Attachment 6
1/23/17

2017 Pending Rules of the Division of Purchasing

- **The Division of Purchasing (DOP) worked through the negotiated rulemaking process throughout the Summer of 2016**
- **There has not been a substantial revision to Purchasing's Rules since 2002**
- **The 2015 efforts to modernize Purchasing's Rules resulted in a handful of changes, most notably the replacement of "telefax" and "telegraph" with "electronic signature"**
- **The majority of the 2015 proposed modifications were put on hold, based on the establishment of an Interim Committee on Procurement, which has convened for the last two years**
- **The Interim Committee was instrumental in creating the "State Procurement Act," effective July 1, 2016, which included two new statutory provisions requiring that the Administrator promulgate rules related to Delegated Purchasing Authority and Contract Oversight, which are included in these pending rules**
- **The 2017 Pending Rules for Purchasing also include several modifications similar to those proposed in 2015, primarily addressing consistent use of terms, clarification, and other housekeeping items**
- **DOP held multiple meetings with various agency attendees throughout the negotiated rulemaking process**
- **DOP invited all agencies to schedule an individual one-on-one meeting to discuss the draft rules**
- **In response to written comments received from various agencies, DOP revised its draft of the rules to address the majority of the agency comments**
- **DOP presented an earlier draft of these rules to the Interim Committee on Purchasing Laws, and made revisions to the draft based on suggestions provided by that committee**

Page #	Rule Section	Summary of Changes	Discussion
28 - 31	.011 Definitions	Remove definitions set forth in Idaho Code section 67-9203 and refer users to this code provision, delete unused definitions, add additional terms, "Contract Management" and "Contract Administration" as they are used in the pending IDAPA term regarding Contract Oversight; definitions only apply to the	The removal of duplicate definitions will avoid conflict between the statutory definitions and the rule definitions. The remaining changes clarify the meaning of terms used in the rules. Contract Management and Contract Administration are terms used in the new IDAPA section on Contract Oversight (a rule promulgated in accordance with the requirements of Idaho Code section 67-9219, attached for reference); these terms are not used in the State

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		IDAPA provisions	Procurement Act which only refers to "administration, management, monitoring and oversight of contracts;" the definitions only apply to Purchasing's Rules; they are intended to delineate the roles and responsibilities between agencies and DOP; the definitions will also help vendors and others understand which contract-related activities are conducted by which state agency.
	IMPACT	These changes are intended to promote consistency, eliminate redundant definitions, and provide definitions for terms that are used in the rules.	
	EXAMPLES	Consistent use of "Purchasing Authority" to refer to DOP as well as to an agency acting under delegated authority as the "Purchasing Authority." Clarify definition of "solicitation" to refer to the competitive solicitation (whether formal or informal). Define Contract Management and Administration as they apply to the pending rule related to Contract Oversight.	
31- 32	.021 Delegation of Authority of Administrator	Revise in accordance with Idaho Code section 67-9206, requiring the Administrator to promulgate rules related to Delegation of Purchasing Authority	The division proposes revisions to this rule to outline the process for agencies to request delegated purchasing authority; as well as the process by which authority may be continued or revoked; along with the factors influencing the decision to delegate such authority (in addition to the demonstrated competence required by I.C. 67-9206, attached for reference).
	IMPACT	Improved understanding and codification of the process related to requesting, exercising and maintaining delegated purchasing authority.	
	EXAMPLES	The proposed rule reflects current practice (which has been substantially the same for many years). The primary agency concern provided during negotiated rulemaking was the potential for a gap in authority. In response, we added a provision for immediate short-term "interim" authority in the event that the individual with delegated authority leaves the agency prior to a new delegee qualifying for and receiving delegated authority.	

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32	.031 Cooperative Purchasing Political Subdivisions	Clarification of language regarding state contracts that may be utilized by political subdivisions and addition of language addressing cooperative purchases with political subdivisions	The proposed revision will provide clarification for political subdivisions seeking to use any state contract (and agrees with language proposed by the political subdivisions related to use of state contracts); and will allow greater flexibility for the state and political subdivisions to consolidate procurement efforts for goods and services for which they have a common need.
32	.032 Acquisition of Concession Services	Add language concerning concessions subject to other provisions of Idaho code and remove unnecessary language	The proposed revisions draw the attention of agencies to the requirements of Idaho Code section 67-6903 (attached for your reference) for certain food service facilities.
	IMPACT	Improved awareness of code requirements	
	EXAMPLES	Food service facilities are not frequently the subject of procurement, and many agencies may not be aware of the requirements in Idaho Code as they relate to this service and the ICBVI. Calling out the code section helps alert agencies to this statutory requirement.	
32-33	.033 Purchase of Telecommunications or Information Technology Property	Delete reference to the Information Technology Resource Management Council and revise language concerning review by the Office of the Chief Information Officer	The title and structure of the Information Technology Resource Management Council (ITRMC) was legislatively changed in 2013. The changes refer generically to the State's oversight entity and clarify the process for the Office of the Chief Information Officer (OCIO) to review technology acquisitions.
	IMPACT	No substantive change; clarifies the process and recognizes the 2013 change related to ITRMC.	
33	.034 Public Notice	Provides for electronic posting of notices on the state's eProcurement System; and recognizes that the Administrator may exempt a solicitation from	Idaho Code section 67-9208 provides that the Administrator shall prescribe by rule the manner of posting and the exceptions to the notice provision. Exemption from posting has typically been requested

Page #	Rule Section	Summary of Changes	Discussion
		the electronic posting requirement	based on the need for an immediate purchase under an informal quote process or for unique goods or services with a limited vendor pool
33 - 34	.042 Exceptions to Competition	Change reference to "competition" rather than "formal procedure" to recognize that exceptions may be granted to informal solicitations as well (solicitations under $100,000); promote consistent use of terms, e.g. "property" (goods and services) rather than simply "services;" and "solicitation" versus "bidding" or "acquisition."	Changes clarify application to competition at any level (informal and formal); and clarify use of language with consistent terms. Used Property included in the list of "examples" of the types of property that may be exempted.
	IMPACT	No substantive change; simply clarifies the application of exemptions to competition at any dollar threshold ($10,000 and up)	
34	.043 Emergency Purchases	Revise terms within the existing section to match revised definitions	"Purchasing Authority" (versus "Purchasing Activity")
	IMPACT	No substantive change.	
34 - 36	.044 Small Purchases	Revise to create a subsection identifying the types of small purchases: • Exempt Purchases (under $10,000) • Informal Requests for Quotes (RFQ) ($10,000 - $100,000) • Professional Services Agreements (PSAs)	The rule reflects the current practice of the division and has been reworked to provide clarity and ease of use. The division proposes a new subsection setting forth the limitations on all small purchases. These limitations currently exist and are consolidated to clearly identify that agencies must use existing open contracts, cannot artificially divide contracts to create a small purchase, and cannot use amendments to avoid the sealed procedure dollar limit.

Page #	Rule Section	Summary of Changes	Discussion
		As well as a subsection setting forth the procedure for each type of small purchases, and a subsection identifying those purchases that are excluded (e.g. open contracts/bid splitting)	
	IMPACT	There is no change to the substance – only the organization/format of the rules related to Small Purchases. Additional instructional language has been added to help agencies understand their responsibilities when conducting informal procurements (file maintenance; use of the eProcurement system to increase competition/visibility/transparency/recordkeeping/ strategic sourcing; etc.).	
	EXAMPLES	Over the years, agencies (and vendors) have expressed some confusion when deciphering this rule as currently written. The re-formatting is intended to clarify the small purchasing rules so that agencies have a better understanding of the process, their responsibilities and the statutory limitations.	
36	.045 Sole Source Purchases	Add language to the rule to clarify that that the Administrator may impose conditions on approval of a sole source purchase (current language states that the Administrator may "specify the application of such determination"); and add language to require a written justification from the agency (in addition to the current rule requirement that agencies	The revisions reflect the current practice of imposing conditions on approval. Appropriate conditions such as a limit on the term of the authorization or the quantity allow the Administrator to periodically revisit whether competition is in the best interest of the state, for future acquisitions (e.g. a due diligence survey of the market and/or financial cost/benefit analysis of switching to a new provider); a Sole Source Authorization may also contain a condition that the agency work with its legal counsel to finalize the sole source agreement to ensure that it is in compliance with Idaho law, and otherwise in the best interest of

Page #	Rule Section	Summary of Changes	Discussion
		"(explain)...why no other contractor is acceptable")	the state. The agency is in the best position to provide information justifying a sole source purchase. The revision incorporates the current practice of requiring such information from the agency into the rule.
	IMPACT	Codifies current practice	
	EXAMPLES	Common conditions include requiring DOP involvement in negotiations (primarily for agencies which do not have the expertise internally); review by DOP prior to contract execution (especially for agencies without much contracting experience or without easy access to a DAG); review by agency DAG; cost/benefit analysis of switching cost prior to renewal (at the end of the current authorization); etc. .04 Language was added to clarify that it is the agency which conducts the negotiations (unless the Administrator provides otherwise).	
36	.046 Determination of Fair Market Price for Rehabilitation Agency Acquisitions	Eliminate the requirement to obtain three quotes and delete the one year limitation on the term of a contract entered into under this exemption for Rehabilitation Agencies.	The revisions eliminate hurdles to securing a cost effective contract for the state through the use of a Rehabilitation Agency. In some circumstances there are fewer than three vendors of property, or it is difficult to obtain quotes in support of "determining a fair market price" to justify use of a Rehabilitation Agency when the quotes are requested as a "survey" to support the exemption request; and not with the intent to award to a quoting vendor. The revised language allows the Administrator to conduct a market survey, rather than obtaining actual quotes. The revisions also allow the Administrator to determine that an annual market survey is not appropriate and to contract with a Rehabilitation Agency for more than a one year term.
	IMPACT	Facilitates the use of Rehabilitation Agencies/streamlines the process to utilize this	

Page #	Rule Section	Summary of Changes	Discussion
		exemption	
	EXAMPLES	Agencies have expressed that it is often difficult to obtain "quotes" from vendors, when the reason is to compare the pricing offered by a Rehabilitation Agency (and not to actually award a contract to one of the quoting vendors). Allowing agencies to utilize alternative market survey methods will facilitate the use of Rehabilitation Agencies. Allowing for contracts greater than one year allows agencies who are satisfied with the service to continue with the Rehabilitation Agency (avoiding the cost of another procurement and maintaining a satisfactory vendor).	
37	.051 Content of Solicitations Issued Under a Formal Sealed Procedure	Revise the title of the section and reference new section .112	112 expressly limits the imposition of contract terms which are contrary to state law
37	.052 Changes to Invitation to Bid or Request for Proposals	Revises the title and corrects language	
	IMPACT	Codifies current practice	
	EXAMPLES	"Bid" was changed to "solicitation" to recognize both bids and proposals. "Division" (Division of Purchasing) was changed to "purchasing authority" to recognize that some agencies can issue their own solicitations.	
37	.053 Price Escalation	Section is deleted	In fairness to vendors, deletion of this section allows the state to consider whether to amend the contract on a case-by-case basis, as appropriate under the circumstances.
	IMPACT	Allows for flexibility to address changing circumstances/market conditions and codifies current practice	
	EXAMPLES	While we try to anticipate increases/decreases and address these appropriately in the solicitation and contract documents there have been cases where a commodity increases	

Page #	Rule Section	Summary of Changes	Discussion
		significantly based on factors outside of the contractor's control (e.g. fuel – impacting travel, plastics, tires, etc.) – and if the contract did not have a price escalation clause, this rule would limit the ability to address those market factors, in fairness to the vendors.	
37	.070 Pre-proposal Conference	Revise terms within the existing section to match revised definitions	
38	.072 Late Bids/Proposals, Late Withdrawals and Late Modifications	Revise terms within the existing section to match revised definitions	Changed to "submitting vendor" (as "offeror" refers to those submitting in response to a Request for Proposals)
38	.073 Receipt, Opening, and Recording of Bids and Proposals	Revise language for purpose of clarification	
38 - 39	.074 Mistakes	Revise terms for consistent use	"Amendment" versus "Addendum"
39 - 40	.081 Evaluation and Award	Deletes language which contradicts another section of IDAPA related to the consideration of responsibility; and revises terms to match revised definitions Clarifies language regarding partial awards	The specific requirements for responsiveness are set forth in every solicitation, however, the requirements for responsibility are the duty of the Administrator. For example, the Administrator must be able to determine that a vendor terminated from another state contract during the review of submissions is not responsible even if that particular "responsibility" criteria (past performance) is not specifically identified in a solicitation. The best interest of the state is not served if responsibility criteria are limited as they are for responsiveness
40	.082 Tie Responses	Cleans up language for consistency and recognizes that ties may occur in formal and informal solicitations	

Page #	Rule Section	Summary of Changes	Discussion
40 – 41	.083 Proposal Discussions with Individual Offerors	Cleans up language for consistency and recognizes that .083 may be used for other solicitation types	
41 - 43	.084 Negotiations	Delete and move price agreements to new section .085, and add an additional example of circumstances which may be appropriate for the use of negotiations	Price agreements are a separate category and have been moved out of the negotiations section to avoid confusion. An additional example of circumstances for negotiation is added to provide clarity on the intent and authority of the Administrator (specifically when all offers exceed available funds)
43	.085 Price Agreements	Moves Price Agreement section, to avoid confusion	
43	.091 Acceptance or Rejection of Bids and proposals	Eliminates the reference to Purchase Order (redundant)	
43	.092 Cancellation of Solicitation	Revise terms within the existing section to match revised definitions	
44	.102 Time Purchase Contacts	Section is deleted	Time purchase agreements can be structured without this rule in place; however, they have fiscal implications in terms of budgeting and other statutory limitations; are therefore rarely utilized and so inclusion of the section leads to confusion
44 - 45	.111 Contract terms – Policies and Limitations	Eliminate reference to "requests for quotations" as these are included in "solicitations" (redundant)	
45 - 46	.113 Contract Oversight	Creates a new Rule, in accordance with the State Procurement Act (July 2016),	Idaho Code section 67-9219 (attached for reference) requires the Administrator formulate rules that establish policies and procedures relating to the

Page #	Rule Section	Summary of Changes	Discussion
		Idaho Code section 67-9219 Delineates Contract Management and Contract Administration responsibilities between the agencies and DOP. Requires agencies to designate a contract manager as a single point of contact; document the responsibilities and reporting requirements; document a communication and escalation plan; develop internal monitoring tools relevant to the dollar value/potential risk; and establish and complete a close out procedure. Additional requirements apply to contracts exceeding $1.5M – the threshold set in Idaho Code section 67-9219.	administration, management, monitoring and oversight of contracts entered by an agency. Provides agencies with some flexibility to establish internal processes; provides for recordkeeping and reporting – which is enhanced at the $1.5M threshold (referenced in Code).

Idaho State Legislature

Attachment 6 - p 11

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Idaho Statutes

TITLE 67
STATE GOVERNMENT AND STATE AFFAIRS
CHAPTER 92
STATE PROCUREMENT ACT

67-9206. delegation of authority. (1) The administrator may delegate such authority as the administrator deems appropriate to an employee of the division, an agency employee or an agency, provided that any such employee or the procurement staff of any such agency demonstrates sufficient competence in procurement as to satisfy the administrator.

(2) A delegation made pursuant to subsection (1) of this section shall be made in writing and shall state with specificity:

(a) The nature of the authority being delegated;

(b) The terms, conditions and limitations of the delegation; and

(c) The duration of the delegation.

(3) The administrator shall, subject to approval of the director, formulate rules specifying:

(a) The process by which delegation of authority may be granted, continued or revoked; and

(b) The factors influencing the decision to delegate such authority in addition to the demonstrated competence required by subsection (1) of this section.

History:

[67-9206, added 2016, ch. 289, sec. 4, p. 795.]

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Attachment 6 - p 12

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Idaho Statutes

TITLE 67
STATE GOVERNMENT AND STATE AFFAIRS
CHAPTER 69
FOOD SERVICE FACILITIES

67-6903. Food service facilities in public buildings. Any governmental agency which proposes to allow, to operate or to continue a food service facility in a public building shall first attempt, in good faith, to notify nonprofit organizations representing persons with disabilities of the opportunity to operate a food service. If more than one (1) organization responds, the governmental agency shall establish reasonable criteria and shall select on the basis of that criteria from the proposals submitted. Criteria adopted by a governmental agency pursuant to this section, and used as a basis for selection among proposals submitted, shall include the requirement that proposals submitted by the Idaho commission for the blind and visually impaired shall have priority over all other proposals submitted. Proposals submitted by nonprofit organizations representing persons with disabilities, other than the Idaho commission for the blind and visually impaired, shall receive priority over all other proposals except proposals submitted by the Idaho commission for the blind and visually impaired. A food service facility shall be operated without payment of rent. The governmental agency shall not offer or grant any other party a contract or concession to operate such food service facility unless the governmental agency determines in good faith that no nonprofit organization representing persons with disabilities is willing or able to provide satisfactory food service.

History:
[67-6903, added 1982, ch. 350, sec. 1, p. 867; am. 1994, ch. 159, sec. 9, p. 366; am. 2010, ch. 235, sec. 66, p. 602.]

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Attachment 6 - p 13

Idaho State Legislature

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Idaho Statutes

TITLE 67
STATE GOVERNMENT AND STATE AFFAIRS
CHAPTER 92
STATE PROCUREMENT ACT

67-9219. contract oversight. (1) Subject to approval of the director, the administrator shall formulate rules that establish policies and procedures relating to the administration, management, monitoring and oversight of contracts entered by an agency.

(2) Any officer, institution or entity that is excluded from the definition of "agency" under section 67-9203, Idaho Code, but that may enter contracts obligating the state, shall establish policies and procedures relating to the administration, management, monitoring and other oversight of such contracts.

(3) Policies and procedures established pursuant to subsection (1) or (2) of this section shall define the roles and responsibilities of those persons assigned to administer, manage, monitor or otherwise oversee state contracts.

(4) Each officer, agency, institution or entity that may enter contracts obligating the state, regardless of whether such officer, agency, institution or entity is included in the definition of "agency" under section 67-9203, Idaho Code, shall make an annual report to the legislature on all qualifying contracts entered into by the officer, agency, institution or entity during the previous year. The report shall be made on the first day of the regular legislative session and shall include the following information for each contract:

(a) The amount;
(b) The duration;
(c) The parties; and
(d) The subject.

(5) For purposes of this section, a qualifying contract is one valued at more than one million five hundred thousand dollars ($1,500,000) over the duration of the contract and that is:

(a) Awarded as a result of a sole source or other noncompetitive procurement pursuant to section 67-9221, Idaho Code;
(b) A multiyear contract; or
(c) Part of a multiple award.

History:
[67-9219, added 2016, ch. 289, sec. 4, p. 798.]

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