

Dear Senators LODGE, Guthrie, Stennett, and
Representatives CRANE, Armstrong, Gannon:

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 (ZBR Chapter Rewrite) - Proposed Rule
(Docket No. 38-0501-2201).

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 10/03/2022. 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 10/31/2022.

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.



Terri Kondoff
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: September 14, 2022
SUBJECT: Department of Administration

IDAPA 38.05.01 - Rules of the Division of Purchasing (ZBR Chapter Rewrite) - Proposed Rule (Docket No. 38-0501-2201)

Summary and Stated Reasons for the Rule

The Department of Administration submits notice of a proposed rulemaking at IDAPA 38.05.01 - Rules of the Division of Purchasing (ZBR Chapter Rewrite). The proposed chapter rewrite is being done pursuant to the Governor's Zero-Based Regulation executive order. This chapter rewrite includes rules for the following:

- (1) Purchasing and acquisition procedures;
- (2) Competitive, formal solicitations;
- (3) Bids and proposals;
- (4) Evaluation and acceptance/rejection of bids and proposals;
- (5) Contract terms and oversight; and
- (6) Contested case hearings.

Negotiated Rulemaking / Fiscal Impact

Negotiated rulemaking was conducted, and notice was published in the July edition of the Idaho Administrative Bulletin. There is no fiscal impact anticipated with this rulemaking.

Statutory Authority

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

cc: Department of Administration
Kim Rau

Paul Headlee, Deputy Director Kristin Ford, Manager Keith Bybee, Manager April Renfro, Manager Glenn Harris, Manager
Legislative Services Office Research & Legislation Budget & Policy Analysis Legislative Audits Information Technology

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

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

***** PLEASE NOTE *****

Per the Idaho Constitution, all administrative rules may 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.

IDAPA 38 – DEPARTMENT OF ADMINISTRATION

38.05.01 – RULES OF THE DIVISION OF PURCHASING

DOCKET NO. 38-0501-2201 (ZBR CHAPTER REWRITE)

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 Sections 67-9204, 67-9205, 67-9206, 67-9215, 67-9219, 67-9226, Idaho Code.

PUBLIC HEARING SCHEDULE: A public hearing concerning this rulemaking will be scheduled if requested in writing by twenty-five (25) persons, a political subdivision, or an agency, not later than September 21, 2022.

The hearing site 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 Department of Administration will perform a critical and comprehensive review of the statutes and existing rules chapter. The Department will rewrite this chapter under the premise of zero-based rulemaking, as per [Executive Order 2020-01: Zero-Based Regulation](#).

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

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: NA

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 July 6, 2022, Idaho Administrative Bulletin, [volume 22-7, pages 247-248](#).

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: NA

ASSISTANCE ON TECHNICAL QUESTIONS, SUBMISSION OF WRITTEN COMMENTS: For assistance on technical questions concerning the proposed rule, contact Steve Bailey at (208) 332-1825.

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 September 28, 2022.

DATED this August 5, 2022.

Steve Bailey, Deputy Director
Department of Administration
650 W. State Street
Room 100
Boise, Idaho 83720
steven.bailey@adm.idaho.gov
(208) 332-1825

THE FOLLOWING IS THE PROPOSED TEXT OF DOCKET NO. 38-0501-2201
(Zero Based Regulation (ZBR) Chapter Rewrite)

38.05.01 – RULES OF THE DIVISION OF PURCHASING

SUBCHAPTER A – GENERAL PROVISIONS

000. LEGAL AUTHORITY.

The following rules are promulgated in accordance with Section 67-9205(11), Idaho Code, by the administrator of the division of purchasing. ()

001. SCOPE.

These rules govern any other state agency acquiring property under these rules or through delegated authority. These rules also govern the contested case hearing process. ()

002. CONSTRUCTION.

“Include,” “Includes,” and “Including” are terms of enlargement and not of limitation or exclusive enumeration. Unless otherwise specified in a rule, lists and examples are illustrative and not exhaustive. ()

003. -- 010. (RESERVED)

011. DEFINITIONS.

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

01. 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. ()

02. 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 property. ()

03. Brand Name Specification. A specification calling for property by manufacturers’ names or catalogue numbers. ()

04. 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. ()

05. 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. ()

06. 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 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. ()

- 07. Contract Administration.** Actions taken related to changes to contracts, including amendments, renewals, and extensions; receipt, review and retaining of the contract and contract-related documents; and exercise of remedies. ()
- 08. Contract Management.** Actions taken to ensure that both the agency and contractor comply with the requirements of the contract. Includes regular monitoring of the contractor's 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. ()
- 09. Division.** The division of purchasing of the department of administration as established by Section 67-9204, Idaho Code. ()
- 10. Document.** When used in these rules, may include electronic documents. ()
- 11. E-procurement.** Use of the division's electronic procurement system. ()
- 12. Equal.** Property that meets or exceeds the quality, performance and use of the brand, model or specifications in the informal or formal solicitation. ()
- 13. Formal Sealed Procedure.** Procedure by which the buyer solicits sealed bids or competitive sealed proposals by means of a formal solicitation. ()
- 14. Formal Solicitation.** An invitation to bid, request for proposal, or invitation to negotiate. ()
- 15. Informal Solicitation.** Procedure by which the buyer solicits informal competitive quotes by means of a request for quote. ()
- 16. Invitation to Bid or ITB.** All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids. ()
- 17. Invitation to Negotiate or ITN.** All documents, whether attached or incorporated by reference, utilized for soliciting proposals for a competitive negotiation. ()
- 18. 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. ()
- 19. Professional Services.** Work rendered by a 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 extensive 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. ()
- 20. 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. ()
- 21. Purchase.** The act of acquiring or procuring property for state use or the result of an acquisition. ()
- 22. 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. ()
- 23. 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. ()

24. Quote. An offer to supply property in response to a request for quote and generally used for informal solicitation procedures. ()

25. Request for Proposals or RFP. 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. ()

26. Request for Quote. The document, form or method generally used for purchases solicited in accordance with informal solicitation procedures. ()

27. Requisition. A standard state or agency specific form that serves as a purchasing request and that requests that the purchasing authority acquire the property. ()

28. Sealed. A bid or proposal physically or electronically sealed and submitted in accordance with requirements of a formal solicitation. ()

29. 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. ()

30. Small Purchase. An acquisition that costs less than the sealed procedure limit. ()

31. Signature. A manual signature or an electronic signature, as defined in Section 28-50-102, Idaho Code, of an individual authorized to bind a person or entity. ()

32. State. The state of Idaho including each agency unless the context implies other states of the United States. ()

33. Telecommunications. All present and future forms of hardware, software or services used or required for transmitting voice, data, video or images. ()

34. Total Cost. The acquisition cost of property, including all components, options, and add-ons available under the contract, related services, and, in the case of ongoing services, the cost of the full term of the contract, including all authorized renewals. Unless a different total term is provided in the contract, the term used for purposes of total cost is five (5) years. ()

35. Written. When used in these rules, may include an electronic writing and communication. ()

SUBCHAPTER B – RULES GOVERNING PURCHASING

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. -- 020. (RESERVED)

021. DELEGATION OF AUTHORITY OF ADMINISTRATOR.

The division's purchases on behalf of another agency are as the agent for such agency. The division administers the acquisition of all property for agencies except those specifically exempted from the state procurement act, title 67, chapter 92, Idaho Code. The administrator may delegate in writing such authority to division employees, an agency or employees of an agency. Such delegations remain in effect unless modified or until revoked in writing. All delegations must be given in writing prior to the acquisition of the property. Designees shall make purchases according to these purchasing rules, the policies developed by the division, and the conditions established by the administrator in the delegation. Delegations are subject to periodic reporting and review as directed by the

administrator. ()

01. Manner of Submission. Request for delegated purchasing authority must be submitted in writing, on a form and in a manner established by the administrator. ()

02. Policy. The administrator’s delegated purchasing authority policy is applicable to all designees; and may place additional conditions on the agency or individual delegated authority. ()

03. Failure to Comply. A designee’s failure to comply with the policy, the conditions included in the written authorization provided by the administrator, or the instructions of the administrator regarding activities delegated pursuant to this rule may result in immediate rescission of delegated authority, increased monitoring, reduced authority level, additional training, or other action deemed appropriate by the administrator. ()

022. -- 033. (RESERVED)

034. PUBLIC NOTICE.

Notice of informal and formal solicitations are posted electronically unless the administrator exempts the acquisition from e-procurement. Notice of sole source acquisitions are posted electronically, and otherwise in accordance with Section 67-9221, Idaho Code. ()

035. -- 040. (RESERVED)

041. ACQUISITION PROCEDURES.

Except as otherwise provided in statute or these rules, the acquisition of property shall be by competitive solicitation. Acquisition requirements shall not be artificially divided to avoid bid statutes, rules, or policies. The procedure followed for acquisitions shall be as follows: ()

01. Small Purchases. ()

a. Acquisitions of the following property are small purchases: ()

i. Services with a total cost less than twenty-five thousand dollars (\$25,000) ()

ii. Software, regardless of the delivery method (e.g. on-premise, cloud, software as a service, etc.), with a total cost less than fifteen thousand dollars (\$15,000); ()

iii. Property, excluding services, with a total cost less than fifteen thousand dollars (\$15,000); ()

iv. A mix of property including services and other property, with a total cost less than fifteen thousand dollars (\$15,000). ()

b. Small purchases do not require acquisition through competitive solicitation. Agencies must comply with the division’s small purchase policy. Property available under single agency or open contracts shall be purchased under such contracts and are not a small purchase under this rule unless otherwise authorized by the administrator. ()

02. Informal Purchases. ()

a. Acquisition of property with a total cost exceeding the dollar limits established in this rule for a small purchase and less than the formal sealed procedure limit are informal purchases. ()

b. Informal purchases may be made using: ()

i. An informal solicitation issued through e-procurement, unless exempted by the administrator; or ()

ii. The formal sealed procedure, when the purchasing authority makes a written determination that

using a formal solicitation is in the best interest of the state, including where selection based solely on cost is not appropriate. ()

c. Agencies procuring property under this rule shall maintain a purchasing file containing: ()

i. The informal or formal solicitation document posted and quotes received. If the acquisition was not publicly posted, the agency shall include a statement describing the justification for determining that posting was impractical or impossible, along with the administrator's authorization. ()

ii. If not using e-procurement, the agency shall document the quotes received (or its attempt to obtain quotes) from at least three (3) vendors having a significant Idaho economic presence as defined in Section 67-2349, Idaho Code. ()

03. Formal Sealed Procedure. ()

a. The sealed procedure limit is one hundred fifty thousand dollars (\$150,000). ()

b. Purchases of property in excess of the sealed procedure limit are made using the formal sealed procedure, unless exempted by these rules or the administrator. ()

042. EXCEPTIONS TO COMPETITION REQUIRING ADMINISTRATOR APPROVAL.

The administrator may exempt the following purchases from the requirement for competitive solicitation by issuing a written determination to the purchasing authority. ()

01. Emergency Purchases. An emergency purchase is a purchase required to address an emergency condition, which is a situation that creates a threat to public health, welfare, or safety, such as may arise from floods, epidemics, riots, equipment failure, or similar circumstances. The existence of such condition must create an immediate and serious need for property that cannot be met through normal acquisition methods. The buyer must send a written explanation stating the emergency condition and the basis for the supplier selection, if applicable, to the administrator for review and written approval that the purchase be undertaken as an emergency purchase. Emergency purchases are limited to only that property required to address the emergency. The director or administrator may delegate authority in writing to an agency or purchasing authority to make emergency purchases and may impose conditions in the delegation. ()

02. Sole Source Purchases. Sole source purchases are authorized only if the required property is reasonably available from a single supplier. A requirement for a proprietary property does not justify a sole source purchase if there is more than one (1) potential supplier that can provide the required property. In cases of reasonable doubt, competition should be solicited. The buyer must send a written request to the administrator justifying the purchase and the basis to conclude that no other supplier is reasonably available. Sole source purchases require written approval of the administrator. The administrator may condition an approval. ()

03. 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. The buyer must submit a written request to the administrator to purchase from a rehabilitation agency and a written approval from the administrator. The purchase must comply with the division's policy for rehabilitation agency acquisitions. ()

04. 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 the price and terms and conditions 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. ()

05. Exempt Purchases. The administrator may, by written policy, 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. ()

- a. Examples include: ()
 - i. Special market conditions; ()
 - ii. Property requiring special contracting procedures due to uniqueness; ()
 - iii. Legal advertising, publication or placement of advertisements by state agency personnel directly with media sources; ()
 - iv. Property for which competitive solicitation procedures are impractical; ()
 - v. Used property; ()
 - 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. ()

043. EXCEPTIONS TO COMPETITION NOT REQUIRING APPROVAL.

Unless the administrator makes a written determination to the contrary, property meeting the following criteria need not be purchased by competitive solicitation. ()

01. Reverse Auction. Purchases through reverse public auctions as authorized by Section 67-9221, Idaho Code. ()

02. Federal Government Acquisitions. Acquisitions from the United State of America or any agency thereof. ()

03. Public Agency Acquisitions. Acquisitions from other public agencies as defined in Section 67-2327, Idaho Code, and authorized by Section 67-2332, Idaho Code. ()

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

05. Open Contracts. Except as provided in these rules or exempted by the administrator, property available under existing open contracts shall be purchased under such contracts in accordance with the provisions or requirements for use thereof. ()

06. Professional or Consultant Services. The acquisition of professional or consultant services for one-time projects costing less than the sealed procedure limit and lasting less than one (1) year in duration. ()

07. Small Purchases. The acquisition of property meeting the criteria in sub-section 041.01 of these rules; provided, however, that acquisitions cannot be artificially divided to meet the small purchase criteria. ()

044. -- 050. (RESERVED)

051. CONTENT OF FORMAL SOLICITATIONS.

The following shall be included in formal solicitations: ()

- 01. Submission Information.** Information regarding the applicable closing date, time and location. ()

02. Specifications. Specifications developed in accordance with Section 111 of these rules. For an ITN, specifications may be limited to those determined by the purchasing authority to be adequate to inform interested vendors of the desired outcome. ()

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

04. Evaluation and Award Criteria. Any evaluation criteria to be used to determine property acceptability and identification of the lowest responsive and responsible offer. For an ITN, also a summary of evaluation criteria to classify proposals and determine the competitive threshold for negotiations. ()

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

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

07. Pre-Proposal or Pre-Bid Conference. The date, time and location of the conference. ()

08. Process. A description of the process for the formal solicitation. ()

052. CHANGES TO FORMAL SOLICITATIONS.

A formal solicitation may be changed by the buyer through issuance of an amendment, provided the change is issued in writing prior to the formal solicitation closing date and is made available to all vendors receiving the original formal solicitation. Any material information given or provided to a prospective vendor with regard to a formal solicitation shall be made available in writing by the buyer to all vendors receiving the original formal solicitation. Oral interpretations of specifications or contract terms and conditions shall not be binding on the state unless confirmed in writing by the buyer prior to the date of the closing. Changes to the formal solicitation shall be identified as such and shall require that the vendor acknowledge receipt of all amendments issued. The right is reserved to waive any informality. ()

053. -- 060. (RESERVED)

061. FORM OF SUBMISSION FOR FORMAL SOLICITATIONS.

01. Manual Submissions. Unless otherwise provided in these rules and in addition to any specific requirements set forth in the formal solicitation, bids or proposals submitted manually must be made on the form provided, which form must be properly completed and contain a signature to receive consideration. All changes or erasures on manual submissions shall be initialed in ink. Unsigned or improperly submitted bids or proposals will be rejected. The purchasing authority assumes no responsibility for failure of the United States Postal Service, any private or public delivery service, or any computer or other equipment to deliver all or a portion of the bid or proposal at the time or to the location required by the formal solicitation. ()

02. Electronic Submissions. Unless otherwise provided in these rules and in addition to any specific requirements set forth in the formal solicitation, bids or proposals submitted electronically must be submitted in accordance with and meet all applicable requirements of these rules and contain a signature. Submission of a bid or proposal through e-procurement shall constitute a signature. The purchasing authority assumes no responsibility for failure of any electronic submission process, including any computer or other equipment to deliver all or a portion of the bid or proposal at the time or to the location required by the formal solicitation. ()

062. -- 069. (RESERVED)

070. PRE-PROPOSAL CONFERENCE.

A pre-proposal conference for vendors must be conducted by the purchasing authority for all RFPs and ITNs. The purchasing authority may provide an opportunity for a verbal question and answer period, however, only written questions and answers posted through e-procurement as an amendment to the formal solicitation, have force or effect in the procurement. ()

071. PRE-OPENING WITHDRAWAL OR MODIFICATION.

Bids or proposals submitted manually may be withdrawn or modified prior to closing of the formal solicitation only as follows. ()

01. By written communication containing a signature. ()

02. In person upon presentation of satisfactory evidence establishing the individual's authority to act on behalf of the submitting vendor. ()

03. Any withdrawing or modifying communication, must clearly identify the formal solicitation and should be worded so as not to reveal the amount of the original bid or proposal. ()

072. LATE BIDS/PROPOSALS, LATE WITHDRAWALS AND LATE MODIFICATIONS.

Any bid or proposal, withdrawal, or modification received after the time and date set for closing at the place designated in the formal solicitation is late. No late bid or proposal, late modification or late withdrawal will be considered. All late bids and proposals, will be returned to the submitting vendor. Time of receipt will be determined by the official time stamp or receipt mechanism located at the designated place for receipt of responses. ()

073. RECEIPT, OPENING, AND RECORDING OF BIDS AND PROPOSALS.

Upon receipt, all bids, proposals, and modifications properly marked and identified are time stamped, but not opened. They shall be stored in a secure place until the time specified for opening. Time stamping and storage may be through electronic means. Bids and proposals shall be opened publicly at the date and time specified in the formal solicitation. Opening of proposals shall identify only the names of the offerors unless otherwise stated in the formal solicitation. Bid and proposal openings may be electronic virtual openings. When no manual bids or proposals are received, retaining the e-procurement audit record shall be opening in public view under section 67-9209, Idaho Code. ()

074. MISTAKES.

The following procedures are established relative to claims of a mistake. ()

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. ()

02. **Mistakes Discovered Before Opening.** Mistakes discovered by a vendor prior to closing may be corrected by such 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 a written notification containing a signature to the purchasing authority if such notification is received by the purchasing authority prior to opening. ()

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. ()

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: ()

i. Return the required number of signed submissions. ()

ii. Provide a 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: ()

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

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

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. ()

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

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

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

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

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. ()

075. -- 080. (RESERVED)

081. EVALUATION AND AWARD.

01. General. The contract is to be awarded to the lowest responsible and responsive bidder or offeror (or for requests for quotes, vendor submitting a quote). The formal or informal solicitation shall set forth the requirements and criteria that will be used to make the lowest responsive and responsible determination. ()

02. Qualification. All vendors submitting responses to informal or formal solicitations issued by the state must be qualified. All vendors are qualified unless disqualified as defined by Section 67-9217, Idaho Code. ()

03. Responsibility. ()

a. Nothing herein shall prevent the buyer from establishing additional responsibility standards for a particular purchase. Factors to be considered in determining whether a vendor is responsible include, whether the vendor has: ()

i. Available the appropriate financial, material, equipment, facility and personnel resources and expertise, or the ability to obtain them, necessary to indicate capability to meet all contractual requirements; ()

ii. A satisfactory record of integrity; ()

iii. Qualified legally to contract with the purchasing authority and qualified to do business in the state of Idaho; ()

iv. Unreasonably failed to supply any necessary information in connection with the inquiry concerning responsibility; ()

v. Requisite experience; or ()

vi. A satisfactory prior performance record, if applicable. ()

b. Information Pertaining to Responsibility. A submitting vendor shall supply information requested by the buyer concerning its responsibility. If such submitting vendor fails to supply the requested information, the buyer shall base the determination of responsibility upon any available information or may find the submitting vendor nonresponsible if such failure is unreasonable. ()

c. Written Determination of Nonresponsibility Required. If a submitting vendor that otherwise would have been awarded a contract is found nonresponsible, a written determination of nonresponsibility setting forth the basis of the finding shall be prepared by the buyer. ()

04. Extension of Time for Acceptance. After opening, the buyer may request submitting vendors to extend the time during which their bids or proposals may be accepted. The reasons for requesting such extension shall be documented. ()

05. Partial Award. A buyer shall have the discretion to award on an all or nothing basis or to accept any portion of a response to a formal or informal solicitation, excluding other portions of a response and other offers, unless the vendor stipulates all or nothing in its submission. ()

082. TIE RESPONSES.

01. Tie Responses -- Definition. Tie responses are low responsive bids, proposals or quotes from responsible bidders or offerors (or for requests for quotes, from vendors submitting a quote) that are identical in price or score. Responsibility is determined based upon the standards of responsibility set forth in Section 081 of these rules. ()

02. Award. Award shall not be made by drawing lots, except as set forth below, or by dividing business among tie responses. In the discretion of the buyer, award shall be made in any permissible manner that will resolve tie responses. Procedures that may be used to resolve tie responses include: ()

a. If price is considered excessive or for another reason such responses are unsatisfactory, reject all responses, resolicit and seek a more favorable contract in the open market or enter into negotiations pursuant to Section 084 of these rules; ()

b. 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; ()

c. Award to the vendor with the earliest delivery date. ()

03. Drawing Lots. If no permissible method will be effective in resolving tie responses and a written determination is made so stating, award may be made by drawing lots or tossing a coin in the presence of witnesses if there are only two (2) tie responses. ()

083. PROPOSAL DISCUSSION WITH INDIVIDUAL OFFERORS.

01. Use of Discussions. Discussions may be used in any type of formal solicitation when the solicitation provides for the possibility of discussions and the buyer determines that clarifications or revisions are required to achieve adequate competition. ()

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

a. Acceptable; ()

b. Potentially acceptable if clarified or amended under this rule; or ()

c. Unacceptable. ()

03. Conduct of Discussions.

a. The buyer may conduct discussions under this rule with offerors whose proposals are classified as acceptable or potentially acceptable. ()

b. The buyer may clarify any portion of a proposal with an offeror where the clarification does not materially alter the proposal. ()

c. The buyer may conduct discussions with offerors to determine potential revisions to proposals or the formal solicitation. Offerors shall be accorded faith and equal treatment with respect to any opportunity for discussions and revisions of proposals. 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 and signed by the offeror. ()

d. If the buyer determines material changes to a formal solicitation or a proposal are necessary, the buyer shall establish a common time and date for submission of best and final offers. The buyer may conduct multiple rounds of best and final offers. If an offeror does not submit a notice of withdrawal or a best and final offer, the offeror's immediate previous offer is the offeror's best and final offer. ()

084. NEGOTIATIONS.

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

01. Use of Negotiations. Negotiations may be used under these rules when the administrator determines in writing that negotiations may be in the best interest of the state including the following circumstances: ()

a. Negotiations undertaken pursuant to an ITN, in accordance with the provisions of Section 094 of these rules. ()

b. A competitive solicitation has been unsuccessful for reasons including that all offers are unreasonable, noncompetitive, or exceed available funds and the available time and circumstances do not permit the delay required for resolicitation; ()

c. There has been inadequate competition; ()

d. During the evaluation process it is determined that negotiations could secure advantageous terms or a reduced cost for the state; or ()

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

02. Conditions of Use. Negotiations, as permitted by Subsection 084.01.d., are subject to the following: ()

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

b. Submissions shall be evaluated and ranked based on the evaluation criteria in the formal solicitation; ()

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

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; ()

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 formal solicitation and shall not materially alter those criteria or the specifications; ()

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

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

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 ()

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

03. 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 formal 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. ()

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

085. PRICE AGREEMENTS.

The administrator may authorize and negotiate price agreements with vendors when such agreements are deemed in the best interest of the state. Price agreements shall provide for termination for any reason upon not more than thirty (30) days' written notice. Price agreements may be in the best interest of the state when: ()

01. Dollar Value. The dollar value of individual procurements of property is less than the maximum dollar value of an exempt small purchase under Section 044 of these rules and multiple individual procurements are anticipated within a state of Idaho fiscal year; ()

02. Property. The property may not be conducive to standard competitive bidding procedures; ()

03. Multiple Agreements. There exists a need to establish multiple agreements with vendors supplying property that is similar in nature or function but is represented by different manufacturers or needed in multiple locations; or ()

04. Non-exclusive Agreements. Non-exclusive agreements for periods not exceeding two (2) years are deemed necessary to establish consistent general business terms, including without limitation, price, use of catalogs, delivery or credit terms. ()

086. -- 090. (RESERVED)

091. ACCEPTANCE OR REJECTION OF BIDS AND PROPOSALS.

Prior to the issuance of a contract, the administrator shall have the right to accept or reject all or any part of a bid or proposal or any and all bids or proposals when: ()

01. Best Interest. It is in the best interests of the state of Idaho; ()

02. Does Not Meet Specifications. The submission does not meet the minimum specifications; ()

03. Not Lowest Responsible Bid. The submission is not the lowest responsible submission; ()

04. Bidder Is Not Responsible. A finding is made based upon available evidence that a submitting vendor is not responsible or otherwise capable of currently meeting specifications or assurance of ability to fulfill contract performance; or ()

05. Deviations. The item offered deviates to a major degree from the specifications, as determined by the administrator (minor deviations, as determined by the administrator, may be accepted as substantially meeting the requirements of the state of Idaho). Deviations will be considered major when such deviations appear to frustrate the competitive process or provides a submitting vendor an unfair advantage. ()

092. CANCELLATION OF INFORMAL OR FORMAL SOLICITATION.

Prior to the issuance of a contract, the purchasing authority reserves the right to reject all bids, proposals or quotes or to cancel a formal or informal solicitation. In the event a formal or informal solicitation is cancelled, all submitting vendors will be notified. Examples of reasons for cancellation are identification of inadequate or ambiguous specifications, unexpected circumstances that require revised specifications, or determination that cancellation is in the best interest of the state. ()

093. NOTICE OF REJECTION.

Bidders or offerors whose bids or proposals are rejected as non-responsive will be notified in writing of the reasons for such rejection. ()

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. A competitive negotiation may only be used when a determination has been made that another type of formal solicitation would not be in the best interest of the state. Only the division may use competitive negotiation unless the administrator provides written authorization to a purchasing authority. ()

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

03. Applicability of Other Rules. An ITN 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 ITN. Section 083 of these rules, proposal discussion with individual offerors, shall not apply to an ITN, except as specifically provided in the ITN. ()

04. Cost Proposals. The buyer may request cost proposals at any time during the ITN 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 ITN. ()

05. Conduct of Negotiations. Negotiations shall be conducted in accordance with the procedure outlined in the ITN, which may include multiple iterations of submissions and discussions in order to classify proposals; to 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). ()

095. -- 100. (RESERVED)

101. LEASES.

01. Lease for Personal Property. A lease for personal property may be entered into provided the lease

is subject to the same requirements of competition that govern the purchase of property. Leases for periods exceeding one (1) year specifically require the approval of the administrator. ()

02. Lease Purchase Option. Unless a specific exemption is granted by the administrator or unless otherwise exempt by these rules, a lease purchase option may be exercised only if the lease containing the purchase option was awarded using the competitive process. Before exercising such an option, the buyer shall meet all applicable requirements of Section 67-9222, Idaho Code, including providing notice of the exercise of option as a sole source or competitively bidding the property by soliciting bids for new or used property. ()

102. -- 110. (RESERVED)

111. SPECIFICATIONS -- POLICIES AND DEVELOPMENT.

01. Purpose. Unless exempted by these rules or by the administrator, all informal and formal solicitations require specifications. Specifications set forth the characteristics of the property to be acquired. Specifications serve as the basis for obtaining property adequate and suitable for the using agency's needs in a cost effective manner, taking into account the costs of ownership and operation as well as initial acquisition costs. Specifications shall be drafted clearly to describe the agency's needs and to enable the vendors to determine and understand the agency's requirements. Specifications shall, as much as practical, be nonrestrictive to provide an equal basis for participation by an optimum number of vendors and to encourage competition. This information may be in the form of a description of the physical, functional or performance characteristics, a reference brand name or both. It may include a description of any required inspection, testing or preparation or delivery. Specifications may be incorporated by reference or contained in an attachment. ()

02. Use of Functional or Performance Descriptions. Specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the agency. To facilitate the use of such criteria, using agencies shall endeavor to include as a part of purchase requisitions their principal functional or performance needs. ()

03. Preference for Commercially Available Property. Requirements shall be satisfied by standard commercial property whenever practicable. ()

04. Brand Name or Equal Specification. ()

a. A brand name or equal specifications may be used when the buyer determines that such a specification is in the agency's best interest. ()

b. A brand name or equal specification shall seek to designate as many different brands as are practicable as "or equal" and shall state that property substantially equivalent to those designated will be considered for award. ()

c. Unless the buyer authorized to finally approve specifications determines that the essential characteristics of the brand names included in the specifications are commonly known in the industry or trade, brand name or equal specifications shall include a description of the particular design and functional or performance characteristics required. ()

d. Where a brand name or equal specification is used, the document shall contain explanatory language that the use of a brand name is for the purpose of designating the standard of quality, performance, and characteristics desired and is not intended to restrict competition. ()

05. Brand Name Specification. ()

a. Since use of a brand name specification is restrictive, such a specification may only be used when the administrator or designee makes a written determination. Such determination may be in any form, such as a purchase evaluation or a statement of single manufacturer justification. The written statement must state specific reasons for use of the brand name specification. ()

b. The administrator shall seek to identify sources from which the designated brand name property can be obtained and shall solicit such sources to achieve whatever degree of competition is practicable. If only one (1) source can supply the requirement, the acquisition shall be made under Section 67-9221, Idaho Code. ()

06. Specification of Alternates May Be Included. A specification may provide alternate descriptions of property where two (2) or more design, functional or performance criteria will satisfactorily meet the agency's requirements. ()

112. CONTRACT TERMS - POLICIES AND LIMITATIONS.

01. Prohibited Terms. Purchasing authorities do not have the authority to bind the state of Idaho or an agency to the following terms. If a contract contains such a term, the term shall be void pursuant to Section 67-9213, Idaho Code. ()

a. Terms waiving the sovereign immunity of the state of Idaho. ()

b. Terms subjecting the state of Idaho or its agencies to the jurisdiction of the courts of other states. ()

c. Terms limiting the time in which the state of Idaho or its agencies may bring a legal claim under the contract to a period shorter than that provided in Idaho law. ()

d. Terms imposing a payment obligation, including a rate of interest for late payments, less favorable than the obligations set forth in Section 67-2302, Idaho Code. ()

02. Terms Requiring Special Consideration. ()

a. Unless specifically authorized by the Idaho legislature, terms requiring an agency or the state of Idaho indemnify a vendor shall be subject to the provisions of Section 59-1015, Idaho Code, and require an appropriation by the Idaho legislature. Indemnification terms not specifically authorized by the Idaho legislature or subject to appropriation shall be void pursuant to Section 67-9213, Idaho Code, and Section 59-1016, Idaho Code. ()

b. Purchasing authorities shall consult with legal counsel prior to accepting terms submitting the contract to arbitration or waiving the state of Idaho's right to a jury trial. ()

113. CONTRACT OVERSIGHT.

01. Contract Management and Contract Administration. ()

a. Agencies which issue their own contracts pursuant to their delegated authority (or as otherwise exempt from the requirements of these rules) will be responsible for all aspects of contract management and contract administration, as those terms are defined in Section 011 of these rules. ()

b. When the division issues a contract on behalf of an agency, in its role as the state's contracting agent, the division is responsible for contract administration and the agency is responsible for contract management. ()

02. Contract Management. Each state agency which manages one (1) or more contracts, whether entered into directly by the agency or by the division acting as the statutory purchasing agency for the agency, will perform the following minimum contract management functions at a level consistent with the dollar value, complexity, and risk associated with each contract ()

a. Designate a competent contract manager as the single point of contact for each agency contract; ()

b. Document the contract manager's responsibilities and reporting requirements relative to the ()

contract, including activities such as management of the invoice and payment process, budget tracking, and invoice review and reconciliation with contract requirements and deliverables, to ensure compliance; ()

c. Document a communication and escalation plan, as between the contract manager, identified agency personnel and the contract administrator, designed to ensure timely and effective contract monitoring and issue resolution (the communication and escalation plan must include the division of purchasing for contracts for which the division of purchasing is acting as the statutory purchasing agent for the agency); ()

d. Develop and implement internal contract monitoring tools, including a reporting structure, based on the dollar value and/or potential risk associated with contract failure; and ()

e. Close out each contract, including, documenting receipt of goods or services in compliance with contract requirements and reviewing vendor performance and lessons learned. ()

03. Service Contracts Exceeding \$1,500,000 in Total Value. For each contract which is valued at more than one million five hundred thousand dollars (\$1,500,000) over the duration of the contract and which consists primarily of the purchases of services, the agency responsible for contract management must develop and implement contract reporting requirements that capture, at a minimum, information on compliance with financial provisions and delivery schedules; the status of any corrective action plans; as well as any liquidated damages assessed or collected under the contract during the current reporting period. Reports will be submitted to the designated agency purchasing representative as well as the division on no less than a biannual basis, with a schedule for each contract determined by the contract manager in consultation with the agency purchasing representative and the division. ()

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. ()

115. -- 199. (RESERVED)

**SUBCHAPTER C – RULES GOVERNING CONTESTED CASE HEARINGS ON BID APPEALS
AT THE DIVISION OF PURCHASING**

200. RULES OF ADMINISTRATIVE PROCEDURE.

The Idaho Rules of Administrative Procedure of the Attorney General shall govern contested cases under these rules, except as specified in these rules or where these rules differ. Determinations officers shall be considered hearing officers for purposes of the Idaho Rules of Administrative Procedure of the Attorney General. ()

201. NOTICE OF CONTESTED CASE HEARING.

A notice of a contested case hearing shall be provided to the bidder, giving at least ten (10) days' advance notice of the contested case hearing. The contested case hearing will be held in Ada County, at such place as may be designated in the hearing notice. Upon concurrence of the parties and the determinations officer, contested case hearings may be conducted telephonically. ()

202. -- 207. (RESERVED)

208. WITNESSES AND EVIDENCE.

The determinations officer, on his own or upon application of the bidder or the department of administration, may issue subpoenas for the attendance of witnesses and production of documents. ()

209. DETERMINATIONS OFFICER'S ISSUANCE OF A RECOMMENDED ORDER.

Once the matter is fully submitted, the determinations officer shall issue a finding of fact, conclusions of law and recommended order, and provide copies to all parties. ()

210. -- 999. (RESERVED)