

AN ACT

RELATING TO THE PROCUREMENT OF INFORMATION TECHNOLOGY GOODS AND SERVICES; AMENDING TITLE 67, IDAHO CODE, TO PROVIDE LEGISLATIVE INTENT REGARDING THE PROCUREMENT OF INFORMATION TECHNOLOGY; DEFINITIONS OF HARDWARE, SOFTWARE AND TECHNOLOGY SERVICES; AUTHORITY FOR TECHNOLOGY PROCUREMENT; APPROVAL PROCESS FOR TECHNOLOGY PROCUREMENT; SOLICITATION PROCESS FOR TECHNOLOGY PROCUREMENT; PROCESS FOR EXEMPTIONS FROM OPEN CONTRACTS; MISCELLANEOUS PROVISIONS; AND CERTAIN TERMS AND CONDITIONS FOR TECHNOLOGY CONTRACTS.

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

SECTION 1.

That NEW SECTION 67-9301, Idaho Code, be added to read as follows:

LEGISLATIVE INTENT. The legislature recognizes that the unique nature of information technology and technology-related services requires a different procurement process for those things. Information technology is a rapidly changing industry, and the state must adapt its procurement strategies and standard terms to reflect that evolution. An information technology driven procurement strategy will ensure efficient procurement of information technology that best meets agency needs while considering the total cost of ownership over time.

SECTION 2.

That NEW SECTION 67-9302, Idaho Code, be added to read as follows:

As used in this act:

(1) "Hardware" means physical technology (i.e., equipment) used to process, manage, store, transmit, receive, or deliver information. This term also includes telephony products and any system based on emerging and future telecommunications technologies.

(2) "Lowest responsible bidder" means the responsible bidder whose bid reflects the lowest total cost of ownership over time, except that specifications of a solicitation may announce other methods, such as comparative performance evaluations, by which the agency will evaluate a response to determine the lowest responsible bidder.

(3) "Small technology purchases" means a purchase or rental of hardware, software, and/or technology services that is estimated to be less than \$250,000.

(3) "Software" means non-physical technology used to process, manage, store, transmit, receive, or deliver information. The term also includes all supporting documentation, media on which the software may

be contained or stored, related materials, modifications, versions, upgrades, enhancements, updates, or replacements.

(4) "Technology services" means all the services, functions, and activities that facilitate the design, implementation, creation, or use of software, hardware, or telephony products. The term includes data acquisition, seat management, staffing augmentation, and maintenance. The term also encompasses subscription services, including emerging and future technologies such as cloud based computing.

SECTION 3.

That NEW SECTION 67-9303, Idaho Code, be added to read as follows:

(1) AUTHORITY GRANTED. Notwithstanding any provision of this act to the contrary, acquisitions shall comply with Title 67, Chapter 92, Idaho Code. Agencies shall have authority to procure hardware, software and technology services as defined in this act. Authority to procure under this section is independent of an agency's delegated authority granted under 67-9206, Idaho Code. The Idaho Technology Authority (ITA), pursuant to 67-5745, Idaho Code, shall exercise general supervision over the procurement of all hardware, software, and technology services. Any officer, institution or entity that is excluded from the definition of "agency" under section 67-9203, Idaho Code may procure hardware, software and technology services under the processes and terms governed by this act.

(2) APPROVAL OF ACQUISITION. The ITA shall approve all acquisitions of hardware, software and technology services that exceed the value of a small technology purchase. An agency must receive approval prior to issuing a solicitation.

- (a) When submitting an acquisition for approval, an agency shall:
- (i) certify that there are sufficient funds or balance in appropriations out of which the amount of the requisition may be lawfully paid, except as provided in section 67-9221(3), Idaho Code;
 - (ii) conduct an analysis of the need and the ability of the proposed equipment and/or services to meet those needs;
 - (iii) certify that the analysis is complete and, based on that analysis, the proposed acquisition maximizes value to the state considering the total cost of ownership over time;
 - (iv) submit a business case for the acquisition;
 - (v) submit proposed solicitation specifications.

(b) When approving an acquisition, the ITA shall ensure compliance with:

- (i) the agency's budget to confirm that sufficient funds exist to lawfully pay for the acquisition;
- (ii) the agency's and user's business and service needs;

- (iii) the agency's information technology plan;
- (iv) the project management requirement, if applicable;
- (v) applicable cyber security standards; and
- (vi) other standards as established in rule in accordance with the act.

(3) NOTIFICATION OF ACQUISITION. Agencies must notify the ITA of all small technology purchases. The ITA may not require a business case for small technology purchases.

(4) ARTIFICIAL DIVISION. Purchase requirements for hardware, software, and technology services may not be artificially divided so as to constitute a small technology purchase under this act.

(5) BUSINESS CASE. The business case analysis required under this section shall include, but not limited to, the following:

- (i) a statement of work to be done and existing work to be modified or displaced;
- (ii) cost of system development and conversion effort, including system analysis and programming costs, establishment of master files, testing, documentation, special equipment cost and all other costs, including overhead;
- (iii) savings or added operating costs that will result from proposed acquisition;
- (iv) other advantages or reasons that justify the procurement; and
- (v) source of funding, including ongoing costs.

(6) PROJECT MANAGEMENT. All proposed contracts for technology services exceeding an amount to be determined in rule shall have a project manager or project management office. The contractor may not also serve in project management.

SECTION 4.

That NEW SECTION 67-9304, Idaho Code, be added to read as follows:

- (1) SOLICITATION. Upon approval from the ITA, the requesting agency shall issue a solicitation. However, the agency may use the Division of Purchasing to issue a solicitation or to advise on the solicitation. The requesting agency may contract with a qualified consulting firm in the field of information technology as necessary. The requesting agency does not need to submit a requisition for property to the Division of Purchasing to issue a solicitation.
- (2) The solicitation may identify contractual terms or conditions that the agency reserves, in a request for proposal, for negotiation with

bidders. The solicitation may also request that bidders propose contractual terms and conditions that relate to subject matter reasonably identified in the request for proposals.

- (3) The solicitation shall identify the manner the agency will use to award the contract, including but not limited to negotiations with the highest ranked responding vendor, competitive negotiations, a multiple-tiered competition designed to identify a class of bidders that fall within a competitive range.
- (4) As provided in the solicitation or in written addenda issued thereunder, the agency may conduct site tours, demonstrations, individual or group discussions and other informational activities with proposers before or after the opening of proposals for the purpose of clarification to ensure full understanding of, and responsiveness to, the solicitation requirements or to consider and respond to requests for modifications of the proposal requirements. The agency shall use procedures designed to accord bidders fair and equal treatment with respect to any opportunity for discussion and revision of proposals.

SECTION 5.

That NEW SECTION 67-9305, Idaho Code, be added to read as follows:

- (1) OPEN CONTRACTS. Agencies may acquire from open contracts for purchases of hardware, software and technology services.

SECTION 6.

That NEW SECTION 67-9306, Idaho Code, be added to read as follows:

- (1) MULTIPLE AWARDS. An agency may award a contract to two (2) or more bidders to furnish the same or similar hardware, software or technology services. When a contract has been awarded to two (2) or more bidders in accordance with this act, a state agency shall make purchases from the contractor who is the lowest responsible bidder.
- (2) PERFORMANCE BONDS. Performance bonds may not be required of a contractor for hardware, software or technology services.

- (3) RULEMAKING. The Idaho Technology Authority may establish rules necessary to carry out this act.

SECTION 7.

That Section 67-9307, Idaho Code, be, and the same is hereby amended to read as follows:

(1) TERMS AND CONDITIONS. Information technology contracts subject to the provisions of this section shall be subject to certain terms and conditions as set forth in this act. All other terms may be negotiated. A response to a request for proposal may not be disqualified or otherwise deemed non-responsive on the basis of a request for negotiated, different or additional terms.

(2) Limitation of Liability. All contracts subject to the provisions of this section shall include a limitation on the contractor's liability to the State for damages. 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. The amount of liability shall be determined based on the nature of the information technology goods or services covered by the contract; however, there shall be a presumptive limitation of no more than two times the value 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) Termination for cause. All contracts subject to the provisions of this section shall include a bilateral right of termination for cause. In addition to penalties imposed by 67-2302, Idaho Code, both parties shall have the right to terminate for material breach, after adequate notice and reasonable opportunity to cure. A party acting in bad faith may not enforce its right to terminate granted under this subsection. Nothing in this subsection affects a party's right of action for fees or damages.

(4) Warranties. All contracts subject to the provisions of this section shall include uniform information technology warranties, to be determined in rulemaking by the Idaho Technology Authority. The uniform information technology warranties shall include, but are not limited to the following:

- (a) termination of a warranty on information technology services when the services ends;
- (b) indemnification of a contractor for third-party disruption or unauthorized third-party access to an information technology service;
- (c) clear delineation of contractor and third party warrant when the contractor provides third party hardware; and
- (d) relief of liability for a contractor if a party other than the contract misuses, modifies or damages a product that would otherwise be warranted by the contractor.

(5) Intellectual Property Ownership. All contracts subject to the provisions of this section shall include a term of project ownership appropriate for the type of information technology governed by the contract. The ownership term shall establish which party owns the project materials delivered to the State and if a contractor retains the ownership of existing but delivered project materials. A contractor may retain ownership but grant the State a license agreement for the project materials. Licensing agreements may also be granted for information technology service contracts.