

FINAL REPORT

State Procurement Laws Interim Committee HCR 48 (2016)

Members of the Committee

Senator Fred Martin, Co-Chair
Senator Bart Davis
Senator Abby Lee
Senator Lori Den Hartog
Senator Maryanne Jordan

Representative Neil Anderson, Co-Chair
Representative Maxine Bell
Representative Brent Crane
Representative John Vander Woude
Representative Mark Nye
Representative Elaine Smith (Ad Hoc)

Staff

Elizabeth Bowen, Senior Legislative Research Analyst
Robyn Lockett, Principal Budget and Policy Analyst
Jennifer Kish, Committee Secretary

November 29, 2016

I. Committee Charge

The State Procurement Laws Interim Committee was authorized in 2016 by House Concurrent Resolution 48. The purpose of the committee was to undertake and complete a study of issues relating to public procurement and to report its findings and recommendations, including any proposed legislation, to the First Regular Session of the Sixty-Fourth Idaho Legislature.

II. Meetings

The committee met five times on the following dates and at the following places:

1. August 22, 2016 – State Capitol, Boise;
2. September 14, 2016 – City Council Chamber, Twin Falls;
3. October 27, 2016 – State Capitol, Boise;
4. November 17, 2016 – State Capitol, Boise; and
5. November 29, 2016 – State Capitol, Boise.

III. Scope of Study

At its August 22 meeting, the committee reviewed the status of state procurement after the 2016 Legislature enacted the State Procurement Act (chapter 92, title 67, Idaho Code). The committee also reviewed administrative rules proposed by the Division of Purchasing to enforce the State Procurement Act. The committee then heard presentations on:

- Idaho's void contracts statute;
- Procurement compliance review and enforcement; and
- The process for reviewing procurement challenges and appeals.

The August meeting concluded with a discussion of issues to be addressed by the committee this interim.

On September 14, the committee considered draft legislation on:

- Procurement by political subdivisions;
- Cooperative purchasing agreements;
- Review of procurement challenges and appeals;
- Multiple contract awards; and
- Contracts that violate the State Procurement Act.

Each draft was discussed by the committee members, but no vote was taken to recommend legislation at that time. Also at the September meeting, the committee heard a presentation on quasi-public entities and the state's liability on contracts entered into by such entities.

On October 27, the committee heard presentations on:

- Information technology procurement;
- Recommendations for review of procurement challenges and appeals; and

- The application of the State Procurement Act to various agencies.

Additionally, the committee took remarks on cybersecurity from Lieutenant Governor Brad Little and considered draft legislation regarding void contracts, procurement by state institutions of higher education, cooperative purchasing agreements, and multiple contract awards. The committee voted to recommend the latter two drafts, which may be found in Appendix I and Appendix II of this report.

On November 17, the committee considered draft legislation on:

- Procurement by political subdivisions;
- Information technology procurement;
- Contracts that violate the State Procurement Act; and
- Procurement by state institutions of higher education.

The committee determined that it would not make recommendations regarding the first two drafts and scheduled its final meeting for November 29.

At the final meeting, the committee voted to recommend draft legislation on contracts that violate the State Procurement Act and procurement by state institutions of higher education; the drafts may be found in Appendix III and Appendix IV of this report. The committee also discussed and agreed to this report.

A list of all persons who presented to the committee may be found in Appendix V of this report.

IV. Findings

Having concluded its authorized study, the State Procurement Laws Interim Committee finds the following:

1. Section 67-9211, Idaho Code, regarding multiple contract awards, should be revised to clarify the circumstances under which the state may award multiple contracts under a single solicitation;
2. Section 67-9213, Idaho Code, regarding void contracts, should be repealed and replaced;
3. Section 67-9224, Idaho Code, regarding group discount purchasing, should be revised in order to enable the state to participate in cooperative purchasing;
4. Section 67-9225, Idaho Code, regarding state institutions of higher education, should be revised for clarity;
5. Section 67-9232, Idaho Code, regarding procurement challenges and appeals, should be revised to allow more opportunities for review of such challenges and appeals, though the committee does not at this time recommend specific legislation; and
6. Certain issues in public procurement require further study. These include:

- Administrative and judicial review of procurement challenges and appeals;
- Information technology procurement;
- Whether there should be greater clarity in the Idaho Code on the persons and entities that may obligate the state on a contract; and
- Whether there should be greater clarity in the Idaho Code on the persons and entities that are subject to the provisions of the State Procurement Act.

V. Recommendations

It is the recommendation of the State Procurement Laws Interim Committee that:

1. The Legislature enact the committee's proposed legislation; and
2. The Legislature reauthorize the committee to conduct further study of public procurement in Idaho.

APPENDIX I

Proposed Legislation

DRELB034

Cooperative Purchasing

DRAFT

DRELB034

LEGISLATURE OF THE STATE OF IDAHO
Sixty-fourth Legislature First Regular Session - 2017

IN THE _____

BILL NO. _____

BY _____

AN ACT

1 RELATING TO STATE PROCUREMENT; AMENDING SECTION 67-9224, IDAHO CODE, TO PRO-
2 VIDE THAT THE ADMINISTRATOR MAY AUTHORIZE AN AGENCY TO PARTICIPATE IN
3 A COOPERATIVE PURCHASING AGREEMENT, TO PROVIDE THAT THE ADMINISTRATOR
4 MAY AUTHORIZE AN AGENCY TO UTILIZE CONTRACTS OF CERTAIN OTHER AGENCIES,
5 TO PROVIDE THAT CERTAIN AGREEMENTS BE MADE IN WRITING, TO REVISE PROVI-
6 SIONS REGARDING ENTRANCE OR PARTICIPATION FEES, TO PROVIDE THAT CERTAIN
7 AGREEMENTS SHALL BE MAINTAINED ON FILE AND TO REMOVE PROVISIONS REGARD-
8 ING PROPERTY ACQUIRED PURSUANT TO THIS SECTION.
9

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

11 SECTION 1. That Section 67-9224, Idaho Code, be, and the same is hereby
12 amended to read as follows:

13 67-9224. COOPERATIVE AND GROUP DISCOUNT PURCHASING. (1) The adminis-
14 trator may authorize an agency to:

15 (a) Become a participating member of a group discount purchasing or-
16 ganization if the administrator finds that:

17 ~~(a) The property to be acquired is at least equal in quality to same or~~
18 ~~similar property that the agency uses;~~

19 (b) ~~The property to be acquired is less costly to the state than if ac-~~
20 ~~quired by other means authorized in this chapter~~ Participate in, spon-
21 sor, conduct or administer a cooperative purchasing agreement for prop-
22 erty with one (1) or more public agencies, independent of the require-
23 ments of section 67-2329, Idaho Code; or

24 (c) Utilize contracts of other public agencies within this state, upon
25 determining that the contract was let in a manner that constitutes com-
26 petitive bidding consistent with the requirements of this chapter and
27 is otherwise in the best interest of the state.

28 (2) The state's participation in the a cooperative purchase or group
29 discount purchasing organization is must be formalized by a written contract
30 that extends for no longer than one (1) year at a time; and agreement.

31 (d3) The state's entrance fee or participation fee in the a group dis-
32 count purchasing organization is must be based on criteria applied to all
33 other members of the organization.

34 (24) Any contract agreement entered into pursuant to subsection (2) of
35 this section shall be maintained on file with the division as well as with the
36 agency entering into the contract agreement.

37 (3) ~~Property acquired pursuant to this section shall be used solely~~
38 ~~by the state and may not be transferred from state ownership until it is no~~
39 ~~longer of use to the state. Such property may not be provided to individuals~~
40 ~~except those in the custody of the state or those receiving direct personal~~
41 ~~services from the state.~~

APPENDIX II

Proposed Legislation

DRELB032

Multiple Contract Awards

DRAFT

DRELBO32

LEGISLATURE OF THE STATE OF IDAHO
Sixty-fourth Legislature First Regular Session - 2017

IN THE _____

BILL NO. _____

BY _____

AN ACT

RELATING TO STATE PROCUREMENT; AMENDING SECTION 67-9211, IDAHO CODE, TO RE-
VISE PROVISIONS REGARDING MULTIPLE AWARDS.

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

SECTION 1. That Section 67-9211, Idaho Code, be, and the same is hereby
amended to read as follows:

67-9211. MULTIPLE AWARDS. (1) Notwithstanding any provision of this
chapter to the contrary, the administrator may make an award of a contract
to two (2) or more bidders ~~to furnish the same or similar property when more
than one (1) contractor is necessary~~ under a single solicitation if a multi-
ple award would:

(a) ~~To~~ More effectively furnish the types of property and quantities
required by state agencies based on immediacy of need, geographic loca-
tion or other factors;

(b) ~~To provide~~ Promote the expeditious and cost-efficient acquisition
of property for state agencies; ~~or~~

(c) ~~To enable~~ Enable state agencies to acquire property that is compatible
with property previously acquired;

(d) Enable contracts to be awarded on a regional basis; or

(e) In some other manner serve the best interest of the state.

(2) No award of a contract to multiple bidders shall be made under this
section unless the administrator makes a written determination showing
that multiple awards satisfy one (1) or more of the criteria set forth in
subsection (1) of this section.

(3) When a contract for property has been awarded under a single solici-
tation to two (2) or more bidders in accordance with this section, a state
agency shall make purchases from the contractor awarded in its region whose
property meets the agency's functional and business requirements and whose
terms and conditions regarding price, availability, support services and
delivery are most advantageous to the agency.

(4) A multiple award of a contract for property under this section shall
not be made when a single bidder can reasonably serve the acquisition needs
of state agencies. A multiple award of a contract shall only be made to the
number of bidders necessary to serve the acquisition needs of state agen-
cies.

APPENDIX III

Proposed Legislation

DRELB033

Contracts in Violation of Provisions of the Act

DRAFT

DRELBO33

LEGISLATURE OF THE STATE OF IDAHO
Sixty-fourth Legislature First Regular Session - 2017

IN THE _____

BILL NO. _____

BY _____

AN ACT

1 RELATING TO STATE PROCUREMENT; REPEALING SECTION 67-9213, IDAHO CODE, RE-
2 LATING TO VOID CONTRACTS; AND AMENDING CHAPTER 92, TITLE 67, IDAHO CODE,
3 BY THE ADDITION OF A NEW SECTION 67-9213, IDAHO CODE, TO ESTABLISH PRO-
4 VISIONS REGARDING SOLICITATIONS, PROPOSED CONTRACT AWARDS AND CONTRACT
5 AWARDS MADE IN VIOLATION OF THE STATE PROCUREMENT ACT.
6

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

8 SECTION 1. That Section 67-9213, Idaho Code, be, and the same is hereby
9 repealed.

10 SECTION 2. That Chapter 92, Title 67, Idaho Code, be, and the same is
11 hereby amended by the addition thereto of a NEW SECTION, to be known and des-
12 ignated as Section 67-9213, Idaho Code, and to read as follows:

13 67-9213. CONTRACTS IN VIOLATION OF PROVISIONS OF THE ACT. (1) Prior to
14 award of a contract, if it is determined administratively or in an admin-
15 istrative or judicial review authorized by this chapter that the proposed
16 award of a contract is in violation of this chapter, the solicitation or pro-
17 posed award shall be canceled or revised to comply with this chapter.

18 (2) After award of a contract, if it is determined in an administrative
19 or judicial review authorized by this chapter that the award of a contract is
20 in violation of this chapter, the following shall apply.

21 (a) If the bidder awarded the contract did not act fraudulently or in
22 bad faith:

23 (i) The contract may be ratified and affirmed by the director upon
24 a declaration of the administrator that immediate delivery of the
25 property is required by public exigencies and that the acquisition
26 of the property satisfies the standards established by the rules
27 of the division of purchasing for an emergency procurement. The
28 ratification shall limit the term of the ratified contract to no
29 more than six (6) months, and any ratification shall be submitted
30 to the board of examiners for approval;

31 (ii) The contract may be terminated by the director, and the
32 person awarded the contract shall be compensated for the actual
33 expenses reasonably incurred under the contract before termina-
34 tion, plus a reasonable profit. Unless determined by a court, the
35 reasonable profit due to the contractor shall be submitted to the
36 board of examiners for approval; or

37 (iii) The winning bidder may request return of any goods deliv-
38 ered under the contract that have not been used or distributed to
39 non-state parties, provided that in the event of a return of goods
40 already paid for, the director may recover the fair market value of
41 the returned goods. The director or the director's designee is au-

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DRELB033

- 1 thorized to negotiate the return of goods and recovery of payments
2 in the best interests of the state.
- 3 (b) If the bidder awarded the contract acted fraudulently or in bad
4 faith:
- 5 (i) The contract may be declared void by the director;
- 6 (ii) The contract may be ratified and affirmed by the director
7 upon a declaration of the administrator that immediate delivery of
8 the property is required by public exigencies and that the acqui-
9 sition of the property satisfies the standards established by the
10 rules of the division of purchasing for an emergency procurement.
11 The ratification shall limit the term of the ratified contract to
12 no more than six (6) months, and any ratification shall be submit-
13 ted to the board of examiners for approval. Ratification shall be
14 without prejudice to the state's right to any damages or remedy it
15 can prove under any theory, including, but not limited to, con-
16 tract or tort; or
- 17 (iii) The winning bidder may request return of any goods delivered
18 under the contract that have not been used or distributed to non-
19 state parties, provided that in the event of a return of goods al-
20 ready paid for, the director may recover the fair market value of
21 the returned goods. The director or the director's designee is au-
22 thorized to negotiate the return of goods and recovery of payments
23 in the best interests of the state.
- 24 (c) Under no circumstances shall a person, including a person challeng-
25 ing a solicitation or an award of a contract or a bidder awarded a con-
26 tract found in violation of this chapter, be entitled to consequential
27 damages in relation to a solicitation or an award of a contract under
28 this chapter, including consequential damages for lost profits, loss of
29 business opportunities or damage to reputation.
- 30 (d) Except where a contract is ratified, in all cases in which a con-
31 tract is declared void under paragraph (b) of this subsection, the state
32 shall endeavor to return those goods delivered under the contract that
33 have not been used or distributed to non-state parties. No further pay-
34 ments shall be made under the contract, and the state is entitled to re-
35 cover the greater of:
- 36 (i) The difference between payments made under the contract and
37 the actual expenses reasonably incurred under the contract before
38 the contract was voided;
- 39 (ii) The difference between payments under the contract and the
40 value to the state of the property delivered before the contract
41 was voided. The value of the property to the state shall be submit-
42 ted to the board of examiners for approval; or
- 43 (iii) If the state returned goods delivered under the contract,
44 the difference between payments made under the contract and the
45 costs to the contractor of such goods plus the actual expenses
46 reasonably incurred under the contract before the contract was
47 voided.
- 48 (e) In all cases in which a contract is declared void under paragraph
49 (b) of this subsection, the state shall be entitled to any damages it can

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1 prove under any theory including, but not limited to, contract and tort,
2 regardless of its ratification and affirmation of the contract.

3 (f) In the event of a refusal or delay when payment under paragraph (d)
4 or (e) of this subsection is demanded by the proper officer of the state
5 of Idaho, under whose authority such contract shall have been made or
6 entered into, every person so refusing or delaying, together with that
7 person's surety or sureties, shall be prosecuted at law for the recovery
8 of such moneys.

9 (3) If it is determined in administrative or judicial review authorized
10 by this chapter that an award or proposed award of a contract is in violation
11 of this chapter, and an employee or officer of the state acted fraudulently
12 or in bad faith, such employee or officer shall be subject to the provisions
13 of section 67-9233, Idaho Code, and chapters 4 and 5, title 74, Idaho Code, as
14 applicable.

15 (4) Nothing provided in this section shall limit the application of the
16 provisions of title 18, Idaho Code, or the prosecution of any person under
17 such provisions.

APPENDIX IV

Proposed Legislation

DRELB013

Procurement by State Institutions of Higher Education

DRAFT

DRELB013

LEGISLATURE OF THE STATE OF IDAHO
Sixty-fourth Legislature First Regular Session - 2017

IN THE _____

BILL NO. _____

BY _____

AN ACT

1 RELATING TO PROCUREMENT BY STATE INSTITUTIONS OF HIGHER EDUCATION; AMEND-
2 ING SECTION 67-9225, IDAHO CODE, TO PROVIDE THAT STATE INSTITUTIONS OF
3 HIGHER EDUCATION MUST PROCURE PROPERTY FROM AN OPEN CONTRACT EXCEPT UN-
4 DER CERTAIN CIRCUMSTANCES.
5

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

7 SECTION 1. That Section 67-9225, Idaho Code, be, and the same is hereby
8 amended to read as follows:

9 67-9225. PROCUREMENT BY STATE INSTITUTIONS OF HIGHER EDUCATION. (1) A
10 state institution of higher education may establish policies and procedures
11 for procuring property that shall be substantially consistent with the re-
12 quirements for procuring property as set forth in this chapter and that shall
13 be approved by the state board of education. When the state board of edu-
14 cation has approved such policies and procedures for a state institution of
15 higher education, the institution shall not be subject to the provisions of
16 this chapter, except as provided in subsection (2) of this section.

17 (2) When the state enters into an open contract, ~~no~~ a state institution
18 of higher education ~~shall fail to~~ must use such the open contract; ~~provided~~
19 ~~however, that if the,~~ or the institution may procure property to be acquired
20 ~~may be procured at equal or less expense to the institution from a vendor that~~
21 ~~is not party to the open contract, then the institution may, at the institu-~~
22 ~~tion's discretion, procure if the cost to the institution would be equal to~~
23 or less than the price of the property from the nonparty vendor under the open
24 contract.

APPENDIX V

Persons who presented to the
State Procurement Laws Interim Committee

Persons who presented to the committee (date of presentation)

1. April Renfro, Legislative Services Office (8.22.16)
2. Bob Perkins, Ada County (9.14.16; 11.17.16)
3. Brad Little, Lieutenant Governor (10.27.16)
4. Brian Kane, Office of the Attorney General (8.22.16; 10.27.16; 11.29.16)
5. Doug Robinson, NASCIO (10.27.16)
6. Elizabeth Bowen, Legislative Services Office (9.14.16; 11.17.16; 11.29.16)
7. Jennifer Saha, CompTIA (10.27.16)
8. Jeremy Chou, Givens Pursley LLP (10.27.16; 11.29.16)
9. Jordan Kroll, IT Alliance for Public Sector (10.27.16)
10. Julie Weaver, Office of the Attorney General (11.29.16)
11. Kate Haas, Kestrel West (11.17.16; 11.29.16)
12. Keith Watts, City of Meridian (9.14.16; 11.17.16)
13. Mike Nugent, Legislative Services Office (10.27.16)
14. Rakesh Mohan, Office of Performance Evaluations (8.22.16)
15. Robert Geddes, Department of Administration (8.22.16)
16. Robyn Lockett, Legislative Services Office (9.14.16; 10.27.16)
17. Sarah Hilderbrand, Division of Purchasing (8.22.16; 9.14.16; 10.27.16)
18. Valerie Bollinger, Division of Purchasing (9.14.16)