

Streamlining State Procurement: Insights from the NASPO State and Supplier Attorney Roundtable

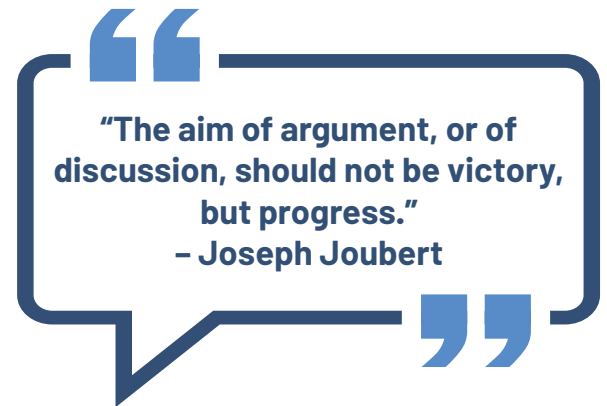


Introduction & Premise of the Roundtable

Since 2014 the National Association of State Procurement Officials (NASPO) has brought together the attorneys who support central procurement functions across the 50 states, territories, and the District of Columbia. This gathering, NASPO Law Institute, fosters learning, networking, and collaboration within the state procurement attorney community. Out of the enthusiasm for the Law Institute grew a desire for more of a focus on procurement legal education. NASPO recognizes that the attorneys in each state who support the procurement office are essential to the overall success of the procurement and contracting process. This requires a strong, collaborative relationship between attorneys and procurement offices.

Law school hones students' ability to think critically and communicate in legal terminology, laying a robust foundation of jurisprudence for future lawyers. This shared educational background, coupled with a common professional language and ethical standards, positions attorneys as exceptional advocates for their clients, particularly in negotiating state government contracts. Their role as legal decision-makers uniquely qualifies them to represent the state's interests in contract discussions, such as determining the feasibility of specific terms or conditions.

As NASPO develops its Legal Education program, incorporating cross-educational content and procurement learning opportunities for attorneys, it has become evident that meaningful change requires dialogue and cooperation between not only state attorneys and procurement officials, but the supplier attorneys as well. The driving force behind this pilot Roundtable was to test the hypothesis that the supplier and state attorneys can dialogue, work together, and come up with solutions to the major challenges being faced in state contracting.



Bringing the Roundtable Together

In August 2024 NASPO facilitated a dialogue among five supplier attorneys experienced in state contracting and five state procurement attorneys. To inform this discussion and gauge the current landscape, NASPO surveyed both groups on IT contracting issues, challenging terms and conditions, and ideas for improving the government contracting process. This survey was sent to suppliers who attended the NASPO Exchange Conference,* which included IT suppliers, small businesses, communications companies, and private law offices who reported have done state government contracting work. On the state side, the survey was distributed to the state attorneys who have attended NASPO's Law Institute in the last three years. State invitees to the Roundtable varied in size, region, and included both attorneys who are embedded in the procurement office or agency and those who are based in the attorney general's office. The survey's open-ended responses guided the topics for the in-person Roundtable.

*The NASPO Exchange conference is a yearly opportunity for our state Chief Procurement Officers and their staffs to have One-on-One meetings with suppliers interested in contracting with state governments. For more information, see www.NASPO.org.

The Roundtable had four primary objectives:

1. Establish open communication channels between supplier and state attorneys
2. Analyze insights from the survey responses
3. Gain mutual understanding of each party's positions
4. Identify actionable takeaways and implementation strategies

"Umbrella" Issues Communication

The Roundtable discussion unearthed a treasure trove of insights into state contracting challenges and potential solutions. At the heart of the matter? Communication. Participants stressed the need for candid, direct dialogue between states and suppliers, preferably through legal-to-legal channels.

Clear communication about non-negotiable terms upfront can save weeks of back-and-forth between the parties. The importance of "redlining contract language with a reason" was noted – with an emphasis on pinpointing the right decision-makers and backing up edits and comments with relevant legal citations. For example, if the state cannot negotiate on third-party indemnity because of statutory law, the supplier should know that up-front in order to determine an appropriate risk profile for the contract in question.

Efficiency and standardization emerged as the dynamic duo of procurement improvement. Templates are a key tool – they can fight against the knowledge loss that goes with turnover and retirement issues in both the public and private sectors. They can also serve to set expectations and provide a starting point for discussions. The idea of creating state-specific lists of non-negotiable terms sparked particular interest – imagine a cheat sheet for procurement negotiations!

Takeaway Tips:

- When communicating with suppliers, states should be upfront and candid about what can and cannot be legally negotiated.
- When citing the law, everyone can get on the same page – "redline for a reason" to build trust and understanding.

Negotiations and Risk

Negotiation strategies were another key issue, with some creative solutions emerging. Demystifying term interpretations, fewer redlines, and "open-handed negotiation" will lead to transparency about non-negotiable terms that could streamline the entire process. Statements of Work can be used to clarify terms, responsibilities, and roles in the contract that can be referred to later without the need to elevate an issue to a contractual remedy or damage assessment.

Discussions on legal risk and liability are often minefields, with indemnity clauses and data protection rising to the top of the hot-button issues. There is a true challenge to "future-proof" contracts for technology that essentially doesn't even exist yet. This illustrates the need for attorney-to-attorney communication in order to find new ways to deal with old problems that get in the way of the state improving services for its citizens.

Takeaway Tips:

- Risk should be calculated carefully and allocated fairly – no one wants to pay for what they did not do.
- Use Statements of Work to properly and clearly define roles and responsibilities for future reference.

Education and Relationship Building

Education and relationship building were identified as the bedrock of smoother procurement processes. For those involved in negotiations, including representatives from procurement, sales, legal, and end-user agencies, speaking the same language is extremely important and requires education on both sides of the table. With ideas such as developing agreed-upon principles for base contract terms to tackling emerging challenges in software licensing and eMarketplace development, the path forward was clear, if not easy. More opportunities like the Roundtable are needed to foster the discussions and education that need to happen between the state and the supplier community.

This Roundtable discussion underscored the complexity of the state procurement process and highlighted the potential for positive change through collaboration, education, and a willingness to adapt to evolving technological and social landscapes. As one participant said, "We've not just buying and selling goods and services – we're shaping the future of government operations."

Takeaway Tips:

- Cross-education between suppliers and the state is crucial to success in government contracting.

There were several "aha!" moments for participants through the Roundtable. Below are some of those ideas to consider as means to improve state contracting:

For States:

- Suppliers have insurance coverage that can heavily influence what they can agree to when it comes to risk that can create issues when it comes to indemnity and liability. An open dialogue about this can prevent many problems down the line in the procurement.
- Suppliers can often be more flexible than states – but they also value consistency across their contracts to ensure quality and internal controls can be utilized.
- When it comes to data, ideally, risk should be shared in the immediate aftermath of a breach to mitigate the damages because it may take a while to determine fault.

For Suppliers:

- State government employees cannot change the law or the procurement code – but they will work with you to find a solution – talk it out.
- State attorneys aren't trying to "win" anything – just find the best solution for the citizens of the state at the best price and value. The pressure is off to make it adversarial!
- The procurement process is not complex to annoy you – it is meant to ensure that the state's tax dollars are spent appropriately with open, fair, and transparent competition for government contracts.

Some basic principles emerged throughout the exchange of ideas between the state and supplier communities that can be shared and utilized in the negotiation process.

Overall, the discussion underscored the complex nature of state procurement processes and the need for collaborative efforts to streamline negotiations, improve understanding between parties, and adapt to evolving technological and social considerations in government purchasing.

Conclusion

The Roundtable concluded with several proposed solutions and areas for further discussion.

These included:

- Developing agreed-upon principles for base contract terms
- Creating regional groups for ongoing discussions
- Standardizing training and education for both suppliers and state procurement officials

The participants also identified several additional topics for future discussion and consideration.

These included:

- Emerging areas such as value-added resellers
- Software purchasing and licensing
- eMarketplace development
- The role of Artificial Intelligence
- Small and Diverse business engagement

Moving forward, NASPO plans to continue this conversation that began at the Roundtable and include more voices.

We will focus on:

1. developing agreed-upon principles for base contract terms;
2. creating ongoing discussion groups;
3. addressing emerging areas such as value-added resellers, software purchasing and licensing, and artificial intelligence; and
4. providing standardized education and training for suppliers about the state procurement process.

By embracing these collaborative efforts and continuing to bridge the gap between state and supplier perspectives, the future of government procurement looks promising!