

BINDING THE STATES: A SURVEY OF STATE LAW CONFORMANCE WITH THE STANDARDS OF THE GATT PROCUREMENT CODE

JAMES D. SOUTHWICK*

1. INTRODUCTION

The issue of binding the U.S. states under trade agreements has become a nettlesome problem in the current negotiations on government procurement in the Uruguay Round of multilateral trade negotiations conducted under the General Agreement on Tariffs and Trade ("GATT").¹ In these negotiations, the European Community ("EC") is pressing the United States to obligate the states to abide by the obligations of the 1979 GATT Agreement on Government Procurement ("Procurement Code" or "Code").²

The Procurement Code obligates the signatories to adopt open and competitive procedures in the preparation, solicitation, review, and award of government contracts covered by the Code for the purchase of goods and related services. The Code, however, does not cover subcentral governments such as the states.³ The EC claims that seventy percent of government purchases in the United States occur at the state and local

* Associate, Akin, Gump, Hauer & Feld, Washington D.C. The author would like to express sincere appreciation to Benjamin Erulkar and Matthew Nicely for their assistance in researching and drafting.

¹ *Opened for signature*, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 44 U.N.T.S. 187. The Uruguay Round takes its name from the country where the trade ministers from several GATT signatory countries met in 1986 to launch the Round. *See* General Agreement on Tariffs and Trade, Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations (Sept. 20, 1986), *reprinted in* 25 INT'L LEGAL MATERIALS 1623 (1986). A ministerial meeting held in Brussels in December of 1990 to bring the Round to a close broke down when the European Community failed to offer reform of its agricultural subsidy program sufficient to satisfy agricultural exporting nations. Since then, the negotiators have continued to meet in an attempt to move the talks forward. *See, e.g., GATT Leader Sets An Ultimatum in Uruguay Round*, JOURNAL OF COMMERCE, Sept. 23, 1991.

² The Procurement Code is reprinted in General Agreement on Tariffs and Trade, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26th Supp. at 33 (1980) [hereinafter Procurement Code with article numbers].

³ The exclusion of subcentral governments is implicit in Procurement Code art. I(2), which requires parties to "inform" regional and local governments of the objectives, principles, and rules of the Code.

government level.⁴ The EC contends that subcentral government purchases therefore should be within the scope of the Code. The EC is unwilling to grant the concessions sought from it by the United States unless the United States agrees to adequate Code coverage for the states.⁵

As a matter of constitutional law, the United States could bind the states without their consent.⁶ However, because of the politics of federalism, the United States refuses to force the states to conform to the Code without their consent. Instead, the United States has offered to seek, and in fact has begun seeking, voluntary commitments from the states to bind their procurement practices under the Code. Currently, it remains uncertain whether the United States will muster sufficient voluntary commitments to satisfy the EC.

A recent case from the United States Court of Appeals for the Third Circuit has effectively closed off an avenue by which the United States could have deflected some of the external pressure placed on it to bind the states under the Code. In *Trojan Technologies, Inc. v. Pennsylvania*,⁷ in which the Supreme Court denied certiorari in the summer of 1991, the Third Circuit upheld a Pennsylvania "Buy America" law that required state and local agencies to award public works contracts only to those contractors who provide products that do not contain foreign steel.⁸

Had the court decided the opposite and struck down Pennsylvania's discriminatory procurement law, which is clearly inconsistent with the open and competitive procurement rules that would have applied to Pennsylvania if it were bound by the Procurement Code, U.S. trade negotiators might have been able to tell the EC to be patient and let the courts

⁴ See SERVICES OF THE COMMISSION OF THE EUROPEAN COMMUNITIES, REPORT ON UNITED STATES TRADE BARRIERS AND UNFAIR PRACTICES 1991: PROBLEMS OF DOING BUSINESS WITH THE US 57 (1991).

⁵ See *infra* notes 21-22 and accompanying text.

⁶ See *infra* notes 23-25 and accompanying text.

⁷ 916 F.2d 903 (3d. Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2814 (1991).

⁸ The court held that the Buy America preference did not violate the commerce clause, because the state was acting as a market participant, and did not interfere with the federal government's foreign affairs power. The court also rejected constitutional attacks based on vagueness and equal protection theories. 916 F.2d at 909-13.

invalidate discriminatory provisions that affect the ability of EC producers to compete for state government contracts. Such an outcome might have helped relieve the pressure on the United States to bind the states. However, the *Trojan* opinion stands as a strong indication that courts will not strike down discriminatory state procurement laws. Consequently, the U.S. negotiators must confront the issue of binding the states, with or without their consent.

This article surveys the changes that would be required in state procurement laws to bring them into compliance with the GATT Procurement Code. The prospect of such change is daunting. Virtually every state has some provision in its laws that would violate the Code. The inconsistencies include not only express preferences such as the "Buy America" provision at issue in the *Trojan* case, but also the "Buy In-State" provisions found in the laws of a majority of states. In addition to these expressly discriminatory provisions, many states' laws fail in some significant respect to follow the basic open and competitive procedures that the Code prescribes.

This article begins with an overview of the Code and the state of the Uruguay Round of negotiations regarding the Code. It then briefly surveys the constitutional law issues in binding the states and the "dormant" commerce clause and foreign affairs powers issues in *Trojan* and its predecessors. Following these sections, the article analyzes the potential inconsistencies between the Code and state laws. The article concludes that binding the states under the Code will require revisions in the procurement laws of nearly every state.

2. THE PROCUREMENT CODE NEGOTIATIONS

2.1. Code Obligations

The GATT Procurement Code was negotiated as part of the Tokyo Round of GATT multilateral trade negotiations, which concluded in 1979.⁹ Currently, the Code has twelve signato-

⁹ General Agreement on Tariffs and Trade, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26th Supp. (1980). The Code came into effect on Jan. 1, 1981. Procurement Code art. IX(3). As mandated under Procurement Code art. IX(6)(B), a further round of negotiations on improving the Code began three years after the Code came into effect, or 1984. These negotiations led to a protocol amending the agreement which came into

ries, including among others the United States and the EC.¹⁰ The Code applies to purchases (or leases, rentals, or hire-purchases, with or without an option to buy) valued at over 130,000 Special Drawing Rights¹¹ of goods and services incidental to the supply of the goods¹² undertaken by the government entities that the signatory governments have agreed to bind under the Code, as listed in Annex I of the Code.¹³

The goals of the Code include ensuring transparency in the procurement practices of covered entities and ensuring that "laws, regulations, procedures and practices regarding government procurement [are not] prepared, adopted, or applied to foreign or domestic producers and to foreign or domestic suppliers so as to afford protection to domestic products or suppliers and [do] not discriminate among foreign products or suppliers."¹⁴ To accomplish these goals, the Code sets forth requirements relating to (1) the use of open or selective tendering, (2) the qualification of suppliers, (3) the preparation of specifications, (4) the notice of proposed purchase and tender documentation, (5) time limits, (6) the submission of tenders, (7) the receipt and opening of tenders and awarding of contracts, and (8) the provision of information

effect on January 14, 1988. See General Agreement on Tariffs and Trade, A PRACTICAL GUIDE TO THE GATT AGREEMENT ON GOVERNMENT PROCUREMENT 1 (1989) [hereinafter PRACTICAL GUIDE]. For a description of the changes implemented in the 1988 protocol, see *International Trade Administration, United States Department of Commerce, Results of 1984-1986 GATT Government Procurement Renegotiations* (1989) [hereinafter *Commerce Department Pamphlet*].

¹⁰ The signatories are: Austria, Canada, European Economic Community (which bound procurement by member country governments), Finland, Hong Kong, Israel, Japan, Norway, Singapore, Sweden, Switzerland, and the United States. See PRACTICAL GUIDE, *supra* note 9 at 1. Korea has applied to join the Code. See *South Korea Seeks to Join GATT Procurement Code, Would Open \$500 Million in Contracts*, 7 Int'l Trade Rep. (BNA) 999 (July 4, 1990).

¹¹ Procurement Code art. I(1)(b). For 1992, the U.S. government valued 130,000 SDRs at \$176,000. See 56 Fed.Reg. 66117 (Dec. 20, 1991).

¹² To qualify under the Code, the value of such incidental services must be less than the value of the goods to which they are incidental. Procurement Code art. I(1)(a).

¹³ Procurement Code art. I(1)(c). This Annex is reproduced in PRACTICAL GUIDE, *supra* note 9, at 209.

¹⁴ Procurement Code Preamble.

and hearing of complaints. In addition, the Code provides a dispute settlement mechanism whereby signatories may challenge the procurement practices of other signatories.

2.2. Code Negotiations

The current round of Code negotiations aims at broadening the Code's coverage and strengthening its obligations. Proposals under consideration include: extending Code coverage to service contracts (including public works contracts); expanding the list of entities bound under the Code; lowering the value threshold for Code coverage, and improving Code procedures, for example, by requiring signatories to provide a bid protest mechanism for challenging bidding procedures.¹⁵

The Code negotiations have made some progress on addressing these issues; however, they have remained largely stalled since December of 1990 because of a deadlock between the United States and the EC over Code coverage for power utility and telecommunications industries, urban transport projects, and subcentral government procurement.

2.2.1. Utilities and Transportation

One of the United States's goals in the Code negotiations is to gain access for U.S. companies to procurement by EC telecommunications and power utility companies, the majority of which are government owned. The United States cited statistics showing that in the telecommunications field, 99.5 percent of all tenders in Germany go to German firms and 100

¹⁵ For a draft of the U.S. proposal, see *Special Report*, INSIDE U.S. TRADE, Nov. 2, 1990 at 2. For a draft of the EC proposal, see INSIDE U.S. TRADE, Sept. 21, 1990 at 10. For a discussion of the negotiations between the United States and the EC, see Dullforce, *GATT Breakdown Hits Public Procurement Pact*, FIN. TIMES, Dec. 18, 1990.

With respect to proposals to require a bid protest procedure, it should be noted that the Code arguably already includes a bid protest requirement. See Procurement Code art. VI(1)(6). Apparently, however, some signatories see the need to strengthen that requirement. See generally, 54 Fed. Cont. Rep. (BNA) at 599 (Oct. 22, 1990) (discussing Code dispute resolution and U.S. bid protest proposal).

percent of the tenders in France go to French firms.¹⁶ The EC, in turn, wanted the United States to bind transportation projects under the Code.¹⁷

In August 1990, the EC proposed to open its public procurement market in the telecommunications, transportation, power and water utilities to foreign bidders if its trading partners would respond with equal treatment.¹⁸ The United States, however, did not view this proposal favorably because U.S. telecommunications, water, and power utilities generally are privately owned companies, while in the EC many are government entities. The United States deemed it inappropriate to bind private companies under the Procurement Code.¹⁹

2.2.2. Subcentral Governments

Another contentious issue was whether state and local governments should be governed by the Code. The EC argued that discriminatory procurement practices by the U.S. states, including "Buy America" and "Buy In-State" laws, effectively exclude EC firms from \$200 billion in procurement awards each year.²⁰ The EC insisted that the states be brought within the Code, and linked progress on the issue of EC

¹⁶ See *U.S. Officials Deny EC Allegations That U.S. Is Blocking Procurement Talks*, 54 Fed. Cont. Rep. (BNA) at 888 (Dec. 24, 1990).

¹⁷ See *id.* at 889.

¹⁸ *European Community Proposes Wider Access for Foreign Bidders in Public Procurement*, 7 Int'l Trade Rep. (BNA) at 1227 (Aug. 8, 1990) [hereinafter *EC Proposal*].

¹⁹ The European Community particularly wanted to bind AT&T, GTE, and the Regional Bell Operating Companies (RBOCs) under the Code. The EC claimed that European suppliers of telecommunications equipment are effectively excluded from procurement by AT&T. Furthermore, the EC contended that AT&T and Northern Telecom provide 90% of the equipment to the RBOCs. Dullforce, *GATT Breakdown Hits Public Procurement Pact*, FIN. TIMES, Dec. 18, 1990.

As one U.S. official explained, "[W]e think it would be somewhat turning logic on its head for the GATT to resolve to take action which results in greater government involvement in the affairs of the private sector. We do not think the way to deal with government influence in the private sector is by giving government even greater influence there." *EC Proposal*, *supra* note 18, at 1227.

²⁰ See *EC Set to Retaliate Against U.S. if States Refuse to Abide by GATT Procurement Code*, 8 Int'l Trade Rep. (BNA) at 323 (Feb. 27, 1991).

telecommunications and public utilities procurement policies to the issue of binding the U.S. states under the Code.²¹

2.2.3. *Attempts to Break the Impasse*

In an attempt to move the talks forward, the negotiators in late 1990 decided to separate the major issues.²² Regarding privately owned power, water and telecommunications utilities, the United States proposed that governments make "self denial" commitments, agreeing not to enact any regulations authorizing or encouraging such entities to discriminate against foreign suppliers.²³

With regard to binding subcentral governments, U.S. negotiators proposed a voluntary compliance plan for the states, under which Code signatories would attempt to obtain the broadest possible coverage of subcentral government entities.²⁴ Under this proposal, within eighteen months after the conclusion of the agreement, the signatories would submit a list detailing the extent to which subcentral government procurement laws had been brought into conformity with the Code. Signatories would have the right not to apply the agreement to other signatories if the coverage was not

²¹ See *EC Proposal*, *supra* note 18. See also *EC Links Agreement on Procurement to Including State, Local Governments*, 7 Int'l Trade Rep. (BNA) at 857 (June 13, 1990).

²² *Special Report*, INSIDE U.S. TRADE, Nov. 2, 1990 at 3. Negotiations were split into three categories: category A addressed federal government procurement (including federal transportation projects); category B addressed subcentral government bodies; and category C addressed entities which depend on special and exclusive rights obtained from the government and which are closely regulated and therefore under "potential government influence." *Id.*

²³ *Id.* The U.S. proposal on "natural monopolies" broke that category down into two groups: 1) companies that have significant government equity investment or ownership *and* that are subject to exclusive or special rights granted by governments would be included in the Code; but 2) companies satisfying only one of those two criteria would not be included in the Code. For these entities, the governments would make "self-denial" commitments, agreeing not to enact any regulations authorizing or encouraging discrimination. This scheme would have placed within the Code a few U.S. government-owned utilities, such as the Tennessee Valley Authority, but would not have included private companies such as AT&T and the RBOCs. *Id.*

²⁴ *Id.*

adequate.²⁵ The EC indicated some willingness to accept this approach, although it was concerned about the number of states that the United States could bring into conformity with the Code.²⁶

Although these proposals helped move the talks forward, agreement was not reached at the Brussels ministerial meeting. Since then, the United States and EC have remained at odds on the issue of Code coverage for telecommunications, water, and power utilities, urban transit projects, and the states.²⁷

Since the Brussels ministerial meeting, the United States has made a concerted effort to convince the states to voluntarily offer to bind a significant amount of their agencies' procurement under the Code. In response to a request by U.S. Trade Representative Carla Hills, the National Governors' Association ("NGA") passed a resolution in August 1991 urging its members to pledge to keep their states' non-discriminatory procurement practices open by placing them under the coverage of the GATT Procurement Code. The NGA had also previously passed a resolution calling for the elimination of existing discriminatory purchasing practices.²⁸

However, the NGA resolution is nonbinding. In order to implement it, state legislatures would have to amend state statutes to bring them into conformity with GATT procedures. For instance, state legislatures would have to eliminate any "Buy America" or "Buy In-State" statutory provisions. The willingness of the states to take these steps remains unclear.²⁹

²⁵ *Id.*

²⁶ *Id.*

²⁷ See INSIDE U.S. TRADE, Aug. 23, 1991 at 7.

²⁸ *Id.* The National Association of Manufacturers has also issued a statement in support of binding the states under the Code. INSIDE U.S. TRADE, July 5, 1991 at 5.

²⁹ Wisconsin has publicly indicated its readiness to bring its procurement practices into Code compliance. See Letter from Tommy G. Thompson, Governor, State of Wisconsin to U.S. Trade Representative Carla Hills, July 22, 1991, *on file with* Office of Public Affairs, United States Trade Representative, Executive Office of the President, 600 17th Street, N.W., Washington, D.C. 20506. See also INSIDE U.S. TRADE, Aug. 23, 1991 at 7. Other states also may have privately informed U.S. negotiators of their willingness to conform to Code procedures.

Thus, more than a year after the Brussels meeting, the United States continues to face the dilemma of bringing state procurement practices into conformity with the Code.³⁰ Without voluntary commitments from a substantial number of states, it is uncertain whether the EC and United States will be able to break their deadlock in the Procurement Code negotiations.

3. CONSTITUTIONAL LAW AND BINDING THE STATES

3.1. *The Authority to Bind the States*

United States trade agreements generally, and GATT multilateral trade agreements in particular, are negotiated as non-self-executing executive agreements.³¹ Thus, while they are not treaties requiring the advice and consent of the Senate, they require implementation either by Congressional enactment or executive branch regulation pursuant to preexisting statutory authority.³²

The widely accepted view is that an executive agreement pre-authorized or approved after the fact by Congress has the same force in domestic U.S. law as a treaty.³³ Therefore, like

³⁰ A draft agreement on Procurement Code revisions tabled on December 20, 1991 by the chairman of the Procurement Code negotiating group indicated that "sub-central governments" would be bound by the Code to the extent specified in Annex 2 to the agreement. Draft Agreement on Government Procurement, Article I (Dec. 20, 1991), available at the offices of the University of Pennsylvania Journal of International Business Law. However, Annex 2 was a blank schedule.

³¹ JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT* 143-55 (2d ed. 1986).

³² *Id.* at 123. Since 1974, the President has conducted GATT negotiations pursuant to "fast track" negotiating authority, by which Congress grants the President authority to enter into negotiations for trade agreements and adopts procedures for passing legislation to implement such agreements without any amendments. 19 U.S.C. § 2191 (1988). Sections 1102 and 1103 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988), imposed limits on the exercise of fast track authority. The authority initially was scheduled to expire as of June 1, 1991, but was extended for another two years when Congress failed to pass a resolution of disapproval on May 31, 1991.

³³ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 175 (1975 ed.).

treaties, such agreements prevail over inconsistent state law and earlier inconsistent federal law.³⁴

Thus, as an executive agreement authorized and implemented by Congress, the GATT Procurement Code and its amendments would prevail over inconsistent state law, if the United States chose to bind the states.³⁵ The United States, however, has not chosen to enter into an agreement that would pre-empt state law without the consent of the states. The reason for its reluctance to do so may well be that Congress, for political reasons, prefers not to preempt the states in an area so closely connected with state governmental operations as the purchase of supplies and equipment.³⁶

³⁴ *Id.* Of course, under the Constitution, a treaty is the supreme law of the land that prevails over any inconsistent state law, as well as earlier inconsistent federal statutes. U.S. CONST. art. VI. *See also* *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (treaties as supreme law of the land). In *United States v. Belmont*, 301 U.S. 324 (1937), the Supreme Court found that a self-executing executive agreement overrode a New York state law. The Court wrote, "[i]n respect of all international negotiations and compacts [including executive agreements], and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist." *Id.* at 331.

³⁵ In this regard, Professor Jackson writes:

[I]t seems reasonably clear that if the nations that are parties to the Tokyo Round Government Procurement Code had provided in the code that it would apply also to governmental purchases by government subdivisions like states in the United States, the U.S. federal government would have had the power to require the states to follow the international agreement.

JOHN H. JACKSON ET AL., *IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES* 200 (1984). Arguably, the Constitution might provide some limits on the federal government's authority to modify state law via international agreements. *See* HENKIN, *supra* note 33, at 245-46 (discussing limitations on treaty power based on federal structure). However, the argument that the Tenth Amendment would limit federal government intrusion into state government procurement practices is not likely to succeed, in view of the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985).

³⁶ Jackson writes, "[T]here were at least some perceptions during the [Tokyo Round] negotiations that some members of Congress might have opposed approval of an international government procurement code designed to apply to state government purchases." JACKSON ET AL., *supra* note 35, at 200.

3.2. *No Help from the Dormant Commerce Clause or Foreign Affairs Powers*

With, on the one side, demands from the EC to bind the states as a prerequisite to significant EC concessions in the Code negotiations, and, on the other side, serious concern that Congress simply would not accept an agreement binding the states without their consent, U.S. negotiators find themselves squeezed into a tight spot. Unfortunately, they will find no help from the courts.

In *Trojan Technologies, Inc. v. Pennsylvania*,³⁷ the United States Court of Appeals for the Third Circuit recently held that the commerce clause and the federal government's foreign affairs powers under the Constitution did not invalidate a Pennsylvania "Buy America" law that required suppliers contracting with the State in connection with public works projects to provide products whose steel is American made. The case therefore upheld the kind of discriminatory government procurement provision to which the EC strongly objects.³⁸

Of course, eliminating such "buy America" laws and other forms of state procurement preference laws would not in itself ensure that state procurement laws contained all the procedural protections set forth in the GATT Procurement Code. However, if the avenue were open for the removal of these provisions through the courts, the U.S. negotiators might have had a partial answer to the EC's major concerns regarding state procurement laws.

Nevertheless, the *Trojan* court found Pennsylvania's "Buy America" preference permissible under the "market participant" exception to the federal commerce clause power.³⁹ The court held that because the State acted as a market partici-

³⁷ 916 F.2d 903 (3d Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 2814 (1991).

³⁸ See SERVICES OF THE COMMISSION OF THE EUROPEAN COMMUNITIES, REPORT ON UNITED STATES TRADE BARRIERS AND UNFAIR PRACTICES 1991: PROBLEMS OF DOING BUSINESS WITH THE U.S. 53-57 (1991) (listing state procurement preferences).

³⁹ See *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984); *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Co.*, 426 U.S. 794 (1976).

pant rather than a market regulator, it was "not subject to the restraints of the Commerce Clause" that otherwise would prohibit "discriminatory state regulations designed to promote local enterprise at the expense of that from other states or from foreign countries."⁴⁰ Instead, the State could discriminate against foreign steel to the same extent that a similarly situated private purchaser could specify the source of steel used in any goods provided by its supplier.⁴¹

With regard to the foreign affairs powers of the federal government, the court acknowledged that "any state law that involves the state in the actual conduct of foreign affairs is unconstitutional."⁴² In this case, however, the court found that the State would not be involved in the actual conduct of foreign affairs because the statute applied to all foreign steel, regardless of the country of origin, and as a result it did not provide opportunities for State officials to tie their decisions to particular foreign policy concerns regarding individual countries.⁴³ The Pennsylvania law therefore did not unconstitutionally interfere with the federal government's foreign affairs powers.⁴⁴

The *Trojan* case was not the first decision passing on the constitutionality of "Buy America" laws.⁴⁵ Earlier state supreme court decisions had split, with the California court in 1969 finding a "Buy America" provision unconstitutional,⁴⁶ and the New Jersey court in 1977 upholding such a provision.⁴⁷ *Trojan*, however, can be said to mark a trend indicat-

⁴⁰ 916 F.2d at 909-10.

⁴¹ *Id.* at 911.

⁴² *Id.* at 913.

⁴³ *Id.* In so holding, the court distinguished *Zschemnig v. Miller*, 389 U.S. 429 (1968). See discussion of this case, *infra* notes 49-52 and accompanying text.

⁴⁴ In addition, the court found that striking down the statute would in fact contravene an established U.S. trade policy not to unilaterally remove procurement preferences, but rather to bargain them away for reciprocal commitments from trading partners. 916 F.2d at 913-14.

⁴⁵ *Trojan* was, however, the first federal court decision on this issue. Although the Supreme Court noted the issue in *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9, the issue was not before the Court, so the Court did not decide it.

⁴⁶ *Bethlehem Steel Corp. v. Bd. of Comm'rs*, 80 Cal. Rptr. 800 (1969).

⁴⁷ *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978).

ing that state procurement preference laws are not likely to be eliminated by action in the courts pursuant to the "dormant" powers of the federal government under the commerce clause or the foreign affairs powers.

The only case finding a "Buy America" law unconstitutional, the California court's 1969 decision in *Bethlehem Steel Corp. v. Bd. of Comm'rs*,⁴⁸ rested upon a reading of the Supreme Court's discussion of the foreign affairs powers in *Zschernig v. Miller*.⁴⁹ Quoting *Zschernig*, the *Bethlehem* court struck down the California "Buy America" law because the act "had a direct impact upon foreign relations, and may well adversely affect the power of the central government to deal with those problems."⁵⁰

Subsequent cases interpreting *Zschernig* have relied less on this "direct impact" analysis, instead focusing on the fact that the *Zschernig* Court was primarily concerned that the application of the law in question in that case would involve judicial and administrative officials in evaluating and making judgments based on their views of foreign policy concerns regarding particular countries.⁵¹ Indeed, the *Trojan* Court distinguished *Zschernig* on this basis, noting that because the Pennsylvania law applied without discretion to *all* foreign countries, it would not involve state officials in making discretionary foreign policy judgments regarding the application of the law to *particular* countries.⁵² Other recent decisions have followed this reading of *Zschernig* as well.⁵³ It

⁴⁸ 80 Cal. Rptr. 800 (1969).

⁴⁹ 389 U.S. 429 (1968).

⁵⁰ 80 Cal. Rptr. at 803 (quoting *Zschernig v. Miller*, 389 U.S. 429 (1968)). The *Bethlehem* Court did not rely on any commerce clause analysis. Note that the "market participant" doctrine was expounded in *Reeves v. Stake* in 1976, seven years after the *Bethlehem* decision.

⁵¹ *Zschernig* struck down an Oregon statute that prohibited a nonresident to inherit from an Oregon resident if the nonresident's government did not accord inheritance rights meeting certain standards. The Supreme Court found that the enforcement of this statute in the Oregon courts had essentially depended on the courts' foreign policy attitudes in connection with the cold war. 389 U.S. at 427.

⁵² 916 F.2d at 913.

⁵³ See *Bd. of Trustees v. City of Baltimore*, 562 A.2d 720 (1989) (upholding city ordinances requiring a city employee pension fund to divest of its holdings in companies doing business in South Africa); *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774

therefore seems unlikely that a court will invoke the federal government's foreign affairs powers as a basis to strike down a state procurement preference law unless the administration of the law would involve state officials in discretionary foreign policy judgments regarding particular countries.⁵⁴

Nor is a commerce clause challenge likely to succeed in the future. The existence of four Supreme Court cases upholding the market participant exception suggests that the exception is firmly in place.⁵⁵ Although one Third Circuit judge has expressed the view that the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Auth.*⁵⁶ removes the theoretical foundation for the market participant exception,⁵⁷ that view has not flourished. The market participant exception, therefore, will probably continue to apply in future cases regarding the constitutionality of state procurement preference laws. There seems little doubt that a state procuring materials and supplies is acting as a market participant.⁵⁸

Thus, U.S. trade negotiators are unable to tell their EC counterparts that greater openness in state procurement will come through action in the courts, and hence that there is no need to bind the states. As a result, the United States must face squarely the question of whether to bring the states under the obligations of the Code, seek their voluntary commitment to the Code, or risk stalemate with the EC in the Procurement Code negotiations.

(1977), *appeal dismissed*, 435 U.S. 982 (1978) (upholding state "buy America" law).

⁵⁴ For example, a state procurement preference law that based the applicability of the preference on a judgment by state officials as to whether the home country of the bidder followed "unfair" trade policies arguably would not pass constitutional muster.

⁵⁵ See *supra* note 39.

⁵⁶ 469 U.S. 528 (1984).

⁵⁷ See *Swinn Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 260-62 (3d Cir. 1986) (Gibbons, C.J., dissenting).

⁵⁸ *Trojan*, 916 F.2d at 909-11.

4. CODE COMPATIBILITY OF STATE LAWS

4.1. Overview

For the states to bring their procurement procedures into line with the Procurement Code, either voluntarily or at the command of the federal government, there is much work to be done. The problem is not just that a majority of states have either a "Buy America" provision similar to the one reviewed by the *Trojan* court or a "Buy In-State" provision. In addition to such preference provisions, a majority of states fall significantly short of at least one of the essential procedural requirements provided in the Code. Although the failure to meet basic procedural requirements of the Code— as opposed to expressly discriminating against out-of-state or foreign products or suppliers— does not necessarily mean that a state treats foreign producers unfairly, U.S. trading partners could reasonably claim that falling substantially short of the mark on one or more major Code requirements could allow discrimination against, or at least disadvantage, foreign producers.

In many cases, the GATT Procurement Code states its procedural requirements with a higher degree of detail and specificity than the procurement laws of the states.⁵⁹ Argu-

⁵⁹ The Procurement laws of many states are patterned after the American Bar Association's Model Code, which was approved in 1979. See AMERICAN BAR ASSOCIATION, THE MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS VI (3d ed. 1986) [hereinafter A.B.A. MODEL PROCUREMENT CODE]. For discussions of the A.B.A. Model Procurement Code, see Louis F. Del Duca et al., *State and Local Government Procurement: Developments in Legislation and Litigation*, 18 URB. LAW. 301 (1986); Patrick J. Falvey et al., *ABA Proposes Legislative Adoption of a Model Procurement Code for State and Local Governments*, 11 URB. LAW. 481 (1979).

The A.B.A. Model Procurement Code is less detailed than the GATT Procurement Code in some areas. For example, regarding the preparation of specifications, the Procurement Code requires, among other things, that technical specifications shall be "in terms of performance rather than design," and "shall be based on international standards, national technical regulations, or recognized national standards." It also requires that specifications make no "requirement or reference to a particular trade mark or name, patent, design or type." Procurement Code art. IV(2), (3).

The A.B.A. Model Procurement Code has no such requirements, although the commentary to section 4-202 states that "[t]he major goals of the drafters [of specifications] should be to encourage competition and prevent favoritism." Arguably, these are the goals that the more detailed GATT Code provisions aim to serve. Thus, the two codes concur in broad

ably, a state law that in broad terms meets the Code's concerns while failing to require all the specifics is not as serious a departure from the Code as a state law that either fails to address a basic procedural requirement even in broad terms or, worse, imposes a procedure contradictory to a basic Code procedure. Undoubtedly a search for petty differences between Code and state procedures would reveal that every state is in violation of the Code.⁶⁰ However, a more fruitful endeavor is to attempt to identify the areas in which the states significantly depart from the Code, in order to determine the most important changes that would be required to bring the states into conformity with the Code.

This article surveys state compliance with the following basic Code requirements: (1) nondiscrimination/award of the contract; (2) preparation of specifications; (3) pre-qualification of suppliers/use of bidder's lists; (4) notice; (5) requirement of competitive bidding procedures/exceptions; and (6) bid protest procedures.⁶¹ Although this is not a complete list of the principal procedural requirements under the Code, it is a good sampling, the discussion of which gives a reasonable indication of the kinds of adjustments in state laws that would be required to bring them into compatibility with the Code. Also, the laws are examined only from the point of view of current Code requirements, not pending proposals for reform. Thus, for example, no examination is made of state laws regarding contracts for the provision of services or public works.⁶²

terms, except the GATT Code is more specific.

⁶⁰ For example, with regard to the timing of the issuance of notice of a procurement opportunity—a requirement which below is argued not to be petty—only two states meet the Code's requirement of 40 days. *See infra* notes 102-03 and accompanying text. These two states, Nevada and Pennsylvania, violate other Code requirements. Pennsylvania has a "Buy America" law, and Nevada has a tie bid preference for in-state producers. *See infra* note 32 and accompanying text. Below it is argued that neither of these Code infractions is petty.

⁶¹ The survey is based on the states' published statutes and administrative regulations; it does not include practices or guidelines not found in these sources.

⁶² Many states have separate laws for the procurement of goods and the procurement of construction and engineering services. Indeed, the A.B.A. Model Procurement Code takes this approach. *See generally*, A.B.A. MODEL PROCUREMENT CODE, *supra* note 59. In many states, these public works procurement statutes contain "Buy America" or "Buy In-State" preferences not found in the sections of their statutes applicable to procurement of

4.2. Code Compatibility

4.2.1. Nondiscrimination / Award of the Contract

Article II of the Code requires that a signatory accord to the products and suppliers of other signatories "treatment no less favorable than that accorded to domestic products and suppliers."⁶³ It also prohibits discrimination against locally established suppliers based on the country of origin of the goods supplied or the degree of foreign affiliation of the supplier.⁶⁴

These requirements have the effect of prohibiting "Buy America" laws. By preferring an American made product or supplier over a product or supplier from another Code signatory, a state would be according the foreign product or supplier less favorable treatment than the domestic supplier.

The following states have statutes that encourage or require procurement officials to prefer U.S. goods or suppliers in the award of purchasing contracts covered by the Code:

STATE	CODE SECTION	PROVISION
Georgia	Ga. Code Ann. § 50-5-81	It is unlawful for the state to purchase beef not raised in the United States.
Hawaii	Haw. Rev. Stat. § 103-24	In the purchase of materials or supplies, preference shall be given to American products, materials and supplies.

goods. *See, e.g.*, ALA. CODE §§ 39-3-1 (1975) and 39-3-4(a) (Supp. 1990) (providing "Buy America" preference for construction contracts). Alabama has no "Buy America" provision in the section of its statute relating to the procurement of goods. *See also* ARIZ. REV. STAT. ANN. § 34-241 (1984) (providing five percent preference for in-state bidders and materials for construction contracts).

⁶³ Procurement Code art. II(1)(a).

⁶⁴ Procurement Code art. II(2).

Iowa	Iowa Code Ann. § 18.3	The life cycle costs of American motor vehicles is reduced by 5 percent for purposes of comparing costs with foreign vehicles.
Kansas	Kan. Stat. Ann. § 75-3739(e)	"The director of purchases may reject a contract or purchase on the basis that a product is manufactured or assembled outside the United States."
Louisiana	La. Rev. Stat. Ann. tit. 39, § 361	Purchasing authority may provide that no foreign vehicles or aircraft shall be purchased.
Massachusetts	Mass. Gen. Laws Ann. ch. 7, § 22 (17); Mass. Regs. Code tit. 802, § 2:01(16)	Preference in the purchase of supplies and materials, other considerations being equal, shall be given in favor of supplies and materials manufactured and sold within the United States.
Minnesota	Minn. Stat. Ann. § 16B.101	"To the extent possible, specifications must be written so as to permit the public agency to purchase materials manufactured in the United States."
Mississippi	Miss. Code Ann. § 31-7-13	"Specifications . . . shall be written so as not to exclude comparable equipment of domestic manufacture."
Missouri	Mo. Ann. Stat. § 34.353	Contracts for the purchase of commodities "shall contain a provision that any manufactured goods or

		commodities used or supplied in the performance of that contract . . . shall be manufactured, assembled, or produced in the United States.”
New Mexico	N.M. Stat. Ann. § 13-1-21.1	Only trucks and cars assembled in North America may be purchased.
Ohio	Ohio Rev. Code Ann. § 125.11	The procuring agency “shall first reject bids that offer goods that have not been or that will not be produced or mined in the United States.”
Oklahoma	Okla. Stat. Ann. tit. 74, § 85.5	General preference for the purchase of American goods.
Pennsylvania	Pa. Stat. Ann. tit. 71, § 639(c)	“[T]he department shall, in all cases, give preference to goods of American production or manufacture.”
South Dakota	S.D. Codified Laws Ann. § 5-19-1.1	No foreign-raised meat products may be purchased.
Texas	Tex. Rev. Civ. Stat. Ann. art. 601b, § 3.28(b)	“[S]upplies, materials, equipment, or agricultural products produced or grown in other states of the United States of America shall be given preference over foreign products, the cost to the state and the quality being equal.”

Wisconsin	Wis. Stat. Ann. § 16.72(c)	"To the extent possible, the department shall write specifications so as to permit the purchase of materials manufactured in the United States."
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In addition to these "Buy America" provisions, 37 states have "Buy In-State" procurement preferences. These preferences take one of three forms: (1) those that prefer in-state bidders or products when all else is equal (a "tie-bid" preference); (2) those that prefer an in-state bidder, or a bid offering to use in-state products, even when that bid is higher by a certain percentage than an out-of-state bidder or a bid using out-of-state products (a "percentage" preference); and (3) those that prefer an in-state bidder over a bidder from another state that provides a preference to its in-state bidders (a "reciprocal" preference).

Alabama provides an example of a tie-bid preference for in-state bidders and products:

The purchasing agent in the purchase of or contract for personal property or contractual services shall give preference, provided there is no sacrifice or loss in price or quality, to commodities produced in Alabama or sold by Alabama persons, firms, or corporations.⁶⁵

Oklahoma provides an example of a 5% preference for in-state products:

The state . . . shall prefer, in all purchases, supplies, materials and provisions produced, manufactured or grown in this state; provided that such preference shall not be for articles of inferior quality to those offered from outside the state, but a differential of not to exceed five percent (5%) may be allowed in the cost of Oklahoma materials, supplies, and provisions of equal quality.⁶⁶

Florida provides an example of a reciprocal preference:

⁶⁵ ALA. CODE § 41-16-27(c) (1990).

⁶⁶ OKLA. STAT. ANN. § 85.32 (1989).

When . . . the lowest responsible bidder is a bidder whose principal place of business is in a state . . . which grants a preference . . . to a person whose principal place of business is in such state, [then] this state may award a preference [in an equal amount] to the lowest responsible bidder having a principal place of business in this state.⁶⁷

In-state preferences contravene the GATT Code by denying foreign suppliers and products national treatment. An in-state preference, however, might not treat a foreign supplier or product less favorably than a domestic one in every case. For example, an in-state preference directed at suppliers but not products would work in favor of foreign-made products supplied by an in-state supplier. Also, a preference for in-state products would work to the advantage of a subsidiary of a foreign producer manufacturing the products in the state. Moreover, in-state preferences disadvantage U.S. suppliers and products from other states in the same way that they disadvantage foreign products and suppliers.

Nevertheless, it is clear that there would be many circumstances when in-state preferences would arbitrarily discriminate against foreign suppliers or products. Because in those circumstances the in-state preference laws would treat a foreign product or supplier less favorably than a similarly situated domestic product or supplier, the laws would violate the national treatment clause of the Code.⁶⁸

The denial of national treatment is a concern for all three types of in-state preferences. In the case of a percentage preference, the discrimination under the preference law is obvious. In the case of a tie bid preference, the problem is not that an in-state bidder will *sometimes* prevail over an out-of-state bidder with an equal bid, but rather that the in-state bidder will *always* prevail.⁶⁹

⁶⁷ FLA. STAT. ANN. § 287.084(1) (West 1991).

⁶⁸ There is no indication in the Code's national treatment clause that incidences of worse than national treatment are to be offset against incidences of better than national treatment.

⁶⁹ Interestingly, the A.B.A. Model Procurement Code recommends tie-bid preferences. See AMERICAN BAR ASSOCIATION, THE MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS: RECOMMENDED REGULATIONS R3-202-15, comment a (1980) [hereinafter A.B.A. MODEL PROCUREMENT

In the case of a reciprocal preference, the discrimination against foreign products or suppliers is more complicated and perhaps also less common. It depends upon whether the reciprocal preference law in question applies the preference by *raising* the bid of the out-of-state company to which the preference is applied, or whether the preference *lowers* the bid of the in-state company. In the former circumstance, a foreign supplier would be disadvantaged only in the case where it was operating through a subsidiary or branch that was located in the state against which the preference was applied. A foreign product (as opposed to supplier) would be disadvantaged only in the case when the product was being offered by a supplier in the state against which the reciprocal preference was invoked.

When the preference lowers the bid of the in-state company, the same discrimination could occur regarding foreign products or suppliers from the state against which the preference is invoked. In addition, however, the preference could disadvantage other foreign bidders or products as well. Consider the following scenario that could occur under Florida's reciprocal preference law:⁷⁰ Suppose a supplier from Germany has the low bid for a contract with the Florida government. At a price one percent higher than the German bid is a bid from a supplier located in Florida. Suppose the Florida bidder is tied with a bidder from Georgia, and that Georgia has a five percent preference for Georgia products and suppliers.

Under this set of facts, the Florida law arguably commands that the Florida bid be lowered by an amount equal to the Georgia preference. Thus, the Florida bid would be reduced by five percent, making it lower than the German bid which, but for the application of the preference law, would have been the lowest.

As a final point, even if the in-state preference laws would not violate the Code's national treatment provision, they would violate other provisions of the Code. In particular, Article

CODE REGULATIONS]. Under U.S. law, in contrast, tie bids are decided by drawing lots. See 1B J. MCBRIDE ET AL., GOVERNMENT CONTRACTS: CYCLOPEDIA GUIDE TO LAW, ADMINISTRATION, AND PROCEDURE § 11.10[6] (1991).

⁷⁰ FLA. STAT. ANN. § 287.084(1) (West 1991).

V(15)(f) of the Code provides the fundamental rule for the competitive award of contracts:

[t]he entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic or foreign products, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.⁷¹

In the case of an in-state percentage or reciprocal preference, the award of the contract does not comply with this rule of award to the lowest bidder.

The following table sets forth the in-state percentage and tie bid preference laws of the states.

STATE	CODE SECTION	PREFERENCE TYPE:	
		PERCENTAGE	TIE BID
Alabama	Ala. Code § 41-16-30		bidders & products
Alaska	Alaska Stat. § 36.30.324 -332	5% bidder 3-7% products	
Arkansas	Ark. Code Ann. § 19-11-259	5% bidder	
Connecticut	Conn. Gen. Stat. Ann. § 4a-59		products
Florida	Fla. Stat. Ann. § 287.082		products
Georgia	Ga. Code Ann. § 50-5-60		products

⁷¹ Procurement Code art. V(15)(f).

Hawaii	Haw. Rev. Stat. 3, 5, or 10% Stat. §§ 103-43, products, soft- 43.5, 44 ware develop- ment firms	
Idaho	Idaho Code § 67-5718	products
Illinois	Ill. Ann. Stat. ch. 127, para. 132.6(e)	bidders & products
Indiana	Ind. Code Ann. § 4-13.4-2-9	5% bidder
Iowa	Iowa Code Ann. § 18.6	bidders & products
Kansas	Kan. Stat. Ann. § 75-3740	bidders
Louisiana	La. Rev. Stat. Ann. § 39.1595	7% products bidders
Maine	Me. Rev. Stat. Ann. tit. 5, § 1825-B	bidders & products
Massachusetts	Mass. Gen. Laws. Ann. ch. 7, § 22 (17); Mass. Regs. Code tit. 802, § 2:01(16)	products
Michigan	Mich. Stat. Ann. § 3.516(261)	products
Mississippi	Miss. Code Ann. § 31-7-15	products & some bidders
Missouri	Mo. Ann. Stat. §§ 34.060, 34.073	bidders & products

Montana	Mont. Code Ann. § 18-1-102	3-5% bidder and products	
Nevada	Nev. Rev. Stat. § 333.300		bidders & products
New Mexico	N.M. Stat. Ann. § 13-1-21	5% bidders and products	
North Carolina	N.C. Gen. Stat. § 143-59		products
North Dakota	N.D. Cent. Code § 48-02-10.2; N.D. Admin. Code § 4-03-07-01(7)		bidders & products
Ohio	Ohio Rev. Code Ann. § 125.11	Ohio products preferred if price is not "excessive"	
Oklahoma	Okla. Stat. Ann. § 85.32	5% products	
Oregon	Or. Rev. Stat. § 279.021		products
Rhode Island	R.I. Gen. Laws § 37-2-8		food products
South Carolina	S.C. Code Ann. § 11-35-1520(9)	2% bidders	products
South Dakota	S.D. Codified Laws Ann. § 5-23-13		bidders & products
Tennessee	Tenn. Comp. R. & Regs. ch. 0690-3-1-.08(5)		bidders

Texas	Tex. Rev. Civ. Stat. Ann. art. 601b, § 3.28	bidders & products
Utah	Utah Admin. R. 24-3-113(d)	bidders & products
Vermont	Vt. Stat. Ann. tit. 29, § 903(c)	Commissioner of general services must justify in writing any rejection of in-state bid
Virginia	Va. Code Ann. § 11-47	bidders & products
West Virginia	W. Va. Code § 5A-3-37	up to 5% bidders
Wisconsin	Wis. Stat. Ann. § 16.75(1)(a)	"Preference" to be given to Wisconsin, materials, supplies, equipment and contract- ual services
Wyoming	Wyo. Stat. § 16-6-105	5% products and bidders

The following is a sampling of states with reciprocal preferences:

Florida	Fla. Stat. Ann. § 287.084
Idaho	Idaho Code § 67-2349
Illinois	Ill. Ann. Stat. ch. 127, para. 132.6(e)

Iowa	Iowa Code Ann. § 18.6
Kansas	Kan. Stat. Ann. § 75-3740(a)
Louisiana	La. Rev. Stat. Ann. § 1595.1
Michigan	Mich. Stat. Ann. § 3.516(268)(5)
Minnesota	Minn. Stat. Ann. § 16B.102
Mississippi	Miss. Code Ann. § 31-3-21
Nebraska	Neb. Rev. Stat. § 73-101.01
North Dakota	N.D. Admin. Code § 4-03-07-01(7)
Oklahoma	Okla. Stat. Ann. tit. 61, § 103.1(3)
South Dakota	S.D. Codified Laws Ann. § 5-19-3
Utah	Utah Code Ann. § 63-56-20.6(2)(a)
Virginia	Va. Code Ann. § 11-47(B)

4.2.2. Preparation of Specifications

The preparation of specifications plays a vital role in government contracting. Specifications provide a basis for the contracting agency to indicate what it wants from potential bidders and to evaluate the bids it receives.⁷² In the drawing of specifications, however, there is a tension between writing contracting documents in sufficient detail to assure the government's needs are met, and writing them too narrowly, so as to unduly restrict competition.⁷³ Moreover, there is a risk that specifications could be drawn deliberately to favor a

⁷² See JOHN CIBINIC JR. & RALPH C. NASH JR., FORMATION OF GOVERNMENT CONTRACTS 337-39 (2d ed. 1986) (discussing purposes for specifications).

⁷³ *Id.* at 338-39.

particular product or supplier, even though other products or suppliers could meet the government's needs.⁷⁴

For this reason, the GATT Procurement Code contains several requirements governing the preparation of specifications. For example, the Code states that specifications "shall not be prepared, adopted or applied with a view to creating obstacles to international trade nor have the effect of creating unnecessary obstacles to international trade."⁷⁵ The Code also requires that all specifications be based on performance rather than design, and that no reference be made to specific brand names unless there is no other way to define the specification. In addition, specifications should be based on international standards, and firms with a commercial interest should not assist in the preparation of specifications.⁷⁶ The Code also generally prohibits procurement entities from accepting advice in the preparation of specifications from firms that might have a commercial interest in the procurement.⁷⁷

No state's law precisely mandates all of these requirements regarding the preparation of specifications. In particular, no state provides that specifications should be based on international standards, and very few states indicate that firms with a commercial interest in a procurement should not assist in the preparation of specifications for it.

However, the laws of twenty states provide that specifications shall be drawn so as to "promote competition" and shall "not be unduly restrictive," or words to that effect.⁷⁸ Argu-

⁷⁴ *Id.* See also COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL GOVERNMENT PURCHASING 42-43 (3d ed. 1988) (discussing purpose of specifications).

⁷⁵ Procurement Code art. IV(1).

⁷⁶ Procurement Code art. IV(2), (3).

⁷⁷ Procurement Code art. IV(4).

⁷⁸ See ALA. CODE § 41-16-67 (1982); ALASKA STAT. § 36.30.060(c) (1990); ARIZ. REV. STAT. ANN. § 41-2565 (1985); ARK. CODE ANN. § 19-11-241(c) (Michie 1987); COLO. REV. STAT. ANN. § 24-104-205 (West 1988); IND. CODE ANN. § 4-13.4-4-1 (West 1991); KY. REV. STAT. ANN. § 45A.080(a) (Michie/Bobbs-Merrill 1986); LA. REV. STAT. § 39.1655 (West 1989); MD. ANN. CODE § 13-205 (1986); MONT. ADMIN. R. § 2.5.501 (1991); NEB. REV. STAT. § 81-154 (1987); N.M. STAT. ANN. § 13-1-164 (Michie 1991); N.Y. STATE FIN. LAW § 164(1)(b), (c) (McKinney 1989); OHIO ADMIN. CODE § 123:5-1-30 (1990); OKLA. STAT. tit. 74, § 85.11 (1987); R.I. GEN. LAWS § 37-2-38 (1990); S.C. CODE ANN. § 11-35-2730 (Law. Co-op. 1986); TENN. CODE ANN. § 12-3-504 (1987); UTAH CODE ANN. § 63-56-19 (1987).

ably, these provisions come close to achieving the objectives of the Code with respect to specifications. The states of greatest concern, therefore, are the thirty that fail to include such provisions. These states are:

California ⁷⁹	Missouri
Connecticut	Nevada
Delaware	New Hampshire
Florida	New Jersey
Georgia	North Carolina
Hawaii	North Dakota
Idaho	Oregon
Illinois	Pennsylvania
Iowa	South Dakota
Kansas	Texas ⁸⁰
Maine	Virginia
Massachusetts	Washington
Michigan	West Virginia
Minnesota	Wisconsin
Mississippi	Wyoming

Of these thirty states that fail specifically to require that specifications be drafted to promote competition and not be unduly restrictive, several simply make no mention of how specifications are to be prepared. Several more provide for a governmental agency to prepare "standard" specifications, but do not require them to promote competition.⁸¹ Five states, however, encourage or require specifications that discriminate against products manufactured outside the United States.⁸²

⁷⁹ California requires specifications to be written so as not to limit competition to only one supplier. CAL. PUB. CONT. CODE § 22040 (West Supp. 1991). While this provision will encourage competition, it leaves open the possibility that specifications may be written to limit foreign competition, so long as more than one domestic producer's product could meet the specifications.

⁸⁰ Texas requires written justification for specifications drawn to describe a product proprietary to one vendor. TEX. REV. CIV. STAT. ANN. art. 601b, § 3.09(b) (West Supp. 1991). For a discussion of the Code compatibility of a similar rule in California, *see supra* note 79.

⁸¹ *See, e.g.*, W. VA. CODE § 5A-3-5 (1991).

⁸² These five are Minnesota, Mississippi, New York, Pennsylvania, and Wisconsin. *See* MINN. STAT. ANN. § 16B.101 (West 1988); MISS. CODE ANN. § 31-7-13 (1990); N.Y. STATE FIN. LAW § 164-a(3) (McKinney 1989); PA.

In addition, two states expressly allow for specifications that favor particular brand names or manufacturers.⁸³ These latter seven states most seriously run afoul of the Code's requirements.

4.2.3. *Prequalification of Suppliers/Use of Bidders List*

Many states provide for the advance preparation of lists identifying bidders to whom notice of a procurement should be sent. Many states also provide for the "prequalification" of bidders. Although bidders lists and prequalification address different purposes, they both may discourage competition in a similar fashion.

Prequalification serves to determine that a given supplier is reliable and capable of performing the contract.⁸⁴ Commonly, governments will make a responsibility determination before signing a contract with a supplier. Prequalification is a determination that a supplier is responsible made in advance of the solicitation of offers. United States law frowns on prequalification because it limits competition to those suppliers who were qualified to bid on a contract before the notice of the contract opportunity was even announced.⁸⁵

Bidders lists, in contrast, usually are not directed at determining which suppliers are "responsible" to perform a contract. Instead, they set forth the suppliers that will receive direct notification of a procurement opportunity.⁸⁶ As a general rule, the use of a bidders list will not unduly restrict

STAT. ANN. tit. 71, § 639(c) (1990); WIS. STAT. ANN. § 16.72(c) (West 1986). In New York, the favoritism for New York suppliers in the drafting of specifications conflicts with a general requirement for specifications to promote competition. N.Y. STATE FIN. LAW § 164(1)(b) (McKinney 1989).

⁸³ These two are Maine and Virginia. See ME. REV. STAT. ANN. tit. 5, § 1825-B-5 (West 1990); VA. CODE ANN. § 11-49 (Michie 1989).

⁸⁴ CIBINIC & NASH, *supra* note 72, at 206-07.

⁸⁵ See *id.* at 250 (prequalification has been held to be an undue restriction on competition, and under U.S. law must be justified in writing). See also Jackson, *Prequalification and Qualification: Discouragement of New Competitors*, 19 PUB. CONT. L.J. 702 (1990). The Council of State Governments recognizes the possibility for prequalification to limit competition when it writes: "prequalification should not be used to establish or exercise preferences for resident bidders." COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL GOVERNMENT PURCHASING 54 (3d ed. 1988).

⁸⁶ See generally COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL GOVERNMENT PURCHASING 53-55 (3d ed. 1988).

competition provided that (1) public notice of a procurement opportunity is given along with a solicitation to suppliers on the bidders list, so that suppliers not on the list have a chance to learn of and participate in the bidding, and (2) the procedures for getting placed on the bidders list are not unduly restrictive. If these conditions are not met, the use of a bidders list may have the same restrictive effect on competition as prequalification: only those suppliers preapproved or preselected by the government to receive notice will receive a fair opportunity to participate.⁸⁷

a. Code Requirements

The Code allows for both prequalification and the use of bidders lists.⁸⁸ However, the Code prohibits using prequalification as a means to discriminate against foreign suppliers.⁸⁹ The Code dictates that the conditions for a firm to qualify to bid on a contract shall be limited to only those essential to ensure the firm's ability to fulfill the contract.⁹⁰ Firms that request to be placed on the pre-qualified suppliers list shall have their application promptly reviewed and a decision given to them.⁹¹ Signatories using bidders lists are required to publish the lists and the criteria met by the suppliers on them.⁹²

b. State Compliance

A majority of states' laws make no mention of either formal bidders lists or prequalifying bidders in advance of a solicitation. These states therefore might be in compliance with the Code in these areas provided that they do not, in practice, limit the ability of potential suppliers to participate in the contracting process through restrictive preselection or prequal-

⁸⁷ The Council of State Governments recognizes the possibility for bidders lists to be used to restrict competition when it writes, in the context of discussing bidders lists, "[f]ostering competition is the basic duty of the public purchasing professional." *Id.* at 55.

⁸⁸ Procurement Code art. V(2)(c), (d).

⁸⁹ *Id.*

⁹⁰ Procurement Code art. V(2)(b).

⁹¹ Procurement Code art. V(2)(d), (7)(c).

⁹² Procurement Code art. V(7)(a).

ification procedures.⁹³ Nine states, however, specifically allow for bidders lists or prequalification without mandating any of the protections required by the Code. Thus, these states do not ensure that suppliers who are not prequalified or who are not on the bidders lists have a fair opportunity to get notice of a proposed procurement and compete for its award. These nine states are:

Arizona	Ariz. Rev. Stat. Ann. § 41-2541
Arkansas	Ark. Code Ann. § 19-11-236
Connecticut	Conn. Gen. Stat. Ann. § 4a-57
Georgia	Ga. Code Ann. § 50-5-68
Indiana	Ind. Code Ann. § 4-13.4-6-2
Louisiana	La. Rev. Stat. Ann. § 39:1602
New Mexico	N.M. Stat. Ann. § 13-1-134
Utah	Utah Code Ann. § 63-56-27
Washington	Wash. Rev. Code Ann. § 43.19.1908

In addition to these nine states, another eight states include requirements with respect to bidders lists or prequalification that contravene Code requirements, and thus create the greatest danger of discrimination against foreign products or suppliers. These eight states are:

Alaska	A person who desires to be on a bidders list must present a valid Alaska business license. Alaska Stat. Ann. § 36.30.50.
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⁹³ The absence of any mention of bidders lists or prequalification, of course, does not mean that these states in practice necessarily follow solicitation and qualification procedures consistent with the Code.

- Maine** Officials preparing bidders lists may limit the number of out-of-state suppliers. Me. Rev. Stat. Ann. § 1825-B-4.
- Massachusetts** General public notice is not required in addition to solicitation of bids from firms on bidders list. Mass. Regs. Code tit. 802, § 2:01(4).
- Mississippi** Goods may be procured from pre-approved sources at pre-approved prices, without competitive bidding. Miss. Code Ann. § 31-7-12.
- North Dakota** Prequalification is required for bidding; general public notice is not required in addition to solicitation from firms on prequalified bidders list. N.D. Admin. Code §§ 4-03-02, 4-03-03.
- Ohio** Notice of solicitation will be sent first to Ohio businesses on bidders list, except when it is determined to be in the state's best interest to send notice to other bidders on the list. Ohio Rev. Code Ann. § 125.08.
- Tennessee** General public notice is not required in addition to solicitation of bids from firms on the bidders list. Tenn. Code Ann. §§ 12-3-701, 702; § 12-3-203.
- Virginia** Consideration of bids or proposals may be limited to prequalified firms. Va. Code Ann. § 11-46.

Only eleven states' laws specify prequalification or bidders lists requirements essentially in compliance with Code procedures.⁹⁴

4.2.4. *Publication of Notice*

a. Code Requirements

An essential part of an open and competitive procurement system is ensuring that notice of the proposed procurement provides all interested bidders with a reasonable opportunity to learn of the procurement opportunity and participate in the bidding. Also, individual bidders who are given access to information regarding a procurement opportunity before other bidders will have the advantage of additional time to plan and prepare their bid.

Because of these concerns, the Code's requirements with respect to notice are perhaps more extensive than in any other area. The Code requires that notice of a proposed procurement be published in all cases except in a sole source procurement.⁹⁵ The notice must indicate the nature and quantity of the products to be supplied, any options for additional quantities, whether the procedure is open or selective, any delivery date, the date and place for receiving tender documentation or submitting an application for pre-qualification, the address of the entity awarding the contract and providing information, any economic or technical requirements, the amount of payment for tender documentation, and whether the contract is for a sale, lease, rental, or hire-purchase.⁹⁶

⁹⁴ See ALA. CODE § 41-16-24 (1990); CAL. PUB. CONT. CODE §§ 10302 and 10303 (West Supp. 1991); COLO. REV. STAT. ANN. § 24-103-402 (1988); FLA. ADMIN. CODE ANN. r. 13A-1.006 (1990); IDAHO CODE § 67-5730 (1989); ILL. ADMIN. CODE tit. 44, §§ 1200.210, 1200.220 (1985); KY. REV. STAT. ANN. § 45A.115 (Michie/Bobbs-Merrill 1986); MONT. ADMIN. CODE § 2.5.401 (1990); S.C. CODE ANN. § 11-35-1520 (Law. Co-op. 1986); TEX. REV. CIV. STAT. ANN. art. 601b, § 3.11(b) (West Supp. 1991); WIS. ADMIN. CODE § Adm 7.05 (Sept. 1986).

⁹⁵ See Procurement Code art. V(4). By stating that published notice shall state whether "open or selective tendering procedures" will be used, the Code implies that notice must be published in the case of selective tendering procedures as well as open procedures. Thus, even if a procuring entity intends to limit procurement only to those suppliers invited to bid, the entity still must publish notice. See also Procurement Code art. V(7)(c).

⁹⁶ Procurement Code art. V(4)-(11).

In addition to the content of the notice, the Code includes requirements for the timing of notice. Providing sufficient time to learn of and participate in bidding for a government contract is important in encouraging new competition to enter into a procurement market. Competitors not as familiar with a given procurement system may require more time to find their way through the procedures and prepare a responsive bid. The GATT Procurement Code requires notice to be published forty days before the date for the receipt of tenders.⁹⁷

b. State Compliance

All but five states require some form of notice to be issued in advance of a public procurement. Three of those without a notice requirement, Iowa, New Hampshire, and Wyoming, have very brief procurement statutes that include little detail in general, although both Iowa and Wyoming indicate that competitive sealed bidding is the preferred method of state procurement.⁹⁸ The other two,⁹⁹ Oklahoma and Virginia, also

⁹⁷ Procurement Code art. V(11)(a). The importance of the length of the notice period to fair competitive opportunities for foreign suppliers is demonstrated by the fact that the signatories to the Code in the 1984-1986 Code renegotiations increased the general notice period from 30 to 40 days. In explaining this change, the U.S. Commerce Department wrote:

Now suppliers have an additional 10 days to prepare and submit bids from the time the original notice of proposed procurement is published. This provision should benefit U.S. and foreign suppliers who often learn of procurement opportunities through the mail and thus have a relatively short time (compared with domestic suppliers who can learn about procurements immediately) to put together a responsive bid.

Commerce Department Pamphlet, supra note 9.

⁹⁸ See IOWA CODE ANN. § 18.6 (West 1989); Wyo. Const. Art. 3 § 31. In these two states, it is possible that administrative practice provides for some notice. In New Hampshire, however, the procurement statute indicates no preference for sealed competitive bidding, suggesting merely that "[t]he director of property and plant management may purchase materials and supplies" N.H. REV. STAT. ANN. § 21-I:15(I) (1988).

⁹⁹ In addition, Mississippi provides that competitive procurement procedures including notice are optional. See MISS. CODE ANN. § 31-7-13 (1991). However, Mississippi has detailed requirements for notice, should the procuring authority determine to use competitive procedures. *Id.*

provide for competitive bidding procedures and may well include a notice requirement in practice.¹⁰⁰

Although forty-five states require some form of notice, six of these either allow or require the administrator to send the notice only to prospective bidders on the pre-qualified bidders list. These states do not require publication of the notice in a newspaper or journal of public circulation, and do not require posting of the notice in a public place. These six are not in conformity with the Code requirement of notice publication for all procurements except sole source procurements.¹⁰¹ These six states are:

Kansas Kan. Stat. Ann. § 75-3739(b)

Massachusetts Mass. Regs. Code tit. 802, § 2:01(4)

Montana Mont. Admin. R. 2.5.503

North Dakota N.D. Admin. Code § 4-03-03-01

Tennessee Tenn. Code Ann. § 12-3-203(b)

Vermont Vt. Stat. Ann. tit. 29, § 903

With respect to the content of the notice, no state specifically requires the notice of procurement to include all of the information stated in the Code. However, thirty states¹⁰² require content that, while falling short of the precise Code standards, is essentially sufficient to inform interested companies of the proposed contract and how they may pursue bidding on it.¹⁰³ The thirteen additional states that require

¹⁰⁰ See OKLA. STAT. ANN. tit. 74, § 85.7 (West 1991); Va. Code Ann. § 11-41 (1990).

¹⁰¹ In addition, New Jersey states that invitations to bid "shall permit such full and free competition as is . . . necessary to meet the requirements of the using agency" N.J. STAT. ANN. § 52:34-12(a) (West 1991).

¹⁰² Including Mississippi, which specifies the content that should be included in the public notice, should the procuring authority determine to use competitive procedures. See MISS. CODE ANN. § 31-7-13 (1991).

¹⁰³ See ALASKA STAT. § 36-30.130 (1987); ARIZ. REV. STAT. ANN. § 41-2533 (1990); ARK. CODE ANN. § 19-11-229(d) (Michie Supp. 1991); CAL. PUB. CONT. CODE § 10311 (West Supp. 1991); COLO. REV. STAT. ANN. § 24-103-202

some form of notice do not specify any particular content requirements for the notice. These thirteen states are:

Alabama	Ala. Code § 41-16-24
Georgia	Ga. Code Ann. § 50-5-67
Hawaii	Haw. Rev. Stat. § 103-26
Kansas	Kan. Stat. Ann. § 75-3739
Maine	Me. Rev. Stat. Ann. § 1825-D
Missouri	Mo. Stat. Ann. § 34.040
Nebraska	Neb. Rev. Stat. § 81.161.01
North Carolina	N.C. Gen. Stat. § 143-52
Rhode Island	R.I. Gen. Laws § 37-2-19(3)
South Carolina	S.C. Code Ann. § 11-35-1520(4)
Vermont	Vt. Stat. Ann. tit. 29, § 903(a)
Washington	Wash. Rev. Code Ann. § 43.19.1908
West Virginia	W. Va. Code § 5A-3-10

(1988); CONN. GEN. STAT. ANN. § 4a-57 (West 1991); DEL. CODE ANN. tit. 29, § 29-6903 (1990); FLA. STAT. ANN. § 287.057 (West 1991); IDAHO CODE § 67-5718 (1989); ILL. ADMIN. CODE tit. 44, § 1200.230(a) (1985); IND. CODE ANN. § 4-13.4-5-2(2) (1990); KY. REV. STAT. ANN. § 45A.080 (Michie/Bobbs-Merrill 1986); LA. STAT. ANN. § 39-1594-C (West 1989); MD. STATE FIN. & PROC. CODE ANN. § 13-103 (1991); MASS. REGS. CODE tit. 802, § 2:01(17) (1986); MINN. STAT. ANN. § 16B.07, subd. 3 (West 1986); MISS. CODE ANN. § 31-7-13(c) (Michie 1991); MONT. ADMIN. R. § 2.5.503 (1990); NEV. REV. STAT. § 333.300 (Michie 1991); N.J. STAT. ANN. § 52:34-12(b), (c) (West 1991); N.M. STAT. ANN. § 13-1-104 (Michie 1988); N.Y. COMP. CODES R. & REGS. tit. 9, § 250.3(b)(2)(i) (1983); N.D. ADMIN. CODE § 4-03-03-01 (1988); OHIO REV. CODE ANN. § 125.07 (Anderson 1990); PA. STAT. ANN. tit. 71, § 639(f) (1990); S.D. CODIFIED LAWS ANN. § 5-23-10 (1985); TENN. CODE ANN. § 12-3-203(b) (Supp. 1991); TEX. REV. CIV. STAT. ANN. art. 601b, § 3.11(a) (West Supp. 1991); UTAH ADMIN. CODE § 24-3-104 (1990); WIS. STAT. ANN. § 16.75 (West Supp. 1991).

With regard to the timing of the notice, only two states, Nevada¹⁰⁴ and Pennsylvania,¹⁰⁵ mandate that notice be given at least forty days in advance of the date for receipt of tenders. All of the remaining states that specify a notice requirement either require a shorter notice period,¹⁰⁶ do not specify the notice period, or leave the timing to the discretion of the officials in charge.¹⁰⁷

4.2.5. Requirement of Competitive Bidding Procedures: Exceptions

a. Code Requirements

The Code recognizes three types of procurement procedures: open, selective, and single tendering (sole source). Open procedures are those in which any interested supplier may submit a tender. Selective procedures are those in which only suppliers invited to submit tenders may participate in the competition for the contract. Sole source procedures are those

¹⁰⁴ NEV. REV. STAT. ANN. § 333.310 (Michie 1986).

¹⁰⁵ PA. STAT. ANN. tit. 71, § 639(f) (1990).

¹⁰⁶ ALASKA STAT. § 36-30.130 (1987); ARIZ. REV. STAT. ANN. § 41-2533 (1985); ARK. CODE ANN. § 19-11-229(d) (1987); 1 COLO. CODE REGS. § 3-202a.01 (1987); CONN. GEN. STAT. ANN. § 4a-57 (West Supp. 1991); DEL. CODE ANN. § 29-6904 (1983); FLA. ADMIN. CODE ANN. r. 13A-1.002(2)(a) (1990); GA. CODE ANN. tit. 29, § 50-5-67 (Michie 1990); HAW. REV. STAT. § 103-26 (1985); IDAHO CODE § 67-5718 (1989); ILL. ANN. STAT. ch. 127, para. 132.4 (Smith-Hurd 1981); IND. CODE ANN. 4-13.4-5-10 (West 1991); KAN. STAT. ANN. § 75-3739 (1989); KY. REV. STAT. ANN. § 45A.080 (Michie/Bobbs-Merrill 1986); LA. STAT. ANN. § 39-1594-C (West 1991); MD. STATE FIN. & PROC. CODE ANN. § 13-103(c) (1988); MINN. STAT. ANN. § 16B-07, subd. 3 (West 1988); MISS. CODE ANN. § 31-7-13 (1990); MO. ANN. STAT. § 34.040 (Vernon Supp. 1991); MONT. ADMIN. R. 2.5.503 (1990); NEB. REV. STAT. § 18.161.01 (1987); N.J. STAT. ANN. § 52:34-12(b) (West 1986); N.C. GEN. STAT. § 142-52 (1983); OHIO REV. CODE ANN. § 125.07(c) (Anderson 1990); R.I. GEN. LAWS § 37-2-19(3) (1990); TEX. REV. CIV. STAT. ANN. art. 601b, § 3.11(a) (West Supp. 1991); WIS. STAT. ANN. § 16.75 (2)(m)(b) (West 1986).

¹⁰⁷ See ALA. CODE § 41-16-24 (1982); CAL. PUB. CONT. CODE § 10311 (West Supp. 1991); ME. REV. STAT. ANN. tit. 5, § 1825-D (West 1985); MASS. REGS. CODE tit. 802, § 2:01(4) (1987); MICH. STAT. ANN. § 3.516(261) (1986); N.Y. COMP. R. & REGS. tit. 16, § 250.3(b)(4) (1983); N.D. ADMIN. CODE § 4-03-03 (1991); S.C. CODE ANN. § 11-35-1520 (Law. Co-op. 1986); S.D. ADMIN. R. 5-23-10 (1978); TENN. CODE ANN. § 12-3-103(b) (1987); VT. STAT. ANN. tit. 29, § 903(a) (1986); WASH. REV. CODE ANN. § 43.19.1908 (West 1983); W. VA. CODE § 5A-3-10 (1990).

in which a supplier is contacted individually to fulfill a contract.¹⁰⁸

The Code prefers the use of open procedures and selective procedures provided that a maximum number of suppliers are invited and those not on the pre-qualified vendors list have adequate opportunity to become qualified.¹⁰⁹ Sole source procurement is allowed only in narrow circumstances, such as in emergencies that do not allow time for open and competitive procedures or in the absence of responses to an open or selective tender.¹¹⁰ The Code requires written justification for the use of sole source procurement procedures.¹¹¹

b. State Compliance

All but two states have a general preference for the use of competitive sealed bidding procedures, or selective procedures open to a broad list of suppliers.¹¹² The two states falling

¹⁰⁸ Procurement Code art. V(1).

¹⁰⁹ See Procurement Code art. V(4), (6), (16).

¹¹⁰ Procurement code art. V(16).

¹¹¹ Procurement Code art. V(17).

¹¹² Even though these procedures are preferred, many of the other procedural defects discussed in this memorandum, such as limitations on pre-qualification, short notice periods, and express "Buy America" or "Buy In-State" preferences limit the extent to which the "competitive" procedures will be truly competitive.

The requirements for competitive procedures can be found at:

ALA. CODE § 41-16-20 (1982); ALASKA STAT. § 36.30.100 (1987); ARIZ. REV. STATE ANN. § 41-2533 (1985); ARK. CODE ANN. § 19-11-228 (Michie 1987); CAL. PUB. CONT. CODE § 10301 (West Supp. 1991); COLO. REV. STAT. ANN. § 24-103-201 (1988); CONN. GEN. STAT. ANN. § 4a-57 (West Supp. 1991); DEL. CODE ANN. tit. 29, § 6903 (1983); FLA. STAT. ANN. § 287.057 (West 1991); GA. CODE ANN. § 50-5-67 (Michie 1990); HAW. REV. STAT. § 103-22 (1985); IDAHO CODE § 67-5718 (1989); ILL. ANN. STAT. ch. 127, para. 132.5 (Smith-Hurd 1981); ILL. ADMIN. CODE tit. 44, § 1200 (1985); IND. CODE ANN. § 4-13.5-5-1 (West 1991); IOWA CODE ANN. § 18.6 (West 1989); KAN. STAT. ANN. § 75-3739 (1989); KY. REV. STAT. ANN. § 45A.080 (Michie/Bobbs-Merrill 1986); LA. REV. STAT. ANN. § 39:1594 (West 1989); ME. REV. STAT. ANN. tit. 5, § 1825-B (1986); MD. STATE FIN. & PROC. CODE ANN. § 13-102 (1988); MASS. GEN. LAWS ANN. ch. 7, § 22 (West 1990); MICH. STAT. ANN. § 3.516(216) (1988); MINN. STAT. ANN. § 16B.07, subd. 3 (West 1988); MO. ANN. STAT. § 34.040 (Vernon Supp. 1991); MONT. CODE ANN. § 18-4-302 (1990); NEV. REV. STAT. ANN. § 333.300 (Michie 1986); N.J. STAT. ANN. § 52:34-6 (West 1986); N.M. STAT. ANN. § 13-1-102 (Michie 1978); N.Y.

short in this regard are Mississippi and New Hampshire. Mississippi provides that all purchases of goods shall be made from the state-approved source at the state-approved price, unless the Department of Finance and Administration determines that competitive procedures are appropriate.¹¹³ New Hampshire's brief statute appears to provide for direct purchases of goods by the director of plant and property management.¹¹⁴

Although forty-eight states prefer competitive bidding procedures, six include significant exceptions that could limit competition in a variety of situations. For example, Alabama has a long list of situations in which competitive bidding is not required.¹¹⁵ California allows sole source procurement of automatic data processing equipment if the Director of General Services determines that "the goods . . . are the only goods . . . which can meet the State's needs."¹¹⁶ Illinois states that bidding is not required for the purchase of data processing equipment.¹¹⁷ Michigan allows derogations from competitive procedures when it is "practicable" and "appropriate" to do so.¹¹⁸ New Jersey provides many exemptions from competitive bidding including, for example, for the lease of office equipment or the purchase of "technical" equipment where standardization or interchangeability is in the public interest.¹¹⁹ South Carolina has a general preference for competitive procedures but provides that information technology

STATE FIN. LAW § 174 (McKinney Supp. 1991); N.C. GEN. STAT. § 143-52 (1983); N.D. CENT. CODE § 54-44.4-05 (1989); OHIO REV. CODE ANN. § 125.07 (Anderson 1990); OKLA. STAT. ANN. § 85.7 (West 1989); PA. STAT. ANN. tit. 71, § 639 (1990); R.I. GEN. LAWS § 37-2-18 (1990); S.C. CODE ANN. § 11-35-1510 (Law. Co-op. 1986); S.D. CODIFIED LAWS ANN. § 5-23-8 (1988); TENN. CODE ANN. § 12-3-202 (1987); TEX. REV. CIV. STAT. ANN. art. 601b, § 3.10 (West Supp. 1991); UTAH CODE ANN. § 63-56-21 (1991); VT. STAT. ANN. tit. 29, § 903 (1989); VA. CODE ANN. § 11-41 (1990); WASH. REV. CODE ANN. § 43.19.1906 (West 1983); W. VA. CODE § 5A-3-10 (1990); WIS. STAT. ANN. § 16.75 (West 1986); WYO. CONST. art. 3, § 31.

¹¹³ MISS. CODE ANN. § 31-7-12 (1990).

¹¹⁴ See N.H. REV. STAT. ANN. § 21:I:15 (1989).

¹¹⁵ ALA. CODE § 41-16-21 (1982).

¹¹⁶ CAL. PUB. CONT. CODE § 12102 (West 1985).

¹¹⁷ ILL. ANN. STAT. ch. 127, para. 132.6(a)(10) (Smith-Hurd 1981).

¹¹⁸ MICH. STAT. ANN. § 3.516(216) (1989).

¹¹⁹ N.J. STAT. ANN. §§ 52:34-9, 10 (West 1986).

procurement may be “exempted from the requirements” of the procurement law.¹²⁰

Moreover, an additional ten states that allow sole source procurements under Code-acceptable circumstances do not require publication of a record justifying the sole source procurement. These ten states are¹²¹:

Iowa	New York
Minnesota	Pennsylvania
Missouri	Tennessee
Montana	Texas
Nevada	Wisconsin

The absence of a requirement for written justification leaves open the possibility that these states will abuse sole source procurements to prefer a favored supplier or product.

4.2.6. *Bid Protest Procedures*

a. Code Requirement

An important means to ensure fairness in government procurements is to provide procedures for unsuccessful bidders to challenge the award of a contract or any other aspect of the procurement process. The importance of this issue to the United States is demonstrated by the United States’s request for the establishment of a “local challenge” requirement under the Code.¹²²

Arguably, the Code already requires bid challenge procedures. The Code states, “[t]here shall also be procedures for the hearing and reviewing of complaints arising in connection with any phase of the procurement process, so as to ensure

¹²⁰ S.C. CODE ANN. § 11-35-1580 (Law. Co-op. 1986).

¹²¹ See IOWA CODE ANN. § 18.6(2) (West 1989); MINN. STAT. ANN. § 16B.08, subds. 2, 8 (West 1988); MO. ANN. STAT. § 34.100 (Vernon Supp. 1991); MONT. CODE ANN. § 18-4-133 (1991); NEV. REV. STAT. ANN. § 333.300 (Michie Supp. 1991); N.Y. STATE FIN. LAW § 176 (McKinney 1989); PA. STAT. ANN. tit. 71, § 639(x) (1990); TENN. CODE ANN. § 12-3-205 (1987); TEX. REV. CIV. STAT. ANN. art. 601b, § 3.07 (West Supp. 1991); WIS. STAT. ANN. § 16.75(2)(b) (West 1986).

¹²² See *Special Report*, INSIDE U.S. TRADE, Nov. 2, 1990 at 4 (setting forth U.S. proposals for Procurement Code negotiations). See also 54 Fed. Cont. Rep. (BNA) 599 (Oct. 22, 1990) (discussing bid protests).

that, to the greatest extent possible, disputes under this agreement will be equitably and expeditiously resolved between the suppliers and the entities concerned."¹²³

Regardless of whether the Code currently requires it or might require it after the conclusion of the current negotiations, a bid protest mechanism is an important measure to ensure the fairness and openness of a procurement system.

b. State Compliance

Twenty-eight states provide no bid protest procedure. These include:¹²⁴

Connecticut	Missouri
Delaware	Montana
Georgia	Nebraska
Hawaii	New Hampshire
Illinois	New Jersey
Kansas	New York
Massachusetts	North Carolina
Michigan	Ohio
Minnesota	Oklahoma
Mississippi	Oregon

¹²³ Procurement Code art. VI(5). In addition, the Code provides for a dispute resolution procedure through which a Code signatory government may challenge another signatory's procurement contract awards or procedures. The United States has invoked this dispute resolution mechanism twice to challenge procurement awards by the government of Norway. See 55 Fed. Reg. 19692 (1990) (discussing first case); Letter from U.S. Trade Representative Carla Hills to Representative John Conyers, Jr., April 26, 1991 (discussing second case), *on file with* Office of Public Affairs, United States Trade Representative, Executive Office of the President, Washington, D.C. 20506.

¹²⁴ For the states with bid protest procedures, see ALA. CODE § 41-16-31 (1982); ALASKA STAT. §§ 560-699 (1987); ARIZ. REV. STAT. ANN. § 41-2611 (1985); ARK. CODE ANN. § 19-11-244 (Michie 1987); COLO. REV. STAT. ANN. § 24-109-102 (1988); IDAHO CODE § 67-5729 (1989); IND. CODE ANN. § 4-13.4-8-1 (West 1991); IOWA CODE ANN. § 18.7 (West 1989); KY. REV. STAT. ANN. § 45A.285 (Michie/Bobbs-Merrill 1986); LA. REV. STAT. ANN. § 39-1671 (West 1991); ME. REV. STAT. ANN. § 1825-B (1988); MD. CODE ANN. § 15-217 (1988); NEV. REV. STAT. ANN. § 333.370 (Michie 1986); N.M. STAT. ANN. § 13-1-173 (1990); N.D. ADMIN. CODE § 4-03-15-01 (1991); R.I. GEN. LAWS § 37-2-52 (1990); S.C. CODE ANN. § 11-35-4210 (Law. Co-op. 1986); TENN. CODE ANN. § 12-3-214 (1987); UTAH CODE ANN. § 63-56-45 (1990); VA. CODE ANN. § 11-66 (1990).

Pennsylvania
South Dakota
Texas
Vermont

Washington
West Virginia
Wisconsin
Wyoming

5. CONCLUSION

This survey of state procurement laws has shown that most states fail to comply with one or more essential Code procedures. Probably the worse area of transgression involves the expressly discriminatory "Buy America" and "Buy In-State" provisions. Thirty-nine states have one or the other or both kinds of these preferences. These provisions may be the most serious violations of Code standards because they expressly require the kind of discrimination against foreign products and suppliers that is a central concern of the Code.

The other procedural protections discussed in this article aim at ensuring that procurement procedures do not indirectly allow for discrimination against foreign products or suppliers, where discrimination may not be express. The failure to meet these procedural protections does not necessarily mean that a state discriminates against foreign products or suppliers. It does, however, leave open that possibility. Moreover, in many instances, the states' procedural shortcomings are not merely a failure to comply with a standard put forth in the Code, but rather, they involve the use of procedures that directly contravene the standards of the Code.

On the bright side, the overwhelming majority of states at least clearly favor competitive bidding procedures and provide for notice of a procurement opportunity, although in many cases the notice requirement falls well short of the standards prescribed by the Code. Optimistically, the states' adherence to these basic principles of open contracting could indicate that the states will be willing to make the adjustments in their procedures that will be necessary to bring them into compliance with the Code. If so, the U.S. may find a way out of its bind in the Procurement Code negotiations with the EC. An agreement between the U.S. and E.C. in these negotiations is essential to the expansion of government contracting opportunities for U.S. companies around the world.