommendation VI-2, amend OSP Regulation R9:19-11-229(3) to read:

“If there is a suspected bid mistake, ~~or there is a question related to a submitted bid~~, the State Procurement Director or agency procurement official may request confirmation ~~or clarification~~ of a bid and shall request the confirmation ~~or clarification~~ to be made in writing. ~~No written response by the bidder may add to or enhance the submitted bid or change its terms. If the bidder fails or refuses to clarify in writing any matter questioned about its bid by the deadline to respond set by the state, the bid shall be evaluated as is or rejected in accordance with the instructions of the State Procurement Director or agency procurement official. The bid of any bidder who fails or refuses to clarify in writing within a reasonable time any matter contained in his bid shall be rejected.~~ The written clarification shall ~~be evaluated and~~ become a part of the contract awarded on the basis of that bid.”

- Per Recommendation VI-3, amend OSP Regulation R1:19-11-233 by adding a definition of “critical emergency” as follows:

“(1) An emergency is critical if human life or health is imminently endangered.”

This possible definition draws upon some, but not all, of the criteria that constitute an emergency in Ark. Code §19-11-204(4). This would imply that non-critical emergencies are those where there is danger to State property or State functional capacity, or a non-imminent danger to human life or health.

- Per Recommendation VI-3, amend the quotation abstract sentence to read as follows:

“The quotation abstract must show the names of at least three (3) firms contacted in attempting to obtain competition, the time of contact, the quoted price obtained (if one was obtained), and the method of contact (e.g. telephone, email).”

- Per Recommendation VI-6, amend OSP Regulation R1:19-11-802 to add the following:

“(a) If the RFQ is being requested as the selection method of other contracts besides architectural, engineering, land surveying, legal, and interior design services, the Director of OSP must consider the following (to be furnished by the entity requesting to use the RFQ):

- iv) Why the RFQ is the most suitable method of solicitation,*
- v) Why cost should not be considered in the procurement, and*
- vi) How cost will be controlled for the contract if it is not a factor in the solicitation.”*

- Per Recommendation VI-7, replace existing OSP Regulation R7: 19-11-229(2)(A) with the following:

“(A) Time discounts or cash discounts shall only be considered in the evaluation of a bid if the State specifically solicits pricing that requests that discount, and then only under the structured terms of that Invitation to Bid. If a bidder, on its own and without State solicitation, offers time or cash discounts as part of its bid, those discounts will not be considered.”

- Per Recommendation VII-1, add a clause similar to the clause below to OSP Regulations: R8:19-11-229, R7(2)(E):19-11-229, and R6:19-11-230.

“Prior to a bid/proposal’s rejection under this rule, the decision to reject the bid/proposal may be validated with the agency for whom the procurement is being conducted.”

- Per Recommendation VII-1, replace the term “essential” with “mandatory” in OSP Regulation R8:19-11-229 and R6:19-11-230.
- Per Recommendation VII-2, Amend OSP Regulation R5(b):19-11-230 to expressly allow (and limit) the consideration of the State’s prior experience with a proposing vendor to a scored reference section within the RFP as follows:

“(b) ~~(1) RESPONSIBILITY OF OFFEROR~~ SCORING PAST PERFORMANCE FOR ARKANSAS. Past performance *serving the state by* ~~of~~ an offeror may *only* be scored as part of a vendor’s proposal to the extent that it is requested, in the RFP, that all proposing vendors provide references. The State may consider its previous experience with a vendor when it scores that vendor’s references, provided the vendor’s past performance is ~~used by the procurement agency to determine whether the offeror is “responsible.”~~ No points for past performance may be used in the evaluation scoring criteria. ~~Past performance must be supported by written documentation not greater than three (3) years old. Documentation may be a formal Vendor Performance Report, an informal memo (signed and dated) or any other appropriate authenticated notation of performance to the vendor file. Reports, memos and files may be in electronic form. Past performance may be positive or negative. However, in no event may the State require previous experience with Arkansas as a mandatory requirement for submitting a proposal.~~

~~(i) Past performance on contracts from other Arkansas State Agencies may also be used for evaluation. Supporting documentation should be provided.~~

~~(ii) Past performance evaluation should not take the place of suspension or debarment procedures.~~

~~(2) The awarding of points for references may be used as evaluation scoring criteria if set forth in the solicitation.”~~

- Pursuant to Recommendation IX-2, amend OSP Regulation R15:19-11-229(a) as follows:

“(a) Negotiation of Competitive Sealed Bids should be used **only** in those cases where the best interests of the State are served, *which would include but not be limited to instances where the state can obtain a lower price without changes to the terms or specifications of the invitation to bid, or an improvement to the terms or specifications of the invitation to bid without an increase to the bid price.* Only those procurement professionals who are trained *and certified* in negotiation and procurement processes should conduct

negotiations. *OSP shall furnish this negotiations training and certification and ensure that such training is specific to the requirements of the state.*”

- Pursuant to Recommendation IX-2, amend OSP Regulation R8:19-11-230 as follows:

“(a) Negotiation of ~~Request for Proposals~~ *proposals* should be authorized in those cases where the best interests of the State are served. *This includes, but is not limited to, instances where the state can obtain a lower price without changes to the terms of the RFP or proposal, or an improvement to the terms or specifications of a proposal without an increase to the proposal’s price.*”

- Pursuant to Recommendation X-4, amend OSP Regulation R2:19-11-244 to eliminate clauses (b) and (c).
- Pursuant to Recommendation XI-2, draft OSP Regulation R1:19-11-219 detailing the criteria for which contracts require attorney review.
- Pursuant to Recommendation XI-2, draft OSP Regulation R2:19-11-219 detailing which attorneys may perform this review.
- Recommendations XII-1 through XII-4 regarding Subcommittee review, if enacted, would require a great number of changes throughout the Arkansas Code and likely necessitate a new Subchapter dedicated exclusively to review and reporting to the Subcommittee. Ikaso would be pleased to work with the Subcommittee and BLR to thoroughly identify these changes and draft language to include any recommendations the Subcommittee wishes to consider.
- Pursuant to Recommendation XII-5, amend OSP Regulation R1:22-8-102(b) as follows (striking the strikethrough text):

“(b) All state agencies shall submit a written request to the State Procurement Director specifying all needed requirements for a lease of a vehicle. The Office of State Procurement will issue the solicitation based upon the criteria set forth by the agency to determine the lowest responsible and responsive bidder. ~~The Office of State Procurement will award the contract for the lease after review by the Arkansas Legislative Council, or Joint Budget Committee when the General Assembly is in session.~~”

Appendix 2 - Acronym Glossary

Name	Acronym
American Council of Engineering Companies	ACEC
Arkansas Administrative Statewide Information System	AASIS
Arkansas Building Authority ²⁸	ABA
Arkansas Department of Transportation	ARDOT
Agency Procurement Official	APO
Best and Final Offer	BAFO
Bureau of Legislative Research	BLR
Central Procurement Office	CPO
Cooperative Purchasing	Co-ops
Department of Finance and Administration	DF&A
Department of Information Systems	DIS
Division of Building Authority	DBA
Federal Acquisition Regulation	FAR
Intent to Bid	ITB
Invitation for Bid	IFB
Office of State Procurement	OSP
Professional and Consultant Services	PCS
Quality Based Selection	QBS
Request for Information	RFI
Request for Proposals	RFP
Request for Qualifications	RFQ
Technical and General Services	TGS
Vendor Performance Report	VPR

²⁸ This is no longer the correct name of the Division of Building Authority, but the name continues to appear in the statutes and rules.

Appendix 3 – List of Written Materials Reviewed

Principal Laws and Regulations	<ul style="list-style-type: none"> Arkansas Code <ul style="list-style-type: none"> Title 19, Chapter 11 Title 12, Chapter 30, Subchapter Administrative Rules <ul style="list-style-type: none"> Office of Purchasing Office of Procurement
Legislative Reports	<ul style="list-style-type: none"> Joint Performance Review Reports Legislative Audit Reports
OSP Procurement Policies	<ul style="list-style-type: none"> Anticipation to Award Cooperative Procurement Cooperative Buying Cooperative Contracts Sole Source Procurement Evaluation of Proposals Contracts for Legal Services Printing Guidelines Request for Qualifications (RFQ) Special Procurement Policy Memoranda and Announcements
Historical Procurement Materials	<ul style="list-style-type: none"> Appendix 8 (Procurement Codes) Executive Order 09-07, 09-04 Markup Rule 2015-3 Act 542 Act 557 Act 1004 Amendment 54 Memoranda and Announcements
Division of Building Authority Policies	<ul style="list-style-type: none"> 2012 Minimum Standards and Criteria Manual Construction Forms and Resources Design Review Forms and Resources
Forms and Supplementary Materials	<ul style="list-style-type: none"> Technical and General Services Forms, Processes and Procedures Professional Consultant Services Forms, Processes and Procedures Service Bureau Forms Delegation Orders Forums Recent Sole Source Contracts

2017 Procurement Bills	<ul style="list-style-type: none"> • 10 Enacted 2017 Procurement Bills <ul style="list-style-type: none"> • Act 893 (HB1849) • Act 609 (SB380) • Act 1080 (HB2218) • Act 442 (HB1533) • Act 696 (SB448) • Act 617 (HB1839) • Act 1004 (HB2096) • Act 710 (SB513) • Act 813 (SB651) • Act 882 (SB449) • 5 Proposed 2017 Procurement Bills <ul style="list-style-type: none"> • HB1536 • HB1832 • HB1893 • HB2200 • SB521
Internal Procurement Materials	<ul style="list-style-type: none"> • Representative Sampling of Procurement Documents <ul style="list-style-type: none"> • Sole Source Procurement • Emergency Procurement • Special Procurement • Purchasing Directories <ul style="list-style-type: none"> • Purchasing Agents Directory • Purchasing Officials Directory • Contract Summary on Successful UA Systems Negotiation • OSP Negotiated Savings Records
Contract Data	<ul style="list-style-type: none"> • Data from 3,199 PCS and TGS contracts submitted for ALC review from December 2015 through January 2018 • AASIS report of unique contract spend data from Fiscal Year 2017

Appendix 4 – List of Interviews Conducted

Office of State Procurement	<ul style="list-style-type: none"> • Office of State Procurement – Director • Office of State Procurement – Data and Reporting Personnel
Other State Procurement Actors	<ul style="list-style-type: none"> • Department of Finance and Administration Representatives • Office of Intergovernmental Services Representatives • Division of Building Authority Representatives • Arkansas Department of Information Systems Representatives • Office of the Governor Representative • Office of the Attorney General Representative
State Agencies	<ul style="list-style-type: none"> • Department of Human Services Representatives • Department of Health Representative • Department of Arkansas Heritage Representatives • Department of Correction Representatives • Department of Education Representatives • Department of Workforce Services Representatives
Procurement Officers from States with Private Evaluators	<ul style="list-style-type: none"> • Wisconsin • North Dakota • Mississippi
Industry Groups	<ul style="list-style-type: none"> • Arkansas Board of Licensure for Professional Engineers and Professional Surveyors Representatives • Arkansas State Board of Architects, Landscape Architects, and Interior Designers Representatives • American Institute of Architects – Arkansas Chapter Representatives • American Council of Engineering Companies of Arkansas Representatives • NIGP - The Institute for Public Procurement Representatives
Institutions of Higher Education	<ul style="list-style-type: none"> • University of Arkansas System Representatives <ul style="list-style-type: none"> • UA Pine Bluff • UA Medical Sciences • UA Legal Representatives • Arkansas State University System Representatives <ul style="list-style-type: none"> • ASU Beebe • ASU Jonesboro • ASU Fayetteville • National Park College
City of Little Rock	<ul style="list-style-type: none"> • Representatives from the City of Little Rock