

Proposed Judicial Review Legislation

- Currently the State Procurement Act allows the Idaho Department of Administration (“Department”) to: 1) draft a Request for Proposal (“RFP”); 2) manage the RFP procurement process; 3) award the contract; and, 4) determine itself whether it correctly conducted the procurement process. Once the Department’s decision is made, there is no check or balance from any other branch of government. Many of these procurements are in the millions of dollars. If there was an issue regarding the procurement, the current statute may allow the Department to prevent a vendor from seeking judicial relief.
- Essentially, the draft legislation addresses this issue. It does the following:
- For any contract that is valued at \$__ million or more, a vendor may ask for a contested case proceeding according to the Idaho Administrative Procedures Act (“APA”).
- A contested case proceeding means that a hearing officer will be appointed to review the procurement. Once the hearing office reviews the decision, he/she makes a recommendation and the Director either accepts or rejects the recommendation and issues an order.
- A vendor may seek review of the order in court.
- The court will review whether: the procurement violated the constitution or Idaho statute; the agency exceeded its authority; the process followed; there substantial evidence on the record as a whole the decision arbitrary or an abuse of discretion. Even if there was a violation, there must also be a finding that substantial rights of the appellants were prejudiced.
- The prevailing party is awarded attorney fees and cost in the administrative and judicial proceeding.
- This proceeding is only available to procurements worth \$__ million or more and therefore is narrowly tailored to limit the amount of contested cases the Department will get.
- A contested case is available only if requested by the Vendor. This makes a vendor analyze the pros and cons before asking for a contested case. The Department will still have other non-contested case options.
- Attorney fees and costs are awarded to the prevailing party. This cuts down on frivolous requests for contested cases by vendors and vis-a-versa with the Department dismissing appeals without careful analysis.
- The draft incorporates the Department’s request for extension of deadlines to accommodate public records requests.
- Finally, the draft legislation provides for greater government accountability and fairness by encouraging checks and balances.

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3 |||| LEGISLATURE OF THE STATE OF IDAHO ||||

4
5 Sixty-fourth Legislature First Regular Session - 2017
6

7
8 IN THE _____

9
10 _____ BILL NO. _____

11
12 BY _____ COMMITTEE

13
14 AN ACT

15 RELATING TO THE STATE PROCUREMENT ACT; AMENDING SECTION 67-9229, IDAHO
16 CODE, REGARDING APPLICATION OF ADMINISTRATIVE PROCEDURE ACT;
17 AMENDING SECTION 67-9232, IDAHO CODE, REGARDING CHALLENGES AND
18 APPEALS; AND DECLARING AN EMERGENCY.
19

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

21
22 SECTION 1. That 67-9229, Idaho Code, be, and the same is hereby
23 amended to read as follows:

24
25 67-9229. APPLICATION OF ADMINISTRATIVE PROCEDURE ACT. (1) All
26 rules of the division of purchasing shall be adopted in accordance
27 with the provisions of chapter 52, title 67, Idaho Code. Only appeals
28 conducted as contested cases pursuant to section 67-9232 (1)(a)(iii),
29 (2)(b)(iii), (3)(a)(iii) and (4)(b)(iii), Idaho Code, shall be subject
30 to the judicial review provisions of chapter 52, title 67, Idaho Code.
31 This section shall not impair any contract right or contract remedy
32 that may exist between the state and a properly licensed contractor or
33 vendor.

34 (2) A determinations officer appointed by the director pursuant
35 to the provisions of this chapter may subpoena witnesses and evidence
36 and administer oaths.

37 (3) In the event that a determinations officer is appointed
38 pursuant to the provisions of section 67-9232, Idaho Code, any vendor
39 who has submitted a bid in the process under review shall,
40 notwithstanding any other disability, have standing to intervene in
41 the proceeding as a party, and such intervenor may participate in the
42 purchase appeal or appeal from any final order entered in a contested
43 case conducted under section 67-9232(3)(a)(iii), Idaho Code.
44

45 SECTION 2. That 67-9232, Idaho Code, be, and the same is hereby
46 amended to read as follows:

47
48 67-9232. CHALLENGES AND APPEALS. (1) Bid specifications.

49 (a) There shall be, beginning with the date of receipt of notice, a
50 period of not more than ten (10) working days in which any vendor,
51 qualified and able to sell or supply the items to be acquired, may
52 notify the administrator in writing of his intention to challenge the

1 specifications and shall specifically state the exact nature of his
2 challenge. The specific challenge shall describe the location of the
3 challenged portion or clause in the specification document, unless the
4 challenge concerns an omission, explain why any provision should be
5 struck, added or altered, and contain suggested corrections.

6 (b) Upon receipt of the challenge, the administrator ~~shall~~ may:

7 (i) either deny the challenge, and such denial shall be considered the
8 final agency decision; or

9 (ii) he shall present the matter to the director for appointment of a
10 determinations officer, to review the challenge.

11 (iii) If the vendor requests a contested case proceeding within its
12 notification and the value of the property or service being procured
13 is \$ million dollars or over, the director shall appoint a
14 determinations officer with authority to conduct a contested case
15 hearing in accordance with the provisions of chapter 52, title 67,
16 Idaho Code. The prevailing party under subsection (1)(b)(iii) shall
17 be awarded reasonable attorney fees and costs in the administrative
18 proceeding and any judicial review proceeding.

19 If the director appoints a determinations officer, then all vendors,
20 who are invited to bid on the property sought to be acquired, shall be
21 notified of the appeal and the appointment of a determinations officer
22 and may indicate in writing their agreement or disagreement with the
23 challenge within five (5) days. The notice to the vendors may be
24 electronic. Any vendor may note his agreement or disagreement with the
25 challenge. The determinations officer may, on his own motion, refer
26 the challenge portion and any related portions of the challenge to the
27 author of the specification to be rewritten with the advice and
28 comments of the vendors capable of supplying the property, rewrite the
29 specification himself and/or reject all or any part of any challenge.
30 If specifications are to be rewritten, the matter shall be continued
31 until the determinations officer makes a final determination of the
32 acceptability of the revised specifications.

33 (c) The administrator shall reset the bid opening no later than
34 fifteen (15) days after final determination of challenges or the
35 amendment of the specifications. If the administrator denies the
36 challenge, then the bid opening date shall not be reset.

37 ~~(d) The final decision of the determinations officer or administrator~~
38 ~~on the challenge to specifications shall not be considered a contested~~
39 ~~case within the meaning of the administrative procedure act; provided~~
40 ~~that a vendor disagreeing with specifications may include such~~
41 ~~disagreement as a reason for asking for appointment of a~~
42 ~~determinations officer pursuant to subsection (3) of this section.~~

43 (2) Nonresponsive bids.

44 (a) There shall be, beginning with the day following receipt of
45 notice of rejection, a period of five (5) working days in which a
46 bidder whose bid was found nonresponsive may appeal such decision to
47 the director of the department of administration. A nonresponsive bid,
48 within the meaning of this chapter, is a bid that does not comply with
49 the bid invitation and specifications and shall not apply to a vendor
50 whose bid is considered but who is determined not to be the lowest
51 responsible bidder as defined in this chapter. The director ~~shall~~ may:

1 (i) deny the appeal, and such denial shall be considered the final
2 agency decision; or

3 (ii) appoint a determinations officer to review the record to
4 determine whether the bidder was nonresponsive.

5 (iii) At the request of the bidder and if the property or service
6 being procured is \$5 million dollars or over, the director shall
7 appoint a determinations officer with authority to conduct a contested
8 case hearing in accordance with the provisions of chapter 52, title
9 67, Idaho Code. The prevailing party under subsection (2)(a)(iii)
10 shall be awarded reasonable attorney fees and costs in the
11 administrative proceeding and any judicial review proceeding.

12 ~~(i) Deny the application; or~~

13 ~~(ii) Appoint a determinations officer to review the record and submit~~
14 ~~a recommended order to the director to affirm or reverse the~~
15 ~~administrator's decision of bid nonresponsiveness.~~

16 ~~(b) The director shall, upon receipt of a written recommendation from~~
17 ~~the determinations officer, sustain, modify or reverse the~~
18 ~~administrator's nonresponsive bid decision. An appeal conducted under~~
19 ~~the provisions of this subsection shall not be considered a contested~~
20 ~~case and shall not be subject to judicial review under the provisions~~
21 ~~of chapter 52, title 67, Idaho Code.~~

22 (3) Lowest responsible bidder.

23 (a) A vendor whose bid is considered may, within five (5) working
24 days following receipt of notice that he is not the lowest responsible
25 bidder, apply to the director for appointment of a determinations
26 officer. The application shall set forth in specific terms the reasons
27 why the administrator's decision is thought to be erroneous. Upon
28 receipt of the application, the director ~~shall~~may within five (5)
29 working days:

30 (i) Deny the application, and such denial shall be considered the
31 final agency decision; or

32 (ii) Appoint a determinations officer to review the record to
33 determine whether the administrator's selection of the lowest
34 responsible bidder is correct; ~~or.~~

35 (iii) At the request of a vendor and if the value of the property
36 being procured is \$ million dollars or over, the director shall
37 appoint a determinations officer with authority to conduct a
38 contested case hearing in accordance with the provisions of chapter
39 52, title 67, Idaho Code. The prevailing party under subsection
40 (3)(a)(iii) shall be awarded reasonable attorney fees and costs in the
41 administrative proceeding and any judicial review proceeding.

42 (b) A determinations officer appointed pursuant to paragraph (a)(ii)
43 of this subsection shall inform the director by written recommendation
44 whether, in his opinion, the administrator's selection of the lowest
45 responsible bidder is correct. The determinations officer in making
46 this recommendation may rely on the documents of record, statements of
47 employees of the state of Idaho participating in any phase of the
48 selection process, and statements of any vendor submitting a bid. A
49 contested case hearing shall not be allowed and the determinations
50 officer shall not be required to solicit statements from any person.
51 Upon receipt of the recommendation from the determinations officer,
52 the director shall sustain, modify or reverse the decision of the

1 administrator on the selection of the lowest responsible bidder, or
2 the director may appoint a determinations officer pursuant to
3 paragraph (a)(iii) of this subsection.

4 (c) A determinations officer appointed pursuant to paragraph (a)(iii)
5 of this subsection shall conduct a contested case hearing and upon
6 conclusion of the hearing shall prepare findings of fact, conclusions
7 of law and a recommended order for the director of the department of
8 administration. Upon receipt of the findings of fact, conclusions of
9 law and recommended order, the director shall enter a final order
10 sustaining, modifying or reversing the decision of the administrator
11 on the selection of the lowest responsible bidder.

12 (4) Sole source procurement.

13 (a) In the case of a sole source procurement, there shall be a period
14 of not more than five (5) working days from the last date of public
15 notice in which any vendor, able to sell or supply the property to be
16 acquired, may notify the administrator, in writing, of his intention
17 to challenge the sole source procurement and briefly explain the
18 nature of the challenge.

19 (b) Upon receipt of the challenge, the director ~~shall~~ may either:

20 (i) deny the appeal, and such denial shall be considered the final
21 agency decision; or

22 (ii) appoint a determinations officer to review the record to
23 determine whether the vendor was nonresponsive.

24 (iii) At the request of the bidder and if the property or service
25 being procured is \$ million dollars or over, the director shall
26 appoint a determinations officer with authority to conduct a contested
27 case hearing in accordance with the provisions of chapter 52, title
28 67, Idaho Code. The prevailing party under subsection (2)(a)(iii)
29 shall be awarded reasonable attorney fees and costs in the
30 administrative proceeding and any judicial review proceeding.

31 ~~(i) Deny the application; or~~

32 ~~(ii) Appoint a determinations officer to review the record and submit~~
33 ~~a recommended order to the director to affirm or reverse the~~
34 ~~administrator's sole source determination.~~

35 (c) The director shall, upon receipt of a written recommendation from
36 the determinations officer, sustain, modify or reverse the
37 administrator's sole source determination. ~~An appeal conducted under~~
38 ~~the provisions of this subsection shall not be considered a contested~~
39 ~~case and shall not be subject to judicial review under the provisions~~
40 ~~of chapter 52, title 67, Idaho Code.~~

41 (5) Challenges and appeals submitted outside of the permitted
42 time established in this section shall be rejected as untimely;
43 provided, however, that the period for filing an appeal under this
44 section shall be suspended upon the filing by a bidder of a request
45 for public records related to the solicitation pursuant to chapter 1,
46 title 74, Idaho Code. The period for filing an appeal shall resume
47 upon a full response to such request pursuant to section 74-104, Idaho
48 Code.

49 ~~(5)(6)~~ (6) The administrator may, on his own initiative, file a
50 complaint with the director for a hearing before a determinations
51 officer. The director shall appoint a determinations officer who shall

1 make written recommendations to the director and the director shall
2 render whatever decision is necessary to resolve the complaint.

3 (6) The director is hereby authorized and directed to appoint a
4 determinations officer whenever one is required by this chapter. The
5 officer shall meet and render whatever determination is called for.
6 ~~When a complaint is filed pursuant to subsection (2) of this section,~~
7 ~~no bid may be awarded until the final decision is rendered by the~~
8 ~~director, provided that in all other cases where a determinations~~
9 ~~officer is appointed by the director, the director shall have the~~
10 ~~power to allow the acquisition contract to be awarded to the~~
11 ~~successful bidder prior to or after the decision of the determinations~~
12 ~~officer if he determines such award to be in the best interests of the~~
13 ~~state. Any determinations officer appointed pursuant to this section~~
14 ~~shall exist only for the duration of unresolved complaints on an~~
15 ~~acquisition and shall be dismissed upon resolution of all such~~
16 ~~complaints. The determinations officer shall be guided in his~~
17 ~~determination by the best economic interests of the state for both the~~
18 ~~near future and more extended periods of time. In addition to the~~
19 ~~powers conferred on the determinations officer, the director may:~~

- 20 (a) Impose the penalty prescribed by section 67-9231(3), Idaho Code;
21 (b) Enjoin any activity that violates this chapter;
22 (c) Direct that bids be rejected or sustained;
23 (d) Direct that specifications be rejected, sustained or modified;
24 and
25 (e) Direct further legal action.

26 ~~(7) Challenges or appeals conducted pursuant to subsection (1),~~
27 ~~(2), (3)(a)(i) or 3(a)(ii) of this section shall not be considered to~~
28 ~~be a contested case as that term is defined in the administrative~~
29 ~~procedure act. An appeal conducted pursuant to subsection (3)(a)(iii)~~
30 ~~of this section shall be conducted as a contested case according to~~
31 ~~the provisions of chapter 52, title 67, Idaho Code.~~

32
33 SECTION 3. An emergency existing therefor, which emergency is
34 hereby declared to exist, this act shall be in full force and effect
35 on and after its passage and approval.