

AN ACT

RELATING TO THE PROCUREMENT OF INFORMATION TECHNOLOGY GOODS AND SERVICES; AMENDING TITLE 67, IDAHO CODE, TO ADD DEFINITIONS OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS; PROVIDE FOR TERMS AND CONDITIONS FOR INFORMATION TECHNOLOGY CONTRACTS; AND ALLOW FOR NEGOTIATION OF IDENTIFIED TERMS AND CONDITIONS.

Be it enacted by the Legislature of the State of Idaho:

SECTION 1.

That 67-9203, Idaho Code, be, and the same is hereby amended to read as follows:

- (1) "Acquisition" means the process of procuring property.
- (2) "Administrator" means the administrator of the division of purchasing as created by section 67-9204, Idaho Code.
- (3) "Agency" means all officers, departments, divisions, bureaus, boards, commissions and institutions of the state, including the public utilities commission, but excluding:
 - (a) The legislative and judicial branches of government;
 - (b) The governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general and superintendent of public instruction; and
 - (c) A state institution of higher education that complies with the provisions of section 67-9225, Idaho Code.
- (4) "Bid" means a written offer to perform a contract to sell or otherwise supply property in response to a solicitation.
- (5) "Bidder" means a vendor who has submitted a bid on property to be acquired by the state.
- (6) "Contract" means an agreement for the acquisition of property, including a purchase order.
- (7) "Contractor" means a vendor who has been awarded a contract.
- (8) "Director" means the director of the department of administration as created by section 67-5701, Idaho Code.
- (9) "Information Technology" means hardware and software used to process, manage, store, transmit, receive, or deliver information, including telecommunications and any system based on emerging and future technologies. The term also includes services, functions, and activities that facilitate the design, implementation, creation, or use of software, hardware, or telecommunications products, including data acquisition, seat management, staffing augmentation, and maintenance.
- (910) "Lowest responsible bidder" means the responsible bidder whose bid reflects the lowest acquisition price to be paid by the state, except that when specifications are valued or comparative performance evaluations are conducted, the results of such examinations and the relative score of valued specifications

will be weighed, as set out in the specifications, in determining the lowest acquisition price.

(101) "Open contract" means a contract awarded by the state through the division of purchasing as a result of a competitive solicitation to one (1) or more vendors who have agreed to allow all agencies to procure specified property under the terms and conditions set forth in the contract.

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

(123) "Property" means goods, services, parts, supplies and equipment, both tangible and intangible, including, but not limited to, designs, plans, programs, systems, techniques and any rights or interests in such property.

(134) "Sole source" means the only vendor from whom specific property is available to procure.

(145) "Solicitation" means an invitation to bid, a request for proposal or a request for quote issued pursuant to this chapter for the purpose of procuring property.

(156) "Specifications" means the standards or requirements for property to be procured as explicitly stated in a solicitation or contract.

(167) "State institution of higher education" means Boise State University, Eastern Idaho Technical College, Idaho State University or Lewis-Clark State College.

(18) "Telecommunications" means all present and future forms of hardware, software or services used or required for transmitting voice, data, video or images.

(179) "Vendor" means a person or entity capable of supplying property to the state.

SECTION 2.

That NEW SECTION 67-9235, Idaho Code, be, added to read as follows:

- (1) TERMS AND CONDITIONS. All information technology contracts exceeding the sealed procedure limit, as established in rule, shall be subject to certain terms and conditions as set forth in this section.
- (2) LIMITATION OF LIABILITY. All information technology contracts shall include a limitation on the contractor's liability to the State for damages. The amount of liability shall be negotiated with the contracting agency and shall be determined based on the nature of the information technology covered by the contract. Except as otherwise provided in this subsection, the limitation of liability shall be for damages arising from any cause whatsoever, regardless of the form of action. Liability shall be limited to the contractor's duties as defined in

the scope of the contract. Limitation of liability pursuant to this subsection shall specifically include, but not be limited to, the contractor's liability for damages and any other losses relating to the loss of, unauthorized access to, or unauthorized disclosure of data.

The limitation of liability required by this subsection shall not apply to liability of the contractor for intentional or willful misconduct, damage to tangible personal property, physical injuries to persons (including death) or any other damages that cannot be limited under Idaho Code or other applicable law. Nothing in this subsection (i) limits the contractor's liability directly to third parties or (ii) affects the rights and obligations related to contribution among joint tortfeasors established by Idaho Code and other applicable law.

- (3) OWNERSHIP OF MATERIALS AND INFORMATION. All information technology contracts shall include a term providing for ownership of the subject matter of the contract. Unless otherwise negotiated, there is a presumption that:
- (i) the state owns and retains the rights to all hardware and other goods purchased under an agreement;
 - (ii) the state owns a copyright in information and materials developed for the state as defined in a contract, except information and materials delivered to the state, but not developed under a contract;
 - (iii) the contractor retains the rights to a computer program and related material made available to the State for licensing, except the State is entitled to a nonexclusive license to use, maintain, and enhance the software and the right to make a single archive copy; and
 - (iv) the contractor retains the rights to a computer program hosted and managed by the contractor but made available to the State, except the State is entitled to access and to protection of its data entered into the program.
- (4) NEGOTIATION. For contracts governed by this section, the contracting agency may negotiate terms and conditions prior to an award. The agency may vary the terms and conditions from the only if:
- (i) the agency receives advice and approval from legal counsel;

- (ii) the request for proposal identifies the terms or conditions that the agency reserves for negotiation; and
- (iii) the nature of the procurement requires different or specific terms and conditions from the state's standard or special terms and conditions.

A request for proposal may request that bidders propose terms and conditions for those identified as reserved for negotiation. Agency negotiations shall be conducted in coordination with the division of purchasing.

- (5) RULEMAKING. The Department of Administration shall establish through negotiated rulemaking one or more sets of special terms and conditions for information technology contracts.