

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 191

BY STATE AFFAIRS COMMITTEE

AN ACT

1 RELATING TO PUBLIC PROCUREMENT; AMENDING SECTION 54-4511, IDAHO CODE, TO
2 PROHIBIT CERTAIN PROCUREMENT ACTIONS BASED ON ENVIRONMENTAL, SOCIAL,
3 AND GOVERNANCE STANDARDS, TO DEFINE A TERM, AND TO MAKE A TECHNICAL
4 CORRECTION; AMENDING CHAPTER 23, TITLE 67, IDAHO CODE, BY THE ADDITION
5 OF A NEW SECTION 67-2347, IDAHO CODE, TO PROVIDE FOR THE PROHIBITION
6 OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE STANDARDS IN CERTAIN PUBLIC
7 CONTRACTS; AMENDING SECTION 67-5711A, IDAHO CODE, TO PROHIBIT AWARDED
8 OR DENYING A CONTRACT BASED ON ENVIRONMENTAL, SOCIAL, AND GOVERNANCE
9 STANDARDS, TO DEFINE A TERM, AND TO MAKE A TECHNICAL CORRECTION; AMEND-
10 ING SECTION 67-5711C, IDAHO CODE, TO PROHIBIT ACCEPTING OR DENYING BIDS
11 BASED ON ENVIRONMENTAL, SOCIAL, AND GOVERNANCE STANDARDS, TO DEFINE
12 A TERM, AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 67-9203,
13 IDAHO CODE, TO DEFINE A TERM; AMENDING SECTION 67-9210, IDAHO CODE,
14 TO PROHIBIT USING ENVIRONMENTAL, SOCIAL, AND GOVERNANCE STANDARDS AS
15 A QUALIFICATION FOR RESPONSIBILITY; AMENDING SECTION 67-9225, IDAHO
16 CODE, TO PROHIBIT APPROVAL OF CERTAIN POLICIES AND PROCEDURES PER-
17 MITTING THE CONSIDERATION OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE
18 STANDARDS IN PROCUREMENT DECISIONS, TO PROVIDE FOR REVOCATION OF POLI-
19 CIES AND PROCEDURES UNDER CERTAIN CIRCUMSTANCES, AND TO PROVIDE THAT
20 CERTAIN STATE INSTITUTIONS OF HIGHER EDUCATION SHALL BE SUBJECT TO THE
21 PROVISIONS OF THE STATE PROCUREMENT ACT; AND DECLARING AN EMERGENCY AND
22 PROVIDING AN EFFECTIVE DATE.
23

24 Be It Enacted by the Legislature of the State of Idaho:

25 SECTION 1. That Section 54-4511, Idaho Code, be, and the same is hereby
26 amended to read as follows:

27 54-4511. AWARD OF CONTRACTS -- DUAL CAPACITY. (1) Construction man-
28 ager representative (CMR). A licensed construction manager and the firm of
29 which he is a principal or full-time employee may be awarded a contract to
30 act only as representative for an owner. In soliciting bids or awarding
31 contracts for public works construction to be entered into by the owner, a
32 licensed construction manager representative shall comply with all notice
33 and bidding laws with which an owner would be required to comply if it were
34 to do the same activities without the assistance of a construction manager.
35 A licensed construction manager representative and the firm of which he is
36 a principal or employee shall not provide construction management services
37 for a construction project on which the licensed construction manager or his
38 firm also provides design services or other construction-related services,
39 whether as a contractor or subcontractor. Provided however, that this sec-
40 tion shall not preclude a licensed architect or registered professional
41 engineer from providing public works construction management services which
42 are normally provided by licensed architects or registered professional

1 engineers for a project on which the person or firm has provided design ser-
2 vices. Such public works construction management services provided by a
3 licensed architect or registered professional engineer shall not include
4 the procurement of equipment or construction work required by law to be com-
5 petitively bid for public works construction.

6 (2) Construction manager/general contractor (CM/GC). A licensed con-
7 struction manager and the firm of which he is a principal or full-time em-
8 ployee may be awarded a contract to act as both construction manager and gen-
9 eral contractor provided the construction manager/general contractor has a
10 valid public works contractor license as a general contractor pursuant to
11 section 54-1902, Idaho Code.

12 (3) Compensation of a construction manager/general contractor shall be
13 determined pursuant to section 67-2320, Idaho Code.

14 (4) At such time as the design of a project or a phase of a project is
15 available, the construction work, materials and equipment for construction
16 of a project may be incorporated into the construction manager/general con-
17 tractor contract based upon bids solicited from licensed public works con-
18 tractors and from suppliers for all construction work, materials and equip-
19 ment.

20 (5) For each portion of the work, competitive bids shall be solicited
21 from not less than three (3) contractors or suppliers deemed to be qualified
22 by the construction manager/general contractor. All bids shall be opened
23 publicly in the presence of a representative of the public entity for whom
24 the project is undertaken and, once opened, bids shall be subject to the pub-
25 lic record requirements outlined in title 74, Idaho Code.

26 (6) All construction work, materials and equipment shall be awarded to
27 the lowest responsive qualified bidder. For good cause, the public entity
28 may approve the award of bids based upon fewer than three (3) bids.

29 (7) The construction manager/general contractor, or its subsidiaries
30 and affiliated companies, may bid to perform construction work or to sup-
31 ply materials or equipment only if it holds a valid license pursuant to sec-
32 tion 54-1902, Idaho Code, and for which it customarily self-performs or sup-
33 plies such construction work, materials or equipment; provided, the public
34 entity may limit the amount of work the construction manager/general con-
35 tractor, including its subsidiaries and affiliated companies, may perform
36 under the contract. Bids from the construction manager/general contractor
37 and its subsidiaries or affiliated companies must be opened at the opening of
38 any other bids.

39 (8) When bidding for all phases of the project has been completed, a
40 guaranteed maximum price for the entire project may be negotiated by the pub-
41 lic entity.

42 (9) No public entity shall enter into a contract with any person or firm
43 for construction management services as construction manager representa-
44 tive or as construction manager/general contractor if such person or firm is
45 required to be licensed under this chapter unless:

46 (a) Such person holds a valid license or such firm holds a valid cer-
47 tificate issued pursuant to this chapter;

48 (b) The selection of such construction manager representative or
49 construction manager/general contractor is made pursuant to section
50 67-2320, Idaho Code; and

1 (c) All terms of the contract including, but not limited to, terms for
 2 management fees, incentive compensation and disposition of any contin-
 3 gency fund, if applicable, are agreed upon in writing.

4 (10) No proposal, bid, or qualifications shall be accepted or denied and
 5 no award of contract under any provision of this section shall be made based
 6 on environmental, social, and governance standards. For purposes of this
 7 subsection, "environmental, social, and governance standards" means pro-
 8 urement standards that screen or score bids, in whole or in part, on objec-
 9 tive ethical or sustainability criteria unrelated to the specifications in a
 10 solicitation or the qualifications of a bidder.

11 SECTION 2. That Chapter 23, Title 67, Idaho Code, be, and the same is
 12 hereby amended by the addition thereto of a NEW SECTION, to be known and des-
 13 ignated as Section 67-2347, Idaho Code, and to read as follows:

14 67-2347. PROHIBITION OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE STAN-
 15 DARDS IN PUBLIC CONTRACTS. (1) As used in this section:

16 (a) "Contract" means an agreement for the provision of goods or perfor-
 17 mance of services in exchange for remuneration between a public entity
 18 and another party that:

19 (i) Has a value of one hundred thousand dollars (\$100,000) or more
 20 that is to be paid wholly or partly from the funds of a public en-
 21 tity; and

22 (ii) Is not subject to the provisions of section 67-5711C, Idaho
 23 Code, or chapter 92, title 67, Idaho Code.

24 (b) "Contractor" means any person or entity who has entered or is
 25 attempting to enter into a contract, including but not limited to a
 26 construction manager licensed pursuant to chapter 45, title 54, Idaho
 27 Code, and design-build entities as provided in chapter 57, title 67,
 28 Idaho Code.

29 (c) "Environmental, social, and governance standards" means standards
 30 that would screen or score contractors based on subjective ethical or
 31 sustainability criteria unrelated to the specifications of a contract
 32 or the qualifications of a contractor.

33 (d) "Public entity" means the state of Idaho or any political subdi-
 34 vision thereof, including all boards, commissions, agencies, institu-
 35 tions, authorities, and bodies politic and corporate of the state, cre-
 36 ated by or in accordance with state law or rule.

37 (2) No contract shall be accepted or denied by a public entity based on
 38 environmental, social, and governance standards.

39 (3) A contractor not selected for a contract with a public entity may
 40 assert noncompliance with this section as a basis to challenge the award of
 41 the contract under the administrative and legal processes otherwise appli-
 42 cable to the award of the contract.

43 SECTION 3. That Section 67-5711A, Idaho Code, be, and the same is hereby
 44 amended to read as follows:

45 67-5711A. DESIGN-BUILD CONTRACTING AUTHORIZED. Notwithstanding any
 46 other provisions of law to the contrary, the director of the department of
 47 administration, or his designee, is authorized and empowered, subject to

1 the approval of the permanent building fund advisory council, to employ the
 2 use of the design-build method of construction in the letting of any and
 3 all contracts for the construction, alteration, equipping, furnishing and
 4 repair of any and all buildings, improvements, or other public works of the
 5 state of Idaho. However, no such contract shall be awarded or denied based on
 6 environmental, social, and governance standards. For the purposes of this
 7 section, ~~a~~:

8 (1) A design-build contract is a contract between the state of Idaho and
 9 a nongovernmental party in which the nongovernmental party contracting with
 10 the state of Idaho agrees to both design and build the structure, roadway, or
 11 other items specified in the contract; and

12 (2) "Environmental, social, and governance standards" means procure-
 13 ment standards that screen or score bids, in whole or in part, on subjective
 14 ethical or sustainability criteria unrelated to the specifications in a so-
 15 licitation or the qualifications of a bidder.

16 SECTION 4. That Section 67-5711C, Idaho Code, be, and the same is hereby
 17 amended to read as follows:

18 67-5711C. CONSTRUCTION OF PUBLIC PROJECTS -- COMPETITIVE SEALED BID-
 19 DING. (1) All construction contracts for public works shall be awarded to the
 20 lowest responsible and responsive bidder, subject to the provisions of sec-
 21 tion 59-1015, Idaho Code, after receipt of competitive sealed bidding ex-
 22 cept as otherwise provided in sections 67-5711B, 67-5711D and 67-5713, Idaho
 23 Code.

24 (2) An invitation for bids shall be issued and shall include a project
 25 description and all contractual terms and conditions applicable to the pub-
 26 lic works.

27 (3) Adequate public notice of the invitation for bids shall be given at
 28 least fourteen (14) days prior to the date set forth therein for the opening
 29 of bids. Such notice shall include publication at least fourteen (14) days
 30 prior to bid opening in a newspaper of general circulation in the area where
 31 the work is located.

32 (4) When prequalification is deemed by the department and by the re-
 33 spective state agency to be in the best interest of the state, competitive
 34 bidding procedures shall be open only to licensed public works contractors
 35 that meet preliminary supplemental qualifications. The solicitation for
 36 bids in a prequalified bidder public works project shall consist of two
 37 (2) stages: an initial stage for identifying prequalified contractors,
 38 either prime or specialty contractors, followed by a stage during which
 39 bid prices will be accepted only from prequalified contractors. Notice of
 40 the prequalification stage shall be given in the same manner that notice of
 41 open competitive bidding is provided. Prequalification standards must be
 42 premised upon demonstrated technical competence, experience constructing
 43 similar facilities, prior experience with the state, past performance re-
 44 lated to quality, workmanship and timeliness, reliability, safety record,
 45 available nonfinancial resources, equipment and personnel as they relate
 46 to the subject project, and overall performance history based upon a con-
 47 tractor's entire body of work. Any request for qualifications must include
 48 the standards for evaluating the qualifications of prospective bidders.
 49 Licensed contractors desiring to be prequalified to bid on a project must

1 submit a written response to a request for qualifications. After a review
2 of qualification submittals, licensed contractors that meet the prequali-
3 fication standards shall be so notified, and licensed contractors that do
4 not meet the prequalification standards shall also be so notified. There-
5 after, bids may be solicited from contractors that meet the prequalification
6 standards. The department may promulgate rules or develop procedures to
7 implement the prequalification process.

8 (5) Bids shall be opened publicly at the time and place designated in
9 the invitation for bids. The amount of each bid and such other relevant in-
10 formation as may be specified by rules, together with the name of each bid-
11 der, shall be entered on a record and the record shall be open to public in-
12 spection. After the time of the award, all bids and bid documents shall be
13 open to public inspection in accordance with the provisions of chapter 1, ti-
14 tle 74 and section 67-9215, Idaho Code.

15 (6) With respect to a project having a written cost estimate of greater
16 than twenty-five thousand dollars (\$25,000) but less than the public works
17 limit established in section 67-5711, Idaho Code, the agency, if it does not
18 perform the work with existing physical plant staff, must award a written
19 contract to the lowest responsible and responsive bidder after soliciting at
20 least three (3) documented informal bids from contractors licensed in Idaho
21 to perform public works contracts, if reasonably available. Adequate pub-
22 lic notice of the invitation for informal bids shall be given at least seven
23 (7) days prior to the date set forth therein for the receipt of the infor-
24 mal bids. Such notice may include publication at least seven (7) days prior
25 to bid opening in a newspaper of general circulation in the area where the
26 work is located; or the agency may advertise the invitation for bids in ap-
27 propriate trade journals, and otherwise notify persons believed to be inter-
28 ested in the award of a contract. Informal bids must be submitted by the con-
29 tractor in writing in response to a prepared written document describing the
30 project's scope of work in sufficient detail so as to enable a contractor fa-
31 miliar with such work to prepare a responsible bid. Nothing herein exempts
32 an agency from the responsibility of utilizing formal plans and specifica-
33 tions if the work involves the public health or safety as described in chap-
34 ters 3 and 12, title 54, Idaho Code. The agency must document receipt of the
35 informal bids in the project file.

36 (7) Any personal property including goods, parts, supplies and equip-
37 ment ~~which~~ that is to be supplied or provided by a state agency for use in
38 any public work, project, or preventive maintenance programs, whether the
39 public work, project, or preventive maintenance program is constructed, un-
40 dertaken or performed by agency in-house personnel, or by delegation pur-
41 suant to section 67-5710A, Idaho Code, or otherwise provided or supplied by
42 the agency to a contractor, the personal property, goods, parts, supplies or
43 equipment supplied or provided by the agency must be purchased or procured
44 by the agency through the division of purchasing in accordance with the Idaho
45 Code.

46 (8) No bid submitted pursuant to this section shall be accepted or de-
47 nied based on environmental, social, and governance standards. For purposes
48 of this subsection, "environmental, social, and governance standards" means
49 procurement standards that screen or score bids, in whole or in part, on sub-

1 jective ethical or sustainability criteria unrelated to the specifications
 2 in a solicitation or the qualifications of a bidder.

3 SECTION 5. That Section 67-9203, Idaho Code, be, and the same is hereby
 4 amended to read as follows:

5 67-9203. DEFINITIONS. As used in this chapter:

6 (1) "Acquisition" means the process of procuring property.

7 (2) "Administrator" means the administrator of the division of pur-
 8 chasing as created by section 67-9204, Idaho Code.

9 (3) "Agency" means all officers, departments, divisions, bureaus,
 10 boards, commissions and institutions of the state, including the public
 11 utilities commission, but excluding:

12 (a) The legislative and judicial branches of government;

13 (b) The governor, lieutenant governor, secretary of state, state con-
 14 troller, state treasurer, attorney general and superintendent of pub-
 15 lic instruction; and

16 (c) A state institution of higher education that complies with the pro-
 17 visions of section 67-9225, Idaho Code.

18 (4) "Bid" means a written offer to perform a contract to sell or other-
 19 wise supply property in response to a solicitation.

20 (5) "Bidder" means a vendor who has submitted a bid on property to be
 21 acquired by the state.

22 (6) "Contract" means an agreement for the acquisition of property, in-
 23 cluding a purchase order.

24 (7) "Contractor" means a vendor who has been awarded a contract.

25 (8) "Director" means the director of the department of administration
 26 as created by section 67-5701, Idaho Code.

27 (9) "Environmental, social, and governance standards" means procure-
 28 ment standards that screen or score bids, in whole or in part, on subjective
 29 ethical or sustainability criteria unrelated to the specifications in a so-
 30 solicitation or the qualifications of a bidder.

31 ~~(9)~~ (10) "Lowest responsible bidder" means the responsible bidder whose
 32 bid reflects the lowest acquisition price to be paid by the state, except
 33 that when specifications are valued or comparative performance evaluations
 34 are conducted, the results of such examinations and the relative score of
 35 valued specifications will be weighed, as set out in the specifications, in
 36 determining the lowest acquisition price.

37 ~~(10)~~ (11) "Open contract" means a contract awarded by the state through
 38 the division of purchasing as a result of a competitive solicitation to one
 39 (1) or more vendors who have agreed to allow all agencies to procure speci-
 40 fied property under the terms and conditions set forth in the contract.

41 ~~(11)~~ (12) "Procure" means to obtain property for state use in a manner
 42 other than by gift including, but not limited to, purchase, lease or rent.

43 ~~(12)~~ (13) "Property" means goods, services, parts, supplies and equip-
 44 ment, both tangible and intangible, including, but not limited to, designs,
 45 plans, programs, systems, techniques and any rights or interests in such
 46 property.

47 ~~(13)~~ (14) "Sole source" means the only vendor from whom specific prop-
 48 erty is available to procure.

1 ~~(14)~~ (15) "Solicitation" means an invitation to bid, a request for pro-
2 posal or a request for quote issued pursuant to this chapter for the purpose
3 of procuring property.

4 ~~(15)~~ (16) "Specifications" means the standards or requirements for
5 property to be procured as explicitly stated in a solicitation or contract.

6 ~~(16)~~ (17) "State institution of higher education" means Boise state
7 university, Idaho state university or Lewis-Clark state college.

8 ~~(17)~~ (18) "Vendor" means a person or entity capable of supplying prop-
9 erty to the state.

10 SECTION 6. That Section 67-9210, Idaho Code, be, and the same is hereby
11 amended to read as follows:

12 67-9210. AWARD OF CONTRACT. (1) The administrator shall award con-
13 tracts to, and place orders for property with, the lowest responsible
14 bidder. Qualifications for responsibility shall be prescribed by rule.
15 However, environmental, social, and governance standards may not be used as
16 a qualification for responsibility.

17 (2) Where both the bids and quality of property offered are the same,
18 preference shall be given to property of local and domestic production and
19 manufacture or from bidders having a significant Idaho economic presence as
20 defined in section 67-2349, Idaho Code. In connection with the award of any
21 contract for the placement of any order for state printing, binding, engrav-
22 ing or stationery work, the provisions of sections 60-101 and 60-103, Idaho
23 Code, shall apply to the extent that the same may be inconsistent with any re-
24 quirements contained in this section.

25 (3) In awarding contracts, the administrator shall not discriminate
26 against, or grant preferential treatment to, any individual or group on the
27 basis of race, sex, color, ethnicity, or national origin unless permitted by
28 an exception described in section 67-5909A, Idaho Code.

29 SECTION 7. That Section 67-9225, Idaho Code, be, and the same is hereby
30 amended to read as follows:

31 67-9225. PROCUREMENT BY STATE INSTITUTIONS OF HIGHER EDUCATION. (1) A
32 state institution of higher education may establish policies and procedures
33 for procuring property that shall be substantially consistent with the re-
34 quirements for procuring property as set forth in this chapter and that shall
35 be approved by the state board of education. When the state board of edu-
36 cation has approved such policies and procedures for a state institution of
37 higher education, the institution shall not be subject to the provisions of
38 this chapter, except as provided in subsections (2) and (3) of this section.

39 (2) When the state enters into an open contract, a state institution of
40 higher education must use the open contract, or the institution may procure
41 property from a vendor that is not party to the open contract if the cost to
42 the institution would be equal to or less than the price of the property under
43 the open contract.

44 (3) (a) The state board of education shall not approve policies and pro-
45 cedures pursuant to subsection (1) of this section if such policies and
46 procedures permit the consideration of environmental, social, and gov-
47 ernance standards in procurement decisions.

1 (b) The state board of education shall revoke approval of policies and
2 procedures pursuant to subsection (1) of this section if:

3 (i) The approval was granted prior to July 1, 2023; and

4 (ii) The policies and procedures violate the provisions of this
5 subsection.

6 (c) If a state institution of higher education's policies and proce-
7 dures are revoked pursuant to paragraph (b) of this subsection, then
8 such institution shall be subject to the provisions of this chapter
9 until such time as new policies and procedures for the institution are
10 approved by the state board of education.

11 SECTION 8. An emergency existing therefor, which emergency is hereby
12 declared to exist, this act shall be in full force and effect on and after
13 July 1, 2023.