

**MINUTES**  
**Approved by the Committee**  
**State Procurement Laws Committee**  
**Thursday, November 17, 2016**  
**9:00 A.M.**  
**EW41**  
**Boise, Idaho**

Co-chair Representative Anderson called the meeting to order at 9:10 a.m.; a silent roll call was taken. Members present: Representatives Crane, Vander Woude, and Nye; Co-chair Senator Martin and Senators Lee, Den Hartog, and Jordan; Legislative Services Office staff Elizabeth Bowen, Robyn Lockett, and Jennifer Kish. Absent and excused: Representatives Bell and Smith (ad hoc) and Senator Davis.

Other attendees: Terri Spinazza - Boise State University; Bob Perkins, Lorna Jergensen - Ada County; Keith Watts - City of Meridian; Kate Haas - Kestrel West; Tony Pirc - State Department of Education (SDE); Lance Giles - Eigurren Ellis; Greg Casey - Veritas Advisors; Valerie Bollinger, Sarah Hilderbrand - Division of Purchasing; Susanne Budge - SBS Assoc. LLC; Jacqueline Welch, Michelle Doane, Kirk Anderson - Idaho Transportation Department (ITD); Colby Cameron - Sullivan & Reberger; Devin Bloss - Idaho Department of Lands (IDL); Carrie Foster - Lobby Idaho.

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 Anderson asked for action on the October 27 meeting's minutes. Representative Vander Woude made a motion to accept the minutes as presented; Co-chair Martin seconded the motion; and the motion was approved by a majority voice vote.

Co-chair Martin made a motion to accept the revised agenda as presented; Ms. Bowen requested that the revised agenda additionally reflect that Kate Haas would be presenting instead of John Foster; Co-chair Martin made an amended motion to include Ms. Bowen's request; Representative Vander Woude seconded the amended motion; and the amended motion was approved by a majority voice vote.

Co-chair Anderson asked Bob Perkins, Procurement Manager for Ada County, to approach the podium for his presentation on [Proposed Procurement Changes for Political Subdivisions](#). Mr. Perkins commented that Keith Watts, Purchasing Manager for the City of Meridian, would assist in the presentation; he noted there was also an [additional handout](#) to accompany the presentation. Mr. Perkins reported that many of the committee's ideas had been worked into the revised changes, including some items that had been abandoned in light of feedback.

- Senator Jordan asked, regarding section 67-2803, whether the political subdivisions would be able to establish a lower threshold if desired. Mr. Perkins responded that by policy they would be able to set lower thresholds than stated in statute.
- Senator Jordan commented on proposed section 31-602, Idaho Code, that, if a spending authority amount was prescribed in statute rather than in policy at county level, it could be difficult to operate; also, since counties were responsible for emergency response and emergency purchasing, that declarations for emergencies be included, so as not to tie their hands. Mr. Perkins commented that the current statute disallowed the policy to delegate; it was currently the duty of the commissioners and was not able to be delegated.
- Senator Den Hartog asked whether the county board would still review purchases, under the established limit, if the responsibility was delegated to someone else. Mr. Perkins noted that the Ada county commissioners currently reviewed every purchase for amounts of \$1,000 or

more; if the proposed policy was accepted, the commissioners would be able to delegate that authority and not have to review every purchase.

- Senator Den Hartog asked whether the term "heavy equipment," as used in section 67-2805(14), was defined in statute. Mr. Perkins responded that he was not aware that it was.
- Senator Den Hartog asked whether section 67-2805(15) had a time limit established within the bid for the awarded contract so that there was an opportunity for other vendors to assume the contract. Mr. Perkins explained that most contracts had a time frame for existence; this section would allow for an additional bid to be placed to continue service.
- Co-chair Martin asked when the amount of \$25,000 and \$100,000 had been established in section 67-2805(2). Mr. Perkins believed the amounts had been established in 2005.
- Co-chair Martin asked why the term "qualified bidder" in section 67-2805(3) was being eliminated. Mr. Perkins explained that it was not clearly defined. He noted that the term "licensed public works contractor" could be substituted.
- Representative Crane inquired whether section 67-2805(3)(b)(xiii) was an attempt to prevent a contract being awarded to the lowest bidder. Mr. Perkins explained that it was to avoid potential litigation; he noted that the current language allowed for the contract to go to someone other than the lowest bidder.
- Representative Crane provided that, in an example where company B was awarded the contract over company A, this section required a reasoning for the decision; therefore, if this language was stricken, it would no longer be required to provide a justification to the other companies. Mr. Perkins responded that such an effect was not the intention, but rather, it was intended to make the process more transparent that the bid was being awarded to the lowest bid. Representative Crane then asked whether there would ever be an opportunity for a company who was not the lowest bidder to receive a contract, and hence this section was no longer needed. Mr. Perkins responded that it should be policy that the lowest bidder always receive the contract. Mr. Watts added that the contract was awarded to the "responsive low bidder"; a bidder was considered a "non-responsive low bidder" if something was missing or not provided by the contract.
- Representative Vander Woude inquired whether the reduction from seven to five calendar days, in the same section, was reasonable. Mr. Perkins responded that the final time frame was undecided, but noted that the intent was to get the award moving forward as quickly as possible.
- Representative Vander Woude commented that there should be included a time frame for the response to the appeal from the solicitor. Mr. Perkins stated that would be a good idea.
- Senator Lee asked whether business days versus calendar days had been discussed. Mr. Perkins responded that it would be good to clarify as business days, in light of the upcoming holiday. Senator Jordan commented that, from her experience as a small business owner, ten business days would be more reasonable than five, for an appeal to be filed. Mr. Perkins noted those suggestions.
- Mr. Watts noted that, per an earlier request from Senator Jordan regarding section 54-1926 on bond failures, it was reported that only six contracts valued less than \$50,000 had failed in the previous 57 years.
- Co-chair Martin asked whether the political subdivisions were still seeking the use of reverse auctions. Mr. Perkins reported that they were not.
- Co-chair Martin asked Mr. Perkins about his expectations of the proposed efforts of the political subdivisions. Mr. Perkins noted that there was more input and cooperation needed by the subdivisions, but felt that they were really close to having the proposed language ready as draft legislation for this year's legislative session.

- Senator Lee asked why the subdivisions decided not to pursue the requirement of vendors declaring "proprietary information" and other issues of what was public information. Mr. Perkins explained that Title 74 covered the issue well enough.

Co-chair Anderson reminded the committee of HCR 48, which charged the committee to focus on the appeals process for DOP, ethics in procurement, information technology contracts, and provisions of law relating to multiple contract awards, public works construction, purchasing by political subdivisions, and void contracts; and that upon completion, the committee would report its findings, recommendations, and any proposed legislation to the Legislature. He noted that options available to the committee included the opportunity to vote on proposed legislation and/or permission for legislation to be drafted on behalf of the committee, as well as a request for extension of the committee for the following session. He added that a germane committee could pick up those items remaining, an individual could carry draft legislation, or an agency could carry draft legislation.

- Co-chair Martin commented that he was willing to request from legislative leadership an additional meeting in December, if warranted.
- Representative Crane advocated a request for continuance of the committee for the purpose of resolution to the issue of some entities not being subject to procurement procedures and, also, for the appeal process with respect to judicial review.
- Representative Vander Woude commented that, if there was not another meeting this year, he would like to see recently proposed draft legislation be presented to Legislature this upcoming session.

At 10:10 a.m., Co-chair Anderson called Kate Haas, of Kestrel West, for her presentation on [IT procurement issues](#). She commented that she was presenting language in response to requests since the last meeting's focus on information technology procurement practices. Ms. Haas noted that the draft was compiled to focus first on the process of procurement, such as agencies subject to the Idaho Technology Authority (ITA), definitions, the authority to procure, contract management, and permissions related to open contracts, multiple awards, performance bonds, and rulemaking authority; and the second part focused on the terms and conditions of contracts.

- Co-chair Martin asked Ms. Haas to provide more clarity on section 67-9307(2), specifically whether it was allowing for fees that were in addition to the contract. Ms. Haas explained that it did allow for the recoupment of fees that were greater than the original cost, but expected the liability to be within the scope of the contract, including costs related to data breaches.
- Co-chair Martin inquired whether the stated 2x the value of the contract could be adjusted in an RFP. Ms. Haas explained that a vendor could not if there existed a cap such as this example.
- Representative Crane asked whether this section was an attempt to address the issue, reported by presenters at the previous interim meeting, that some companies refrained from making bids in Idaho because there was no liability limit. Ms. Haas responded that it was, even though industry standards were often set at 1.5%.
- Representative Crane inquired about the juxtaposition of vendors balking that there was no cap, but that she was proposing a cap higher than the industry standard. Ms. Haas explained that vendors were comfortable knowing that some terms and conditions could be negotiated when others were firmly established. Representative Crane commented that he thought the original intent was to allow negotiation in the terms and conditions. Ms. Haas responded that he had a good point, but the draft was an attempt to address the earlier perspective that the state was not willing to negotiate.
- Senator Lee commented that her first impression of the draft language was that it was heavily in favor of the vendor, and cautioned that there be a balance for both sides of the process. She suggested that Ms. Haas look at what other states had in statute.

- Senator Lee then asked Ms. Haas to speak to issue of not requiring a performance bond. Ms. Haas noted that it was a recommendation presented by Doug Robinson of NASCIO at the previous interim committee. She submitted that, if there existed a combination of a percentage cap and a performance bond, a vendor may feel there was not enough flexibility for negotiation.
- Representative Vander Woude wondered whether to place a requirement that there had to be a liability limit in the contract. Ms. Haas responded that it was certainly an option to consider.
- Co-chair Martin inquired about the response from vendors if the 2x value of the contract was removed from section 67-9307(2). Ms. Haas responded that she would have to vet that idea with vendors before commenting; she noted that the 2x value of the contract was the high end of the limit and that it could always be negotiated to be less.
- After thanking Ms. Haas for working on the issues, Co-chair Anderson provided comments regarding his first impression upon reading the draft language: Was DOP not capable of managing IT contracts or was DOP not empathetic to the specifics of IT procurement? Did DOP need more employees or more employees with an IT specialty to manage IT contracts? What exactly qualified as "technology" and would be included under this purview? Why should ITA be notified if not responsible? If contracts may not be divided, what was the penalty if it was? Who would deal with the appeals process or what would be the appeals process, if not within DOP originally? Would ITA be separate from DOP? Cautioned the use of "may" used throughout the draft. What was limited by section 67-9307? What was the definition of a material breach and who determines that a breach has occurred? Also, in section 67-9307, was the reference to third-party access for physical or electronic access?

The committee then took a short break.

At 11:00 a.m., Co-chair Anderson asked Elizabeth Bowen, Senior Research Analyst for LSO, to begin her presentations on proposed draft legislation. Ms. Bowen began with proposed draft language for section 67-9213, Idaho Code, regarding void contracts. Ms. Bowen noted that the [previously requested revisions](#) submitted to Brian Kane, Assistant Chief Deputy for the Office of the Attorney General, were incorporated into this version [DRELB033](#).

- Representative Nye inquired whether approval of this draft language would impact any currently pending litigation. Ms. Bowen explained that current litigation would not be affected unless it had occurred when this statute was in effect; she noted that she would follow-up with Mr. Kane.
- Representative Crane asked whether item (4) of DRELB033 would impact current litigation. Ms. Bowen again responded that it would not as the draft language was not in effect.
- Co-chair Anderson requested that Senator Davis be given an opportunity to review the draft language for void contracts and, hence, submitted that no vote would be taken on DRELB033 at this time. Ms. Bowen explained that the draft could be approved by the committee by use of a buck slip, if that could be accomplished by the end of day on November 30; she also added that, if the committee was appointed as a working group to meet in December (by the newly elected leadership post-November 30), the committee could approve the draft language at such meeting. Co-chair Anderson suggested that Senator Davis be given the chance to review, the committee members provide opinions, and, barring any significant changes, DRELB033 be buck-slipped for approval by November 30.

Ms. Bowen then discussed [DRELB013](#), proposed draft language for procurement by state institutions of higher education. The proposed language was to provide better clarity to the term "expense"; identifying costs that were tangible for comparison.

- Representative Crane asked whether it was necessary for an entity to itemize the cost of transportation for retrieving an item and an employee's time involved to research and retrieve the item in the justification. Ms. Bowen felt that such related expenses were tangible and could be compared (specifically, delivery costs versus having no delivery cost), but admitted that such items could be a gray area.

- Co-chair Anderson commented that the dependent clause ", such as the cost of the property to be procured and the cost of delivering the property," could be removed from the proposed language and have no impact on the other language.
- Representative Crane commented that the consideration of soft costs, such as delivery, may be too limiting for the justification.
- Representative Nye inquired whether any institutions had reviewed the proposed language and provided any feedback. Ms. Bowen reported that she was not aware of any review or feedback. She added that the DOP had reviewed the language for clarity of "expense." Sarah Hilderbrand, administrator for the Division of Purchasing, commented that clarity for the item's price and related costs were in the best interest of the employee and taxpayer. She noted that she had provided examples of draft language to Ms. Bowen for inclusion in this section. Ms. Bowen submitted that she did not have the examples with her but could provide them at a break.
- Senator Den Hartog asked whether the DOP currently expected such itemization of staff time and travel expenses in the justification when requesting to buy from vendors not on state contract. Ms. Hilderbrand reminded the committee that universities were not required to use the DOP for purchasing so she could not comment.
- Representative Crane commented that the process should be simple and obvious so as to not cause problems, especially in auditing; and asked what suggestions she had to improve the process. Ms. Hilderbrand suggested that the term "expense" itself should be deleted because any related expenses were traditionally included in the evaluation; the cost should be the pure cost of the item.

Co-chair Anderson put the committee at recess while Ms. Bowen retrieved the documents for the committee.

At. 11:40 a.m., Ms. Bowen began her presentation on the [State Obligation for Contracts](#), which included the previous handouts [State Liability for Contracts](#) and the draft of [Agencies Subject to the State Procurement Act](#). Robyn Lockett, Principal Budget & Policy Analyst for LSO, clarified that the issue was 1) agencies exempt from portions of the State Procurement Act, which was different from 2) agencies that may or may not be liable for their actions related to state contracts.

- Co-chair Anderson asked, in the situation where an entity was not obligated to the state but received state funds, where the funds would derive if the entity was held liable for a bad contract; could the entity not just come to the state with an increase in the appropriation request to accommodate the shortfall. Ms. Bowen responded that it could depend on the amount of private funding an entity received, but, in truth, that scenario could play out. She summarized that the state was not liable for the entity but nothing precluded the entity from coming back to JFAC for additional funding.
- Co-chair Martin asked for clarification on why the state lottery was not subject. Ms. Bowen explained that it was exempted during its inception.
- Senator Den Hartog asked whether there was a way to modify statute to require those not subject to obligation of the state to be required to follow the State Procurement Act process but not be required to go through DOP for procurement. Ms. Bowen felt that such a modification could be accomplished if: 1) language similar to that adopted for contract monitoring and oversight was adopted for other provisions of the act; or 2) write out every process (request a bid, award a contract, etc.,) for procurement into statute, and in that manner apply the law to everyone.
- Representative Crane inquired whether Ms. Bowen was aware of previous litigation that occurred when an attempt was made to have constitutional officers be subject to procurement policies. Ms. Bowen submitted that she was not aware of the case to which he referred. Representative Crane commented that he was surprised that certain agencies were not obligated to the State Procurement Act. Ms. Bowen replied that there was a unique interpretation for the separation of powers doctrine in Idaho. She suggested that, before the committee made any changes regarding

the constitutional officers, the legislative branch, or the judiciary, the committee consult with the attorney general's office on what acts of the Legislature might violate that doctrine.

Ms. Bowen then briefly reviewed the draft of the [final report](#), which would be presented to the Legislature upon the committee's conclusion. Co-chair Anderson requested committee members to provide comments on the immediate direction the committee should take.

- Senator Den Hartog commented that she had an interest in the political subdivision issue and was willing to assist them in their continued efforts outside of the committee and into session.
- Representative Vander Woude supported the idea of meeting the last week of November to conclude/approve some of the draft language.
- Senator Jordan requested that materials be sent to committee members prior to the meeting for time to review.
- Senator Martin requested that Ms. Bowen prepare draft language on the requirement for all agencies comply with procurement procedures.

Co-chair Anderson asked whether committee members would like to package all of the legislation into one bill, or provide each topic individually as a committee or by sponsoring as individuals.

- Senator Lee felt that topics should be presented as individual draft legislation. She desired the political subdivision issues be brought as a separate item, possibly spearheaded by Senator Den Hartog, and brought to the germane committee for session.
- Co-chair Martin echoed Senator Lee's opinion; and supported that individual members could carry topics of importance to them, with permission to cite the committee's support.
- **Representative Nye made a motion to adopt the amendments made to section 67-9211, Idaho Code, (DRELB032 multiple awards) as presented today; Co-chair Martin seconded the motion; motion was approved by majority voice vote.**

Co-chair Anderson summarized that the draft language for Multiple Awards (DRELB032) was then approved and ready for a sponsor from the committee for presentation to the Legislature; the draft language for Void Contracts (DRELB033) [Contracts in Violation of Provisions of the Act] would be buck slipped for approval; political subdivision issues would champion on for revision and presentation for the session; and, lastly, Cooperative and Group Purchasing was still in the works.

Co-chair Martin directed the members to review the letter included in their packet from a public policy firm regarding judicial review and the appeal process.

The committee decided to meet on Tuesday, November 29, at 1 p.m. to wrap up items, and adjourned the meeting at 12:10 p.m.