

**MINUTES**  
**Approved by the Committee**  
**State Procurement Laws Committee**  
**Thursday, October 27, 2016**  
**9:00 A.M.**  
**EW41**  
**Boise, Idaho**

Co-chair Senator Martin called the meeting to order at 9:05 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, and Nye; Legislative Services Offices staff Mike Nugent, Robyn Lockett, and Jennifer Kish. Absent and excused: Representative Smith (ad hoc) and LSO staff Elizabeth Bowen.

Other Attendees: Jennifer Saha - CompTIA; Doug Robinson - National Association of State Chief Information Officers (NASCIO); Jordan Kroll - Information Technology Alliance for the Public Sector (ITAPS); Jacqueline Leech - Idaho Transportation Dept.; Terri Spinazza - Boise State University; John Foster, Kate Haas - Kestrel West; Bob Perkins, Doug Barr - Ada County; Mark Estess, Lance Gilley - Eigureen Ellis; Valerie Bollinger, Sarah Hilderbrand - Division of Purchasing; Suzanne Budge - SBS Assoc. LLC; Dan Goicoechea - State Controller's Office; Carlie Foster - Lobby Idaho; Greg Kunz - Dept. of Health and Welfare; Brad Little - Lieutenant Governor; Marilyn Whitney - Governor's Office; Greg Zickau - Office of the Chief Information Officer (OCIO); Jeremy Chou - Givens Pursley; Clark Corbin - IdahoEdNews.

NOTE: presentations and handouts provided by the presenters/speakers are posted to 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 Office located in the State Capitol.

Co-chair Martin called upon Jennifer Saha, of CompTIA, for her presentation "[Idaho's IT Procurement](#)." Ms. Saha explained that her company is a global IT trade association that works with public entities and studies purchasing behaviors of state and local governments. The company focuses on ways to improve procurement practices by feedback from vendors. She then gave a brief summary of Idaho's technology industry and identified Idaho's challenges from vendors' perspective.

- Co-chair Martin asked Ms. Saha to further explain her finding that Idaho requires a terminated contractor to fund a new bid. Ms. Saha explained that, as she understood DOP policy, when a contract was terminated by the state for the vendor not meeting expectations, the terminated vendor was responsible for the state's cost to rebid the contract. She commented that such a policy did not exist in any other state; traditionally, the contract was terminated, bills accrued were paid, and the parties went their ways.
- Senator Den Hartog asked whether the policy was found in the Division of Purchasing (DOP) procedures, state code, or within the contract. Ms. Saha responded that it was located in the standard terms and conditions, not in statute.
- Representative Vander Woude asked whether the issue was with all contracts or specifically IT contracts. Ms. Saha responded that she spoke to IT contracts, she had not reviewed general contract policy.
- Co-chair Martin asked for more clarification about setting a financial limit on a vendor's liability for failure of a contract. Ms. Saha explained that Idaho had no limit established; traditionally a liability limit is set at 1.5-2% of the value of the contract. She noted that some vendors reported that they would not even place a bid on Idaho contracts because of the unlimited factor.

- Co-chair Martin asked, since the state received bids in lieu of that factor, why the state should consider establishing a limited liability. Ms. Saha explained that the solicitations were not attracting a broad enough pool of qualified vendors for the benefit of the state.
- Representative Crane requested that Ms. Saha identify the member companies CompTIA. Ms. Saha provided: large telecom companies (ATT, Verizon), smaller telecom companies (ShoreTel), systems integrators (Deloitte), hardware/software vendors (IBM), security system providers; most any type of IT equipment provider. Representative Crane asked whether there were any provisions in the Idaho procurement process that would allow vendors to negotiate the terms and conditions within the contract. Ms. Saha responded that there was traditionally an aversion to negotiating for fear of crossing an undisclosed line. Representative Crane then asked whether she was concluding that vendors did not want to bid in Idaho because there was not an opportunity to negotiate the terms and conditions. Ms. Saha agreed with his statement.
- Co-chair Anderson asked whether, in observation that vendors were willing to pay for a "wrong that they had done," the phrase "within reason" should be added. Ms. Saha agreed that it should, especially if it was not already established in a capped liability.

Co-chair Martin called Doug Robinson, Executive Director of NASCIO, to the podium for his presentation [Forces of Change and the Need for IT Procurement Reform](#). NASCIO is a national non-profit association that represents state government IT and executives.

- Representative Vander Woude inquired whether, with the move from assets to services, there were enough vendors meeting the needs of that movement. Mr. Robinson reported that the options were very broad and companies were moving to position themselves to provide such services.
- Co-chair Martin asked, regarding the recommendation to include more flexible terms and conditions, why the contract shouldn't be focused and limited. Mr. Robinson explained that the goal was not to transfer too much liability onto the vendor, by the creation of specific terms and conditions, that the vendor does not submit bids. He admitted that there needed to be a balance.
- Senator Jordan asked Mr. Robinson to further explain the recommendation for not requiring performance bonds. Mr. Robinson responded that a performance bond was borrowed from the transportation and construction industries, and it was not really applicable to information and technology. He would recommend the removal of unlimited liability and the establishment of a ceiling of liability.
- Senator Den Hartog asked when was the best time in the solicitation for terms and conditions to be negotiated to ensure fairness to all the vendors. Mr. Robinson promoted the negotiations be done in advance of the award.

At 10:00 a.m., Co-chair Martin call upon Jordan Kroll of Information Technology Alliance for the Public Sector (ITAPS) for her presentation [Improving State IT Procurement](#). Ms. Kroll's presentation focused on traditional best practices within procurement and the level to which Idaho fared within those standards, and provided recommendations for the committee to consider.

- Co-chair Martin asked why Ms. Kroll was recommending to preclude a provision that permitted the vendor to terminate a contract. Ms. Kroll explained that, with respect to material obligations (payment), vendors should have that option, especially if wronged by the state.
- Co-chair Anderson asked whether Ms. Kroll was aware of recent draft legislation by the DOP that addressed the issue of an IT RFP not having that avenue. Ms. Kroll responded that she was. She commented that the policies should reflect fairness for both sides of the contract to prevent any undue mistrust.

Co-chair Martin asked whether John Foster or Kate Hass, of Kestrel West LLC, had any additional comments to add to the morning's presentations. Mr. Foster expressed a desire to have the

procurement process be more consistent by creating better agency rules, rather than agency policy, which often changes. He submitted that this mostly dealt with the governance of IT solicitations.

After a brief break, Co-chair Martin invited Brad Little, Idaho's Lieutenant Governor, to provide his comments to the committee on cybersecurity. The Lieutenant Governor commented that he chaired the governor's cybersecurity task force. He reported that the governor would be issuing an executive order regarding best practices that should be adopted by agencies on hardware/software/third-party vendors as standard operations for preventing cybersecurity attacks. Recommendations to come from that task force would include training every state employee on cybersecurity awareness and creating an audit process for cybersecurity.

- Representative Crane asked whether the lieutenant governor was suggesting that the committee recommend a policy to move toward a centralized system for IT procurement. Lieutenant Governor Little responded that it would be most beneficial to have minimum standards for the purchase of software/hardware.

Representative Nye made a motion to accept the September 14 minutes as presented; Co-chair Anderson seconded the motion; and the minutes were approved by a majority voice vote.

At 10:55 a.m., Co-chair Martin called Brian Kane, Assistant Chief Deputy for the Office of the Attorney General, to the podium for comments on [previously presented draft legislation](#) on void contracts (section 67-9213, Idaho Code). Mr. Kane gave a brief overview of the draft and spoke to some issues that needed more clarity: subsection (2)(ii) "expenses reasonably incurred" needed to define who would determine this; consider adding mention of Title 18 sanctions to subsection (3).

- Senator Davis suggested that subsections (2)(a)(i) and (ii) be reviewed by a board of examiners. Mr. Kane submitted that the phrase "reasonable profit" was subject to negotiation but liked the idea of a review board. Senator Davis suggested that subsection (2)(d)(ii) could also be reviewed by a board of examiners. Mr. Kane also could see a board as a good idea if that was what the committee wanted. Mr. Kane commented that whoever made the decision needed to have sufficient detachment from the process.
- Senator Davis asked whether any of the proposed language was intended to preclude judicial review in the search for establishing "reasonable profit." Mr. Kane stated that judicial review or arbitration was not precluded if the earlier methods were unsuccessful. Senator Davis commented that if such avenues were available then, maybe, there was no need for a board of examiners.
- Senator Davis inquired whether any of the proposed language in subsection (2)(b) prohibited any form of unjust enrichment consideration, or were there different levels of bad faith. Mr. Kane replied that the language was very broad but more in favor of the state (no quantum meruit); he commented that if the committee wished to have levels of bad faith that it could be attempted. Mr. Kane noted that the intent of the language was to restore both parties, as closely as possible, to the original position before the contract.
- Senator Davis asked who would determine the remedy for subsection (2)(b)(i) and (ii). Mr. Kane reported that it would be the state. Senator Davis suggested that it be placed under section (2) to cover all of the subsections. Mr. Kane noted that the term "director" would be moved to the paragraph of subsection (2) to better define those subsections.
- Senator Davis then asked whether "null and void," [subsection (2)(b)] as suggested by the Model Procurement Act language, was necessary. Mr. Kane agreed that the language could be changed to simply read "void". He also commented that possibly an additional subparagraph (iii) was necessary to create an absolute "walk away" solution, connecting the solutions with an "or." He cautioned that the more options provided often allowed for more opportunities for litigation; also, that there was a need to balance the option for fairness along with the disincentive to file appeals where a vendor would still be paid while in the appeal process.

- Representative Vander Woude asked for clarification on "fraudulent" versus "bad faith" behavior. Mr. Kane explained that fraudulent meant "intended with deceit" (dealt with honesty) and that bad faith meant "intended with untowardness or used undue influence" (dealt with one's conduct). Representative Vander Woude commented that it seemed vague. Mr. Kane commented that the behavior would be determined by the review as identified in subsection (2).
- Co-chair Anderson asked how, as referenced in subsection (2)(d), goods would be returned; should the term "refund" be listed as an option. Mr. Kane commented that, in theory, the remedy was understood, but maybe it should be defined better.
- Representative Nye asked whether the language for subsection (2)(a)(ii) was directly from the Model Code. Mr. Kane submitted that it was not verbatim and had been tweaked for Idaho. Representative Nye inquired whether a limitation should be placed on "reasonable profit." Mr. Kane commented that an "equitable remedy plus" situation was not intended to create a profit.

At 11:33 a.m., Co-chair Martin called upon Mike Nugent, Division Manager of LSO Research and Legislation, to present draft language for [DREL013](#). Mr. Nugent explained that the draft language was intended to better clarify how a "value" was determined when these entities attempted to justify buying items not available with or better priced than state contracts.

- Senator Davis asked who would determine those costs as required. Mr. Nugent explained that it was the entity's duty to determine those costs in the justification. Senator Davis suggested the term "cost" be revised to state "market rate."
- Senator Jordan inquired whether the factor of needing the item in a timely fashion could be included in the determination. Mr. Nugent could see why that would be a valuable factor and would carry that suggestion to Ms. Bowen.
- Representative Crane asked why the delivery cost was a factor in the determination. Mr. Nugent explained that it was a factor because one vendor would deliver the item for free but another vendor had a delivery cost; so, if the items were advertised at the same price, the cost was not actually the same since one added a delivery fee. Mr. Nugent added that the cost of driving around to compare prices was a factor to consider when the state contracts easily provided prices to the entity. Representative Crane commented whether determining all of these additional related costs was really necessary.

The committee recessed for lunch at 11:45 a.m.

At 1:05 p.m., Co-chair Martin called the meeting back to order, and called upon Jeremy Chou, attorney for Givens Pursley LLC, for his presentation [Recommendations for Administrative and Judicial Review Process](#). Mr. Chou also presented a handout of his [proposed draft language](#) for the committee. Mr. Chou commented that his presentation was intended for public policy consideration; however, he admitted, for the record, he was involved in current litigation with a vendor who had a suit against the state regarding procurement issues.

- Co-chair Martin asked Mr. Chou to identify the requirements of a determinations officer appointed by the director. Mr. Chou explained that appointees were often lawyers or individuals with expertise on the issue.
- Co-chair Martin inquired how the state allowed for judicial review. Mr. Chou identified Title 52, Chapter 67, Idaho Code, as stated in SECTION I of his draft proposal language.
- Senator Den Hartog inquired why the emergency clause provision had been included. Mr. Chou commented that, if the proposed language was approved, it would allow vendors the opportunity to request judicial review, retroactively.
- Representative Crane asked Mr. Chou to explain how the current process operated. Mr. Chou reported that it would have an determinations officer appointed to look at the appeal, or the director could look at the review, or the director could deny the appeal. Mr. Crane then asked how the proposed draft differed. Mr. Chou explained that the prevailing party, in reviews for

contracts valued at or over \$5 million, could be awarded reasonable attorney fees and court costs. Representative Crane inquired whether Mr. Chou had met and shared the draft language with the Dept. of Administration. Mr. Chou reported that he had not.

- Representative Vander Woude inquired how many contracts valued at or over \$5 million existed. Mr. Chou reported that he did not know. Co-chair Anderson cited an October 2016 report from the Division of Purchasing that there existed 18 contracts reported as such.
- Representative Vander Woude asked how the proposed language would prevent the issue of a vendor continuing to profit from a contested contract rather than bidding a new contract. Mr. Chou responded that the fear of having to cover attorney and court fees, if unsuccessful, should be the disincentive.
- Co-chair Martin asked whether the determinations officer was under some type of timetable to provide a decision. Mr. Chou reported that there was not a time frame established and suggested that the Legislature create one. He submitted that a contested case would have timetable.
- Representative Nye asked whether the proposed emergency clause provision would benefit his client, currently in litigation. Mr. Chou replied that it would give his client an opportunity to seek judicial review.
- Representative Nye asked whether Mr. Chou had discussed the proposed draft language with any other vendors. Mr. Chou reported that he had discussed the concept with other vendors but had not shown the language to any other vendors.

Co-chair Martin then called Mike Nugent and Robyn Lockett, LSO Principal Budget and Policy Analyst, for their presentation on [agencies subject to the State Procurement Act](#). Mr. Nugent submitted that this presentation was a follow-up to the September 14 meeting agenda item on quasi-public entities. He explained that this spreadsheet was a "work in progress" as Ms. Lockett and Ms. Bowen had researched how each quasi-public entity was created and how or who was responsible for its operation. Mr. Nugent shared that there were exemptions established at the creation of the original act, mostly attributed to political party affiliation; in addition, some entities had exempted themselves by statute. Mr. Nugent felt it worthy of the Department of Administration's time to research each entity's history and current administration to make a clarification whether an entity was subject to the State Procurement Act.

- Co-chair Martin asked why these entities would be exempt from best practices of procurement policy. Mr. Nugent commented that exempt meant not required to use DOP, not to ignore best practices and their fiduciary responsibility. Ms. Lockett clarified that all state entities had to adhere to the ethics, training, reporting, and contract monitoring requirements of the State Procurement Act; however, not all entities were required to use DOP for the letting of the agency contracts.
- Representative Crane asked about the history that allowed the state lottery to be exempt from the requirement. Mr. Nugent shared that, when the lottery was created, the director of the Department of Administration felt that the department did not have the expertise for purchasing lottery machines; as such, the Legislature allowed the lottery to be exempt from the requirement.
- Representative Crane requested Mr. Nugent to identify the deciding factors for some of the agency exemptions. Mr. Nugent commented that community colleges (exempt) were political subdivisions even though they received state funds and were connected to state universities. He noted that the public health districts (exempt) received state funds, but also county funds; and in statute stated that the districts were neither state, county, or city. He submitted that, if there was a hint of the entity being a political subdivision or an independent body corporate politic, it was exempt - unless the entity requested itself be subject to the requirement.
- Co-chair Anderson commented that this issue had arisen while researching other issues related to the committee's procurement topics. He noted that the conversation of *who* was subject to the procurement rules had come about, especially as it was discovered that some were exempt or

could request exemption. The discussion then became about the different depths to which the state could be liable for an entity's contract. He noted that there seemed to be no definitive reason as to why an agency was either subject to or not subject to the State Procurement Act. He listed these items on how the efforts of DOP would benefit an agency: protect the financial integrity of the state; protect the funds contributed by taxpayers by achieving the best value; ensure state employees have necessary items to do their jobs efficiently; ensure consideration of the vendor community, who are often Idahoans; and provide expediency to the process. Co-chair Anderson expressed a desire to better understand the reasons for exemption, but also to possibly provide better clarification why an entity was subject (for DOP's clarity also) or not.

- Co-chair Martin asked whether, if litigation were to occur with the state lottery, the state would have any exposure. Mr. Nugent responded that the state could have exposure, but efforts would try to limit it to just the lottery.
- Senator Den Hartog inquired whether entity was subject to procurement procedures versus being subject to contracting through DOP could be itemized for clarity. Ms. Lockett responded that it would be very helpful to create a sort of "checklist" that stated whether an entity was subject to the ethics, training, reporting, contract monitoring, and using DOP for contracting.

At 2:15 p.m., Sarah Hilderbrand, Administrator for the Division of Procurement, was called to the podium for her comments and presentations on [Cooperative and Group Discount Purchasing](#) and [Multiple Awards](#).

- Co-chair Martin asked what kind of action the committee should recommend regarding such a list of entities being required to follow the State Procurement Act. Administrator Hilderbrand commented that she and her division would very much appreciate a more decisive list of agencies that were required to use DOP, as earlier discussed. She acknowledged that it would give the division better guidance when working with agencies as to the agency's level of required compliance. She noted that all agencies were welcome to use the division for contracting purposes for education of the process.
- Co-chair Martin inquired whether the division would prefer that an agency that received state funds be required to follow the State Procurement Act. Administrator Hilderbrand submitted that such a decision was for the Legislature. She noted that a benefit of such a requirement would be that the division could better understand overall purchasing behaviors and requested items by the review of so many contracts. Co-chair Martin asked how such a requirement would impact the division. Administrator Hilderbrand admitted that it would definitely increase the division's workload.
- Co-chair Anderson inquired why the original subsection (1) of Cooperative and Group Discount Purchasing was being removed. Administrator Hilderbrand explained that the total cost of acquisition (travel, personnel time involved, delivery fee) was now considered, not just the item's listed cost.
- Co-chair Anderson asked why the new subsection (3) of Cooperative and Group Discount Purchasing was being amended. The administrator explained that the proposed language was to guarantee that participation occurred at the same fee as other members, so that there were not additional or differing participant fees required for the opportunity, which would skew the actual cost.
- Representative Vander Woude asked what the fees for participation in the purchasing cooperatives were. Ms. Hilderbrand responded that it varied: some had no fee and some required a \$100 annual fee. Representative Vander Woude commented that inclusion of this item seemed unnecessary for statute and maybe it should be considered as an agency rule instead.
- Representative Vander Woude asked how the division would defend a challenge on a multiple award if a vendor claimed able to provide the entire contract. Administrator Hilderbrand

reminded the committee that, as stated in subsection (4), no multiple award is made if one vendor can fulfill the entire contract.

- Co-chair Anderson inquired how subsection (1)(e) of Multiple Awards could be defended/justified. Administrator Hilderbrand submitted that such a determination is made by the administrator; the agency requests such a justification within the bid.
- Co-chair Anderson queried whether a multiple award was opposed or embraced by the soliciting agency. Administrator Hilderbrand stated that the division makes such a decision based on the guidance or consultation of the soliciting agency.
- Representative Crane inquired why the phrase "same or similar" was suggested to be stricken from subsection (1) of Multiple Awards. Administrator Hilderbrand replied that it was often difficult to justify the comparison of items and it was a vague phrase.
- Senator Den Hartog asked when the possibility of multiple awards was considered in the procurement process. Administrator Hilderbrand stated that it occurred with the agency before the initial solicitation is advertised, and it is decided after the bids were received. She stated that the possibility of the solicitation being fulfilled by multiple awards would be stated in the RFP for vendor awareness.

At the conclusion of the presentations, Co-chair Martin commented on the direction that the committee should take. He suggested that the committee begin with the recently presented draft language from the DOP, and decide to accept or not to accept those items. He then commented that the committee should discuss what would additionally be presented and how best to present items to the Legislature.

Co-chair Anderson commented that the committee may not complete this year's goals, and, citing that it took Utah about five years to accomplish its goals, the committee may need to ask for continuance. He submitted that the committee should suggest new legislation, but was not sure whether it should be multiple, smaller pieces or not. He also agreed that action should be taken on the two items proposed by DOP.

- Representative Nye made a **motion "to accept 67-9224 as presented"**; seconded by Representative Bell; motion approved by voice vote.
- Representative Nye made a **motion "to accept the Multiple Awards draft as presented"**; seconded by Co-chair Anderson; discussion: Senator Lee wished to have better clarification on subsection (1)(e); Representative Crane wished to have more discussion on the removal of the phrase "same or similar"; motion approved by voice vote.

Co-chair Martin encouraged members to communicate their concerns and opinions on void contracts and procurement by state institutions of higher education to the co-chairs or Ms. Bowen so that draft language could be presented at the next meeting for consideration. He was not sure that proposed draft language from the political subdivisions, absolute clarification on agencies being subject to the State Procurement Act, or proposed draft language for IT contracts would be ready for a decision at the next meeting, and may need to be the focus of another year.

- Representative Vander Woude felt that there was a lot of information to consider with the IT contracts and, though it might not be ready for presentation, he felt it worth discussion at the next meeting.
- Senator Den Hartog commented that this year's items were so diverse, and submitted that the committee propose multiple smaller pieces of legislation.

Co-chair Martin noted that the next meeting was scheduled for November 17, with November 18 also reserved, if needed.

The meeting was adjourned at 2:50 p.m.