Issues by Edward Armstrong (black) Ikaso responses (red)
Joi addition (blue)

JLL063

Issue 1: JLL063, page 3, line 16 does not require notice of a solicitation conference to state the place where the solicitation conference will be held. It should be revised to read: State the date, time, and place of the solicitation conference

Rationale: To make it read the same as the provisions before it (and avoid a different construction based on the presumption of meaningful variation), use less words (economy), and require publication of the “place” where the solicitation conference will be held.

Ikaso response: We have no objection to this suggestion, it is a good change.

Issue 2: As it currently reads, JLL063 (on page 4, lines 5-6 and on page 6, lines 24-25) will require us to evaluate unclear or ambiguous bids and proposals even where the bidder or offeror has refused to clarify its bid or its proposal. The State should be able to ask a vendor to clarify an unclear bid or proposal and to reject the bid or proposal if the vendor refuses to do so. To fix this JLL063, page 4, line 5 should be revised to read: director or agency procurement official, the bid may be rejected. Similarly, JLL063, page 6, line 24 should be revised to read: director or agency procurement official, the proposal may be rejected. This will keep us consistent with other provisions of Ark. Code. Ann. § 19-11-230 that give the State the power to reject non-conforming bids and proposals.

Ikaso response: We have no objection to this suggestion, it is a good change (and I believe we voiced support to this change when it was discussed in the hearing).

JLL addition: As you may remember from our previous meetings, the current language of the bill was compromise language that was intended to be broad enough to allow the agency to handle the refusal to clarify in whatever way made sense given the nature of the clarification. There was some concern that stating that a bid or proposal would be rejected for failure to clarify would allow agencies to manipulate the process by submitting unnecessary requests for clarification in hopes of not obtaining a response so they could reject the bid in favor of the vendor they wanted to give the contract to.

Issue 3: The current statutory language already makes it clear that award is made after price, evaluation factors, and any discussions have been considered. JLL063, page 6, lines 29-30 adds unnecessary words regarding best and final offers before the word “award.” The single word “Award,” gets the same job done better. Adding new prefatory words about BAFOs can support an argument that there is a new legislative intent, and could support an argument that the subsection only applies after a BAFO. We shouldn’t disturb established law unless there is a compelling reason to. The current language should be kept.

Ikaso response: If there is risk that the statute could be misconstrued, the same intention of this language can be accomplished by adding “consideration of any best and final offer” to the list of things taken into consideration at the end of this clause. If the BAFO is not mentioned, one could support an argument that there is legislative intent that BAFOs cannot be considered in award decisions.

Issue 4: JLL063, page 12, lines 34-36, and page 13, lines 1-3 adds a bunch of useless language that can only create confusion. The period on line 33 of page 12 should be deleted, as should lines 34-36 of page 12, and lines 1 and 2 of page 13. The first six words of line 3, page 13, should be deleted so that the word "other" follows the word "qualifications" on line 33 from page 12 and completes the thought. If you'd like, I'll be glad to explain why the words in between "qualifications" on page 12, line 33 and "other" on page 13, line 3 are superfluous verbiage.

Ikaso response: We appreciate Director Armstrong's perspective on this, his proposed edits do not detract from our intended reforms in this section.

JLL addition: The language Ed refers to makes an affirmative statement about when RFQs are recommended. It is "useless language" only if the subcommittee decides that it prefers not to make an affirmative statement about when RFQs should be used.

JLL064

Issue 1: JLL064, page 3, lines 11-12, as currently written, make an impossible demand. I cannot make a roster of all expiring contracts for which there is no new requisition. This can be fixed by inserting the word "state" between the word "expiring" and the word "contracts" on line 11, page 3, of JLL064.

Ikaso response: We appreciate Director Armstrong's perspective on this – this recommendation was not originally offered as a statute or rule but offered as a practice for OSP's consideration. The idea behind this list was to create a downstream awareness of potential upcoming procurement needs. We anticipated that this would have been delegated out to respective agencies to force them to think about their upcoming procurement needs.

JLL addition: This change would limit the requirement to create a roster of expiring contracts to "state contracts," which is a defined term in the Arkansas Procurement Law and includes only those contracts for commodities or services in volume that are awarded by the State Procurement Director. I believe this is Ed's intention, but I wanted to make sure you know the scope of the change.

Issue 2: Whenever there is a critical emergency, i.e., one that imminently threatens human life or health, there isn't time to wait around a month or more for legislative review before the State addresses it. Even delaying a few days while trying to organize a special meeting of the chairs to review a contract addressing a critical emergency seems ill advised where human life or health are at risk. The current review statute doesn't make an exception for critical emergencies. To fix this, I propose that the words "for critical emergency procurements or" be added after the word "Except" on JLL064, page 4, line 13.

Ikaso response: This does not relate to a recommendation made by Ikaso.

Issue 3: The bill will require a new cover sheet for every service contract that is submitted for legislative review. It will be a significant administrative burden because it requires a lot of information, including a listing of the vendors that participated in the procurement, the evaluators and their qualifications, and the outcome of any protests. One of the things the bill requires to be

included on the cover sheet for each service contract submitted for review is a "description of the *goods* or services being procured and their criticality to the state." The reference to goods doesn't make sense here because the statute is calling for the review of *service* contracts. Accordingly, the words "goods or" should be stricken from line 16, page 5, JLL064.

This portion of the bill also requires agencies to describe the "criticality to the state" of the services being provided. Why? We will already have a description of the services being provided, so why ask the agencies for their subjective opinion about how critical the services are to the state? As I noted previously, with the threshold for review of services at a total projected cost of $100,000, ALC will be pulling in service contracts with an annual value of $14,285.71 ($100,000 ÷ 7 years = $14,285.71 per year) and up, which means that the bulk of the contracts, while important to the agencies, will likely not be of critical importance to the state. On that note, why ask for a summary of the procurement for a $15,000 per year sanitation contract identifying all of the vendors that participated, the outcome of any protests, etc. Perhaps the more detailed cover sheet makes more sense at a higher threshold?(For example, a total projected cost of $350,000, which equates to $50,000 a year over a seven year span). If so, then that can be inserted in line 15, page 5, JLL064 after the word "subsection." For example "with a total projected cost of three hundred fifty thousand dollars ($350,000) or greater" This would help alleviate the administrative burden on the agencies of having to provide a detailed coversheet for smaller dollar contracts.

Ikaso response: The cover sheet was proposed as part of a suite of recommendations which presumed a larger reduction in the number of service contracts reviewed and an expansion of review to include large commodity contracts (which explains the vestigial language that, under any circumstance, should be removed). Director Armstrong is right that, if the cover sheet is required universally, it would be an administrative burden at the proposed review levels. Ikaso would recommend requiring it for high dollar contracts, the threshold provided by Director Armstrong (total contract value $350K) is suitable.

Issue 4: JLL064 presents us with an opportunity to eliminate some confusing language regarding what type of service contracts get presented for review. The current language requires them to be submitted when the contract for services requires the service "of one or more individuals for regular full-time or part-time weekly work." Corporations, technically speaking, are not individuals. They are, however, "persons" under the definition of persons provided in Arkansas Procurement Law. The word "persons" also includes natural persons. The current language, which calls for presentation of contracts that requires services from individuals, allows an argument that the statute only calls for presentation of service contracts with individuals, not corporations or other persons who are artificial entities.

Another problem with the current language is that it limits the presentment requirement to a subset of service contracts that rely on "full-time or part time" individuals. This invites uncertainty as to whether the requirement applies to all service contracts, or just those that rely on full-time or part-time help by individuals. To eliminate any confusion about whetherthe review requirement covers service contracts with corporations as well as individuals, and whether it applies to all service contracts over the threshold or just those requiring individuals to do regular full-time or part-time weekly work, I propose that the word "persons" replace the words "~~individuals for regular full-time or part-time weekly work~~" on lines 14 and 15, page 4, of JLL 064. This simplifies and clarifies the statute's meaning.

Ikaso response: This does not relate to a recommendation made by Ikaso.

JLL066

Issue 1: On page 2, line 13, of JLL066 the word “good” should be replaced with “commodity.” The reason for this is that a good is a type of commodity, but the word commodity, as defined in JLL064, encompasses more than just goods. Procurement law applies to the purchase of commodities and services, so the broader word “commodity” should be used.

Ikaso response: Ikaso agrees with this edit.

JLL067

Issue 1: One shortcoming of the Ikaso Report is that it recommends changes that will add more administrative burden to the procurement process without any explicit cost benefit analysis to justify the additional process step. From an efficiency standpoint, you should not add a step to a process unless that step adds value. If a process step adds no real value or more cost than value, it is a waste of resources. If ALC’s aim is to make procurement more efficient, then any step it adds to the procurement process that adds more cost than value (or simply does not add value), should be eliminated.

Although Ikaso recommends that the State adopt a more strategic and proactive approach to procurement, including use of more mandatory State contracts, it recommends another procedural bottleneck be added to the procurement process. Bill JLL067 introduces an additional layer of pre-contract review that will make it more cumbersome for OSP and DFA to collaborate with other agencies and participate in the procurement process with them. It does this by requiring the Director of DFA and the State Procurement Director to submit any request for DFA or OSP to participate in a cooperative purchasing agreement to the Governor for approval. *See* JLL067, page 4, lines 20-24. Strictly speaking, anytime OSP participates in, sponsors, conducts, or administers a contract with or for another agency it is engaging in “cooperative procurement.” Thus this new administrative burden to OSP participating in cooperative purchasing is a barrier to Statewide purchasing. Not only will it make the Governor’s office a contract review bottleneck, it is wholly unnecessary because all purchases made under cooperative purchasing agreements are already reported to the Legislative Council or, if the General Assembly is in session, to the Joint Budget Committee (see Ark. Code Ann. § 19-11-249(b)). Furthermore, the Director of DFA, who manages the State Procurement Director, serves at the pleasure of the Governor. If the Governor does not approve of their performance, he can have them removed. He can (and currently does) order them to submit contracts for his review according to his own dictates as he sees prudent without the need of any additional legislation.
Ikaso response: As we stated in the most recent hearing – this is a misinterpretation of our intent of this requirement. We did not intend for State Contracts established through cooperative agreements to be caught in this review.

During our project, members of the Subcommittee expressed concerns to Ikaso regarding OSP’s use of cooperative agreements for OSP’s own purposes (not for establishing State Contracts for other agencies). Thus, our recommendation was that, while OSP would review other agency’s requests to participate in cooperatives, it could not review its own requests to participate in cooperatives. To the extent that this statute needs to be modified to make that clearer we would support such a modification.