

January 25, 2019 - Attachment I

**DIVISION OF PURCHASING PROPOSED RULE MODIFICATIONS
JANUARY 2019
DOCKET 38.0501.1801**



IDAPA 38.05.01, THE RULES OF THE DIVISION OF PURCHASING

NEGOTIATED RULEMAKING PROCESS

- DOP worked with an Interim Legislative Committee for three years, culminating in a new Chapter of Idaho Code, Chapter 92, the State Procurement Act (2016).
- During several of the last 5 legislative sessions, DOP has proposed Rule modifications, to modernize its rules, reduce ambiguity, and provide for additional flexibility within the State's procurement process.
- DOP began the Negotiated Rulemaking Process in May of 2018, publishing meeting notices on its website, distributing draft modifications to agencies for input, and holding several meetings throughout the summer, which were attended by multiple agencies, including Health and Welfare, Corrections, Transportation, DEQ and Fish & Game.
- DOP also shared an overview of the proposed modifications with vendors at its annual Vendor Outreach Day, held in November of 2018, and has discussed the proposed modifications with multiple vendors over the last 8 months.

SUMMARY OF PROPOSED MODIFICATIONS

- **Housekeeping:**
 - Definitions and clarifications
- **Modernization:**
 - Electronic recordkeeping
 - Electronic communications
- **Increased Flexibility for Solution-Driven Procurements:**
 - Expand the ability to Negotiate
 - Specifically as related to complex Information Technology procurements/complex service contracts
- **Prohibited Terms Void:**
 - Use IDAPA to address terms that violate state law in order to facilitate contract finalization specifically with regard to the use of Information Technology Resellers

House State Affairs Committee Page #	Rule Section	Summary of Changes	Discussion
25 - 26	.011 Definitions	Remove a definition which is set forth in Idaho Code section 67-9203; and Add definitions related to a proposed new solicitation type.	The removal of duplicate definitions will avoid conflict between the statutory definitions and the Rule definitions. The Division of Purchasing (DOP) is proposing to add a new solicitation type, an "Invitation to Negotiate (ITN)" which would allow for "Competitive Negotiations." Terms related to this proposed solicitation type have been added to the definitions.
27	.012 Preservation of Records	Add a new section to specify how records may be kept by the Purchasing Authority.	Idaho Code section 67-9215 requires the administrator to prescribe by rule the form in which solicitation records are preserved. The proposed rule allows the Purchasing Authority to designate how records are kept (i.e. hard copy or electronic), recognizing that other record preservation and retention policies may also apply.
27	.013 Form of Communication	Add a new section, specifically recognizing that written communications may be provided electronically.	The majority of communication by DOP and other Purchasing Authorities is conducted via e-mail and through our electronic Procurement System (many businesses no longer maintain a fax line, and the use of regular mail, while appropriate for some communication, slows the day-to-day processes).
28	.042.05 Contracts with other Public Agencies	Add a new subsection, recognizing that contracts between public agencies are exempt from competition.	Idaho Code section 67-2332 authorizes contracts between "public agencies." This is a common question presented to DOP, and this new subsection in the Rules simply provides an easy statutory reference for agency procurement staff, other public agencies, and vendors.

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28-29	.042.09 Exempt Purchases	Add two additional examples of property which "may" be exempt from competition, based on requests which have been made (and approved) under this section of IDAPA over the years.	<p>Agencies may apply to the Administrator for an exemption from competition to acquire property for which it is determined to be "impractical, disadvantageous or unreasonable" to bid, under the circumstances. The list contains "examples" but is not exhaustive. Each request is evaluated on a case-by-case basis under the surrounding circumstances, recognizing that competition is the default.</p> <p>The first new subsection recognizes that under some circumstances, it "may" be appropriate to exempt from competition the purchase of ongoing maintenance, etc. of Information Technology which was originally acquired in compliance with applicable Purchasing Code/Rules; or to allow for a change in the manner of solution delivery with the same functionality (e.g. "on premise" to cloud), again, for a solution that was originally acquired in compliance with applicable Code/Rule.</p> <p>The second proposed subsection recognizes that it may be impractical, disadvantageous or unreasonable to go out to bid for items intended for direct resale (e.g. Idaho-themed gift shop items for sale to the public at the State Museum or one of our State Parks).</p>

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29	.051.01 Content of Solicitations Issued Under a Formal Sealed Procedure	Corrects the Rule to indicate that "Closing" information must be provided in a solicitation.	The revision clarifies the requirement that solicitations must contain information about the date and time that a solicitation closes (when bids are due).
30	074.03 Mistakes	Allows the Purchasing Authority to waive the requirement for a signature at the time of bid submission if it is determined that the submitting vendor intended to be bound by its offer.	Currently, the failure to physically or electronically sign a bid results in a non-responsive finding. This revision would allow bidders who make this mistake to provide a signature after bid closing, if the Purchasing Authority determines that it is clear from the submission materials that the bidder intended to be bound by its offer. This revision is intended to increase competition, and the state's opportunity to obtain the best solution, pricing, terms, etc.
31	.083 Proposal Discussion with Individual Offerors	Adds a subsection clarifying that the Purchasing Authority may establish criteria within the solicitation in order to put bidders on notice as to how proposals will be classified in accordance with .083.01.	.083 requires that the Purchasing Authority "classify" proposals as "acceptable," "potentially acceptable," or "unacceptable" for purposes of conducting proposal discussions; the proposed addition of .083.03 provides that criteria may be included within the solicitation in order to determine how proposals will be classified. This revision will allow the State to better inform bidders of how their bids will be evaluated under .083, ensuring a fair and level playing field.

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31	.084.01 Negotiations	Adds a reference to negotiations pursuant to the proposed new solicitation type, "Invitation to Negotiate."	A new solicitation type, an "Invitation to Negotiate (ITN)" is being proposed, which would allow for "Competitive Negotiations." For consistency, a reference to negotiations under an ITN has been added to .084 "Negotiations."
32	.084.03 Negotiations	Adds a reference to the possibility of concurrent negotiations.	The Invitation to Negotiate, a new solicitation type being proposed, contemplates the possibility of "Competitive Negotiations," which may involve concurrent negotiations.
32	.084.04 Negotiations	Adds a reference to the traditional forms of procurement, for which (by Rule) negotiations are the last step in the procurement process; to distinguish the traditional negotiation process from the negotiations which would be conducted under an "Invitation to Negotiate," if that proposed section is approved.	Negotiations would occur throughout the solicitation process under the newly proposed "Invitation to Negotiate" (as opposed to solely at the end of the procurement process under traditional procurement methods).

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32	.084.05 Negotiations	Adds a subsection to make it clear that the Purchasing Authority has the ability to terminate negotiations at any time, in the best interest of the State.	Currently, this language is included in the solicitation document itself. By adding it to the Rule, all vendors are on notice of the State's ability to terminate negotiations, in the interest of keeping the procurement process moving, reducing the impact on an agency's business operation, and otherwise as may be determined to be in the best interest of the State.
32-33	.094 Competitive Negotiations	Adds a new paragraph to the Rules, allowing for a new solicitation type, an "Invitation to Negotiate," which would allow for Competitive Negotiations.	This new solicitation type is geared specifically toward complex IT procurements (as well as complex service contracts). It would allow the State to more freely negotiate with qualified bidders during the solicitation process - in an effort to more effectively refine requirements, expectations, roles and responsibilities between the agency subject matter and business experts, and the bidders, prior to contract award. This solicitation method would allow bidders a much greater opportunity to understand the intricacies of the State's technical environment and business needs, and modify their proposals accordingly prior to award. Ultimately, DOP expects this solicitation method to help identify solutions that best fit the State's needs, to increase the likelihood of successful implementations, and ensure that the State is paying a fair and reasonable price.

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34	.114 Information Technology Resale	<p>This new section addresses the common situation where resellers are required by an information technology owner (whose product the reseller is offering to the State) to pass through the technology owner's licensing, sale, or use terms, some of which may violate State law.</p>	<p>The State often finds itself in the situation where a reseller must include licensing or other terms in its contract with the State, when selling a manufacturer's product that the reseller does not own. This provision would provide state agency purchasers with the ability to move forward with a purchase, without negotiating prohibited terms (e.g. waiving the sovereign immunity of the State, terms subjecting the state of Idaho the jurisdiction of another state's courts, etc.) by designating "prohibited terms" (as currently outlined in Section 112 of the Rules) as void, if included in the resale agreement.</p> <p>This section also addresses the application of terms under "click-through" or similar acceptance methods, making it clear that acceptance of terms through these methodologies is dependent on written Administrator approval (and the requirements of Idaho Code section 67-9212, which requires that contracts be in writing and signed by the contracting parties).</p> <p>The proposed rule would facilitate contract finalization when a reseller is bound by an IT owner's terms and conditions; and help protect the state from terms that violate Idaho law.</p>

QUESTIONS?

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