

Dear Senators McKENZIE, Pearce & Stennett, and  
Representatives LOERTSCHER, Anderson & Mary Lou Shepherd:

The Legislative Services Office, Research and Legislation, has received the enclosed rules of the Department of Administration:

**IDAPA 38.05.01 - Rules of the Division of Purchasing (Docket No. 38-0501-1001).**

Pursuant to Section 67-454, Idaho Code, a meeting on the enclosed rules may be called by the co-chairmen or by two (2) or more members of the subcommittee giving oral or written notice to Research and Legislation no later than fourteen (14) days after receipt of the rules' analysis from Legislative Services. The final date to call a meeting on the enclosed rules is no later than 10-26-10. If a meeting is called, the subcommittee must hold the meeting within forty-two (42) days of receipt of the rules' analysis from Legislative Services. The final date to hold a meeting on the enclosed rules is 11-24-10.

The germane joint subcommittee may request a statement of economic impact with respect to a proposed rule by notifying Research and Legislation. There is no time limit on requesting this statement, and it may be requested whether or not a meeting on the proposed rule is called or after a meeting has been held.

To notify Research and Legislation, call 334-4845, or send a written request to the address or FAX number indicated on the memorandum attached.



# Legislative Services Office

## Idaho State Legislature

*Serving Idaho's Citizen Legislature*

**Jeff Youtz**  
Director

### REVISED MEMORANDUM

**TO:** Rules Review Subcommittee of the Senate State Affairs Committee and the House State Affairs Committee

**FROM:** Research & Legislation Staff - Eric Milstead

**DATE:** October 12, 2010

**SUBJECT:** Rules of the Department of Administration – Division of Purchasing

#### **IDAPA 38.05.01 - Rules of the Division of Purchasing (Docket No. 38-0501-1001)**

The Division of Purchasing submits notice of proposed rulemaking at IDAPA 38.05.01 - Rules of the Division of Purchasing. The proposed rule makes a number of revisions, including the following:

- Defines the term “open contract” which provides that “a contract awarded by the state of Idaho through the division of purchasing to one (1) or more vendors who have agreed to allow all agencies to procure or purchase specified property under the terms and conditions set forth in the contract.”; and deletes the term “State or Statewide contract”. (See, Rule 011.26 and 011.46);
- Replaces the term “state contract” with the term “open contract” throughout the rule;
- Increases, from \$75,000 to \$100,000 small purchase exemption limits and professional services exemption limits where agencies can make purchases without a formal bid (See, Rule 041; 044.01 and 044.07);
- Provides that purchases in amounts less than \$10,000 may be acquired as each agency sees fit, in accord with good business practices and in the best interest of the state and if the property is not available under an “open contract”; (See, Rule 044.08);
- Provides for a pre-proposal contract and requires that such pre-proposal must be included in “request for proposals; (See, Rule 051.07 and Rule 070).

**Mike Nugent, Manager**  
Research & Legislation

**Cathy Holland-Smith, Manager**  
Budget & Policy Analysis

**Don H. Berg, Manager**  
Legislative Audits

**Glenn Harris, Manager**  
Information Technology

The agency notes that negotiated rulemaking “was not conducted because the substance and nature of the rule does not warrant negotiated rulemaking.”

The Division's proposed rule appears to be authorized pursuant to Sections 67-5226, 67-5717 and 67-5732, Idaho Code.

cc: Department of Administration  
Edith L. Pacillo, Deputy Attorney General  
Tim Mason, Administrator, Division of Purchasing

**IDAPA 38 - DEPARTMENT OF ADMINISTRATION**

**38.05.01 - RULES OF THE DIVISION OF PURCHASING**

**DOCKET NO. 38-0501-1001**

**NOTICE OF RULEMAKING - PROPOSED RULE**

**AUTHORITY:** In compliance with Section 67-5221(1), Idaho Code, notice is hereby given that this agency has initiated proposed rulemaking procedures. The action is authorized pursuant to Sections 67-5717(11) and 67-5732, Idaho Code.

**PUBLIC HEARING SCHEDULE:** Public hearing(s) concerning this rulemaking will be scheduled if requested in writing by twenty-five (25) persons, a political subdivision, or an agency, not later than October 20, 2010.

The hearing site(s) will be accessible to persons with disabilities. Requests for accommodation must be made not later than five (5) days prior to the hearing, to the agency address below.

**DESCRIPTIVE SUMMARY:** The following is the required finding and concise statement of its supporting reasons for adopting a temporary rule and a nontechnical explanation of the substance and purpose of the proposed rulemaking:

Update rules to require federal contracting qualification of a vendor submitting a bid proposal; increase small purchase exemption limit and professional services exemption limit under which agencies can purchase without formal bid process, from \$75,000 to \$100,000; increase small purchase limit from \$5,000 to \$10,000; clarify mandatory use of open contracts; and establish a mandatory pre-proposal conference for vendors to further communication and clarify Request for Proposals' requirements.

**FEE SUMMARY:** The following is a specific description of the fee or charge imposed or increased: None.

**FISCAL IMPACT:** The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year: N/A

**NEGOTIATED RULEMAKING:** Pursuant to Section 67-5220(2), Idaho Code, negotiated rulemaking was not conducted because the substance and nature of the rules does not warrant negotiated rulemaking.

**INCORPORATION BY REFERENCE:** Pursuant to Section 67-5229(2)(a), Idaho Code, the following is a brief synopsis of why the materials cited are being incorporated by reference into this rule: N/A

**ASSISTANCE ON TECHNICAL QUESTIONS, SUBMISSION OF WRITTEN COMMENTS:** For assistance on technical questions concerning the temporary and proposed rule, contact Edith L. Pacillo, Deputy Attorney General, Department of Administration at (208) 332-1832.

Anyone may submit written comments regarding the proposed rulemaking. All written comments must be directed to the undersigned and must be delivered on or before October 27, 2010.

DATED this 8th day of September, 2010.

Edith L. Pacillo  
Deputy Attorney General  
Department of Administration  
650 W. State Street  
P.O. Box 83720  
Boise, Idaho 83720-0303  
Telephone: (208) 332-1832

THE FOLLOWING IS THE PROPOSED TEXT FOR DOCKET NO. 38-0501-1001

**000. LEGAL AUTHORITY.**

The following rules are promulgated in accordance with Sections 67-5717(11); ~~and~~ 67-5732 ~~and 67-2356(1)~~, Idaho Code, by the administrator of the division of purchasing. ~~(3-15-02)~~(    )

**(BREAK IN CONTINUITY OF SECTIONS)**

**011. DEFINITIONS.**

- 01. Acquisition.** The process of procuring or purchasing property by the state of Idaho. (3-15-02)
- 02. Administrator.** The administrator for the division of purchasing. The administrator is the chief buyer. (3-15-02)
- 03. Agency.** All offices, departments, divisions, bureaus, boards, commissions and institutions of the state, including the public utilities commission, but excluding other legislative and judicial branches of government, and excluding the governor, the lieutenant-governor, the secretary of state, the state controller, the state treasurer, the attorney general, and the superintendent of public instruction. (3-15-02)
- 04. Alternate.** Property or services that are not at least a functional equal in features, performance or use of the brand, model or specification designated as the standard. (3-15-02)
- 05. Bid.** A written offer that is binding on the bidder to perform a contract to purchase or supply property or services in response to an invitation to bid. (3-15-02)
- 06. Bidder.** A vendor who has submitted a bid or quotation on specific property. (3-15-02)
- 07. Brand Name or Equal Specification.** This means a specification that uses a brand name to describe the standard of quality, performance or other characteristics being solicited and that invites the submission of equivalent products. (3-15-02)
- 08. Brand Name Specification.** This means a specification calling for one (1) or more products by manufacturers' names or catalogue numbers. (3-15-02)
- 09. Buyer.** An employee of the division of purchasing designated as a buyer, contract administrator, purchasing agent, contracting officer, or similar designation by the administrator, including, where appropriate, the administrator and other management personnel. The term also includes authorized employee(s) of a purchasing activity. (3-15-02)
- 10. Component.** An item of property normally assembled or incorporated with other items into a unified productive whole at the site of use, which items belong to functional classes that may be interchangeable units of similar function but differing operational or productive capabilities. (3-15-02)
- 11. Concession Services.** The granting by the purchasing activity of a right, franchise, authority, property interest or option to a contractor, regardless of whether an expenditure of state or other funds occurs. (3-15-02)
- 12. Consultant Services.** This means work, rendered by either individuals or firms who possess specialized knowledge, experience, and expertise to investigate assigned problems or projects and to provide counsel, review, design, development, analysis or advice in formulating or implementing programs or services or

improvements in programs or services, including but not limited to such areas as management, personnel, finance, accounting and planning. The consultant's services, opinions or recommendations will be performed according to the consultant's methods without being subject to the control of the agency except as to the result of the work. (3-15-02)

**13. Contract.** Contract means any state written agreement, including a solicitation or specification documents and the accepted portions of the solicitation, for the acquisition of property. Generally, the term is used to describe term contracts, definite or indefinite quantity or delivery contracts or other acquisition agreements whose subject matter involves multiple payments and deliveries. A contract shall also include any amendments mutually agreed upon by both parties. (3-15-02)

**14. Contractor.** A bidder or offeror who has been awarded an acquisition contract. (3-15-02)

**15. Director.** The chief officer of the department of administration. (3-15-02)

**16. Division.** The division of purchasing of the department of administration as established by Section 67-5714, Idaho Code. Whenever a purchase is made by the division on behalf of another agency, the division shall be deemed to be acting as the agent for such agency. (3-15-02)

**17. Document.** When used in these rules, may include electronic documents. (3-15-02)

**18. Equal.** Property that meets or exceeds the quality, performance and use of the brand, model or specifications in the invitation to bid, request for proposals or request for quotation. (3-15-02)

**19. Equipment.** Items of personal property that have a normal useful life expectancy or measurable service life of two (2) or more years. (3-15-02)

**20. Formal Sealed Procedure.** Procedure by which the buyer solicits competitive sealed bids or competitive sealed proposals by means of an invitation to bid or request for proposals. (3-15-02)

**21. Goods.** Items of personal property including concession services, not qualifying as equipment, parts or supplies. (3-15-02)

**22. Information Technology Property.** Includes, but is not limited to, all present forms of computer hardware, computer software or services used or required for automated data processing, computer related office automation or telecommunications. (3-15-02)

**23. Invitation to Bid.** Means all documents, whether attached or incorporated by reference, utilized for soliciting formal sealed bids. (3-15-02)

**24. Lowest Responsible Bidder.** The responsible bidder whose bid conforms in all material respects to the invitation to bid or request for proposals and reflects the lowest acquisition price to be paid by the state; except that when specifications are valued or comparative performance examinations 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. (3-15-02)

**25. Offeror.** A vendor who has submitted a proposal in response to a request for proposals for property to be acquired by the state. (3-15-02)

**26. Open Contract.** A contract awarded by the state of Idaho through the division of purchasing to one (1) or more vendors who have agreed to allow all agencies to procure or purchase specified property under the terms and conditions set forth in the contract. ( )

**267. Person.** Any business, individual, union, committee, club or other organization or group of individuals, not including a state or public agency. (3-15-02)

**278. Procurement.** The process of obtaining property for state use by lease, rent or any manner other than by purchase or gift. (3-15-02)

**289. Professional Services.** Work rendered by an independent contractor whose occupation is the rendering of such services and who has a professional knowledge of some department of learning or science used by its practical application to the affairs of others or in the practice of an art founded on it, including but not limited to accounting and auditing, legal, medical, nursing, education, engineering, actuarial, architecture, veterinarian, and research. The knowledge is founded upon prolonged and specialized intellectual training that enables a particular service to be rendered. The word “professional” implies professed attainments in special knowledge as distinguished from mere skills. (3-15-02)

**2930. Property.** Goods, services, parts, supplies and equipment, both tangible and intangible, including, but nonexclusively, designs, plans, programs, systems, techniques and any rights and interests in such property. Includes concession services and rights to access or use state property or facilities for business purposes. (3-15-02)

**301. Proposal.** A written response including pricing information to a request for proposals that describes the solution or means of providing the property requested and which proposal is considered an offer to perform a contract in full response to the request for proposals. Price may be an evaluation criterion for proposals, but will not necessarily be the predominant basis for contract award. (3-15-02)

**342. Public Agency.** Has the meaning set forth in Section 67-2327, Idaho Code. (3-15-02)

**323. Purchase.** The act of acquiring or procuring property for state use or the result of an acquisition action. (3-15-02)

**334. Purchase Order.** See also definition of Contract, typically used to acquire property. It is a notification to the contractor to provide the stated property, required material, equipment, supplies or services under the terms and conditions set forth in the purchase order. It may include the form of the state’s acceptance of a bidder’s proposal or bid. (3-15-02)

**345. Purchasing Activity.** The division or an agency delegated that authority by the administrator for the division. (3-15-02)

**356. Quotation.** An offer to supply property in response to a request for quotation and generally used for small or emergency purchases. (3-15-02)

**367. Request for Proposals.** Includes all documents, whether attached or incorporated by reference, utilized for soliciting competitive proposals and is generally utilized in the acquisition of services or complex purchases. (3-15-02)

**378. Request for Quotation.** The document, form or method generally used for purchases solicited in accordance with small purchase or emergency purchase procedures. (3-15-02)

**389. Requisition.** A standard state or agency specific form that serves as a purchasing request and that requests that the purchasing activity acquire the stated requirements. (3-15-02)

**3940. Sealed.** Includes bids electronically sealed and submitted in accordance with requirements or standards set by the division and bids manually sealed and submitted. (3-15-02)

**401. Sealed Procedure Limit.** That dollar amount, as established by these rules, above which the formal sealed bid procedure will be used. Said amount may be lowered by the administrator to maintain full disclosure or competitive purchasing or otherwise achieve overall state efficiency and economy. (3-15-02)

**442. Services.** Personal, general, professional or consultant services, in excess of personnel regularly employed for whatever duration and/or covered by personnel system standards, for which bidding or competition is not prohibited or made impractical by statute, rules and regulations or generally accepted ethical practices. (3-15-02)

**423. Small Purchase.** An acquisition that costs less than the sealed procedure limit. (3-15-02)

~~43~~**44.** **Solicitation.** Means an invitation to bid, a request for proposals or other document issued by the purchasing activity for the purpose of soliciting bids, proposals, or offers to perform a contract. (3-15-02)

~~44~~**45.** **Specifications.** The explicit requirements furnished with an invitation to bid, request for proposals or request for quotations upon which a purchase order or contract is to be based. Unless specifically provided in a solicitation, specifications do not include solicitation conditions or contractual terms including, without limitation, items such as vendor qualification requirements, bid closing times, delivery time or payment terms. (3-15-02)

~~45~~**46.** **State.** This means the state of Idaho including each agency unless the context implies other states of the United States. (3-15-02)

~~46.~~ ~~**State or Statewide Contract.** Contracts for property or services administered by the division on behalf of or for the benefit of an agency. Statewide contracts apply to more than one (1) agency. The contract document will identify the conditions under which usage by agencies is required.~~ (3-15-02)

**47.** **Supplies.** Items of personal property having an expendable quality or during their normal use are consumed and that require or suggest acquisition in bulk. (3-15-02)

**48.** **Telecommunications.** Means all present and future forms of hardware, software or services used or required for transmitting voice, data, video or images. (3-15-02)

**49.** **Vendor.** A person or entity capable of supplying property to the state. (3-15-02)

**50.** **Written.** When used in these rules, may include an electronic writing. (3-15-02)

**(BREAK IN CONTINUITY OF SECTIONS)**

**031. COOPERATIVE PURCHASING POLITICAL SUBDIVISIONS.**

The various bid statutes relating to municipal corporations, school districts, and counties may authorize these political subdivisions to utilize any contract resulting from a state bid process. A public agency may use state open contracts as authorized by statute and the terms of the state open contract. (3-15-02)(    )

**(BREAK IN CONTINUITY OF SECTIONS)**

**041. PROCEDURE FOLLOWED IN THE SOLICITATION OF BIDS AND PROPOSALS.**

Except as otherwise provided, the acquisition of property exceeding seventy five one hundred thousand dollars (\$75100,000) (the sealed procedure limit) shall be by the formal sealed procedure. All vendors submitting responses to solicitations issued by the state must be qualified. All vendors are qualified unless disqualified as defined by Section 67-5730, Idaho Code. (4-2-08)(    )

**042. EXCEPTIONS TO FORMAL SEALED PROCEDURE.**

Purchases meeting the following criteria need not be purchased by the formal sealed procedure: (3-15-02)

**01. Emergency Purchases.** Emergency purchases as authorized by Section 67-5720, Idaho Code, and Section 43. (3-15-02)

**02. Small Purchases.** Small purchases, unless the administrator specifically requires a formal sealed procedure, made in accordance with Section 044. (3-15-02)

**03. Sole Source Purchases.** Sole source purchases made through direct solicitation with documented source selection, in accordance with Section 67-5720, Idaho Code, and Section 045. (3-15-02)

**04. Reverse Auctions.** Purchases through reverse public auctions as authorized by Section 67-5720, Idaho Code. (3-15-02)

**05. Federal Government Acquisitions.** Acquisitions from the United States of America or any agency thereof. (3-15-02)

**06. Rehabilitation Agency Acquisitions.** Acquisitions of property that is provided by non-profit corporations and public agencies operating rehabilitation facilities serving the handicapped and disadvantaged and that is offered for sale at fair market price as determined by the administrator in accordance with these rules. (3-15-02)

**07. Correctional Industries.** Purchases of road or street signs, metal motor license plates, wearing apparel, furniture, articles or containers for state use not for resale on the open market or any other property marketed directly by Correctional Industries in accordance with Section 20-245, Idaho Code. (3-15-02)

**08. Purchases from General Services Administration Federal Supply Contractors.** Acquisitions of property may be made from General Services Administration federal supply contractors without the use of competitive bid. The administrator shall determine whether such property meets the purchasing activity's requirements and whether the price of acquisition is advantageous to the state. The administrator shall commemorate the determination in a written statement that shall be incorporated in the applicable file. If the administrator determines that the acquisition of property from General Services Administration contractors is not advantageous to the state, the acquisition shall be in accordance with competitive bidding procedures and requirements. (3-15-02)

**09. Existing ~~State or Statewide~~ Open Contracts.** Supplies, services or other property available under these contracts shall be purchased under such contracts in accordance with the provisions or requirements for use thereof. ~~(3-15-02)~~( )

**10. Exempt Purchases.** By written policy the administrator may exempt from the formal sealed procedure or the requirement for competitive acquisition that property for which bidding is impractical, disadvantageous or unreasonable under the circumstances. (3-15-02)

**a.** Examples include, but are not limited to: (3-15-02)

**i.** Special market conditions; (3-15-02)

**ii.** Property requiring special contracting procedures due to uniqueness; (3-15-02)

**iii.** Legal advertising, publication or placement of advertisements by state agency personnel directly with media sources; or (3-15-02)

**iv.** Services for which competitive solicitation procedures are impractical. (3-15-02)

**b.** Such policy shall describe the property exempted, the duration of the exemption, and any other requirements or circumstances appropriate to the situation. (3-15-02)

**(BREAK IN CONTINUITY OF SECTIONS)**

**044. SMALL PURCHASES.**

**01. General.** Small purchases are those purchases or procurements expected to cost ~~seventy five one~~ hundred thousand dollars (~~\$75~~100,000) or less. Costs are determined based on the following: ~~(4-2-08)~~( )

**a.** One-time purchases of property; or (3-15-02)

**b.** Total cost of a contract for services, including renewal or extension periods. (3-15-02)

**02. Splitting of Requirements.** Acquisition requirements shall not be artificially divided to avoid bid statutes, rules or policies. (3-15-02)

**03. Procedure.** Unless impractical or impossible and documented in the file, these small purchase procedures require the acquisition to be publicly posted. Except as otherwise provided in this rule, no less than three (3) vendors having a significant Idaho presence as defined by Section 67-2349, Idaho Code, shall be solicited to submit quotations. Award shall be made to the responsible and responsive bidder offering the lowest acceptable quotation. The purchasing file will be fully documented for unacceptable quotations. Should it be impractical or impossible to solicit three (3) vendors, the file shall be fully documented and every effort should still be made to obtain the most favorable terms, conditions and price possible. (3-15-02)

**04. Form of Request for Quotation.** Unless otherwise prohibited by the buyer, the request for quotation and the quotation may be written, oral, electronic, telephonic or facsimile. (3-15-02)

**05. Quoting Time.** The quoting time shall be determined by the buyer and should provide sufficient time for the vendor to prepare and return a quotation. The amount of time shall take into consideration such factors as complexity, urgency, availability of property and the number and location of vendors. (3-15-02)

**06. Statewide Open Contracts.** Property available under single agency or statewide open contracts shall be purchased under such contracts and not as a small purchase under this rule unless otherwise authorized by the administrator. (~~3-15-02~~)(    )

**07. Professional, Consultant, and Information Technology Services.** Professional, consultant, and information technology services acquired under this rule, where the services are reasonably expected to cost ~~seventy-five one hundred~~ thousand dollars (~~\$75,100,000~~) or less through a fixed price/not to exceed price contract for a non-renewable term not to exceed one (1) year, may be acquired as each agency sees fit, in accordance with good business practice and in the best interest of the state, and if the service is not available under an open contract. (~~4-2-08~~)(    )

**08. Purchases in Amounts Less Than Five Ten Thousand Dollars.** If the property to be acquired is expected to cost less than ~~five ten~~ thousand dollars (~~\$510,000~~), it may be acquired as each agency sees fit, in accordance with good business practice and in the best interest of the state, and if the property is not available under an open contract. (~~3-15-02~~)(    )

**(BREAK IN CONTINUITY OF SECTIONS)**

**051. CONTENT OF THE INVITATION TO BID OR REQUEST FOR PROPOSALS.**

The following shall be included in an invitation to bid or a request for proposals: (3-15-02)

**01. Submission Information.** Information regarding the applicable opening date, time and location. (3-15-02)

**02. Specifications.** Specifications developed in accordance with these rules including, if applicable, scope of work. (3-15-02)

**03. Contract Terms.** Terms and conditions applicable to the contract. (3-15-02)

**04. Evaluation Criteria.** Any evaluation criteria to be used in determining property acceptability. (3-15-02)

**05. Trade-In Property.** If trade-in property is to be included, a description of the property and location where it may be inspected. (3-15-02)

**06. Incorporation by Reference.** A brief description of any documents incorporated by reference that specifies where such documents can be obtained. (3-15-02)

**07. Pre-Proposal Conference.** The date, time and location of the pre-proposal conference must be included in the Request for Proposals. ( )

**(BREAK IN CONTINUITY OF SECTIONS)**

**062. -- ~~070~~69. (RESERVED).**

**070. PRE-PROPOSAL CONFERENCE.**

All Request for Proposals' solicitations will have a pre-proposal conference for vendors and will be conducted by the procurement team and project personnel. The conference will consist of a general overview of the procurement process as well as the scope of work and requirements of the subject Request for Proposal. The procurement team will allow attendees to submit written questions and may provide an opportunity for a verbal question and answer period, provided, however, that only questions submitted and answered in written form and posted to the state's eProcurement system as an amendment to the Request for Proposal, will have any force or effect. ( )