

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 166

BY COMMERCE AND HUMAN RESOURCES COMMITTEE

AN ACT

RELATING TO STATE PROCUREMENT; REPEALING SECTION 67-9213, IDAHO CODE, RELATING TO VOID CONTRACTS; AND AMENDING CHAPTER 92, TITLE 67, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 67-9213, IDAHO CODE, TO ESTABLISH PROVISIONS REGARDING SOLICITATIONS, PROPOSED CONTRACT AWARDS AND CONTRACT AWARDS MADE IN VIOLATION OF THE STATE PROCUREMENT ACT.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section [67-9213](#), Idaho Code, be, and the same is hereby repealed.

SECTION 2. That Chapter 92, Title 67, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 67-9213, Idaho Code, and to read as follows:

67-9213. CONTRACTS IN VIOLATION OF PROVISIONS OF THE ACT. (1) Prior to award of a contract, if it is determined administratively or in an administrative or judicial review authorized by this chapter that the proposed award of a contract is in violation of this chapter, the solicitation or proposed award shall be canceled or revised to comply with this chapter.

(2) After award of a contract, if it is determined in an administrative or judicial review authorized by this chapter that the award of a contract is in violation of this chapter, the following shall apply:

(a) If the bidder awarded the contract did not act fraudulently or in bad faith:

(i) The contract may be ratified and affirmed by the director upon a declaration of the administrator that immediate delivery of the property is required by public exigencies and that the acquisition of the property satisfies the standards established by the rules of the division of purchasing for an emergency procurement. The ratification shall limit the term of the ratified contract to no more than six (6) months, and any ratification shall be submitted to the board of examiners for approval;

(ii) The contract may be terminated by the director, and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract before termination, plus a reasonable profit. Unless determined by a court, the reasonable profit due to the contractor shall be submitted to the board of examiners for approval; or

(iii) The winning bidder may request return of any goods delivered under the contract that have not been used or distributed to non-state parties, provided that in the event of a return of goods already paid for, the director may recover the fair market value of the returned goods. The director or the director's designee is au-

- 1           thorized to negotiate the return of goods and recovery of payments  
2           in the best interests of the state.
- 3       (b) If the bidder awarded the contract acted fraudulently or in bad  
4       faith:
- 5           (i) The contract may be declared void by the director;
- 6           (ii) The contract may be ratified and affirmed by the director  
7           upon a declaration of the administrator that immediate delivery of  
8           the property is required by public exigencies and that the acqui-  
9           sition of the property satisfies the standards established by the  
10          rules of the division of purchasing for an emergency procurement.  
11          The ratification shall limit the term of the ratified contract to  
12          no more than six (6) months, and any ratification shall be submit-  
13          ted to the board of examiners for approval. Ratification shall be  
14          without prejudice to the state's right to any damages or remedy it  
15          can prove under any theory including, but not limited to, contract  
16          or tort; or
- 17          (iii) The winning bidder may request return of any goods delivered  
18          under the contract that have not been used or distributed to non-  
19          state parties, provided that in the event of a return of goods al-  
20          ready paid for, the director may recover the fair market value of  
21          the returned goods. The director or the director's designee is au-  
22          thorized to negotiate the return of goods and recovery of payments  
23          in the best interests of the state.
- 24       (c) Under no circumstances shall a person, including a person challeng-  
25       ing a solicitation or an award of a contract or a bidder awarded a con-  
26       tract found in violation of this chapter, be entitled to consequential  
27       damages in relation to a solicitation or an award of a contract under  
28       this chapter, including consequential damages for lost profits, loss of  
29       business opportunities or damage to reputation.
- 30       (d) Except where a contract is ratified, in all cases in which a con-  
31       tract is declared void under paragraph (b) of this subsection, the state  
32       shall endeavor to return those goods delivered under the contract that  
33       have not been used or distributed to nonstate parties. No further pay-  
34       ments shall be made under the contract, and the state is entitled to re-  
35       cover the greater of:
- 36           (i) The difference between payments made under the contract and  
37           the actual expenses reasonably incurred under the contract before  
38           the contract was voided;
- 39           (ii) The difference between payments under the contract and the  
40           value to the state of the property delivered before the contract  
41           was voided. The value of the property to the state shall be submit-  
42           ted to the board of examiners for approval; or
- 43           (iii) If the state returned goods delivered under the contract,  
44           the difference between payments made under the contract and the  
45           costs to the contractor of such goods plus the actual expenses  
46           reasonably incurred under the contract before the contract was  
47           voided.
- 48       (e) In all cases in which a contract is declared void under paragraph  
49       (b) of this subsection, the state shall be entitled to any damages it can

1 prove under any theory including, but not limited to, contract and tort,  
2 regardless of its ratification and affirmation of the contract.

3 (f) In the event of a refusal or delay when payment under paragraph (d)  
4 or (e) of this subsection is demanded by the proper officer of the state  
5 of Idaho, under whose authority such contract shall have been made or  
6 entered into, every person so refusing or delaying, together with that  
7 person's surety or sureties, shall be prosecuted at law for the recovery  
8 of such moneys.

9 (3) If it is determined in administrative or judicial review authorized  
10 by this chapter that an award or proposed award of a contract is in violation  
11 of this chapter, and an employee or officer of the state acted fraudulently  
12 or in bad faith, such employee or officer shall be subject to the provisions  
13 of section 67-9233, Idaho Code, and chapters 4 and 5, title 74, Idaho Code, as  
14 applicable.

15 (4) Nothing provided in this section shall limit the application of the  
16 provisions of title 18, Idaho Code, or the prosecution of any person under  
17 such provisions.