

MINUTES
Approved by the Committee
State Procurement Laws Committee
Tuesday, November 29, 2016
1:00 P.M.
State Capitol - EW41
Boise, Idaho

Co-chair Senator Martin called the meeting to order at 1:03 p.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 Elizabeth Bowen, Robyn Lockett, and Jennifer Kish. Absent and excused: Representative E. Smith.

Other attendees: Jeremy Chou - Givens Pursley; Terri Spinazza - Boise State University; Kate Haas, John Foster - Kestrel West; Michelle Doane - Idaho Transportation Dept.; Jason Risch - Risch Pisca PLLC; Devin Bloss - Idaho Dept. of Lands; Carlie Foster - Lobby Idaho; Colby Cameron - Sullivan & Reberger; Sarah Hilderbrand - Department of Purchasing.

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

Co-chair Martin called Jeremy Chou, attorney for Givens Pursley, to the podium for his comments and presentation of proposed draft language related to procurement challenges and appeals. This [draft language](#) reflected changes in response to previous committee feedback such as the removal of a retroactive provision and removal of the \$5 million threshold for contracts.

- Co-chair Martin asked whether the approval of the proposed language would add more time to the original process. Mr. Chou responded that, while he could not identify the exact amount of time, there would be a significant amount of time added to the process. He suggested that time frames be added to the language to keep the process in check.
- Representative Nye questioned whether the proposed language would permit judicial review over administrative review. Mr. Chou noted that it would be allowed. He added that the issue was that the agency would get to choose rather than the vendor.
- Co-chair Martin asked for more detail regarding the phrase "reasonable attorney fees and costs" as stated on page 3, line 40. Mr. Chou explained that such language was to prevent frivolous law suits.
- Senator Jordan asked whether Mr. Chou felt that businesses with smaller contract values deserved the same opportunities. Mr. Chou agreed that they did and, hence, the value amount had been left blank; originally, the amount was established also to limit the amount of frivolous suits.
- Representative Vander Woude inquired what events could occur while the judicial review was in place. Mr. Chou noted that there were options for the Department of Administration to go forward with contracts while the review was in place.
- Co-chair Martin asked whether this proposed judicial review process would prevent additional suits against the state. Mr. Chou responded that the proposed language offered the opportunity to prevent a lawsuit through negotiation.
- Senator Davis asked for better explanation of proposed 67-9229(3). Mr. Chou explained that the lowest responsible bidder initially awarded the contract had the opportunity to intervene in the appeal proposed by another vendor.
- Senator Davis asked whether language proposed on page 2, lines 7-18, was the same as the language proposed on page 3, lines 1-11. Mr. Chou reported that the language was not exact.

- Senator Davis asked why the administrator should not just do items 67-9232(b)(i) or (ii); why would item (iii) be needed. Mr. Chou explained that if a vendor requests a contested case, then the director shall enact item (iii). Senator Davis commented that the opportunity for a contested case should be mentioned earlier in the language.
- Senator Davis asked whether the prevailing vendor was able to take advantage of the process in 67-9232(b)(iii). Mr. Chou responded that such was not the intent of the proposed language.
- Senator Davis inquired about the specifics of lines 16-18 in 67-9232(b)(iii). Mr. Chou noted that an appeal could be made to an administrative ruling; and if, during that appeal, a "prevailing" vendor decision was overturned, then the "reasonable attorney fees and costs," as described, would not be awarded from the lower ruling.
- Senator Davis commented that the \$5 million value was still in the language in 67-9232(2)(a)(ii). Mr. Chou noted that it should have been omitted.
- Senator Davis, recognizing that the retroactive effective date had been removed, inquired why an emergency clause provision was necessary. Mr. Chou reported that most legislation contained such a clause, but he could not see any negative effect if it was removed from the proposed language.
- Senator Davis asked why the status quo was not effective anymore. Mr. Chou responded that the volume and value of business now done with government entities was so lucrative that it often tempted vendors and government representatives to bend the guidelines to award/attain bid awards.

Co-chair Martin asked whether the committee felt it was ready to take a vote on the proposed draft language. Co-chair Anderson expressed a need for additional testimony by other affected parties and, hence, felt it was not appropriate to vote on the adoption of the presented language. Representative Crane echoed Co-chair Anderson's opinion.

Co-chair Martin called upon Jason Risch of Risch Pisca PLLC for his comments on the proposed draft language. Mr. Risch expressed that his firm was currently involved in legal procedures with a client that would be affected by such legislation, and, as the proceedings were ongoing, he would rather have the proposed language be presented through a germane committee during the legislative session.

- Representative Crane asked whether the proposed appeal process was a good idea from Mr. Risch's perspective. Mr. Risch responded that he would not want a situation where judges decide who receives a contract, rather than subject experts.
- Senator Lee asked whether the consequence of possibly being subjected to a judicial review influenced better behavior, by both the vendor and the government entities. Mr. Risch noted that a system of checks and balances was necessary, but agencies should have the autonomy to operate.

Co-chair Martin surmised that the committee was not ready to adopt the proposed draft language. Senator Lee expressed that the topic was relevant and should not be abandoned in future efforts of the committee. Senator Den Hartog requested that a statement on the importance of the topic be included in the final report. Ms. Elizabeth Bowen, Senior Legislative Analyst for LSO, commented that such a statement was already included in the final report draft, which she would discuss later in the meeting. Co-chair Anderson requested that the statement reflect the committee's desire to "endorse the investigation of the particular concept." Co-chair Anderson noted that proposed language always could be introduced to a germane committee during session.

At 2:00 p.m., Co-chair Martin called Brian Kane, Assistant Chief Deputy for the Office of the Attorney General, to the podium for his presentation of the edited version of DRELBO33 relating to void contracts. Mr. Kane explained the edits to this version influenced by previous committee feedback:

- (2)(a)(ii): end sentence beginning with "Unless determined by a court," was added;

- (2)(a): subparagraph (iii) was added;
 - (2)(b): subparagraph (iii) was added;
 - (2)(d): subparagraph (iii) was added; and
 - (4): subsection added.
- Co-chair Martin asked who else had reviewed the proposed draft language. Mr. Kane reported that only members of the attorney general's office and LSO had seen the text.
 - Co-chair Anderson inquired whether market value and invoice value of goods were/would be the same. Mr. Kane explained that the language in (2)(a)(iii) allowed for the discretion of negotiation on such issues. He added that it was impossible to provide for every scenario and that, in trying to do so, the law would be too restrictive and useless.
 - Co-chair Anderson asked whether the phrase "non-state parties" was appropriate because there existed the possibility that two state parties may have a contract. Mr. Kane acknowledged that the intent was to provide for an easy manner for the state in dealing with non-state parties because it seemed that most state entities understood how each operated, being under the same rules.
 - Co-chair Anderson asked whether the term "consequential damages" located in (2)(c) was defined. Mr. Kane reported that it was.
 - Representative Vander Woude inquired whether the state could request that the goods be returned or could only the bidder make that request. Mr. Kane clarified that, per this statute, it was only an option for the vendor.
 - Senator Davis queried whether (b)(ii) should be included with subparagraphs (i) and (iii), in regard to the six month limit on the contract. Mr. Kane agreed with the observation that it probably should not be included.
 - Senator Davis queried how "appropriate" (page 2, line 14) was considered/established, and was such related to the language in paragraph (e). Mr. Kane explained that even though there was a six month limit to the contract in such instance, those damages should be limited. He agreed that there was a connection to the language in paragraph (e) and that it could be reworked.
 - Senator Davis suggested editing the language "~~an solicitation or proposed award~~" ((3) on page 3, line 8) so as not to create confusion during the appeal process. Mr. Kane agreed with the edit. Senator Lee asked whether the same edit should be made on page 1, line 15, 16, and 19. Mr. Kane acknowledged the additional edits, but would like the time to be reviewed.
 - Senator Davis requested that other parties possibly impacted by the legislation, especially the Department of Administration, be able to review the draft language.

Co-chair Martin requested that Mr. Kane, in cooperation with LSO staff, incorporate the proposed edits and return before adjournment to present the draft to the committee. With that, Co-chair Martin recessed the committee for a break.

At 2:50 p.m., the committee reconvened and Co-chair Martin called upon Kate Haas of Kestrel West for her presentation of draft language relating to procurement of information technology. Ms. Haas reported that [this draft](#) incorporated feedback from the committee during a previous meeting, focusing on language to address negotiating terms of more complex IT projects and requesting the Department of Administration to update terms and conditions through rulemaking authority (currently standard terms and conditions are applied to IT projects, which is often not appropriate). Ms. Haas' presentation was put on hold while staff provided the committee members with the appropriate, newly proposed draft language.

During such time, Co-chair Martin requested that the committee consider newly proposed DREL013 (procurement by state institutions of higher education.)

- Representative Crane requested changing "expense" to "cost" (line 21); deleting the words "such as the cost" (line 22); and deleting the words "and the cost of delivering the property" (line 23).

- Ms. Bowen asked whether changing the term "expense" to "cost" in line 18, as proposed by the Division of Purchasing during a previous committee meeting, would negate the need for the new language, as found on lines 21 through 24. Senator Den Hartog felt the new language clearly explained the scope of items necessary in the comparison and that the language should stay.

Co-chair Martin requested Sarah Hilderbrand, Administrator for the Division of Purchasing (DOP), to come forth from the audience to participate in the ensuing discussion. Administrator Hilderbrand commented that the terms had different meanings in the procurement realm - expense traditionally meant all costs involved, including the posted price of an item.

- Senator Davis commented that the words used by Ms. Hilderbrand were more in alignment with the phrases used in the Uniform Commercial Code.
- Co-chair Anderson asked whether the term cost was a subset of expense. Administrator Hilderbrand explained that either term could be defined within a solicitation. She added that the terms were not defined in statute, and that, from a procurement standpoint, it probably was not desired to do such. She proffered that price was the price of the item; cost included additional fees related to the item's procurement; and expense was an even broader term than cost. She further explained that the comparison being requested would use the price on the open contract, which would be the listed price of a item (FOB included), as compared to that of the price of an item not on the state contract.

Co-chair Martin requested that the proposed language be incorporated into a new draft and submitted to the committee later during the meeting.

Co-chair Martin then recalled Kate Haas to the podium (3:15 p.m.) to continue her testimony, now that the committee had received copies of the newest, edited version. Ms. Haas explained that this draft added definitions to statute and outlined fundamental terms. She noted that much of the proposed language was based on language used in other states.

- Regarding subsection 67-9235(2), Co-chair Martin asked whether the limited liability would be negotiated at the time the contract was let. Ms. Haas agreed with his statement, noting that the previous version of the draft had requested a limited liability that was 2X the value of the contract. She added that currently there was no limit on the liability and no requirement that it be negotiated.
- Senator Davis asked whether paragraph 67-9235(2)(iii) intended for the vendor to provide a source code. Ms. Haas replied that it did not intend that; it intended for the vendor to provide updates. Senator Davis requested that she review the language as written to ensure the intention.
- Senator Davis proposed that, for paragraph 67-9235(2)(iv), language be considered for the state to retain ownership of the data placed on a cloud server. Ms. Haas responded that she would consider and review the language per his suggestion.

The committee decided not to take a vote on the proposed draft language, but supported the prospect of the proposed language being introduced by way of a germane committee during the upcoming session or returning for review by the committee (if renewed) the following year.

At 3:35 p.m., the committee was directed by Co-chair Martin to review the newly edited version of DRELBO13 (procurement by state institutions of higher education), as prepared by Ms. Bowen during the break. After much discussion about the current changes, the committee could not agree to adopt the newly edited draft. Additional edits were proposed and requested to be incorporated. **Senator Davis made a motion that the edited draft be included in the final report draft for the committee members to review and approve; Representative Vander Woude seconded the motion; the motion was approved by voice vote.**

At 3:50 p.m., Co-chair Martin requested the presentation of the newly edited version of DRELBO33 (void contracts), as prepared by Mr. Kane and Ms. Bowen during the break. Julie Weaver, Deputy Attorney General, presented the edits for Mr. Kane, who was unable to return to the committee.

Ms. Weaver, commented that the phrase "solicitation or" should be returned to (1) following "...chapter, the". **Senator Davis made a motion that the edited draft be included in the final report draft for the committee members to review and approve; Representative Nye seconded the motion; motion was approved by voice vote.**

At 3:58 p.m., Ms. Bowen presented DREL023 on procurement by exempt entities, at the request of Co-chair Martin.

- Senator Davis asked whether this language would require those currently exempted officers and entities to abide by certain procurement practices, even if the Procurement Act did not apply to them. Ms. Bowen agreed with his statement; noting that it would impact the judiciary, the legislature, and constitutional officers. Senator Davis commented that the committee had decided in earlier discussions not to pursue this issue.
- Co-chair Anderson commented that this issue was very complex and required a broader discussion with more affected parties.
- Senator Den Hartog agreed with Co-chair Anderson's observations and noted that it was still a relevant issue that should be discussed.
- Representative Vander Woude commented that he was also still concerned that some agencies were exempt from procurement practices and supported that this discussion, along with that of the exempt agencies, be the focus of future work for the committee.
- Representative Crane echoed Representative Vander Woude's concerns, and surmised that the issue would not be solved at this meeting, but that it should be included in future assignments.
- **Representative Nye made a motion to table any discussion of the issue and DREL0023; Representative Crane seconded the motion; the motion was approved by a voice vote.**

Representative Nye made a motion to approve the minutes of the November 17 meeting; Co-chair Anderson seconded the motion; the motion was approved by a voice vote.

Upon request, Ms. Bowen was permitted to quickly review the changes to be made to the final report draft presented at today's meeting. Committee members voted unanimously for Ms. Bowen to make the proposed edits to legislative drafts, as discussed, and to incorporate recommendations of future items to be studied by the committee, if renewed. Such edits would be highlighted in the next version of the final report draft, which would be submitted to committee members via email, for final approval.

The meeting was adjourned at 4:10 p.m.