

MINUTES
SENATE STATE AFFAIRS COMMITTEE

DATE: Monday, January 23, 2017

TIME: 8:00 A.M.

PLACE: Room WW55

MEMBERS PRESENT: Chairman Siddoway, Vice Chairman Hagedorn, Senators Davis, Hill, Winder, Lodge, Lakey, Stennett, and Buckner-Webb

ABSENT/ EXCUSED: None

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman Siddoway** called the Senate State Affairs Committee (Committee) to order at 8:07 a.m. with a quorum present and announced the agenda would be reordered because some Committee members had been delayed due to traffic and weather.

VOTE ON GUBERNATORIAL APPOINTMENTS: **The Gubernatorial reappointment of Paul Kjellander to the Public Utilities Commission.**

Senator Stennett moved to send the Gubernatorial reappointment of Paul Kjellander to the Public Utilities Commission to the Senate floor with the recommendation that he be confirmed by the Senate. **Senator Winder** seconded the motion. The motion carried by **voice vote**.

VOTE ON GUBERNATORIAL APPOINTMENTS: **The Gubernatorial appointment of Chris Jensen as Administrator for the Division of Building Safety.**

Senator Winder moved to send the Gubernatorial reappointment of Chris Jensen as administrator for the Division of Building Safety to the Senate floor with the recommendation that he be confirmed by the Senate. **Senator Buckner-Webb** seconded the motion. The motion carried by **voice vote**.

GUBERNATORIAL APPOINTMENTS: **The reappointment of Dr. Gregory J. Schade to the State Building Authority.**

Dr. Gregory J. Schade stated he was a retired orthodontist and was reappointed to the State Building Authority (Authority). **Dr. Schade** explained he has been on the board for six years. There has not been a lot of activity over the last year; in prior years there was a lot of activity. **Dr. Schade** said he enjoys being on the Authority because they help finance State projects.

Senator Winder asked Dr. Schade to describe a project that was important. **Dr. Schade** said the new parking garage was an interesting project to follow; it looks good, is in place, and the facility was needed. **Dr. Schade** said he is from Nampa and then Boise. He attended the University of Idaho, Northwestern Dental School, and was an Army dentist. He came back to Boise in 1972. His practice was in Boise and he was active in the community. He also was an active member of various professional associations.

GUBERNATORIAL APPOINTMENTS: The reappointment of E. Robert (Bob) Mooney to the Idaho Energy Resources Authority (IERA).

Bob Mooney, Executive Director of the IERA, stated he is a professional engineer with more than 50 years of experience. IERA was formed in 2005; prior to that time municipals, cooperatives, and investor owned utilities couldn't finance and jointly own electric facilities for transmission and generation. Since IERA's formation, **Mr. Mooney** explained that he has been the chairman for two five-year terms and is the current executive director. He is looking forward to continuing the progress IERA has made. IERA enables the \$50 million wind project near Idaho Falls. Two years ago, IERA put together a seven-year lease for Bonneville Power Administration that benefits Idaho consumers. **Mr. Mooney** described Bonneville Power's agreement to do a \$200 million financing through the sale of the Series 2016-2 Bonds to acquire transmission facilities from the Northwest Infrastructure Financing Corporation V (NIFC V). **Mr. Mooney** asked for the Committee's consideration for reappointment.

Chairman Siddoway requested more detail about the NIFC V project. **Mr. Mooney** stated that Bonneville Power has federal limits on borrowing so they have been financing certain projects through private means over the last 15 or so years. IERA has issued 30 year, AA rated bonds that are guaranteed by Bonneville Power.

Senator Hill referred to Mr. Mooney's employment as an Electric Energy Consultant. Is that a full time occupation and does that create any conflicts of interest? **Mr. Mooney** stated he can recuse himself on anything that may be a conflict. The only project that Mooney Consulting was involved with over the last year was to the rehabilitation of a 75 year old hydro project at Idaho Falls. That was not financed through IERA. At this point, there are no conflicts to disclose.

Chairman Siddoway announced that the agenda would be reorganized and provided a recap of the events leading up to this point in time for the Contest of Election that resulted in the denial of the of that Contest Election. The contestant and the incumbent was given the opportunity to submit their costs and the Committee committed to take up that question.

CONTESTED ELECTION:

Review of the memorandums and the determination of the awarding of costs and/or fees.

Senator Davis presented the three issues that were in front of the Committee:

1. the issue of costs;
2. attorney's fees; and
3. return of the record from this Committee to the Senate for its ultimate return pursuant to the statute.

MOTION ON RETURN OF RECORD:

Taking the last item first, **Senator Davis** moved to return the sealed box, and its contents that was assigned by the Senate to the Committee for its consideration, and return the same to the Senate as required and provided by law. **Senator Hill** seconded the motion. The motion carried by **voice vote**.

DISCUSSION ON ISSUE OF COSTS:

Regarding the issue of costs, **Senator Davis** stated that he has read both memorandums for the request of costs as well as the responsive memorandums. In reading Idaho Code (I.C.) § 34-2120, **Senator Davis** determined that the \$500 bond is a perfecting bond; meaning that failure to post the bond results in the dismissal of the Contest without further consideration. However, it is not intended to be the maximum amount that an individual may be required to pay in

the event the Senate exercises its right to judge the elections and to determine if costs should be imposed if the Senate determines that the Contest of Election should be dismissed.

Senator Davis said the second issue is whether an amount greater than the \$500 should be assessed. The Committee should separate the issue of costs into two parts: 1.) the \$500 bond; and 2.) amounts greater than \$500. I.C. § 34-2120 provides "if the election is upheld by the Legislature, the Legislature may assess costs against the contestant." In this instance, the Senate upheld the election of the Senator from Legislative District 29. The Senate may, in the exercise of its discretion, assess costs against the contestant.

**MOTION ON
ISSUE OF COST:**

Senator Davis moved that costs be assessed against the contestant as follows:

1. The \$500 bond that has been paid to and posted by the Secretary of State by the contestant be forfeited to the incumbent, and that a Committee Report be issued asking the Senate to direct the Secretary of State to pay those funds to the incumbent.
2. The incumbent, Senator Nye has, in his briefing to this Committee, indicated that he has incurred costs exclusive of fees in the amount of \$1, 711.84. This Committee should also recommend to the full Senate that it impose, as additional costs, the difference between the \$500 bond and the \$1,711.84 incurred costs; the amount of \$1,211.84.

Senator Lakey seconded the motion.

Senator Stennett stated her understanding that the sum of the bond would go to the incumbent and the Committee is considering the additional costs for a total of \$1,711.84. **Senator Siddoway** concurred.

Senator Davis explained that the statute says that the Legislature may assess costs. The Committee is exercising its statutory right in the assessment of those costs. It would be the \$500 bond plus \$1,211.84.

The motion carried by **voice vote**.

**DISCUSSION
ON ATTORNEYS
FEES:**

Senator Davis pursued the final issue in regard to attorney's fees, and referred to the Contestant's response to the incumbent's Memorandum of Costs, particularly the assertions in Section 1, page 3, second paragraph, it is asserted that the "Contestant had a good faith basis in fact and law to pursue this Election Contest. Contestant proved that Incumbent violated the Sunshine Laws and thus, Contestant is arguably a prevailing party". **Senator Davis** said that is not how he judged this issue. The Contestant did not have a good faith basis in fact or law to pursue the Election Contest. In **Senator Davis'** opinion, the Election Contest was without legal or factual foundation and was pursued frivolously. The Contestant had several opportunities to withdraw and request that the Election Contest not continue. The Contestant did not do so. As a result, **Senator Davis** asserted Senator Nye was required to defend the county, the Board of Canvassers, the election process, and he was required to defend himself, and to do so at his sole cost and expense so argues the Contestant.

The Contestant's memorandum continues, "The stated reasons of the Committee, or at least some members thereof, seemed to be a concern that many other members of the Legislature may have committed similar Sunshine Law violations, as well as the concern that having done so could expose them to a similar election contest. The Contestant should not be penalized for the Senate's unwillingness to recognize a violation of the Sunshine Laws against its own members." **Senator Davis** agreed that the Contestant and the memorandum in support of that position misreads the position and actions of

the Senate. As a result of the prior holding and finding of the Senate, **Senator Davis** asserted that it is appropriate that a Committee Report be submitted to the Senate floor in which the Committee reports that the Election Contest was frivolous and pursued without legal or factual foundation.

Senator Davis referred to the Noble v. Ada County, 20 P.3.d, 679 (2000). The court, with the costs and attorney's fees, held "I.C. § 12-121 authorizes this court to award reasonable attorney's fees to the prevailing party on appeal but not as a matter of right, but only where the court is left with the abiding belief that the appeal was brought, pursued, or defended frivolously, unreasonably, or without foundation (20 P.3d, 688)." **Senator Davis** recognized the narrow scope the Court held in its decision. In that case, the Supreme Court ruled that Noble had raised legitimate issues concerning the District Judge's interpretation of the election laws, and for this reason concluded that the appeal was not pursued without foundation. **Senator Davis** asserted that is not exactly what we are dealing with in this case, but the principles of whether a matter is brought, pursued, or defended frivolously, unreasonably, or without foundation does. Noble and the court's definition and interpretation of the word "costs" is, in fact, intended to deal with the administration of justice. The court has to deal with many matters and it is important for the court to have a standard regarding how it will interpret the word "costs". **Senator Davis** asserted, however, we are the Legislature. The Senate sits as the judge of the election process for the members of the Senate body. In the event it involves a constitutional officer, then the Senate sits in concert with the House of Representatives.

Senator Davis said as the Committee interprets the statute, it is important that it define and provide its own definition of costs. In this instance, where an action is brought, pursued, or defended frivolously, unreasonable, or without foundation, that interpretation of the word "costs" in that instance, under the State Constitution, as a judge, and pursuant to the statute, may include an award of attorney's fees. In this instance, the contestant pled for attorney's fees in the Contest of Election and memoranda. In this instance, it is **Senator Davis'** belief that costs should include attorney's fees and the Committee should award attorney's fees in the amount that has been briefed by the Incumbent in the amount of \$18,060.

**MOTION ON
ATTORNEY FEES:**

Senator Davis moved to award attorney's fees in the amount of \$18,060 to the incumbent. **Senator Lodge** seconded the motion.

Senator Hagedorn asked for clarification that the source of those fees is inclusive of campaign accounts along with any other sources. **Senator Davis** responded they were not. The sole purpose of this motions is to indicate that the attorney fee assessment is an assessment against the contestant.

The motion carried by **voice vote**.

**GUBERNATORIAL
APPOINTMENTS:**

The reappointment of Mark William Llitas to the Idaho Energy Resources Authority.

Mark Llitas stated he is a member of the Idaho Energy Resources Authority (IERA), and is being appointed to a second term. **Mr. Llitas** provided some background information: 44 years as a commercial banker in Idaho with First Security Bank and subsequently, through its acquisition, with Wells Fargo Bank working with middle market and larger sized businesses defined as over \$20 million. This brought a background of financing with larger organizations to the IERA. **Mr. Llitas** has been involved with a variety of community activities and he has been active in the Idaho Banking Association, Idaho Association of Counties, Boise Chamber of Commerce, and as a graduate of Boise State University (BSU), **Mr. Llitas** has been involved with the BSU Foundation and

BSU Alumni Association. **Mr. Lliteras** said he couldn't add anything to the information that Mr. Mooney had provided earlier about the IERA.

Chairman Siddoway asked if Mr. Lliteras has experienced any conflicts of interest due to his banking interests and the interests of the IERA. **Mr. Lliteras** responded that he had not encountered any conflicts. During the time Mr. Lliteras was employed by Wells Fargo, they were not a part of any of the financing he was involved with. He was only involved with the Bonneville Power Authority who had a relationship with Bank of America.

Vice Chairman Hagedorn asked what will be the largest issue in energy resources facing the State over the next five years. **Mr. Lliteras** answered that there are issues with siting and with aging infrastructure. The IERA will be required to expand substations and lines or update existing facilities. The demand for energy will not go away and the debate on how to provide enough energy will continue whether from renewable resources, coal, a less popular nuclear energy, or water resources, also unpopular. Those are not going away. The issue will be to have projects that benefit the State and its citizens. **Vice Chairman Hagedorn** asked for Mr. Lliteras' personal positions on using nuclear as a source of energy. **Mr. Lliteras** answered that nuclear can and would be viable although there are issues: how to handle nuclear waste in terms of finding it and storing it. Those resources are valuable and should be considered over the long haul.

**PASSED THE
GAVEL:**

Chairman Siddoway passed the gavel to Vice Chairman Hagedorn to conduct the rules review..

Vice Chairman Hagedorn thanked Sarah Hilderbrand for the information provided to the Committee (see attachment 6, pages 1-13) by the Division of Purchasing.

**DOCKET NO.
38-0501-1601:**

**IDAPA 38 - DEPARTMENT OF ADMINISTRATION - 38.05.01 - Rules of the
Division of Purchasing.**

Sarah Hilderbrand, Administrator of the DOP, Idaho Department of Administration, explained she would be discussing **Docket No. 38-0501-1601**. Ms. Hilderbrand yielded to Valerie Bollinger to provide an overview of the negotiated rulemaking process.

Valerie Bollinger, Division Manager, DOP, provided some background. Two years ago, changes were proposed to the IDAPA rules that included contract oversight, cleanup, and modernization. At that time the Legislature created an interim committee to review the State purchasing rules. On July 1, 2016 the State Procurement Act went into effect. Two of the new sections in Idaho Code required the administrator to promulgate rules: 1.) delegated purchasing authority; and 2.) contract oversight. The pending rules before the Committee include those two sections: 1.) changes to a delegated purchasing authority section; and 2.) a new section on contract oversight. **Ms. Bollinger** gave a detailed calendar of events the lead to these pending rules (see attachment 6, page 1). In general, the draft rules were well received by the agencies; they were especially happy to see the change in direction on contract oversight. The DOP presented a draft to the Interim Committee on Purchasing Laws and made changes to the draft based on suggestions from that committee.

Ms. Hilderbrand stated that the document before the Committee (see attachment 6, pages 1-13) gives an overview of each change that the DOP is proposing. Some of the changes were similar to those proposed a few years ago, others are cleanup items like consistent definitions, referring to terms with consistent language, and updating references. This is an attempt to cleanup, modernize, and be consistent in the rules. There have been no major revision to

the DOP rules since 2002. There were a few modifications in 2015 to eliminate references to telefax and telegraph and replace those terms with electronic signature. **Ms. Hilderbrand** guided the Committee through the changes in **Docket No. 38-0501-1601** (see attachment 6, pages 1-13).

Senator Davis asked if, under the definition of Request for Proposals, does the word "component" mean something different than the definition of component that has been struck. **Ms. Hilderbrand** acquiesced. The definition of component that was struck had to do with a piece or part of property and goods, whereas the word "component" in the Request for Proposals is a generic term as a part or portion of the Request for Proposals. **Senator Davis** stated that for purposes of that section, he should use the dictionary definition of "component." However, under examples of Sole Source Purchases, the word "components" appears again. That appears to mean something more than the dictionary definition. **Ms. Hilderbrand** explained that the components of Sole Source Purchases are the pieces and parts of a particular piece of equipment that then become the components; it would be a common sense definition of what a component would be when looking at equipment.

Senator Buckner-Webb asked how the vendors were selected. **Ms. Hilderbrand** stated that there are several different processes depending on the dollar threshold:

- If the purchase is under \$10,000 for the life of the purchase, then it is an exempt purchase.
- The next level is between \$10,000 and \$100,000 which is an informal purchase.
- Over \$100,000, there would be either invitations to bid or a request for proposal. Those are the formal sealed procedures.

Within each one of those solicitations, informal or formal, those solicitations will indicate the qualifications, the experience, the necessary requirements and requests for all other information needed to make a decision. The vendors who are responding must demonstrate that they have all the qualifications that are required. **Senator Buckner-Webb** asked if it is possible to review the qualification piece. Is it in another segment of the rules or is it by commodity code? **Ms. Hilderbrand** responded that the qualifications for the solicitation will be within that solicitation document. There is a responsibility section that is in rule that includes reviewing past performance, integrity, financial responsibility, and gives factors to consider in terms of those basic responsibility requirements. **Vice Chairman Hagedorn** inquired if the responsibility section is contained within this rule the Committee is reviewing. **Ms. Hilderbrand** responded in the affirmative.

Senator Davis asked if Ms. Hilderbrand had statutory authority to impose conditions. **Ms. Hilderbrand** said she does have the discretion to award Sole Source Purchases. She can look at Idaho Code to get the proper language. **Senator Davis** requested that Ms. Hilderbrand look that section up and send it to him via email.

Senator Winder asked about the rules provision under Sole Source Purchases, that refers to "functional equivalent." What does functional equivalent mean? **Ms. Hilderbrand** answered that there was not a definition, and explained that the DOP has a rigorous process for Sole Source Purchases. **Senator Winder** stated his discomfort with that process because it is a target for a lawsuit.

Ms. Hilderbrand added that they publish their intent to issue a Sole Source Purchase and there is a provision in Idaho Code which allows for an appeal of a Sole Source Authorization. Also, industry and other manufacturers are relied upon to inform the DOP of other options that would meet the need.

Senator Davis asked if tie breakers were going to be resolved by administrative rule. **Ms. Hilderbrand** responded in the affirmative. **Senator Davis** asked when the cost of delivery is included, what does it mean the award would go to the vender located farthest from the point of delivery. **Ms. Hilderbrand** answered by example. If the State was buying trucks and the costs came in exactly the same; same truck each at a cost of \$20,000 including Freight on Board (FOB) destination. In this case, the cost of delivering would be reviewed for each of the tie responses. If one vender is shipping from New Jersey and one shipping from Salt Lake, the cost from New Jersey is much more expensive. It is a way to differentiate the cost. **Senator Davis** said the State has two bids, one from New Jersey and another in Boise. The vender furthest from Idaho would be advantaged; is that correct? **Ms. Hilderbrand** replied that the modifications being proposed will not change the policy. That is how the rule has been written since 2002. Using the FOB costs allows the DOP a way to get to the actual cost of the goods. The genesis of the modifications to the rule is to identify where the actual shipping point is and what the shipping costs are.

Senator Davis asked what are the hierarchy of options when making the decision to break a tie. **Ms. Hilderbrand** said she reads them as non-exclusive. The language in the rules says that the procedures that may be used to resolve tie responses include a, b, c, or d. If an Idaho vender is one of the choices, Rule Section 082.02.d which reads: "Award to an Idaho resident or an Idaho domiciled vendor or for Idaho produced property where other tie response(s) are from out of State or to a vendor submitting a domestic property where other tie responses are for foreign (external to Idaho) manufactured or supplied property." It will depend on where the vendors are coming from and what makes more sense and is most fair to the vendors who are participating in that particular solicitation. The intent is to be fair in the obligation. **Senator Davis** asked if the rules should include a certain hierarchy. **Ms. Hilderbrand** stated a tie response such as the one being discussed does not happen very often, only two or three times in the last ten years. There doesn't need to be a hierarchy. In practice, there clearly is a preference for an Idaho vendor or product in the event of a tie response.

Senator Davis revisited the truck example, assume there is a tie and no delivery date requirement. However, the New Jersey truck and the Idaho truck have a different delivery date. How is subpart 082.02.c and the new subpart 082.02.d balanced? New Jersey's deliver date is Monday of next week and Boise can deliver on Friday of this week. There are two different tie responses in conflict with each other. **Ms. Hilderbrand** stated when looking at the vendor with the earliest delivery date, it would make sense to utilize 082.02.d if none of the other provisions worked, or if there was an agency that had a need for that goods or services at the earlier delivery date. **Senator Davis** referred to subsection 082.02 and arrived at the conclusion that there could be other responses because it does not say that the responses that are listed are the only ones that could be considered. Because several of the responses are in conflict with each other, it invites disputes. **Senator Davis** suggested that Ms. Hilderbrand think about a more thorough way to address the tied bids. **Ms. Hilderbrand** reiterated that out of about 10,000 solicitations over a ten year period, there have only been two or three tie bids. She agrees there is not a hierarchy and they could be open to a challenge. The DOP has to look at the circumstances of any particular solicitation, make the best call, and be able to defend it.

Senator Buckner-Webb asked if the DOP, in the example of the trucks, could go back to the local vender to renegotiate the bid. **Ms. Hilderbrand** answered that they don't have the ability to renegotiate, they get firm, fixed prices. In the case of the trucks, if they awarded the tie response to the Idaho vendor, once the award was made, they could go back to them and ask why the price was \$20,000.

Ms. Hilderbrand closed by explaining the new section for Contract Oversight (see attachment 1, pages 9-10).

**PASSED THE
GAVEL:**

Vice Chairman Hagedorn passed the gavel to Chairman Siddoway.

MOTION:

Senator Winder stated this rule is an improvement and moved to approve **Docket 38-0501-1601**. **Senator Buckner-Webb** seconded the motion. The motion carried by **voice vote**.

ADJOURNED:

Being no further business, **Chairman Siddoway** adjourned the meeting at 9:36 a.m.

Senator Hagedorn
Vice Chair

Twyla Melton
Secretary