

Dear Senators SIDDOWAY, Stennett, Hill, and
Representatives LOERTSCHER, Monks, Smith:

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 - Proposed Rule (Docket No. 38-0501-1801).

Pursuant to Section 67-454, Idaho Code, a meeting on the enclosed rules may be called by the
cochairmen 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 11/05/2018. 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 12/05/2018.

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 334-4854, or send a written request to the address on the
memorandum attached below.



Eric Milstead
Director

Legislative Services Office

Idaho State Legislature

Serving Idaho's Citizen Legislature

MEMORANDUM

TO: Rules Review Subcommittee of the Senate State Affairs Committee and the House State Affairs Committee
FROM: Principal Legislative Drafting Attorney - Ryan Bush
DATE: October 17, 2018
SUBJECT: Department of Administration

IDAPA 38.05.01 - Rules of the Division of Purchasing - Proposed Rule (Docket No. 38-0501-1801)

Summary and Stated Reasons for the Rule

The Department of Administration submits notice of proposed rulemaking at IDAPA 38.05.01 - Rules of the Division of Purchasing. This proposed rule revises and eliminates definitions and defines "competitive negotiation" and "invitation to negotiate"; provides for the preservation of records and allowed forms of communication; identifies examples of potentially exempt acquisitions; provides for competitive negotiations and the methods for competitive negotiations; and provides for information technology that is purchased through a reseller. The Department states that further changes were made for consistency and to clarify, consolidate and modernize existing language.

Negotiated Rulemaking / Fiscal Impact

The Department states that negotiated rulemaking was conducted and that notice was published in the June edition of the Idaho Administrative Bulletin. There is no fiscal impact associated with this rulemaking.

Statutory Authority

The proposed rule appears to be within the statutory authority granted to the Department in Section 67-9205, Idaho Code.

cc: Department of Administration
Sarah Hilderbrand

*** PLEASE NOTE ***

Per the Idaho Constitution, all administrative rules must be reviewed by the Legislature during the next legislative session. The Legislature has 3 options with this rulemaking docket: **1)** Approve the docket in its entirety; **2)** Reject the docket in its entirety; or **3)** Reject the docket in part.

Kristin Ford, Manager
Research & Legislation

Paul Headlee, Manager
Budget & Policy Analysis

April Renfro, Manager
Legislative Audits

Glenn Harris, Manager
Information Technology

Statehouse, P.O. Box 83720
Boise, Idaho 83720-0054

Tel: 208-334-2475
www.legislature.idaho.gov

IDAPA 38 – DEPARTMENT OF ADMINISTRATION

38.05.01 – RULES OF THE DIVISION OF PURCHASING

DOCKET NO. 38-0501-1801

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 Section 67-9205, 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 17, 2018.

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 a nontechnical explanation of the substance and purpose of the proposed rulemaking:

The proposed rules address the format for preservation of purchasing records within the purchasing authority; add a solicitation method allowing for competitive negotiations, when justified by the agency and authorized by the administrator; clarify the use of electronic communications during the solicitation process; identify additional examples of potentially exempt acquisitions; add a provision concerning information technology purchased through a reseller; and also include minor modifications for consistency within the rules, and to further clarify, consolidate and/or modernize existing language.

FEE SUMMARY: The following is a specific description of the fee or charge imposed or increased: N/A

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 resulting from this rulemaking: N/A

NEGOTIATED RULEMAKING: Pursuant to Section 67-5220(1), Idaho Code, negotiated rulemaking was conducted. The Notice of Intent to Promulgate Rules – Negotiated Rulemaking was published in the June 6, 2018 Idaho Administrative Bulletin, [Vol. 18-6, page 120](#).

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 proposed rule, contact Sarah Hilderbrand at (208) 332-1612 or at sarah.hilderbrand@adm.idaho.gov.

Anyone may submit written comments regarding this proposed rulemaking. All written comments must be directed to the undersigned and must be delivered on or before October 24, 2018.

Dated this 31st day of August, 2018.

Sarah Hilderbrand, Administrator
Division of Purchasing
Department of Administration
304 N. 8th Street, Room 403
P. O. Box 83720
Boise, ID 83720-0075
Phone: (208) 332-1612
Fax: (208) 327-7320

THE FOLLOWING IS THE PROPOSED TEXT OF DOCKET NO. 38-0501-1801
(Only Those Sections With Amendments Are Shown.)

011. DEFINITIONS.

Unless defined otherwise in these rules, the definitions set forth in Section 67-9203, Idaho Code, shall apply to this chapter. (3-29-17)

01. Administrator. The administrator of the division of purchasing. (3-29-17)

02. 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)

03. Brand Name or Equal Specification. 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. (3-29-17)

04. Brand Name Specification. A specification calling for one (1) or more products by manufacturers' names or catalogue numbers. (3-29-17)

05. 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 authority. (3-29-17)

06. Competitive Negotiation. Procedure by which the buyer negotiates with one (1) or more responsive offerors in accordance with the provisions of an invitation to negotiate. ()

067. Concession Services. The granting by the purchasing authority of a right, franchise, authority, property interest or option to a contractor, regardless of whether an expenditure of state or other funds occurs. (3-29-17)

078. Consultant Services. 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. (3-29-17)

~~**08. Contract.** 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 includes purchase orders issued by the purchasing authority. (3-29-17)~~

09. Contract Administration. Actions taken related to changes to contracts, including amendments, renewals and extensions; as well as receipt, review and retaining of the contract and contract-related documents; and exercise of remedies. (3-29-17)

10. Contract Management. Actions taken to ensure that both the agency and contractor comply with the requirements of the contract. Includes some functions related to solicitation development and contract development and close-out; also includes, but is not limited to regular monitoring of the contractor's day-to-day performance, evaluation of deliverables, invoice review, payment approval, progress tracking, regular status meetings, and management of state-owned property and other resources used in contract performance management.

- (3-29-17)
11. **Director.** The chief officer of the department of administration. (3-15-02)
12. **Division.** The division of purchasing of the department of administration as established by Section 67-9204, 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)
13. **Document.** When used in these rules, may include electronic documents. (3-15-02)
14. **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)~~ ()
15. **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)
16. **Informal Solicitation.** Procedure by which the buyer solicits informal competitive quotes by means of a request for quote. (3-29-17)
17. **Invitation to Bid.** All documents, whether attached or incorporated by reference, utilized for soliciting formal sealed bids. (3-29-17)
- ~~18.~~ **Invitation to Negotiate.** All documents, whether attached or incorporated by reference, utilized for soliciting proposals for a competitive negotiation. ()
- ~~19.~~ **Offeror.** A vendor who has submitted a response to a request for proposals or invitation to negotiate for property to be acquired by the state. ~~(3-29-17)~~ ()
- ~~20.~~ **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 purchase specified property under the terms and conditions set forth in the contract. (3-29-17)
- ~~21.~~ **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, actuarial, veterinarian, information technology 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. (3-29-17)
- ~~22.~~ **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. When used in conjunction with an invitation to negotiate, a proposed may or may not initially include pricing information, as provided in the solicitation. ~~(3-15-02)~~ ()
- ~~23.~~ **Public Agency.** Has the meaning set forth in Section 67-2327, Idaho Code. (3-15-02)
- ~~24.~~ **Purchase.** The act of acquiring or procuring property for state use or the result of an acquisition action. (3-15-02)
- ~~25.~~ **Purchase Order.** Notification to the contractor to provide the stated property under the terms and conditions set forth in the purchase order. It may include the form of the state’s acceptance of a vendor’s quote, proposal or bid. See also definition of contract. (3-29-17)
- ~~26.~~ **Purchasing Authority.** The division or an agency exercising authority based on a delegation of

authority by the administrator to an individual or an agency; or as otherwise provided under these rules to engage in the conduct of purchasing. (3-29-17)

267. Quote. An offer to supply property in response to a request for quote and generally used for informal solicitation procedures. (3-29-17)

278. Request for Proposals. Includes all documents, whether attached or incorporated by reference, utilized for soliciting competitive proposals as a component of the formal sealed procedure and is generally utilized in the acquisition of services or other complex purchases. (3-29-17)

289. Request for Quote. The document, form or method generally used for purchases solicited in accordance with informal solicitation procedures. (3-29-17)

2930. Requisition. A standard state or agency specific form that serves as a purchasing request and that requests that the purchasing authority acquire the property. (3-29-17)

301. Sealed. Includes invitations to bid and requests for proposals electronically sealed and submitted in accordance with requirements or standards set by the division and bids and proposals manually sealed and submitted. (3-29-17)

312. Sealed Procedure Limit. That dollar amount, as established by these rules, above which the formal sealed procedure will be used. The amount may be lowered by the administrator to maintain full disclosure or competitive purchasing or otherwise achieve overall state efficiency and economy. (3-29-17)

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

334. Solicitation. An invitation to bid, a request for proposals, request for quote or other document or communication issued by the purchasing authority for the purpose of soliciting bids, proposals, or quotes to perform a contract. (3-29-17)

345. Specifications. The explicit property to be acquired by the state. Specifications include the scope of work and the performance and physical characteristics of property. (3-29-17)

356. State. The state of Idaho including each agency unless the context implies other states of the United States. (3-29-17)

367. Telecommunications. All present and future forms of hardware, software or services used or required for transmitting voice, data, video or images. (3-29-17)

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

012. PRESERVATION OF RECORDS.
Records of a purchasing authority, which are created or held pursuant to these rules, may be kept in such format as prescribed by the purchasing authority responsible for record retention; and otherwise in accordance with record preservation and retention policies established by the agency designated by the legislature for such purpose. ()

013. FORM OF COMMUNICATION.
Any written communication authorized or required by these rules may be provided electronically, or in another format as designated by the administrator. ()

0124. -- 020. (RESERVED)

(BREAK IN CONTINUITY OF SECTIONS)

042. EXCEPTIONS TO COMPETITION.

Purchases meeting the following criteria need not be purchased by competitive solicitation, unless otherwise directed by the administrator: (3-29-17)

01. Emergency Purchases. Emergency purchases as authorized by Section 67-9221, Idaho Code, and Section 043 of these rules. (3-29-17)

02. Sole Source Purchases. Sole source purchases made through direct solicitation with documented source selection, in accordance with Section 67-9221, Idaho Code, and Section 045. (3-15-02)

03. Reverse Auctions. Purchases through reverse public auctions as authorized by Section 67-9221, Idaho Code. (3-15-02)

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

05. Contracts with Other Public Agencies. Contracts with other public agencies as defined in Section 67-2327, Idaho Code, and authorized by Section 67-2332, Idaho Code. ()

056. 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)

067. Correctional Industries. Purchases of property marketed directly by Correctional Industries in accordance with Section 20-245, Idaho Code. (3-29-17)

078. 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 upon written approval of the administrator. The administrator shall determine whether such property meets the requesting agency'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 solicitation procedures and requirements. (3-29-17)

089. Existing Open Contracts. Except as provided in these rules, property available under these contracts shall be purchased under such contracts in accordance with the provisions or requirements for use thereof. (3-29-17)

109. Exempt Purchases. By written policy the administrator may exempt from the formal sealed procedure or the requirement for competitive solicitation that property for which bidding is impractical, disadvantageous or unreasonable under the circumstances. (3-29-17)

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; (3-29-17)

iv. Property for which competitive solicitation procedures are impractical; ~~or~~ (3-29-17)()

v. Used property; (3-29-17)()

vi. Ongoing maintenance, upgrades, support or additional licenses for software or other information

technology solutions, including a change in the manner of solution delivery; which software or solution was originally acquired in compliance with the purchasing laws in effect at the time of acquisition; or ()

vii. Acquisition of property for direct resale. ()

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)

051. CONTENT OF SOLICITATIONS ISSUED UNDER A FORMAL SEALED PROCEDURE.

The following shall be included in an invitation to bid or a request for proposals: (3-29-17)

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

02. Specifications. Specifications developed in accordance with Section 111 of these rules. (3-29-17)

03. Contract Terms. Terms and conditions applicable to the contract, subject to the provisions of Section 112 of these rules. (3-29-17)

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 or Pre-Bid Conference. The date, time and location of the conference must be included in the solicitation. (3-29-17)

(BREAK IN CONTINUITY OF SECTIONS)

074. MISTAKES.

The following procedures are established relative to claims of a mistake. (3-15-02)

01. Mistakes in Submission. If a mistake is attributable to an error in judgment, the submission may not be corrected. Correction or withdrawal by reason of an inadvertent, nonjudgmental mistake is permissible, but at the discretion of the administrator and to the extent it is not contrary to the interest of the state or the fair treatment of other submitting vendors. (3-29-17)

02. Mistakes Discovered Before Opening. Mistakes discovered by a vendor prior to closing may be corrected by the submitting vendor by submitting a timely modification or withdrawing the original submission and submitting a corrected submission to the purchasing authority before the closing. Vendors who discover a mistake after closing but prior to opening may withdraw the submission by written notification to the purchasing authority and signed by an individual authorized to bind the vendor if such notification is received by the purchasing authority prior to opening. (4-6-15)

03. Mistakes Discovered After Opening But Before Award. This subsection sets forth procedures to be applied in three (3) situations described below in which mistakes are discovered after opening but before award. (3-15-02)

a. Minor Informalities. Minor informalities are matters of form rather than substance evident from the bid or proposal document, or insignificant mistakes that can be waived or corrected without prejudice to other submitting vendors, that is, the effect of the mistake on price, quantity, quality, delivery or contractual conditions is not significant. The buyer may waive such informalities. Examples include the failure of a submitting vendor to: (3-15-02)

i. Return the required number of signed submissions. (3-15-02)

ii. Sign in ink or provide an electronic signature, but only if it is clear from the submission that the submitting vendor intended to be bound by its terms. ()

iii. Acknowledge the receipt of an amendment, but only if: (3-29-17)

(1) It is clear from the submission that the submitting vendor received the amendment and intended to be bound by its terms; or (3-29-17)

(2) The amendment involved had a negligible effect on price, quantity, quality or delivery. (3-29-17)

b. Mistakes Where Intended Submission is Evident. If the mistake and the intended submission are clearly evident on the face of the document, the submission shall be corrected to the intended submission and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the document are typographical errors, errors in extending unit prices (unit prices will always govern in event of conflict with extension), transposition errors and arithmetical errors. (3-15-02)

c. Mistakes Where Intended Submission is not Evident. A vendor may be permitted to withdraw a low bid if: (3-15-02)

i. A mistake is clearly evident on the face of the submission document but the intended submission is not similarly evident; or (3-15-02)

ii. The vendor submits timely proof of evidentiary value that clearly and convincingly demonstrates that a mistake was made. (3-15-02)

04. Mistakes Discovered After Award. Mistakes shall not be corrected after award of the contract. (3-15-02)

05. Written Approval or Denial Required. In the event of a mistake discovered after the opening date, the administrator shall approve or deny, in writing, a request to correct or withdraw a submission. (3-15-02)

(BREAK IN CONTINUITY OF SECTIONS)

083. PROPOSAL DISCUSSION WITH INDIVIDUAL OFFERORS.

01. Classifying Proposals. For the purpose of conducting proposal discussions under this rule, proposals shall be initially classified as: (3-15-02)

a. Acceptable; (3-15-02)

b. Potentially acceptable, that is reasonably susceptible of being made acceptable; or (3-15-02)

c. Unacceptable. (3-15-02)

02. "Offerors" Defined. For the purposes of this rule, the term "offerors" includes only those vendors submitting proposals that are acceptable or potentially acceptable. The term shall not include vendors that submitted

unacceptable proposals. (3-29-17)

03. Classification of Proposals. For the purposes of this rule, the purchasing authority may establish criteria within the solicitation to classify proposals. ()

034. **Purposes of Discussions.** Discussions are held to facilitate and encourage an adequate number of potential offerors to offer their best proposals, by amending their original offers, if needed. (3-15-02)

045. **Conduct of Discussions.** The solicitation document must provide for the possibility of discussions. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. The buyer should establish procedures and schedules for conducting discussions. If during discussions there is a need for clarification or change of the request for proposals, it shall be amended to incorporate such clarification or change. Auction techniques (revealing one offeror's price to another) and disclosure of any information derived from competing proposals are prohibited. Any oral clarification or change of a proposal shall be reduced to writing by the offeror. (3-15-02)

056. **Best and Final Offer.** The buyer shall establish a common time and date for submission of best and final offers. Best and final offers shall be submitted only once unless the buyer makes a written determination before each subsequent round of best and final offers demonstrating another round is in the purchasing authority's interest, and additional discussions will be conducted or the requirements will be changed. Otherwise, no discussion of, or changes in, the best and final offers shall be allowed prior to award. Offerors shall also be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediate previous offer will be construed as their best and final offer. (3-29-17)

067. **Application to Other Solicitation Types.** The provisions of this Section 083 may be utilized in other types of solicitations, in addition to requests for proposals, so long as the solicitation document provides for the possibility of discussions and includes a reference to this section. (3-29-17)

084. NEGOTIATIONS.

In accordance with Section 67-9205(12), Idaho Code, the administrator may negotiate acquisitions as follows: (3-15-02)

01. Use of Negotiations. Negotiations may be used under ~~this~~ these rules when the administrator determines in writing that negotiations may be in the best interest of the state including but not limited to the following circumstances: (3-29-17)()

a. Negotiations undertaken pursuant to a solicitation for competitive negotiation, in accordance with the provisions of Section 094 of these rules. ()

b. A competitive solicitation has been unsuccessful because, without limiting other possible reasons, all offers are unreasonable, noncompetitive or all offers exceed available funds and the available time and circumstances do not permit the delay required for resolicitation; (3-15-02)

b.c. There has been inadequate competition; (3-29-17)

d. During the evaluation process it is determined that more than one (1) vendor has submitted an acceptable proposal or bid and negotiations could secure advantageous terms or a reduced cost for the state; or (3-29-17)

d.e. During the evaluation process it is determined that all responsive offers exceed available funds and negotiations could modify the requirements of the solicitation to reduce the cost to available funds and avoid the extended time and expenditure of resources for a resolicitation. (3-29-17)

02. Examples. Examples of situations in which negotiations may be appropriate include but are not limited to: (3-29-17)

a. Ensuring that the offering vendor has a clear understanding of the scope of work required and the

requirements that must be met; (3-15-02)

b. Ensuring that the offering vendor will make available the required personnel and facilities to satisfactorily perform the contract; or (3-15-02)

c. Agreeing to any clarifications regarding specifications or contract terms. (3-29-17)

03. Conditions of Use. Negotiations, as permitted by Subsection Paragraph 084.01.ed. of this rule, are subject to the following: ~~(3-29-17)~~()

a. The solicitation must specifically allow for the possibility of negotiation and describe, with as much specificity as possible, how negotiations may be conducted; (3-15-02)

b. Submissions shall be evaluated and ranked based on the evaluation criteria in the solicitation; (3-15-02)

c. Only those vendors whose proposals or bids are determined to be acceptable, in accordance with criteria for negotiations set forth in the solicitation, shall be candidates for negotiations; (3-15-02)

d. Negotiations shall be conducted first with the vendor that is the apparent low responsive and responsible bidder, unless concurrent negotiations are permissible, in accordance with the terms of the solicitation; ~~(3-15-02)~~()

e. If one (1) or more responsive offers does not exceed available funds, negotiations shall be against the requirements of and criteria contained in the solicitation and shall not materially alter those criteria or the specifications; (3-29-17)

f. Auction techniques (revealing one vendor's price to another) and disclosure of information derived from competing proposals is prohibited; (3-15-02)

g. Any clarifications or changes resulting from negotiations shall be documented in writing;(3-15-02)

h. If the parties to negotiations are unable to agree, the administrator shall formally terminate negotiations and may undertake negotiations with the next ranked vendor; and (3-15-02)

i. If negotiations as provided for in this rule fail to result in a contract, as determined by the administrator, the solicitation may be canceled and the administrator may negotiate in the best interest of the state with any qualified vendor. (3-15-02)

04. Timing of Use. If conducted as part of a small purchase or under the formal sealed procedure, negotiations are the last step in the procurement process. Use of oral interviews or best and final procedures, as provided for in a solicitation, must precede negotiations as provided for in this rule, unless the administrator makes a written determination that it is in the state's best interest to proceed directly to negotiations in lieu of first conducting oral interviews and the best and final procedures. ~~(3-29-17)~~()

05. Termination of Negotiations. The purchasing authority may terminate negotiations at any time, in the best interest of the state. ()

(BREAK IN CONTINUITY OF SECTIONS)

094. COMPETITIVE NEGOTIATIONS.

Notwithstanding the provisions of Section 041 of these rules applicable to the formal sealed procedure, the administrator may authorize the use of competitive negotiations when it is determined that the use of negotiations may enable the state to more effectively identify and refine potential solutions, especially where the business need is complex or requires innovation. ()

01. Written Authorization. The administrator shall establish guidelines on how and when agencies may request to use competitive negotiations. Requests for authorization to utilize competitive negotiations must be provided in writing, in a format designated by the administrator. The request must provide the reasons that a formal sealed procedure is not practicable; as well as support for the use of competitive negotiations in order to meet a complex business need, solicit innovative solutions, enable the state to keep within approved program budgets, or to otherwise facilitate the receipt of the most cost-effective solution. Written authorization must be provided by the administrator in order for a purchasing authority to use competitive negotiations under this rule. ()

02. Form of Solicitation. Proposals under this rule shall be solicited pursuant to an invitation to negotiate. ()

03. Applicability of Other Rules. An invitation to negotiate shall be subject to the rules applicable to a request for proposals, except as otherwise provided. Modifications under Section 072 of these rules will be allowed after closing to the extent authorized within the invitation to negotiate. Section 083 of these rules, proposal discussion with individual offerors, shall not apply to an invitation to negotiate. ()

04. Content of Solicitation for Competitive Negotiation. Notwithstanding Section 051 of these rules, the following shall be included in an invitation to negotiate: ()

a. Submission Information. Information regarding the applicable closing date, time and location. ()

b. Solicitation Procedure. An outline of the invitation to negotiate process. ()

c. Specifications. Specifications developed in accordance with Section 111 of these rules, to the extent the purchasing authority determines adequate to inform interested vendors of the desired result. ()

d. Contract Terms. Terms and conditions applicable to the contract, subject to the provisions of Section 112 of these rules. ()

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

f. Incorporation by Reference. A brief description of any documents incorporated by reference that specifies where such documents can be obtained. ()

g. Pre-Proposal or Pre-Bid Conference. The date, time and location of the conference must be included in the solicitation. ()

h. Evaluation and Award Criteria. A summary of evaluation criteria to be used in determining property acceptability; evaluation criteria to classify proposals and determine the competitive threshold for negotiations; as well as the criteria that will be used to make the lowest responsive and responsible determination. ()

05. Cost. The buyer may request cost proposals at any time during the invitation to negotiate process; and may elect to request cost proposals only from those offerors determined to be in the competitive range for award ("finalists"), in accordance with the instructions contained within the solicitation. ()

06. Conduct of Negotiations. Negotiations shall be conducted in accordance with the procedure outlined in the invitation to negotiate, which may include multiple iterations of submissions and discussions in order to classify proposals; allow for revisions to the solicitation proposal(s), including any requirements, terms, conditions or specifications; and to determine finalists. The negotiation process ends upon submission of the best and final offer(s) from the finalists, after which time vendors shall not be allowed to make further modifications to their proposal(s). ()

0945. -- 100. (RESERVED)

(BREAK IN CONTINUITY OF SECTIONS)

114. INFORMATION TECHNOLOGY RESALE.

01. Purpose. The use of resellers is common in the acquisition of information technology; however, the use of a reseller to acquire information technology attempts to separate the application of the State Procurement Act from the contract terms required by the information technology owner for use of the information technology. The requirements of this rule are in place to apply Idaho law to the contract terms required by the information technology owner, when information technology is acquired through a reseller. ()

02. Terms. All license, sale, or use terms imposed by the information technology owner shall be subject to the following: ()

a. Licensing, sale, or use terms required by a third party owner of information technology sold through a reseller shall be subject to these rules, specifically including Subsection 112.01 and Paragraph 112.02.a. of these rules. If a contract contains a term prohibited by Section 112 of these rules, the term shall be void pursuant to Section 67-9213, Idaho Code. ()

b. The provisions of Section 67-9212, Idaho Code, shall apply to licensing, sale or use terms required by a third party owner of information technology sold through a reseller. Purchasing authorities are not authorized to accept or modify the terms of licensing, sale or use through click-wrap, click-through or similar acceptance methods unless such acceptance or modification is approved in writing by the administrator. ()

1145. -- 999. (RESERVED)