

MINUTES
Approved by the Committee
State Procurement Laws Committee
Monday, August 22, 2016
9:00 A.M.
State Capitol, Room EW42
Boise, Idaho

Co-chair Senator Martin called the meeting to order at 9:00 a.m.; a silent roll call was taken. Members present: Senators Davis, Lee, Den Hartog, and Jordan; Co-chair Representative Anderson and Representatives Bell, Crane, Vander Woude, Nye, and Smith (ad hoc); Legislative Services Office staff Elizabeth Bowen, Robyn Lockett, and Jennifer Kish.

Other attendees: Kelli Brassfield - Idaho Assoc. of Counties; Michelle Doane - Idaho Transportation Dept.; Bob Geddes - Idaho Dept. of Administration; John Foster, Kate Haas - Kestrel West; Jeremy Chou - Givens Pursley; Laura Lantz - Idaho Assoc. of Highway Districts; Colby Cameron - Sullivan & Reberger; Brent Olmstead - My Political Idaho; Betsy Russell - The Spokesman-Review; and presenters: Sarah Hilderbrand, Valerie Bollinger - Dept. of Purchasing; Brian Kane - Office of the Attorney General; April Renfro - LSO Audits; Rakesh Mohan, Amanda Bartlett - LSO Office of Performance Evaluation.

NOTE: presentations and handouts provided by the presenters/speakers are posted on the Idaho Legislature website: <http://legislature.idaho.gov/sessioninfo/2016/interim/procurement.htm>; and copies of those items are on file at the Legislative Services Offices located in the State Capitol.

Co-chair Martin made reference to HCR 48, which authorized the committee and summarized its directives.

Co-chair Anderson welcomed Representative Elaine Smith, who would serve as an ad hoc member.

Co-chair Martin announced that the next meeting would be held September 14 in Twin Falls, ID, at City Hall. Members discussed future possible meeting dates and tentatively selected: September 29, October 27, and November 17.

At 9:13 a.m., Co-chair Martin called Robert Geddes, Director of the Department of Administration (DOA), to the podium for his comments to the committee. Director Geddes commended the committee on its accomplishments the previous session, most notably the State Procurement Act [HB 538], which consolidated all purchasing code sections into its own Idaho Code chapter [Title 67, Chapter 92]. He commented that the department was charged with developing negotiated rules, which were currently in the process. The director reported that a number of training sessions facilitated by the Department of Purchasing (DOP) had been held with agencies to better understand the purchasing process and policy changes. He emphasized the department's desire to work with the committee to ensure that the purchasing process was fair and transparent, and that those entrusted with purchasing duties for the state were held accountable to the taxpayers.

- Co-chair Anderson noted that Director Geddes identified the consolidation of all purchasing code as an accomplishment of the committee, but could the director list others? Director Geddes identified the modernization of the statute language to reflect current usage and to provide easier comprehension, and he noted that the process was specific and well-defined.
- Rep. Vander Woude inquired as to what would be the director's next key topic to be addressed? Director Geddes replied that void contracts needed to be better understood/defined.
- Senator Davis asked whether the director was aware of any outstanding issues regarding purchasing by universities? Director Geddes responded that there were some issues with that process. He noted that the University of Idaho was totally separate from the requirement of purchasing through the DOP, and that others wished for more flexibility in making purchases

outside the state contracts. He felt that some universities misunderstood, when they were authorized by DOP to purchase outside of state contracts, that they still had to follow the purchasing policies to which other state agencies adhered. The director commented that the main issue was in the interpretation of the terms "value" and "cost" in relation to the justification of outside purchases. He commented that the justification should be directly related to the expense of the item and not necessarily include any assumed future benefits/relationships or noncontracted service support.

Sarah Hilderbrand, Administrator of the Department of Purchasing, then addressed the committee with her comments. She noted that the State Procurement Act had been in effect only since July 1, and so the department was still in the process of evaluating how well it was working for agencies. She commented that the significant highlights of the committee's efforts, from her perspective, were the following:

- All purchasing code was in its own chapter, which made it easy to locate for the department, vendors, and agency staff;
- Topics were more logically organized;
- Procurement training was required in statute, not just as a DOP policy;
- The authorization to promulgate rules on the issues of contract oversight and delegated authority;
- The administrator's authority to grant exemptions from state contract purchasing was expanded;
- The need for a report to the Legislature on certain types of contracts and a summary of exemptions approved and not approved had been included;
- Reorganization of and improvements to the vendor appeals process; and
- Inclusion of ethics provisions into the same chapter, which allowed for easier reference by vendors and agencies.

Ms. Hilderbrand noted minor but significant areas of accomplishment, such as:

- Removal of outdated and/or confusing language;
- Reference to the use of electronic signatures;
- Addressing issues in regard to an electronically received bid in the event of a canceled solicitation;
- Removal of the term "monetary" from statute in reference to the trade-in process (allows DOP to consider soft costs such as storage, transportation, personnel costs, etc., in such determination); and
- Inclusion of the requirement for approval from the Board of Examiners for assignments.

Ms. Hilderbrand acknowledged that the department had more areas that needed to be addressed, such as:

- Group discount purchasing - needed updated language, address the flexibility to participate in other cooperative organizations, permit more collaborative and cooperative purchases along with cities and counties, possibly rename the section as cooperative procurement.
- Protest statute - additional modification to allow for options permitted when the administrator or director receives and agrees with an appeal.
- Exemption from state contract by institutions of higher education - better define the term "expense" to include soft costs (personnel time, delivery, restocking fee, warranty, etc.), better detail how a comparison was justified, make justification for those below and above the \$10,000 threshold as separate processes.

- Senator Davis requested Ms. Hilderbrand to share her perspective on the issue of void contracts. Ms. Hilderbrand responded that she was in favor of Senator Davis's previous suggestion of changing the term "void" to "voidable." Senator Davis compared the language modification to that of "annulment" versus "divorce," and asked how the committee should address the perception of quantum meruit, or unjust enrichment to the state? Ms. Hilderbrand commented that she was keen to lean on others' legal advice for the solution.
- Senator Davis asked where the concept of void contract would rank on her list of desired items to be addressed? Ms. Hilderbrand replied that she would see it as item #5 or #6, as she felt multiple awards and other minor language modifications were more important.
- Senator Davis then inquired whether Ms. Hilderbrand knew the status of the American Bar Association's (ABA) committee on procurement? Ms. Hilderbrand responded that the committee was still working on its efforts to produce an updated version of the Model Procurement Code.
- Co-chair Martin asked where the department was on the terms and conditions of IT contracts? Ms. Hilderbrand reported that the department had been working with the deputy attorney general to modernize language for terms and conditions on software, telecommunications, and in general for such contracts; and, to determine how to be more flexible with special terms and conditions. She noted that NASPO (National Association of State Procurement Officials) had recently issued terms and conditions on cloud contracts, and the department would be incorporating those. Ms. Hilderbrand commented that the department was balancing security, best practices, risk, and cost with the desire to meet the industry's needs. She concluded that the department's efforts were targeted to be completed in the next few months.
- Co-chair Martin inquired whether the terms and conditions were included in the initial solicitation for a bid? Ms. Hilderbrand reported that they were included with the initial solicitation; if any questions about the terms and conditions were received during the allotted time, the department would respond to those questions.
- Co-chair Anderson asked, when there was an RFP (request for proposal) out, whether vendors had the opportunity to contact the department directly to ask questions regarding the bid? Ms. Hilderbrand explained that during a bid, there was a Q&A period in which the vendor or interested party may contact the department, preferably in writing; all questions and responses were posted en masse in anonymity to the website for public viewing. When a question of a substantive nature was received after the close of the bid, and the department felt that the response would affect how a vendor might have bid, the department would reach out to the earlier submitted bid vendors to provide the new information. She added that the department also may adjust the closing date, for fairness to all vendors. Co-chair Anderson then inquired how the department would respond to a direct phone call? Ms. Hilderbrand responded that the department would receive and record it, but would have to explain that no response could be made at the time.
- Senator Lee asked whether the department shared the evaluation process with a vendor when an appeal was filed? Ms. Hilderbrand responded that the department will conduct a "debrief" with a vendor, but that the items discussed would be of a general nature. She added that, during the upcoming vendor day, this was one of the topics covered so that vendors were better educated on what a top answer was. Senator Lee asked whether the vendor actually would see its proposed bid and its scoring? Ms. Hilderbrand stated that the vendor would.
- Co-chair Martin inquired whether there were any additional changes that Ms. Hilderbrand would like to see added to the appeals process? She stated that she was quite pleased with the processes that had been established (specification appeal, nonresponsive appeal, sole-source appeal, and not-the-lowest responsible bidder appeal) and that the response time for the administrator had been increased from 3 to 5 working days. She continued to look at other states' procurement laws to discover better processes and ideas.

- Rep. Vander Woude inquired what would happen when the terms and conditions of a contract were better than was requested? Ms. Hilderbrand suggested that it might have happened with software, because there was a boilerplate for conditions. She stated that the department had a pre-clarification process on large contracts to expose unknown variables.
- Rep. Crane asked whether there was a barrier for vendors who did not bid electronically? Ms. Hilderbrand felt that there was not; the department encouraged vendors to use the department website for fairness of distributing the bid information and related questions.
- Rep. Crane asked whether the state had considered requiring all vendors to make submissions electronically? Ms. Hilderbrand reported that it was not something the department wished to do because it was a limiting factor; in fact, the department had received and awarded contracts to handwritten bids.
- Senator Den Hartog inquired as to the percentage of bids that were received nonelectronically? Ms. Hilderbrand replied that the amount was significant.
- Co-chair Martin asked whether Ms. Hilderbrand felt there was any benefit to having an outside entity perform the review in the appeals process? Ms. Hilderbrand responded that there was a provision for the administrator to appoint an appeals officer, but the appeals process was working as it existed. She commented that an outside entity would add another layer to the process and, hence, add additional time to the process.
- Co-chair Martin asked Ms. Hilderbrand to describe her experience with those requests to make purchases outside the state contract. Ms. Hilderbrand reported that there had been a handful of such requests and all but one had been approved; she commented that the process worked best for requests to purchase outside the state catalog contracts.
- Co-chair Martin, in regard to institutions of higher education being permitted to make purchases outside state contracts, requested Ms. Hilderbrand to identify items that might be included in considering the term "expense." Ms. Hilderbrand suggested that all elements of expense should be considered: administrative time to find/retrieve the goods, freight, restocking fee, etc. She commented on the ease of purchasing from the state contract vendors and the services they provided at no additional expense: delivery, return fee, transportation, etc.
- Co-chair Martin asked where Ms. Hilderbrand saw DOP's future in relation to purchasing and training? Ms. Hilderbrand responded that the department goal would be to move toward providing training to other agencies to make them more efficient, but continue the steps of consulting and negotiating large contracts.
- Co-chair Martin inquired how well the issue of delegated authority was working? Ms. Hilderbrand stated that she would discuss that more later, but felt she had been given the right amount of responsibility as the administrator to make those decisions.
- Ms. Bowen inquired whether it would be helpful to have a list of items in statute to consider when evaluating the "expense" savings for justification of purchases outside state contracts, especially for institutions of higher education? Ms. Hilderbrand felt that such a list would be a helpful visual, as well as the need to address the competitive solicitation threshold.
- Senator Lee asked Ms. Hilderbrand to identify instances where the latitude given to the administrator to use her discretion was beneficial? Ms. Hilderbrand cited the few requests that the department had received to buy outside state contracts. She noted that she needed to keep in sight the existing contractual obligations along with the benefits those vendors offered, while recognizing that sometimes the contracted vendor did not have everything that an agency might need.
- Senator Lee asked what kind of information would be included in the required exemption report to be submitted to the Legislature from DOP? Ms. Hilderbrand explained that the report would have such information as how much was being spent, who the statewide contract vendor was, who the

targeted vendor was, the agency's justification, and the department's reason for acceptance or denial; in addition, there would be a spreadsheet of such information from all requests.

Seeing no more questions for Ms. Hilderbrand, the committee went to the scheduled break.

At 10:35 a.m., Co-chair Martin recalled Ms. Hilderbrand to the podium to continue her comments to the committee. Ms. Hilderbrand discussed the current attempt to promulgate rules, in particular the topics of contract oversight and delegation of authority. She reported that she did not have any draft language at this time but the notice of intent had been filed in the June bulletin and, consequently, public meetings had been held in July and August for public input, as per the procedures. Ms. Hilderbrand noted that proposed rules had to be submitted by the September 2 deadline in order to be considered for this legislative session.

CONTRACT OVERSIGHT: Ms. Hilderbrand discussed the department's efforts to detail the procedures for contract oversight. She explained that when DOP issues a contract, the department administers the contract (i.e., ensures the benchmarks of the contract were met) once the contract was in place. She went on to detail the duties of *contract administration*: issuing amendments, sending cure notices, resolving contractual issues, etc.; whereas, *contract management* was the daily monitoring. She reported that the department was requesting, through proposed administrative rule, that each agency create its own manual to better detail the oversight necessary in supervising a contract. She noted that when an agency issued its own contract, it was responsible for the oversight and administration of the contract; when DOP issued the contract on behalf of an agency, DOP was responsible for the administration and the agency was responsible for the daily monitoring. She proposed that the agency oversight manual:

- Identify different levels of management for the contract, depending on the dollar value and complexity of the contract.
- Identify who would be the contract manager for the agency and identify the qualifications and duties of the person in that position.
- Detail a normal communication and escalation plan.
- Detail the closeout process upon contract completion.
- Contain a section detailing the procedures necessary for contracts meeting the definition of a qualifying contract as described in section 67-9219(5), Idaho Code.

DELEGATION OF AUTHORITY: Ms. Hilderbrand then discussed the department's efforts to detail the procedures for delegation of authority. She explained that the proposed rules were not much different than those currently in place, the requirements being:

- The proposal must be in writing;
 - The application must be accompanied by documentation of proficiency;
 - Justification for the need of delegated authority must be included;
 - Proof of an agency policy and procedure manual;
 - A written plan for continued training;
 - A delegated authority policy (including subdelegation);
 - Recognize that delegation of authority was not transferable; and
 - Detail when the delegated authority was able to be revoked or rescinded.
- Co-chair Martin inquired how delegated authority requested by an agency, rather than an individual, would be conducted? Ms. Hilderbrand explained that it would follow the same procedures; but the rules would state that there would still be a person within the agency who would be identified as the accountable entity.
 - Senator Davis commented that he was not fond of the requirement of a manual when rules and statute would regulate. Ms. Hilderbrand explained that the type of manual being discussed was a

desk manual that would guide or assist the agency in understanding the steps of the process; it was not an enforcement manual.

- Senator Davis then asked why the department felt it needed to identify terms using administrative rule, and had it consulted the Legislature about having the terms placed in statute? Ms. Hilderbrand reaffirmed that the terms she referenced were more for assisting the user in identifying responsibilities and not for use as a legal definition. She added that, in fact, the proposal was to remove language that already existed in state code and that, as always, IDAPA and state code superseded all other language.
- Senator Den Hartog inquired whether such manuals were available to the public? Ms. Hilderbrand reported that the Desk Manual was on the front page of the department website, along with the Contract Administration and Management Guide.
- Co-chair Martin requested Ms. Hilderbrand to restate where the department was in its process to promulgate rules. Ms. Hilderbrand restated that the notice of intent to promulgate rules had been published in the June Idaho Administrative Bulletin, public hearings had been held, and feedback was currently being reviewed. Co-chair Martin inquired whether there would be more opportunities for public feedback? Ms. Hilderbrand stated that feedback would be accepted until August 19th, as stated on the department website. Co-chair Martin asked her to clarify that the department had received feedback from agencies but not from vendors or citizens? Ms. Hilderbrand agreed with his statement. Co-chair Martin then asked her to comment on why there had not been more of a variety in the opportunities for feedback? Ms. Hilderbrand stated that she could not identify the exact reasons, but perhaps it was due to the fact that contract oversight and delegation of authority were more of an internal agency item.
- Senator Davis inquired whether the [Idaho] Supreme Court had provided any input or counsel in regard to bill negotiation and the ability to maintain separate constitutional autonomy? Ms. Hilderbrand reported that the department had not had any communication from the court.
- Co-chair Martin inquired how the authority would be reassigned when it had been granted to an agency rather than an individual? Ms. Hilderbrand reported that a memorandum of understanding (MOU) would be in place between the agency and DOP in such an instance, as well as additional procedures of review by DOP.
- Co-chair Martin asked whether Ms. Hilderbrand anticipated more agencies requesting the delegation of authority and, hence, would that make DOP's role more of a training responsibility? She replied that she did expect more delegated authority to be granted and that it would reduce the department's workload on contracts, so that it could focus more on training with the agencies.
- Co-chair Martin queried whether training would be a portion of the currently proposed rules? Ms. Hilderbrand stated that training was not an issue being addressed by those rules.
- Senator Den Hartog asked Ms. Hilderbrand to comment on why more agency and public feedback had not been received; were the comments able to be made anonymously? Ms. Hilderbrand reported that the comments were able to be received by phone, email, piece of paper, etc.; she theorized that there was not much feedback because the items were more of a housekeeping nature and not of a contentious nature.

Ms. Hilderbrand continued her presentation on delegation of authority in regard to other areas needing improvement: small purchasing (under \$100,000) needed better organization not substantive changes; interagency agreements needed language added to make the opportunity more known; language cleanup of "purchasing authority" and "purchasing activity" where relevant in IDAPA; modify the provision that allows for the use of a rehabilitation agency (extend the allowed one-year limit).

- Senator Davis asked whether it would be helpful to provide statutory standards for interagency agreements to better define those guidelines? Ms. Hilderbrand responded that it might be helpful in making the process more specific. Senator Davis requested that Ms. Hilderbrand draft some language and provide it to the committee at a future date.

- Co-chair Martin commented that he thought such already existed in statute. Ms. Hilderbrand explained that the proposed language simply stated that it was possible for public agencies to contract with one another.

Co-chair Martin commented that the purpose of Ms. Hilderbrand's presentation was to report the department's progress since the changes went into effect. He recognized that some members might not have known of the administrative rules progress since they would only be aware of such rules if they sat on the appropriate germane committee(s). With that, Co-chair Martin recessed the meeting for lunch.

At 1:00 p.m., Co-chair Martin called the meeting back to order.

Co-chair Martin then called Brian Kane, Assistant Chief Deputy from the Office of the Attorney General, for his presentation [Into the Void](#). Mr. Kane stated that words have impact and so it was important to choose the correct ones. He summarized that the term "void" essentially meant that something was never in effect, while the term "voidable" essentially meant that it was not in effect from the moment it was affirmed/recognized to no longer be effective. He commented that the important terms in section 67-9213, Idaho Code, regarding contracts, were *void* and *money advanced* (noting that it was more common to use "payment prior to receipt of goods and services"). He submitted that the Legislature had to decide what it wished to fix: was a contract void or voidable? And whichever it was, when did the time begin for when money was advanced? Mr. Kane then explained the duality of statutes to protect the taxpayer and state from poor performances (shield) while also protecting providers from being bilked (sword).

- Co-chair Martin asked Mr. Kane whether he knew of the reason or history as to why "void" had been chosen for this statute? Mr. Kane reported that he did not know the history but could research it for the committee.
- Co-chair Martin requested Mr. Kane to redefine the term "money advanced." Mr. Kane reiterated that it traditionally meant "money advanced prior to the receipt of goods or services." He observed that the Idaho Supreme Court had, in regard to the Syringa suit, determined that the term meant "any sum advanced on a void contract."
- Co-chair Martin then inquired whether it was more common for the state to pay before or after services/goods were received? Mr. Kane responded that he did not know, as such activities were not within his department's purview.
- Senator Davis commented that he was concerned with how the state should proceed in policy going forward, and then asked Mr. Kane to identify some policies that would be helpful. Mr. Kane suggested that it would be best to provide a section of definitions to make things more clear.
- Senator Davis asked whether Mr. Kane was aware of any unjust enrichment in Idaho's statutory language or of other states addressing unjust enrichment in their purchasing laws statutes? Mr. Kane explained that unjust enrichment was a remedy in equity, and so it often did not exist in statute. He cited that section 73-116, Idaho Code, had adopted the common law in which there was no other statute.
- Senator Davis asked Mr. Kane, in regard to his experience with other states, what the policy should be? Mr. Kane explained that he would need to do more research.
- Senator Davis summarized Mr. Kane's statements to conclude that, with current Idaho statutes and current judicial interpretation, the state did not have a perfect mechanism established. Mr. Kane responded that Senator Davis was correct in his summary.
- Co-chair Anderson theorized that a contract was void because at some point it was voidable; and, hence, the reason for declaring something void was because a deal broke down somewhere along the process. He then surmised that there must exist a statute of limitations somewhere in all the dealings. Mr. Kane commented that Co-chair Anderson's observations were correct; that it all

boiled down to interpretation of the terms. He noted that it was especially delicate when the state was involved because such an entity was held to a higher standard.

- Co-chair Anderson asked what safeguards a vendor needed in dealing with the state? Mr. Kane responded that his question was at the heart of the issue in trying to balance the shield and sword for both vendors and the state.
- Co-chair Martin concluded that, as the statute reads, his only recourse as a vendor would be to sue the state. Mr. Kane agreed with his statement.
- Senator Davis proposed a scenario where a vendor diligently provided the services as agreed by contract with the state for a span of four years, at which time an unsuccessful bidder challenges the awarded bid. In such scenario, the unsuccessful bidder wins the suit and the original contract was determined to be void due to circumstances of inappropriate procedure on the state's behalf. If the contract was void, and if the term "advanced" means "any payment received," would the original winning vendor have to return any and all payment received, even though services had been provided for four years? Mr. Kane submitted that such a scenario could play out just as described based on an interpretation of the current statutes.
- Co-chair Anderson proposed a scenario where a vendor has a contract with the state; and after a couple years into the contract, the vendor sells the company to another vendor and retires. Co-chair Anderson speculated whether it was possible that the original vendor could be sued for the payment received if the contract was declared void after some time in the new owner's possession? Mr. Kane admitted that such a scenario was fact-dependent; such a scenario was possible, but there were many gray areas. He then reemphasized the need for the Legislature and others to select words carefully and then to support those words by providing definitions.
- Co-chair Martin asked whether making the change from "void" to "voidable" was sufficient, or would a definition need to be included? Mr. Kane recommended the inclusion of definitions. He commented that if the committee should propose changing "void," then it should also consider defining "advance" and "performance" [for section 67-5704, Idaho Code].
- Co-chair Martin asked whether changing the term from "void" to "voidable" would change the balance of the sword and shield explained earlier? Mr. Kane explained that such a change would influence the balance, but it would need to be tested to see how much it would influence.
- Senator Den Hartog inquired whether the committee needed to consider revision to statute for situations where the vendor acted in bad faith, not just those situations when the state possibly had acted in bad faith? Mr. Kane reiterated that it was a balance to ensure both situations were covered.
- In regard to the terms "void" and "voidable," Co-chair Martin asked Mr. Kane to provide his recommendation as to how the committee should proceed? Mr. Kane thought it best that he have time to draft, consider, and edit the language now that he had a better understanding of the issues and concerns of the committee.
- Rep. Nye inquired if when a void contract was declared invalid, was Mr. Kane suggesting that the state should pay for that invalid or illegal contract? Mr. Kane reemphasized that word choice was critical and that there was the need to create benchmarks as to levels of payment or nonpayment in such situations.

Co-chair Martin thanked Mr. Kane for his comments and suggested that he work with Ms. Bowen in his attempt to provide draft language for the committee. He then called Ms. Hilderbrand, Administrator of the DOP, back to the podium for questions from the committee.

- Co-chair Martin inquired what auditing systems were in place to determine whether an individual was making purchases correctly? Ms. Hilderbrand responded that the statutes regarding ethics were the first line of defense; then, there was the department's liaisons with the agencies, who

provided training, reviewed files, and discussed best practices. She explained that any discovery of a violation of the purchasing process would become a personnel issue.

- Co-chair Martin asked who would know when a purchasing card (P-card) was used incorrectly? Ms. Hilderbrand reported that each agency had its own internal structure to monitor the usage of P-cards.

At 1:46 p.m., Co-chair Martin called upon Rakesh Mohan, Director of the Office of Performance Evaluations (OPE). Director Mohan explained that his department's role was to provide the Legislature with objective information on whether state agencies and programs were operating economically, efficiently, and in compliance with law. His staff conducted evaluations and presented findings, conclusions, and recommendations to the Joint Legislative Oversight Committee (JLOC) and other legislative committees. He observed that the issues with contracts his staff had reviewed were not in whether the contract was written poorly, but, rather in the policy design, the implementation design, and what type of legislative oversight existed, if any. Director Mohan applauded the committee for remedying the issues addressed in OPE's 2013 report, with the implementation of the State Procurement Act. Director Mohan noted that large contracts often had the most issues, which he attributed to a lack of oversight during the awarding process. He felt there should be more review during the process on larger contracts, to prevent problems. Director Mohan proposed that possibly his department could serve as an outside mechanism to ask additional questions on such projects.

- Co-chair Martin asked whether Director Mohan was suggesting that the Legislature have an oversight committee that would evaluate contracts during the process in a formally recognized manner? Director Mohan responded that it would be too much work for one committee alone to do that; rather, a combination of the germane committees and his department could do that additional review.
- Co-chair Anderson, quoting from a January 13, 2016, report on the Idaho Behavioral Health Plan by OPE, read comments recommending that all agencies could benefit from improvements in better communication and policy design, especially when contracting on program implementation. He then asked whether Director Mohan felt that there had been improvement? Director Mohan replied that it was good to have policy in writing, but it was another thing to act effectively on the plan. He observed that real-time compliance was more effective than hindsight review.

Co-chair Martin called upon Amanda Bartlett, Performance Evaluator for OPE, for her comments. Ms. Bartlett, reiterated that the concept of contracting was to get the best value for taxpayer dollars. She observed that often, during the contract process, attempts were made to keep the overhead low and, hence, money for oversight was eliminated from a contract. She felt that such funding, wherever it was allocated, could be very beneficial in ensuring that contracts were as efficient as possible.

Co-chair Martin called upon April Renfro, Division Manager of Legislative Audits for LSO, for her comments. Ms. Renfro, explained that the duties of her office were to perform financial audits and compliance audits for the Legislature and for the state. Included in those responsibilities were the statewide comprehensive financial report, and the management reviews on each government agency, which were performed at least once every three years. In reviewing the agencies, her division was looking for strong internal controls to be in place and whether there was compliance with applicable laws. She agreed with Director Mohan and Ms. Bartlett that there was often a two-fold issue in the lack of project management/planning and in the compliance with policies that were already established by the agencies. Ms. Renfro also agreed that there was insufficient monitoring until after the fact, which was discovered in the audits.

- Co-chair Martin asked Ms. Renfro to identify who should perform statewide monitoring? Ms. Renfro responded that there was a lot of assistance at the front end of contracting, but that there was not much guidance once the contract was awarded to ensure that benchmarks were met. Those items were identified during the audit and then a new policy/process was implemented. Co-chair Martin restated his initial question, asking whether it should be the

agency itself, the Legislature, or the DOP? Ms. Renfro commented that it made sense for the DOP to have someone designated to assist in the monitoring, especially when the department had assisted with the contract.

Co-chair Martin asked Ms. Hilderbrand to return to the podium.

- Co-chair Martin asked Ms. Hilderbrand to comment on what was being done or what should be done regarding the monitoring of contracts? Ms. Hilderbrand explained that contract management and contract administration were at the center of the issue. She reported that the DOP did not have access to the finances of agency contracts unless a request was made for a report. In addition, her staff had many new contracts to assist with, along with monitoring old contracts; at the moment, there was simply not enough staff to supervise all of the contracts that existed. She explained that this was why the department had endeavored to include these monitoring steps in the proposed administrative rules.
- Co-chair Martin asked whether other states have an oversight committee to monitor contracts? Ms. Hilderbrand reported that every state has something different: Texas has a monitoring team; Nevada has individuals within the executive branch that served as auditors; and some states have a very large staff and are able to perform those duties.
- Senator Den Hartog asked whether the responsibility of managing a contract was an issue with how code was written or was it in how contracts were written; and, additionally, did the DOP have the expertise to manage all of such contracts? Ms. Hilderbrand admitted that the department did not have expertise on every topic, as the agency would.
- Rep. Crane commented that the efforts of OPE and Legislative Audits were observed "after the fact." So, he asked, would it be more beneficial for the agency that bid the contract to monitor the contract or would it be better if another agency did the monitoring? Ms. Hilderbrand explained that it was a combination of both: the agency that bid the contract had to have the tools in place to monitor the daily functions of the contract, while it would be wise to have another entity monitor higher level responsibilities - ones that required expertise in contract management, issue resolution, and some subject matter expertise in program implementation. She noted that many agencies had good monitoring in place, but when a problem arose, the agency did not always know how to address the issue or from whom it should seek assistance.
- Rep. Crane then summarized that her comments were suggesting a hybrid model where an individual from the agency teamed with someone from DOP to perform the necessary monitoring. Ms. Hilderbrand admitted that she could not conclude what the plan should be; but the key to the plan was to create more visibility, especially on high-risk and high-dollar contracts.
- Co-chair Martin commented that, even though section 67-9219, Idaho Code, grants authority to manage and supervise all contracts, he was hearing Ms. Hilderbrand say that the department just didn't have the resources to do that. Ms. Hilderbrand agreed; the department did not have enough resources to perform all the solicitations and also manage all the contracts. She had hoped that the proposed rules would ensure the monitoring was being done by the agency at the crucial benchmarks (3 months, 6 months, etc.) to catch any issues that may arise.
- Senator Davis inquired whether it was being suggested that the committee authorize an internal audit division? Ms. Hilderbrand replied that any mechanism would be helpful in monitoring large contracts to ensure their success.
- Senator Davis questioned whether the monitoring was for contracts or for the department in performing its duties? Ms. Hilderbrand responded that it was for the contracts.

Co-chair Martin requested that Ms. Hilderbrand present her report on the Department of Purchasing's current appeal process. Ms. Hilderbrand stated that the changes made to the appeals process during last session made the section better organized and listed the type of appeals available (specification, nonresponsive, sole-source, and not-the-lowest bidder). She reported that

the department would like to propose additional items regarding the appeals process: additional provision for when an appeal that the department was at fault was valid.

- Senator Davis inquired as to the rights of the bidder who was awarded the contract when an appeal was filed? Ms. Hilderbrand explained that the appeal was processed before the contract was actually awarded, as the winning bidder receives a letter of intent to be awarded the contract. If such appeal was given merit, she added, the letter of intent would be rescinded and the contract would be rebid.
- Senator Davis asked what exactly the department was trying to address in its policy change proposal? Ms. Hilderbrand explained that the current statute allows for the administrator to deny an appeal or to appoint a determinations officer for the appeal; the statute does not address how to handle an appeal in which the administrator agrees with the appeal.
- Senator Davis asked what other type of items, other than a mathematical error by the department, should be added to this policy? Ms. Hilderbrand noted that only factual items of the contract were to be addressed, and, if needed, she could provide a list of items or examples for the committee.

Seeing no other questions for Ms. Hilderbrand, Co-chair Martin thanked her for her testimony.

The committee then discussed items that should be on future agendas, identified in the scope of its missive.

- Co-chair Anderson noted that the agenda for the next meeting would be addressing political subdivisions and quasi-public agencies or entities. He noted the other issues to be addressed were cooperative purchasing agreements, void contracts, multiple awards, and IT contracts.
- Rep. Nye wished to have discussed the issues of whistle-blower protection and who was auditing the auditors.
- Rep. Crane expressed a desire to better define the term "expense" as it appears in section 67-9225, Idaho Code.
- Co-chair Martin agreed with Rep. Crane and added the task of better defining or clarifying "void," "voidable," and "money advanced," as discussed earlier during Mr. Kane's presentation.
- Senator Davis identified the issues of interagency agreements (as proposed by Ms. Hilderbrand), consideration of adding the definitions of "contract management" and/or "contract administration," the discussion of "void" and "voidable," and unjust enrichment, along with sideboards to the appeal process.

Co-chair Martin noted the next meeting to be September 14 in Twin Falls at City Hall, and restated the proposed dates of the future meetings. With no further business to address, the committee adjourned at 2:48 p.m.