

§ 67-9213. Contracts in Violation of Provisions of the Act

(1) If, prior to award of a contract it is determined on administrative or judicial review that a solicitation or proposed award of a contract is in violation of this chapter, the solicitation or proposed award shall be cancelled or revised to comply with this chapter.

(2) If, after award of a contract it is determined on administrative or judicial review that a solicitation or award of a contract is in violation of this chapter, the following shall apply:

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

(i) The contract may be ratified and affirmed by the director upon a declaration of the administrator that immediate delivery of the property is required by public exigencies and that the acquisition of the property satisfies the standards established by the rules of the division of purchasing for an emergency purchase. The ratification shall limit the term of the ratified contract to no more than six (6) months, and any ratification shall be submitted to the Board of Examiners for approval; or,

(ii) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract before termination, plus a reasonable profit.

(b) If the bidder awarded the contract acted fraudulently or in bad faith:

(i) The contract may be declared null and void; or

(ii) The contract may be ratified and affirmed by director upon a declaration of the administrator that immediate delivery of the property is required by public exigencies and that the acquisition of the property satisfies the standards established by the rules of the division of purchasing for an emergency purchase. The ratification shall limit the term of the ratified contract to no more than six (6) months, and any ratification shall be subject to approval by the Board of Examiners. Ratification shall be without prejudice to the state's rights to any appropriate damages.

(c) Under no circumstances shall a person, including a person challenging a solicitation or award of a contract or a bidder awarded a contract found in violation of this chapter, be entitled to consequential damages in relation to a solicitation or award of a contract under this chapter, including consequential damages for lost profits, loss of business opportunities or damage to reputation.

(d) In all cases where a contract is declared null and void under subsection 2(b) of this section, the state shall endeavor to return those goods delivered under the contract that have not been used or distributed to non-state parties. No further payments shall be made under the contract and the state is entitled to recover the greater of:

(i) The difference between payments made under the contract and the actual expenses reasonably incurred under the contract before the contract was voided; or

(ii) The difference between payments under the contract and the value to the state of the property delivered before the contract was voided. The value of the property to the state shall be determined by the division manager, of the legislative audits division, in her sole discretion.

(e) In all cases where a contract is declared null and void under subsection 2(b) of this section, the state shall be entitled to any damage it can prove under any theory including, but not limited to, contract and tort regardless of its ratification and affirmation of the contract.

(f) In the event of a refusal or delay when payment under subsection 2(d) or (e) of this section is demanded by the proper officer of the state of Idaho, under whose authority such contract shall have been made or entered into, every person so refusing or delaying, together with that person's surety or sureties, shall be prosecuted at law for the recovery of such monies.

(3) If it is determined on administrative or judicial review that a solicitation or proposed award of a contract is in violation of this chapter and an employee or official of the state act fraudulently or in bad faith, such official or employee shall be subject to the provisions of section 67-9233, Idaho Code and title 74 chapters 4 and 5, Idaho Code.

Discussion

The American Bar Association Model Procurement Code, Article 9, Part B (2000) addresses the issue of solicitations and contracts in violation of the Model Procurement Code. A copy of those provisions is attached. We have also reviewed many of the provisions of the states that have adopted the Model Procurement Code and considered the balance it offers between taxpayer interests and vendor interests. The proposed language is based on this review.

Subsection 1 is taken directly from the Model Procurement Code and addresses consequences when a violation is discovered before contract award. The consequences set forth in subsection 2(a) to (c) address when a violation is discovered after award and are also based on the Model Procurement Code. Subsections 2(a)(i) and (b)(ii) have been modified from the Model Procurement Code to provide that a party other than the purchasing administrator may ratify a contract in violation of the chapter, to establish that only those contracts meeting the criteria for an emergency contract may be ratified, and to establish a shortened term for ratified contracts. This provides additional parameters and limits on the ratification option granted in the Model Procurement Code.

Subsections 2(d) and 2(e) are based on Hawaii's law, which follows the Model Procurement Code and adds additional clarification. Subsection 2(f) is based on the current Idaho provision. Section 3 is included as a clarification that a violation of the chapter by a state employee or officer is addressed by the ethics in procurement provisions and other ethics provisions currently in Idaho Code and is thus not a part of this language or the Model Procurement Code's provisions it is based on.

ARTICLE 9 – LEGAL AND CONTRACTUAL REMEDIES

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Part B – Solicitations or Awards in Violation of Law

§9-201 Applicability of this Part.

The provisions of this Part apply where it is determined administratively, or upon administrative or judicial review, that a solicitation or award of a contract is in violation of law.

§9-202 Remedies Prior to an Award.

If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- (a) cancelled; or
- (b) revised to comply with the law.

§9-203 Remedies After an Award.

If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

- (a) if the person awarded the contract has not acted fraudulently or in bad faith:
 - (i) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the [State]; or
 - (ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.
- (b) if the person awarded the contract has acted fraudulently or in bad faith:
 - (i) the contract may be declared null and void; or
 - (ii) the contract may be ratified and affirmed if such action is in the best interests of the (State], without prejudice to the [State's] rights to such damages as may be appropriate.