

**Idaho State Bar**

**Idaho**

**Local Procurement Laws**

**Manual**



**Government & Public  
Sector Lawyers Section**

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**IDAHO STATE BAR**

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# **Idaho State Bar Government and Public Sector Lawyers**

## **INTRODUCTION**

The Government and Public Sector Lawyers Section of the Bar is pleased to present the Local Procurement Laws Manual. Efficient and cost-effective procurement of goods, services, and public works construction is an important aspect of local government operations. It is imperative to ensure the fair and equitable treatment of all persons who deal with the procurement system, and to foster effective broad-based competition.

## **ACKNOWLEDGEMENTS**

Special thanks go to the 2022–2023 section leadership for sponsoring this issue, and to the section members and volunteer attorneys who participated in creating this Manual.<sup>1</sup> The contributing authors are listed below.

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<sup>1</sup> Please note that the information or opinions expressed in this Manual do not necessarily reflect the opinions of the respective offices. Thanks also goes to Rita Jensen for her review, and the staff at the Idaho State Bar for helping to post, publish, and distribute this Manual.

## NOTE ON USING THIS MANUAL

This Manual is not intended to be relied on as legal advice or constitute legal advice from the Idaho State Bar, the Government and Public Sector Lawyers Section, or the volunteer authors or their offices. If you are not an attorney, it is recommended you seek legal advice. The Manual is intended to be an educational reference guide and generally discusses legal requirements for local procurement. Every fact pattern and issue are different, and this Manual does not address them all.

The Idaho Legislature passes legislation annually, so the citations in this Manual may not be the most up-to-date if the Manual has not yet been updated to reflect legislative changes. Please review the sections cited within to ensure the statutes relied upon are current. The Idaho Legislature provides the most recent versions of the Idaho Code online at:

<https://legislature.idaho.gov/statutesrules/idstat/>

The citations in the Manual adhere to the Bluebook system of citation, except citations to “*id.*” have been removed for readability unless part of a quotation.

Terminology may differ from state to local procurements. For example, the term “competitively bid” is used differently in state and local procurement. Please consult with your local attorney or review the definitions in the Idaho Code to determine applicability to your entity.

This Manual was created to compile knowledge, experience, and ideas from local government across the state to share information and materials with one another. We enjoyed creating it and hope you find it useful.

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## **DISCUSSION**

### **I. Procurement Overview**

#### **A. Procurement Basics**

This section answers commonly asked questions about procurement.

##### **What is procurement?**

Procurement is the process of purchasing goods and services that includes the purchasing decision, the selection of the goods and services, and the payment made by the governmental-entity buyer to purchase the goods from a vendor or contractor. All states, including Idaho, require state agencies and political subdivisions (“governmental entities”) to engage in the competitive procurement of certain categories of goods and services, often when the total contract amount exceeds a set dollar amount.

##### **What is competitive procurement?**

Competitive procurement is a bidding system that enables contractors and vendors to submit bids to encourage competitive bidding. The governmental entity’s requirements are posted in the solicitation and bidders submit bids. The governmental entity evaluates the bids and selects a winning bidder—depending on the type of solicitation, the bids will be evaluated on a cost-only basis or by comparing the services and terms offered.

##### **What is the purpose of competitive procurement?**

There are several major purposes of competitive procurement: transparency in contract award, reducing costs, efficiency, and fostering competition. It helps to ensure a fair, open, and honest process.

##### **What’s the difference between public and private sector contracting?**

Procurement differs from private sector contracting in several ways. The biggest deviation comes from the fact that these contracts are not negotiated in the traditional sense. A governmental entity solicits the good or service it desires and provides the legal terms that will govern the agreement. The governmental entity may publish a request for information to obtain more information about best practices or trends in an industry

from potential bidders or may hire an expert to assist it in developing the solicitation requirements. Negotiations after the solicitation is posted may be limited by the type of procurement process used. *See Syringa Networks, LLC v. Idaho Dep't of Admin.*, 159 Idaho 813, 367 P.3d 208 (2016) (holding that material changes to a state agency solicitation after the award were unlawful and violated the State Procurement Act). Thus, developing the requirements early in the process is vital to the success of the solicitation.

## **B. Types of Solicitations**

There are a few main types of solicitations that local government entities utilize:

1. Requests for Quotes (“RFQ”), also known as “low-bid” solicitations.
2. Requests for Proposals (“RFP”), discussed in depth in the following section (Section I.C).
3. Sealed, formal bids for expenditures over \$150,000.<sup>2</sup>
4. Direct negotiation when one of the exceptions to competitive procurement applies.

With some exceptions, state entities use similar solicitations.

## **C. Requests for Proposals**

Idaho Code section 67-2806A allows political subdivisions to utilize RFP’s:

(1) A political subdivision may utilize a request for proposal process as set forth in this section as an alternative to the competitive bidding process required by section 67-2806, Idaho Code, when the political subdivision contemplates a procurement for goods or services for which:

- (a) Fixed specifications might preclude the discovery of a cost-effective solution;
- (b) A specific problem is amenable to several solutions; or

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<sup>2</sup> I.C. § 67-2806(2).

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(c) Price is not the sole determining factor for selection.

(2) Factors that may be considered in the evaluation of vendors in a request for proposal process include, but are not limited to:

- (a) An innovative solution that is offered;
- (b) Unique product features;
- (c) Price;
- (d) Vendor experience in the market;
- (e) Financial stability of a vendor;
- (f) Differences among vendors in their ability to perform contract requirements in a timely or efficient manner;
- (g) Ability to meet product specifications;
- (h) Product quality;
- (i) Product performance records;
- (j) Past performance by a vendor;
- (k) Future product maintenance or service requirements; and
- (l) Product warranties.

(3) At a minimum, a request for proposal shall state the instructions of the process, the scope of work for the goods or services contemplated, the selection criteria, contract terms and the scoring methodology applying relative weights to factors considered.

(4) Notification, solicitation and consideration of contests concerning the award of procurement pursuant to a request for proposal shall be in accordance with the minimum requirements established in section 67-2806, Idaho Code, subject to the selection criteria established at the outset of each such procurement. Records compiled in the scoring process shall be made available for public inspection when a procurement recommendation is made to the governing board.

Using an RFP process allows the political subdivision to select bidders on bases other than price alone, which is particularly useful in contracts for services or combined service-goods contracts.

### **D. Exclusions, Emergencies, Sole Source**

#### **Exclusions**

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Political subdivisions are authorized to make certain purchases without following the procurement requirements. Idaho Code section 67-2803 provides for exclusions to the procurement requirements, which include the following:

1. Piggybacking: Acquiring personal property that is the same price and substance for like goods or services that has been competitively bid by the State of Idaho, a political subdivision of the State of Idaho, or an agency of the federal government. This does not include other states.
2. Contracts or purchases for public works construction less than \$50,000, and expenditures to procure services or personal property less than \$75,000.
3. Wages.
4. Personal or professional services to be performed by an independent contractor.
5. Real property.
6. Insurance.
7. Joint purchasing agreements/joint powers agreements with other units of government.
8. Used personal property.
9. Purchases from federal government general services administration (“GSA”) schedules or federal multiple award schedules (“MAS”).
10. Personal property or services acquired through contracts entered into by the Idaho Department of Administration, Division of Purchasing.
11. Goods for direct resale.
12. Travel and training.
13. Goods and services from Idaho Correctional Industries.
14. Repair for heavy equipment.

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15. Software maintenance, support, and licenses of an existing system or platform that was bid in compliance with state law.
16. Public utilities.
17. Food for use in jails or detention facilities.
18. Used equipment acquired at an auction if authorized by the governing board.

In addition to the exclusions listed above, emergency expenditures and sole source expenditures are also permitted without following the procurement requirements when specific criteria are met.

### **Emergency Expenditures**

Under Idaho Code section 67-2808(1), political subdivisions, through their governing boards, may declare an emergency and authorize the immediate expenditure of public money without complying with the formal bidding procedure when the nature of the emergency, along with the public interest to immediately respond to the emergency, justifies action. Qualifying emergencies include:

1. A great public calamity, such as an extraordinary fire, flood, storm, epidemic, or other disaster;
2. Emergency work to prepare for the national or local defense; or
3. Emergency work to safeguard life, health or property.

### **Sole Source Expenditures**

Under Idaho Code section 67-2808(2), when there is only one vendor reasonably available for the public works construction, services, or personal property to be acquired by the political subdivision, the governing board may make a sole source declaration and not be required to follow the formal bidding procedures. The following are some examples of when there is only one source reasonably available:

1. Life-threatening situations or situations immediately detrimental to the public welfare or property;
2. Compatibility of equipment, components, accessories, computer software, replacement parts, or service is the paramount consideration;

3. The sole supplier's item is needed for trial use or testing;
4. Purchase of mass-produced movies, videos, books, or other copyrighted materials;
5. Purchase of public works construction, services, or personal property for which it is determined there is no functional equivalent;
6. Purchase of public utility services;
7. Purchase of products, merchandise, or trademarked goods for resale at a political subdivision facility; or
8. Where competitive solicitation is impractical, disadvantageous, or unreasonable under the circumstances.

The political subdivision, after making the declaration that there is only one vendor reasonably available, is required to provide notice of its sole source procurement. The notice must be published in the official newspaper of the political subdivision at least 14 calendar days prior to awarding the contract to the sole source vendor. The notice requirement does not apply to situations where a sole source expenditure is necessary to address a life-threatening situation or a situation that is immediately detrimental to the public welfare or property. The emergency declaration required in Idaho Code section 67-2808(1) for emergency expenditures does not apply to a sole source declaration.

## **E. Vendors Requiring Illegal Terms**

If the other party refuses to change its term to comply with Idaho law, one option is to send a letter to that party stating that the party is asking the governmental entity to sign an agreement that violates state law, and that the contract is a contract of adhesion for necessary services (if accurate). This *might* void the illegal terms as unenforceable if the governmental entity is not in a position to refrain from using the services. This strategy has not been tested in Idaho courts.

## **II. Government Contract Requirements**

### **A. Idaho Code Title 29: Contracts**

The requirements found in Idaho Code title 29, chapter 1, sections 101 through 116, apply to all agreements, whether private or government

contracts at the state or local level, and it may be beneficial to review all the provisions that have not been discussed in detail in this Manual.

Specifically, Idaho Code section 29-110 provides that any term of a contract subjecting a party to arbitration conducted outside the state of Idaho is void.<sup>3</sup> It also provides that any contract provision which restricts a party from enforcing the party's rights in Idaho courts or limits the time within which the party may enforce the party's rights is void. The section permits choice of law provisions in contracts:

(1) Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals, or which limits the time within which he may thus enforce his rights, is void as it is against the public policy of Idaho. Nothing in this section shall affect contract provisions relating to arbitration so long as the contract does not require arbitration to be conducted outside the state of Idaho.

(2) Any condition, stipulation or provision in a franchise agreement is void to the extent it purports to waive, or has the effect of waiving, venue or jurisdiction of the state of Idaho's court system. Any condition, stipulation or provision in a franchise agreement, to the extent it purports to assert, or has the effect of asserting, the choice of law is enforceable.

I.C. § 29-110(1), (2).

### **B. Indemnification**

An indemnification clause is included in a contract to assign liability and defense obligations for claims arising under the contract to the parties to the contract. The typical clause calls out the obligation to defend,

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<sup>3</sup> The U.S. Supreme Court held that “[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.” *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 1916, 32 L. Ed. 2d 513 (1972) (“*Bremen*”), overruled by statute in part as stated in *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28–29, 108 S. Ct. 2239, 2243 (1988). The Ninth Circuit in *Gemini Technologies, Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 915–16 (9th Cir. 2019), affirmed that *Bremen* remained controlling law, and recognized the “strong public policy” declared in section 29-110 and required in that case for arbitration to occur in Idaho.

indemnify, and hold harmless. See Charles Brocato, Jr., *Drafting Indemnification Clauses*, 1 Transactional Lawyer 1, 1–2 (Gonzaga Univ. Sch. of Law), Oct. 2011 (discussing judicial decisions identifying differences between each obligation); Hilary Bradbury, *Beyond Boilerplate: Drafting and Understanding Indemnification Clauses*, 51 The Advocate, no. 1, Jan. 2008), at 13–15 (describing the three obligations). Under the indemnification clause, liability for defense and payment of claims is placed on the indemnitor. Often, the most important benefit of the clause is to trigger the insurance coverage the contract requires and specifically to trigger the insurer’s obligation to pay for the legal defense of the indemnified party.

### **Indemnification of the Public Agency**

Public agencies generally require contractors to indemnify, defend, and hold harmless the agency for the acts and omissions of the contractor under the contract. The principle behind this requirement is that the costs arising from the contractor’s acts and omissions belong with the contractor, not with the taxpayers represented by the public entity. In most cases, the contractor can obtain insurance for its indemnification obligations. Unless the public agency has considered limiting the indemnification obligation to only specific claims, the clause should include any claim arising under the contract. The following is a sample broad indemnification of the public agency.

<i>Example Term</i>
Contractor shall indemnify, defend, and save harmless the public agency, its officers, agents, employees, and volunteers from and against any and all liability, claims, damages, losses, expenses, actions, settlements, attorney fees, and suits whatsoever caused by, arising out of, or in connection with Contractor’s acts or omissions under this Agreement or Contractor’s failure to comply with any state or federal statute, law, regulation, or rule applicable to the Contract.

When negotiating contractor indemnification clauses, public agencies may encounter adjacent issues, including limitations of liability, insurance, and other related terms.

### **Limitations of Liability**<sup>4</sup>

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<sup>4</sup> See Section VIII.A for a sample limitations of liability terms.

Contractors can attempt to substitute an indemnification by the public agency, discussed below, with a limitation of liability. The limitations proposed by contractors are often tied to the cost of the contract and not to the risks it poses. Where the limitation shifts the costs of the contractor's performance to the public agency, it can be viewed as equivalent to an indemnification of the contractor. In addition, if not carved out of the limitation, the insurance provider may be able to argue that the insurance policy coverage for liabilities assumed under a contract is also limited. This can defeat the purpose of requiring the contractor to hold the insurance.

### **Professional Liability**

Where the contractor is a licensed professional, the public agency may have difficulty receiving full indemnification for the professional services. This is because the license holder is only covered under its professional liability insurance for claims of professional malpractice or negligence. In many situations, claims other than professional negligence could be made against the public agency, including discrimination claims, trademark or copyright violations, or claims arising from an automobile accident. The public agency should consider a more nuanced carve-out to preserve indemnification for those claims.

#### *Example 1*

##### **Save Harmless and Indemnification**

Contractor shall indemnify, defend, and hold harmless the [Government Entity], its officers, agents, employees, and volunteers from and against any and all liability, claims, damages, losses, expenses, actions, settlements, attorney fees, and suits whatsoever caused by, arising out of, or in connection with Contractor's acts or omissions under the Contract or Contractor's failure to comply with any State or federal statute, law, regulation, or rule. Notwithstanding the foregoing, Design Professional's indemnity under this paragraph arising from "professional services" is limited to those liabilities arising from the Design Professional's negligence, or error, omissions, or failure to perform Professional Services. As used in this paragraph, Professional Services means those services performed by a licensed professional employed by Design Professional under the scope of their license or a person performing the services under the direct supervision of a licensed professional.

Upon receipt of the [Government Entity's] tender of indemnity and defense, Contractor shall immediately take all reasonable actions necessary, including, but not limited to, providing a legal defense for the [Government Entity], to begin fulfilling its obligation to indemnify, defend, and save harmless the [Government Entity]. Contractor's indemnification and defense liabilities described herein shall apply regardless of any allegations that a claim or suit is attributable in whole or in part to any act or omission of the [Government Entity] under the Contract. Contractor shall not be required to hold the [Government Entity] harmless for damages attributed to the [Government Entity] in a final order issued by a court of competent jurisdiction.

Or the government entity can separate liability by type of claim:

*Example 2*

**Indemnification.**

1. **General Liability**

1.1 Design Professional shall indemnify, defend, and hold harmless the [Government Entity], its officers, agents, employees, and volunteers from and against any and all liability, claims, damages, losses, expenses, actions, settlements, attorney fees, and suits whatsoever caused by, arising out of, or in connection with Design Professional's acts or omissions under the Contract or Design Professional's failure to comply with any State or federal statute, law, regulation, or rule ("Liability"). For purposes of section [section #], Liability shall not include "Professional Services," defined in section [section #].

1.2 Upon receipt of the [Government Entity's] tender of indemnity and defense, Design Professional shall immediately take all reasonable actions necessary, including, but not limited to, providing a legal defense for the [Government Entity], to begin fulfilling its obligation to indemnify, defend, and save harmless the [Government Entity]. Design Professional's indemnification and defense liabilities described herein shall apply regardless of any allegations that a claim or suit is attributable in whole or in part to any act or omission of the [Government Entity] under the Contract. Design Professional shall not be required to hold the [Government

Entity] harmless for damages attributed to the [Government Entity] in a final order issued by a court of competent jurisdiction.

2. Professional Services

2.1 Design Professional shall indemnify and hold harmless the [Government Entity], its officers, agents, employees, and volunteers from and against any and all liability, claims, damages, losses, expenses, actions, settlements, attorney fees, and suits whatsoever caused by, arising out of, or in connection with Design Professional's acts or omissions under the Contract or Design Professional's failure to comply with any State or federal statute, law, regulation, or rule relating to Professional Services.

2.2 As used in this paragraph, "Professional Services" means those services performed by a licensed professional employed by Design Professional under the scope of its license or a person performing the services under the direct supervision of a licensed professional.

2.3 Notwithstanding the foregoing, Design Professional's indemnity under this paragraph arising from "Professional Services" is limited to those liabilities arising from the Design Professional's negligence, error, omissions, or failure to perform Professional Services.

2.4 The [Governmental Entity] shall provide Design Professional with timely notice of Professional Services claims. Upon receipt of claims under this section, Design Professional is required to immediately report all claims to its insurance carrier.

3. Any legal defense provided by Design Professional to the [Government Entity] under Article [article #] must be free of any conflicts of interest, even if retention of separate legal counsel for the [Government Entity] is necessary.

**Indemnification by the Public Agency**

During the contracting process, contractors commonly request reciprocal indemnification by the public agency. As discussed below, Idaho law limits the contractual indemnification a public entity can provide in a contract.

**Construction Contracts**

Between both public and private parties, Idaho code section 29-114 limits the scope of contractual indemnification clauses in construction contracts. Under this provision, a contractual indemnification by one party to a construction agreement for liability “caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitees” is void as against public policy.<sup>5</sup>

**Prohibition on Liabilities Extending Beyond a Budget Year**

Idaho law limits public entities acting as a contractual indemnitor in any type of contract. Political subdivisions are limited in their authority to incur an indebtedness or liability by Idaho Constitution article VIII, section 3.<sup>6</sup> This section provides that political subdivisions shall not incur any indebtedness or liability exceeding its annual income and revenue without a vote of its citizens.<sup>7</sup> In *Greater Boise Auditorium District v. Fraiser*, the Idaho Supreme Court explained that Idaho’s limitation is stricter than most other states’ constitutional provisions. 159 Idaho 266, 271, 360 P.3d 275, 280 (2015). The Court described the limits imposed by Idaho Constitution article VIII, section 3 as applying to contingent liabilities and not all possible liabilities, like theoretical torts, that may be committed by the public entity in the future. In the context of a contract, its terms must not bind the public entity to any specifiable liability beyond the entity’s ability to pay in the budget year in which the contract is entered. *Id.* at 273, 360 P.3d at 282; *see Hoffman v. City of Boise*, 168 Idaho 782, 487 P.3d 717 (2021) (“[T]he ability to cover potential taxpayer liability within a particular year is the determinative consideration . . . .”); Idaho Att’y Gen. Op. No. 79-13 (opining that where a city is obligated by an indemnity clause only to pay for the tort liability it is otherwise legally obligated to pay, there is no violation of Idaho Constitution article VIII, section 3).

An Idaho political subdivision can run afoul of the Idaho Constitution with a typical private sector indemnification clause. Clauses obligating one party to indemnify the other party for its acts or omissions under the contract generally do not limit the obligation to a particular

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<sup>5</sup> The question of “sole negligence” was explored by the Idaho Supreme Court in *Beitzel v. Orton*, 121 Idaho 709, 827 P.2d 1160 (1992).

<sup>6</sup> State agencies are subject to similar restrictions found at Idaho Constitution article VIII, section 1. *See* Idaho Att’y Gen. Op. No. 2019-1.

<sup>7</sup> Exceptions to the general prohibition are provided for ordinary and necessary expenses authorized by state statute and construction of specified types of facilities.

budget year. The annual budgets approved by the governing body for the political subdivision likely do not include funds to pay for contractual indemnification obligations. Also, not all acts or omissions giving rise to an indemnification claim will be within the waiver of sovereign immunity under the Idaho Tort Claims Act. Lastly, the contractual claim for indemnification these clauses create may not be within the provisions of the public entity's insurance coverage or pooled insurance program. See Herbert C. (Lee) Phillips, *Indemnity Clauses in Local Government Contracts*, Colo. Law., December 2014, at 53 (discussing indemnification terms from the perspective of Colorado local governments).

For public works specific indemnity provisions, see Section IV.J.

Phrases like “to the extent permitted by law” may not save otherwise unenforceable contract terms and are, at a minimum, unwise. Please see Section I.E for a discussion on pre-adhesion letters.

### **C. Anti-Boycott Against Israel Act**

The Idaho Legislature enacted the Anti-Boycott Against Israel Act (the “Anti-Boycott Act”) through Senate Bill 1086 (2021), effective July 1, 2021. The Anti-Boycott Act can be found at Idaho Code section 67-2346. The Anti-Boycott Act prohibits a public entity from entering into a contract with companies that are engaged in a boycott of goods or services from Israel or territories under Israel's control. This prohibition only applies to contracts with a total value of \$100,000 or more and where the contractor has 10 or more employees. Contracts with companies to acquire or dispose of services, supplies, information technology, or construction should include “a written certification that the company is not currently engaged in, and will not for the duration of the contract engage in, a boycott of goods or services from Israel or territories under its control.”

<i>Example Term</i>
<u>Certification Concerning Boycott of Israel</u> . Pursuant to Idaho Code section 67-2346, if payments under the Contract exceed one hundred thousand dollars (\$100,000) and Contractor employs ten (10) or more persons, Contractor certifies that it is not currently engaged in, and will not for the duration of the Contract engage in, a boycott of goods or services from Israel or territories under its control. The terms in this section defined in Idaho Code section 67-2346 shall have the meaning defined therein.

## D. Ownership or Operation by China

As of July 1, 2023, a state entity or political subdivision may not enter into a contract with a company for services, supplies, information technology, or construction unless the contract provides a provision that the company is not currently owned or operated by the government of China and shall not for the duration of the contract be owned or operated by the government of China. I.C. § 67-2359.

<i>Example Term</i>
<p><u>Ownership or Operation by China.</u> Pursuant to Idaho Code section 67-2359, Contractor certifies that it is not currently owned or operated by the government of China and will not for the duration of the Contract be owned or operated by the government of China. The terms in this section defined in Idaho Code section 67-2359 shall have the meaning defined therein.</p>

## E. No Public Funds for Abortion Act

The Idaho Legislature enacted the No Public Funds for Abortion Act (the “NPFAA”) through House Bill 220 (2021), effective May 10, 2021. The NPFAA can be found at title 18, chapter 87, Idaho Code. The NPFAA prohibits the state, counties, cities, public health districts, public school districts, and political subdivisions from entering into contracts with an abortion provider or an affiliate of an abortion provider. The NPFAA additionally prohibits public funds from being used to “provide, perform, or induce an abortion; assist in the provision or performance of an abortion; promote abortion; counsel in favor of abortion; refer for abortion; or provide facilities for an abortion or for training to provide or perform an abortion.” I.C. § 18-8705(1). Government entities should ensure that the contractors with whom they are negotiating do not engage in any of the acts outlined in the NPFAA.

If a public officer or public employee intentionally violates the NPFAA, the violation is considered a misuse of public funds and the penalties outlined in Idaho Code section 18-5702 apply. I.C. § 18-8709. The penalties range from a misdemeanor, punishable by a fine of up to \$1,000 or by imprisonment in the county jail for up to one year, or both; to a felony, punishable by a fine of up to \$10,000 or by imprisonment in the state prison for a minimum of 1 year but no more than 14 years, or both. *See* I.C. § 18-5702(1)–(3).

Without caselaw or other guidance to the contrary, it appears as though due diligence must be conducted *prior to* signing an agreement’s provision certifying compliance. Due to the potential criminal penalties, the more due diligence and precautionary steps taken ahead of time, the more certainty of compliance. Many governmental entities have been sending a letter to the other party *prior to* signing the agreement, which includes the following language:

<i>Example Term</i>
I am writing to you as the last step in our internal compliance process for Idaho’s No Public Funds for Abortion Act. All agencies of the State of Idaho, including [Government Entity], are subject to this Act. The Act establishes a penalty against state employees who intentionally enter into an agreement with abortion providers or affiliates of abortion providers, or who authorize the use of state facilities or public funds for abortion-related activity. Under the Act, there are no penalties that apply to you. At this time, the [Government Entity] has no information that would trigger the Act and prevent it from finalizing its agreement with you. If you have additional information the [Government Entity] should consider under the Act, please respond to me with that information.

If, out of an abundance of caution, the government entity desires to *also* include a reference to the NPFAA in the agreement, understanding that a contract term alone is likely insufficient without other prior due diligence, the following term can be inserted.

<i>Example Term</i>
<u>No Public Funds for Abortion Act Acknowledgement Receipt.</u> The [Governmental Entity] certifies that it has sent and received an acknowledgement from [Other Party] of the [Government Entity]’s obligations under Idaho’s No Public Funds for Abortion Act on [date]. The [Other Party] acknowledges that the [Governmental Entity] provided it with this acknowledgement.

The NPFAA does apply when the contract is between Idaho governmental entities because they are already subject to the law’s prohibitions, and the certification is not necessary.

## **F. Environmental, Social, and Governance Standards**

In 2023, the Idaho Legislature passed House Bill 191 (2023), which prohibits procurement actions awarded on the basis of environmental, social, and governance standards (“ESG”). For the statutes identified in House Bill 191,<sup>8</sup> bids shall not be accepted, denied, or scored on ESG bases. ESG is defined as subjective ethical or sustainability criteria unrelated to the specifications in a solicitation or the qualifications of a bidder.

## **G. Cooperative Purchasing Agreements**

To promote the efficient and cost-effective procurement of goods, services, and public works construction among political subdivisions, Idaho Code section 67-2807 allows for cooperative purchasing. *See* I.C. § 67-2801. A political subdivision may choose to participate in, and enter into, cooperative purchasing agreements with other political subdivisions, the State of Idaho, other government entities, or associations thereof. I.C. § 67-2807. Political subdivisions are also permitted to “participate in cooperative purchasing programs established by any association that offers its goods or services as a result of competitive solicitation processes.” A political subdivision’s decision to participate in cooperative purchasing requires prior approval of its governing board. Any goods or services procured through the participation in, and utilization of, cooperative purchasing are “deemed to have been acquired in accordance with the requirements of” title 67, chapter 28.

Idaho Code section 67-2809(2)(b)(i) defines “political subdivision” as the “state of Idaho, or any county, city, school district, sewer district, fire district or any other taxing subdivision or district of any public or quasi-public corporation of the state, or any agency thereof, or with any other public board, body, commission, department or agency, or officer or representative thereof.” As a reminder, generally, “political subdivisions of the state shall endeavor to purchase goods and services from vendors with a significant Idaho economic presence.” I.C. § 67-2801. Interested parties, which includes bidders, offerors, contractors, subcontractors, or taxpayers, have standing to challenge any cooperative agreement made in violation of title 67, chapter 28. I.C. § 67-2809(2)(e). If the interested party prevails on its challenge, it will be awarded associated costs and attorney fees.

## **H. Reciprocal Purchasing Preference**

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<sup>8</sup> Idaho Code sections 54-4511, 67-2347, 67-5711A, 67-5711C, 67-9203, 67-9210, and 67-9225.

When following its competitive solicitation process, a public entity is required to hold preferences for both public works contractors domiciled in Idaho and Idaho suppliers domiciled in Idaho. *See* I.C. §§ 67-2348, 67-2349. When a contract is sent out for bid to public works contractors, or when a contract for the purchase of any materials, supplies, services or equipment is sent out for bid, a “contractor [or bidder] domiciled outside the boundaries of Idaho shall be required, in order to be successful, to submit a bid the same percent less than the lowest bid submitted by a responsible contractor [or bidder] domiciled in Idaho as would be required for such an Idaho domiciled contractor [or bidder] to succeed over the bidding contractor [or bidder] domiciled outside Idaho on a like contract being let in his domiciliary state.” I.C. § 67-2348; *see also* I.C. § 67-2349(1). This preference is applicable to public works contractors and supplier-bidders domiciled outside of Idaho in states that grant their own in-state contractors and bidders such preference or similar preference. This is referred to as reciprocal purchasing preference. This preference does not apply to public works contractors and supplier-bidders domiciled in states that do not have this same preference or a similar preference in place.

Any supplier-bidder domiciled outside the state of Idaho may actually be considered an Idaho domiciled bidder if it establishes a significant Idaho economic presence, as defined in Idaho Code section 67-2349(1), for a period of at least one year prior to the date of the bid.

As used in the first sentence of this section H, the term “public entity” means “the state of Idaho, or any department, division, bureau or agency thereof, or any city, county, school district, irrigation district, drainage district, sewer district, highway district, good road district, fire district, flood district, or other public body[.]” *See* I.C. §§ 67-2348, 67-2349(1).

### **I. P-Cards**

P-cards or “purchasing cards” are credit cards used for small purchases, such as travel, business lunches, small office supplies, and other orders. The card statement can be split by cardholders, and have restrictions placed on the type of products or services that may be purchased (bars, golf, luxury, etc.). Dollar amounts may also be placed on the cards.

Most public entities have implemented a policy and procedure concerning use of their p-cards. Generally, p-cards help to streamline the purchasing and payment process for the public entity, removing the need

for cash, checks, or other more tedious forms of payment. P-cards benefit the cardholders (quick and convenient, expedites the delivery process); the overarching public entity (simplifies the purchasing process, electronic records); and the vendor (expedites receipt of payment, electronic records). P-cards are typically only issued to employees of the public entity and are used solely for official purchases or payments in connection with current contracts or other expenses related to official business of the public entity (*i.e.*, travel expenses). It is recommended that the p-card policy and procedure of the public entity be thoroughly reviewed before p-cards are utilized.

Payments to vendors (which may include sole proprietors, independent contractors, partnerships, and LLCs) over a certain dollar amount may be subject to Form 1099 requirements, among others. It is recommended that public entities review the most recent rules and guidance issued by the Internal Revenue Service relevant to that entity.

However, p-cards cannot be used to undermine or circumvent purchasing laws. If the purchases made on the p-card are in an amount that would have to be bid out, then a governmental entity may not use a p-card to avoid the procurement requirements. A good practice is to add up the type of transaction (office supplies or another category) and see whether the amount spent on that category in a single fiscal year would have to be publicly bid.

### **J. Vending Machines**

Governmental agencies that desire to have food service facilities, including vending machines, in a public building are required by Idaho Code section 67-6903 to notify, in good faith, nonprofit organizations representing persons with disabilities of the opportunity to operate a food service facility. Idaho Code also requires the governmental agency to give first priority to proposals submitted by the Idaho Commission for the Blind and Visually Impaired. Second priority is required to be given to the nonprofit organizations representing persons with disabilities. If there is no vendor applicant from either the Idaho Commission for the Blind and Visually Impaired or a nonprofit organization representing persons with disabilities, then the governmental agency may choose any other vendor to operate a food service facility. *See* I.C. § 67-6903. Furthermore, the governmental agency is not permitted to collect rent for the operation of the food service facility.

The Idaho Commission for the Blind and Visually Impaired is designated as the sole licensing agency under the provisions of the federal

Randolph-Sheppard Vending Stand Act, at 20 U.S.C. §§ 107–107f. I.C. § 67-5411. The Idaho Commission for the Blind and Visually Impaired was authorized to promulgate rules to carry out the purpose of relieving persons with blindness from the distress of poverty and encourage and assist persons with blindness in their efforts to become more self-supporting through the operation of vending facilities in public buildings. *See* I.C. §§ 67-5401, 67-5407(e). Through this grant of authority, the Idaho Commission for the Blind and Visually Impaired created a Business Enterprise Program (“BEP”) that governs the administration of the Vending Stand Act through IDAPA 15.02.30.

Vending facilities are defined as:

- a. Automatic vending machines, cafeterias, snack bars, cart service, shelters, counters, and such other appropriate auxiliary equipment which may be operated by blind licensees and which is necessary for the sale of newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws, and including the vending or exchange of chances for any lottery authorized by state law and conducted by an agency of a state within such a state. (See 34 CFR 395.1(x)); or
- b. Restaurants, cafeterias, snack bars, and goods and services customarily offered in connection with any of the foregoing, and includes vending machines dispensing foods when operated independently or in conjunction with such facilities. (See Section 67-6903, Idaho Code); or
- c. Any type of business which the Supervisor finds is consistent with and furthers the policies, goals, and objectives of the Program.

IDAPA 15.02.30.010.10.

Public buildings, under Idaho Code section 67-6902(4), include:

- All county courthouses;
- All city halls; and
- All buildings used primarily as governmental offices of the state or any county or city.

Public buildings, under Idaho Code section 67-6902(4), do not include:

- Public schools;
- Buildings or institutions of higher education or professional-technical training;
- Buildings of the Department of Health and Welfare<sup>9</sup>;
- Facilities of the State Board of Correction; or
- The State Capitol Building.

Public entities that wish to have vending facilities in their public buildings are required to give priority to those who are licensed through the BEP. I.C. § 67-6903. In essence, the BEP is granted the right of first refusal for providing vending services in public buildings.

## **K. Purchasing Vehicles from an Authorized Seller**

Idaho Code section 49-1601 requires vehicle dealers, salesmen, manufacturers, distributors, and the representatives from each to procure a dealer license from the Idaho Transportation Department, Division of Motor Vehicles. It is unlawful to solicit sales of vehicles without a dealer's license unless the title is in the name of the seller. Governmental entities should only purchase vehicles from authorized, licensed sellers.

## **L. Buying from Rehabilitation Facilities**

Governmental entities should be aware of Idaho Code section 67-2319:

Products which are manufactured by and services which are provided for nonprofit corporations and public agencies operating rehabilitation facilities serving people with disabilities and disadvantaged people and offered for sale at the fair market price as determined by the administrator of the division of purchasing which meet the specific requirement for such products may be procured by the state agencies or departments or any political subdivision of the state from such nonprofit corporations or public agencies **without advertising or calling for bids.**

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<sup>9</sup> The Department of Health and Welfare is required to follow the provisions of Idaho Code section 67-6903 when providing services utilizing vending machines for dispensing food in its buildings. *See* I.C. § 67-6904.

(Emphasis added.)

### **III. Procuring Services or Personal Property**

#### **A. General Services and Personal Property**

The primary procurement statute for purchasing services, excluding personal or professional services, or personal property is contained in Idaho Code section 67-2806.

##### **Procurement of less than \$75,000**

Idaho Code section 67-2806 does not require an agency to follow any particular steps in procuring services or personal property valued at less than \$75,000. Regardless, care should be taken to ensure that all other contractual requirements and ethical considerations are addressed, and strong consideration should be made to obtain multiple quotes from qualified providers to meet the intent of providing a publicly accountable process as well as meeting the goals dual of quality and economy. *See* I.C. § 67-2801.

##### **Procurements between \$75,000 and \$150,000**

When the agency contemplates a procurement estimated to cost between \$75,000 and \$150,000, the agency may use a less formal bid solicitation process. I.C. § 67-2806(1). Generally, the agency must provide the written request for bids to at least three vendors selected by the agency. I.C. § 67-2806(1)(a). The request for bids may be sent to the selected vendors physically or electronically (*i.e.*, e-mail or other digital means). The request must provide sufficient detail to allow vendors dealing in the goods or services to understand what the agency seeks to procure. Additionally, the solicitation must advise the selected vendors of the deadline for submitting a bid, who the bid must be submitted to, and whether a physical bid must be submitted or whether electronic delivery (e-mail) is sufficient. I.C. § 67-2806(1)(b). The selected vendors must be given a reasonable time to respond to the request for bids. At a minimum, the vendors must be given three business days to respond to the request for bids. Any objection to the plans and specifications from the vendor must be received at least one business day before the bidding deadline. I.C. § 67-2806(1)(c).

Following the bidding deadline, the agency's governing board, or its authorized representative, must award the bid to the responsive vendor proposing the lowest price. I.C. § 67-2806(1)(d). Alternatively, the governing board or its representative may reject all bids and begin the

procurement process again. I.C. § 67-2806(1)(d). If more than one bidder offers the same price, the agency may award the bid to whichever contractor it chooses. I.C. § 67-2806(1)(e).

If the agency finds it impossible or impractical to obtain three bids, the agency may acquire the property or services “in any manner” the agency deems best from a qualified vendor quoting the lowest price. I.C. § 67-2806(1)(e). If less than three bids are received, the agency must document the efforts the agency took to obtain three bids. The agency must keep this documentation for at least six months after the procurement decision is made.

### **Procurements above \$150,000**

When the agency contemplates a procurement estimated to cost more than \$150,000, the agency must publish notice giving the time and place of the bid opening and describing the project. I.C. § 67-2806(2)(a). The notice must be published twice in the print edition of the official newspaper of the agency. I.C. § 67-2806(2)(b); *see* I.C. §§ 60-106, 60-106A. The first notification must be published at least two weeks before the scheduled bid opening and the second notice must be published at least seven days prior to the bid opening. I.C. § 67-2806(2)(b). Copies of specifications, bid forms, contract documents, and bidding instructions must be made available to prospective bidders.

Written objections to the specifications or bidding procedures must be received by the clerk or secretary of the agency at least three business days prior to the scheduled bid opening. I.C. § 67-2806(2)(c). While not required by the statute, it is good practice for the person supervising the bid to ensure the agency responds to all objections in writing and provides the response to all other vendors who have obtained copies of the bid documents. If necessary, bidding timeframes should be adjusted to allow the necessary response to the objection. Failure to timely object constitutes a waiver of the objection. I.C. § 67-2804(3).

The agency may choose to require that each bidder provide security of at least five percent of the bid amount to ensure that the bidder honors the bid. I.C. § 67-2806(2)(d). The bid security may be cash, a certified or cashier’s check, or be a bid bond issued by a qualified surety company. If bid security is required, the bid cannot be considered if the security was not provided as part of the bid.

Any bids received by the agency may not be withdrawn after the date and time set in the notice for the bid opening. I.C. § 67-2806(2)(e). Any bids received must be opened in public at the scheduled bid opening

and read aloud prior to being reviewed and prior to being submitted to the agency's governing board for a potential bid award. The bid must be awarded to the qualified bidder submitting the lowest responsive bid. I.C. § 67-2806(2)(a).

If the agency chooses to award the procurement contract to a bidder other than the apparent low bidder, the agency must declare on the record its reason(s) for not awarding the contract to the apparent low bidder and include its reasoning in the notification to all bidders. I.C. § 67-2806(2)(i).

If any participating bidder objects to the proposed award of the bid for any reason, that bidder must respond in writing within seven calendar days of the date the notice is transmitted. I.C. § 67-2806(2)(j). The objection must explain the reason or reasons why the objecting bidder believes that the agency's decision to award the procurement contract is wrong. Failure to timely object constitutes a waiver of the objection. I.C. § 67-2804(3).

If the agency receives a bid protest, the agency must stop the procurement process while it evaluates the protest. I.C. § 67-2806(2)(j). The agency must respond in writing to the protest explaining the basis for its resolution of the protest. It is good practice to provide a copy of the response to all bidders. Following the agency's evaluation of the protest, it may affirm its prior award, modify the award, or choose to re-bid the procurement, whichever the agency deems is in the best interest of the public.

In its discretion, the governing board of the agency may reject all bids received by the agency and re-bid the project. I.C. § 67-2806(2)(h). Alternatively, the governing board may decide that it is more economical to procure the goods or services on the open market. To do so, the governing board must pass a resolution, which includes findings of fact, establishing that the work can be accomplished more economically through the open market. If the agency receives no bids, it may make the expenditure without further competitive bidding. If identical bids are received, the agency may decide, in its discretion, which contractor to award the bid to.

If the successful bidder fails to execute the contract, the agency may elect to deposit the bidder's security into a designated account to pay for obtaining a different contractor to complete the work. I.C. § 67-2806(2)(f). If the agency elects to award the bid to the next lowest qualified bidder, the low bidder's security may be used to fund the difference between the lowest and next lowest bids. I.C. § 67-2806(2)(g).

Any remaining amount of the security must be returned to the low bidder minus any administrative costs. Administrative costs cannot exceed 25% of the total amount of the low bidder's security.

## **B. Procuring Personal or Professional Services**

Under Idaho Code section 67-2803, the procurement processes under chapter 28, title 67, Idaho Code, do not apply to the procurement of personal or professional services. Further, the Qualification Based Selection process contained in Idaho Code section 67-2320 only applies to the procurement of design professionals, construction managers, and land surveyors. Regardless, care should be taken to ensure that all other contractual requirements and ethical considerations are addressed. Interviewing multiple professional service providers should be strongly considered to meet the intent of providing a publicly accountable process as well as meeting the goals dual of quality and economy. *See* I.C. § 67-2801. If the contract value exceeds \$10,000, the agency must publish a notice, in its official newspaper, giving the name of the parties, the contract amount, and a one-sentence summary of the purpose of the contract. *See* I.C. § 59-514.

## **IV. Public Works Contracts**

Title 67, chapter 28, Idaho Code, which contains the purchasing and procurements statutes for political subdivisions of Idaho, does not contain a definition of either the term “public work” or “construction.” But there is a definition of “public works construction” contained in Idaho Code section 54-1901(2)(c)<sup>10</sup> regarding the licensure of public works

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<sup>10</sup> Idaho Code section 54-1901(2)(c) provides that “public works construction,” includes any or all of the following branches:

(i) Heavy construction, which is defined as constructing substantially in its entirety any fixed works and structures (not including “building construction”), without limitation, for any or all of the following divisions of subjects: irrigation, drainage, sanitation, sewage, water power, water supply, reservoirs, flood control, reclamation, inland waterways, railroads, grade separations, track elevation, elevated highways, hydroelectric developments, aqueducts, transmission lines, duct lines, pipelines, locks, dams, dikes, levees, revetments, channels, channel cutoffs, intakes, drainage, excavation and disposal of earth and rocks, foundations, piers, abutments, retaining walls, viaducts, shafts, tunnels, airports, air bases and airways, and other facilities incidental to the same;

contractors. The definition includes essentially any construction, modification, or rehabilitation of any improvement affixed to public property including, roads, bridges, public buildings, parks, etc. Idaho Code section 54-1903<sup>11</sup> contains several limited exceptions to this

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(ii) Highway construction, which is defined as all work included in highway construction contracts, including, without limitation, highways, roads, streets, bridges, tunnels, sewer and street grading, street paving, curb setting, surfacing and other facilities incidental to any of the same;

(iii) Building construction, which is defined as all work in connection with any structure now built, being built, or hereafter built, for the support, shelter and enclosure of persons, chattels, personal and movable property of any kind, requiring in its construction the use of more than two (2) unrelated building trades or crafts.

(iv) Specialty construction, which is defined as any work in connection with any public works construction, requiring special skill and the use of specially skilled trades or crafts.

<sup>11</sup> Idaho Code section 54-1903 provides:

EXEMPTIONS. This chapter shall not apply to:

(1) An authorized representative of the United States government, the state of Idaho, or any incorporated town, city, county, irrigation district, reclamation district or other municipal or political corporation or subdivision of this state.

(2) Officers of a court when they are acting within the scope of their office.

(3) Public utilities operating under the jurisdiction of the public utilities commission of the state of Idaho on construction, maintenance and development work incidental to their own business.

(4) The sale or installation of any finished products, materials or articles of merchandise, which are not actually fabricated into and do not become a permanent fixed part of the structure.

(5) Any construction, alteration, improvement or repair of personal property.

(6) Any construction, alteration, improvement or repair carried on within the limits and boundaries of any site or reservation, the title of which rests in the federal government.

(7) Any construction or operation incidental to the construction and repair of irrigation and drainage ditches of regularly constituted irrigation districts, drainage districts or

definition, but the definition is broad enough to encompass almost all construction projects contemplated by an Idaho political subdivision. If there is any doubt as to whether a project falls within the requirements of public works, readers of this Manual should consult with the attorney for the agency before proceeding with the procurement because there are significant legal risks for the agency if the agency fails to comply with the requirements for public works procurement.

## **A. Licensed Public Works Contractors**

Generally, any project with a value of \$50,000 or more must be constructed by a public works contractor possessing a current public works contractor's license issued by the Idaho Division of Occupational and Professional Licenses. I.C. § 54-1903(9). The contractor must have the appropriate license for both the type and value (or class) of construction that is contemplated as reflected on the license. I.C. § 54-1904(5). There are four branches of public works construction:

1. Heavy construction,
2. Highway construction,
3. Building construction, and
4. Specialty construction.

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reclamation districts, except when performed by a person required to be licensed under this chapter.

(8) Duly licensed architects, licensed engineers, and land surveyors when acting solely in their professional capacity.

(9) Any construction, alteration, improvement or repair involving any single project involving any number of trades or crafts with an estimated cost of less than fifty thousand dollars (\$50,000).

(10) Any construction, operation, alteration or maintenance of a solid waste disposal site including those operated by, for, or at the direction of a city or a county.

(11) Any construction, operation or repair carried on in response to an emergency that has been officially declared by the governor pursuant to the provisions of chapter 10, title 46, Idaho Code, or an emergency that has been declared by a governing body (city or county) in anticipation of a governor's declaration, for a period of time not to exceed seven (7) calendar days.

I.C. § 54-1901(2)(c). And there are eight classes of licenses:

1. Class Unlimited,
2. Class AAA,
3. Class AA,
4. Class A,
5. Class B,
6. Class CC,
7. Class C, and
8. Class D.

I.C. § 54-1904(3). The contractor must possess the license prior to submitting bids to the agency or prior to soliciting bids from subcontractors. I.C. § 54-1902. However, if the project is funded in whole or in part with federal funds, the contractor may submit a bid prior to obtaining the license, though the contractor must obtain the license prior to the construction contract being awarded to the contractor. I.C. §§ 54-1902(4), 67-2804(1).

### **A. Written Plans and Specifications Must Be Available for Review and “or Equal” Substitutions**

Written plans and specifications for the work to be completed must be prepared in advance of bidding and be available to all prospective bidders. I.C. § 67-2309. This helps to ensure that the prospective bidders understand the nature and scope of the project. The plans must include, among other relevant items, the work to be performed or materials furnished; and the number, size, kind, and quality of materials and service required for the project. The plans cannot require the use of specific instruments or apparatus where there are other suitable alternatives of equivalent value, utility, or merit. Be aware of additional requirements found in Idaho Code section 67-2802A.

Preparing plans and specifications for review can be costly. As such, the agency may require a deposit to obtain a copy of the plans and specifications.

Failure to comply with the requirements of Idaho Code section 67-2309 can result in a civil fine of up to \$500.

## **B. Naming Subcontractors on Bids**

With limited exceptions, Idaho Code section 67-2310 requires that the name, address, and license number for all HVAC, plumbing, and electrical subcontractors be listed in the bid received by the agency from the general contractor if the project involves any of those specialties. Failure to do so renders the bid unresponsive and void. I.C. § 67-2310(6). If the general contractor is properly licensed by the state to perform any required plumbing, electrical or HVAC work, the general contractor may do the work themselves, but they must indicate on their bid that they intend to “self-perform” the work and must provide their Idaho HVAC, plumbing, and/or electrical license number(s) for any work they intend to perform themselves. I.C. § 67-2310(1).

At the time the subcontractors are named, they must be properly licensed to perform the HVAC, plumbing, and/or electrical work unless the project is funded in whole or in part with federal funds. I.C. § 67-2310(7). In that instance, the subcontractors must obtain the required license prior to the award of the bid to the general contractor by the agency.

## **C. Performance Bonds, Payment Bonds, and Retainage**

Prior to executing the construction contract for any public works construction with a value of \$50,000 or more, the contractor must provide the agency with a performance bond and a separate payment bond that become binding when the contract is executed. I.C. § 54-1926. Each bond must be for at least 85% of the contract amount. I.C. § 54-1926(1), (2). The bonds must be issued by a surety company licensed to do business in Idaho and made payable to the public agency. I.C. § 54-1926. It is illegal for the agency to require that these bonds be provided by any particular company or through any particular agent. As an alternative to the required bonds, the contractor may deposit with the agency a “government obligation” meeting the definition contained in Idaho Code section 54-1901(2)(h). I.C. § 54-1926A.

The purpose of the performance bond is solely to ensure that the contractor fully complies with the plans and specifications for the project and faithfully performs the contract. *See* I.C. § 54-1926(1).

The payment bond is solely to protect the subcontractors and suppliers providing labor and materials for the project and provide a source of payment if the contractor fails to make required payments. I.C. § 54-1926(2). If that failure occurs, the party supplying the labor or materials for the project is authorized to bring suit in the county where the project is located to obtain payment through the bond within 90 days after performing the work or materials. I.C. § 54-1927. If the unpaid party does not have a direct contractual relationship, such as a material supplier for a subcontractor, with the general contractor who provided the payment bond, they must provide written notice to the general contractor at least 90 days prior to filing suit. The public agency is required to provide a certified copy of the contract and bond to any person making a claim against the bond, or to the surety or the general contractor upon filing an affidavit. The agency may charge copying costs for providing the certified copies.

If the agency did not require a payment bond, the agency is required to pay all persons who have supplied materials or performed labor on the project. I.C. § 54-1928. The agency, acting as a creditor, may then file suit seeking repayment of the amounts paid out. The suit must be brought within one year after the labor or material was furnished. If suit is brought against the agency for failing to obtain the payment bond, the agency is subject to an award of attorney fees. I.C. § 54-1929.

Where a public agency has required either a performance or payment bond of more than 50% of the contract amount,<sup>12</sup> the agency cannot withhold more than 5% of the contract amount as retainage. I.C. § 54-1926(3). Further, the agency must release any retainage for portions of the project that have been accepted by the agency within 30 days.

### **D. Design, Bid, Build Contracts**

The primary public works construction requirements for local governmental agencies are contained in Idaho Code section 67-2805. These provisions work in conjunction with the public works contractor licensing and bonding requirements contained in title 54, chapter 19, Idaho Code, among others, to provide the structure for most public works procurements by local public agencies. The process outlined in Idaho Code section 67-2805 is known as the “Design, Bid, Build” process. There

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<sup>12</sup> All performance or payment bonds should exceed 50% of the contract amount to comply with the requirement in Idaho Code section 54-1926 that the bonds must at least equal 85% of the contract amount.

are other forms of procuring public works construction that are discussed in other sections.

### **Procurement of less than \$50,000**

Idaho Code section 67-2805 does not require an agency to follow any particular steps in procuring public works projects valued at less than \$50,000. Further, as noted above, use of a licensed public works contractor is not required. I.C. § 54-1903(9). Regardless, care should be taken to ensure that all other contractual requirements and ethical considerations are addressed; obtaining multiple quotes from qualified contractors should be strongly considered to meet the intent of providing a publicly accountable process as well as meeting the dual goals of quality and economy. *See* I.C. § 67-2801.

### **Procurements between \$50,000 and \$200,000**

When the agency contemplates a public works construction project estimated to cost between \$50,000 and \$200,000, the agency may use a less formal bid solicitation process. I.C. § 67-2805(1). Generally, the agency must provide the written request for bids to at least three public works contractors selected by the agency. I.C. § 67-2805(1)(a). The request for bids may be sent to the selected contractors physically or electronically (e-mail or other digital means). The request must provide plans and specifications of sufficient detail to allow an experienced public works contractor to understand what the agency seeks to build. Additionally, the solicitation must advise the selected contractors of the deadline for submitting a bid, who the bid must be submitted to, and whether a physical bid must be submitted or whether electronic delivery (e-mail) is sufficient. I.C. § 67-2805(1)(b). The selected contractors must be given a reasonable time to respond to the request for bids. At a minimum, the contractors must be given three business days to respond to the request for bids. Any objection to the plans and specifications from the contractor must be received at least one business day before the bidding deadline. I.C. § 67-2805(1)(c).

Following the deadline, the agency's governing board, or its authorized representative, must award the bid to the responsive contractor proposing the lowest price. I.C. § 67-2805(1)(d). Alternatively, the governing board or its representative may reject all bids and begin the procurement process again. If more than one bidder offers the same price, the agency may award the bid to whichever contractor it chooses. I.C. § 67-2805(1)(e).

If the agency finds it impossible or impractical to obtain three bids, the agency may acquire the work “in any manner” the agency deems best from a public works contractor quoting the lowest price. If less than three bids are received, the agency must document the efforts the agency took to obtain three bids. The agency must keep this documentation for at least six months after the procurement decision is made.

### **Procurements above \$200,000**

Idaho Code section 67-2805 provides two options for agencies desiring to procure a public works project valued at more than \$200,000. The agency can pursue a “Category A” procurement where bidding is open to all interested bidders and where the award does not consider the qualifications of the bidder. Alternatively, the agency can pursue a “Category B” procurement where bidding is open only to those bidders that go through a preliminary qualification review by the agency.

#### **Category A**

When the agency contemplates a Category A procurement, the agency must publish notice giving the time and place of the bid opening and a description of the project to be constructed. I.C. § 67-2805(2)(a)(i). The notice must be published twice in the print edition of the official newspaper of the agency. I.C. §§ 60-106, 60-106A. The first notification must be published at least two weeks before the scheduled bid opening and the second notice must be published at least seven days prior to the bid opening. Copies of specifications, bid forms, contract documents, and bidding instructions must be made available to prospective bidders. Interested bidders may be charged a reasonable copy fee for the bidding documents.

Written objections to the specifications or bidding procedures must be received by the clerk or secretary of the agency at least three business days prior to the scheduled bid opening. I.C. § 67-2805(2)(a)(ii). The person supervising the bid for the agency must respond to all objections in writing. The response must be provided to the objecting bidder as well as all other contractors or vendors who have obtained copies of the bid documents. If necessary, bidding timeframes may be adjusted to allow the necessary response to the objection. I.C. § 67-2804(3). Failure to timely object constitutes a waiver of the objection.

The agency may choose to require that each bidder provide security of at least five percent of the bid amount to ensure that the bidder honors the bid. I.C. § 67-2805(2)(a)(iv). The bid security may be cash, a certified or cashier’s check or be a bid bond issued by a qualified surety

company. If bid security is required, the bid cannot be considered if the security is not provided as part of the bid.

Bids must be submitted under sealed cover to the clerk, secretary, or other authorized agent of the agency who has been designated to receive the bids. I.C. § 67-2805(2)(a)(iii). Each bid must be marked on the outside identifying the project that the bid is related to. Any bids received by the agency may not be withdrawn after the date and time set in the notice for the bid opening. I.C. § 67-2805(2)(a)(v). Any bids received must be opened in public at the scheduled bid opening and read aloud prior to being reviewed and prior to being submitted to the agency's governing board for a potential bid award.

When evaluating the bids, the agency can only consider the amount bid, the bidder's compliance with the administrative requirements of the bidding process, and whether the bidder holds the requisite license. I.C. § 67-2805(2)(a). The bid must be awarded to the qualified bidder submitting the lowest responsive bid. *Id.*; see also *Hillside Landscape Constr., Inc. v. City of Lewiston*, 151 Idaho 749, 264 P.3d 388 (2011).

After determining the apparent low bidder, the agency must notify all bidders of its intent to award the contract. I.C. § 67-2805(2)(a). If the agency chooses to award the construction contract to a bidder other than the apparent low bidder, the agency must declare on the record its reason(s) for not awarding the contract to the apparent low bidder and include its reasoning in the notification to all bidders. I.C. § 67-2805(2)(a)(ix).

If any participating bidder objects to the proposed award of the bid for any reason, that bidder must respond in writing within seven calendar days of the date the notice was transmitted. I.C. § 67-2805(2)(a)(x). The objection must explain the reason(s) why the objecting bidder believes that the agency's decision to award the construction contract is wrong. Failure to timely object constitutes a waiver of the objection. I.C. § 67-2804(3). If the agency receives a bid protest, the agency must stop the procurement process while it evaluates the protest. I.C. § 67-2805(2)(a)(x). The agency must respond in writing to the protest explaining the basis for its resolution of the protest. It is good practice to provide a copy of the response to all bidders. Following the agency's evaluation of the protest, it may affirm its prior award, modify the award, or choose to re-bid the project, whichever the agency deems is in the best interest of the public.

In its discretion, the governing board of the agency may reject all bids received by the agency and re-bid the project. I.C. § 67-

2805(2)(a)(viii). Alternatively, the governing board may decide that it is more economical to procure the services on the open market. To do so, the governing board must pass a resolution, which includes findings of fact, establishing that the work can be accomplished more economically through the open market. If the agency receives no bids, it may make the expenditure without further competitive bidding. If identical bids are received, the agency may decide, in its discretion, which contractor to award the bid to.

If the successful bidder fails to execute the contract, the agency may elect to deposit the bidder's security into a designated account to pay for obtaining a different contractor to complete the work. I.C. § 67-2805(2)(a)(vi). If the agency elects to award the bid to the next lowest qualified bidder, the low bidder's security may be used to fund the difference between the lowest and next lowest bids. I.C. § 67-2805(2)(a)(vii). Any remaining amount of the security must be returned to the low bidder minus any administrative costs. Administrative costs cannot exceed 25% of the total amount of the low bidder's security.

### **Category B**

In a Category B procurement, the agency is authorized to establish criteria that the bidders are qualified to perform the type of construction contemplated by the agency. The solicitation process consists of two stages. I.C. § 67-2805(2)(b). The first stage evaluates whether the contractor meets the pre-qualification standards established by the agency. The second stage involves evaluating bids submitted by those contractors who meet the prequalification criteria. Prequalification may be used to select either the general contractor or any specialty subcontractors. Unless the project is funded in whole or in part with federal funds, the contractor must have a valid public works contractor's license at the time it seeks to prequalify. I.C. §§ 54-1902(4), 67-2805(2)(b).

To begin a Category B procurement, the agency establishes prequalification standards that the general or specialty contractor must meet. The standards must be based on the contractor's:

1. Demonstrated technical competence;
2. Experience constructing similar facilities;
3. Prior experience with the political subdivision;
4. Available nonfinancial resources, equipment, and personnel related to the project; or

5. The contractor's overall performance history based upon its entire body of work.

I.C. § 67-2805(2)(b)(i).

After developing the criteria, notice of the prequalification must be published in the same manner as a Category A procurement. I.C. § 67-2805(2)(a)(i), (b)(i). The notice must be published twice in the print edition of the official newspaper of the agency. The first notification must be published at least two weeks before the scheduled deadline and the second notice must be published at least seven days prior to the deadline. The notice must give the specific date and time by which interested contractors must provide a written response and advise the contractors of the prequalification standards that will be used to evaluate the qualifications of prospective bidders. I.C. § 67-2805(2)(b)(i).

Objections to the established prequalification standards must be received by the authorized person at the agency at least three business days before the due date and time. I.C. § 67-2805(2)(b)(iii). Failure to timely object constitutes a waiver of the objection. I.C. § 67-2804(3). The person/board supervising the bid for the agency must respond to any objection timely received by the agency in writing. I.C. § 67-2805(2)(b)(iii). The response must be provided to the objecting contractor as well as all other contractors seeking to prequalify. If necessary, bidding timeframes may be adjusted to allow for the necessary response to the objection. After addressing any objections, the agency may evaluate the submittals and determine which contractors have met the prequalification standards.

After a review of qualification submittals, the political subdivision may select the contractors that meet the prequalification standards. The agency must inform any contractor who failed to prequalify, in writing, of the reasons why the contractor did not meet the prequalification standards.

Any contractor who failed to meet the prequalification standards can appeal that determination to the governing board of the agency within seven days after the prequalification results are transmitted. I.C. § 67-2805(2)(b)(iv). Failure to timely appeal constitutes a waiver of the appeal. I.C. § 67-2804(3). If, following an evaluation of the basis of the appeal, the governing board of the agency sustains the decision that the contractor failed to meet the prequalification standards, the governing board must state its reasoning for the record. I.C. § 67-2805(2)(b)(iv). The reasoning should be provided in writing to create a written record for the basis of the decision in the event of further appeal.

The contractor may appeal the decision of the agency's governing board to the Public Works Contractor's Licensing Board within 14 days. Failure to timely appeal constitutes a waiver of the appeal. I.C. § 67-2804(3). The Public Works Contractor's Licensing Board must decide the appeal within 35 days of receiving the appeal. I.C. § 67-2805(2)(b)(iv). The Public Works Contractor's Licensing Board must allow participation, either written or oral, by the appealing contractor and the agency and may use a hearing officer to hear the appeal. The Public Works Contractor's Licensing Board cannot substitute its judgment for that of the agency and must limit its review to determining:

1. Whether the decision of the agency's governing board is consistent with the announced prequalification standards,
2. Whether the prequalification standards comport with the law, and
3. Whether the governing board's decision is supported by the entirety of the record.

Following the hearing of the appeal, the Public Works Contractor's Licensing Board must issue a written decision stating the reasoning for its decision. Any contractor affected by the Public Works Contractor's Licensing Board's decision on the appeal may seek judicial review, as provided by the Idaho Administrative Procedure Act, within 28 days of the final decision. Failure to timely appeal constitutes a waiver of the appeal. I.C. § 67-2804(3). An appeal stays the procurement process during the review by the Public Works Contractor's Licensing Board or until 49 days have passed since the agency's governing board issued its ruling regarding prequalification, whichever occurs first. I.C. § 67-2805(2)(b)(iv).

At the end of the prequalification process, the bidding stage generally follows the same steps as a Category A procurement. The agency sets a date and time for the public opening of bids. I.C. § 67-2805(2)(b)(v). If the prequalification involved the general contractor, a notice soliciting bids will be sent to the prequalified contractors at least 14 days prior to the scheduled bid opening. If the prequalification involved subcontractors, the notice soliciting bids must be published in the same manner as Category A bids. The notice must be published twice in the print edition of the official newspaper of the agency. *See* I.C. §§ 60-106, 60-106A, 67-2805(2)(a)(i). The first notification must be published at least two weeks before the scheduled bid opening and the second notice must be published at least seven days prior to the bid opening. *See* I.C. § 67-2805(2)(a)(i). The notice must describe the project to be constructed.

I.C. § 67-2805(2)(b)(v). Copies of specifications, bid forms, contract documents, and bidding instructions must be made available to prospective bidders, but the agency may charge a reasonable copying fee for the bidding documents.

Written objections to the specifications or bidding procedures must be received by the clerk or secretary of the agency at least three business days prior to the scheduled bid opening. I.C. § 67-2805(2)(b)(iii). The person supervising the bid for the agency must respond to all objections in writing. The response must be provided to the objecting bidder as well as all other entities who have obtained copies of the bid documents. If necessary, bidding timeframes may be adjusted to allow the necessary response to the objection. Failure to timely object constitutes a waiver of the objection. I.C. § 67-2804(3).

The agency may choose to require that each bidder provide security of at least five percent of the bid amount to ensure that the bidder honors the bid. I.C. § 67-2805(2)(b)(viii). The bid security may be cash, a certified or cashier's check or be a bid bond issued by a qualified surety company. If bid security is required, the bid cannot be considered if the security is not provided as part of the bid.

Bids must be submitted under sealed cover to the clerk, secretary, or other authorized agent of the agency who has been designated to receive the bids. I.C. § 67-2805(2)(b)(vii). Each bid must be marked on the outside identifying the project that the bid is related to. I.C. § 67-2805(2)(b)(vii). Any bids received by the agency may not be withdrawn after the date and time set in the notice for the bid opening. I.C. § 67-2805(2)(b)(ix). Any bids received must be opened in public at the scheduled bid opening prior to being reviewed for a potential bid award. The governing board of the agency typically makes the determination to award a bid; however, the governing board may authorize a staff member to make that determination.

When evaluating the bids, the agency can only consider the amount bid, the bidder's compliance with the administrative requirements of the bidding process, and whether the bidder holds the requisite license. I.C. § 67-2805(2). *See also Hillside Landscape Constr., Inc. v. City of Lewiston*, 151 Idaho 749, 264 P.3d 388 (2011). The bid must be awarded to the qualified bidder submitting the lowest responsive bid.

After determining the apparent low bidder, the agency must notify all bidders of its intent to award the contract. If the agency chooses to award the construction contract to a bidder other than the apparent low bidder, the agency must declare on the record its reason(s) for not awarding

the contract to the apparent low bidder and include its reasoning in a written notification to all bidders. I.C. § 67-2805(2)(b)(xii).

If any participating bidder objects to the proposed award of the bid for any reason, that bidder must respond in writing within seven calendar days of the date the notice is transmitted. I.C. § 67-2805(2)(b)(xiii). The objection must explain the reason(s) why the objecting bidder believes that the agency's decision to award the construction contract is wrong. Failure to timely object constitutes a waiver of the objection. I.C. § 67-2804(3). If the agency receives a bid protest, the agency must stop the procurement process while it evaluates the protest. I.C. § 67-2805(2)(b)(xiii). The agency must respond in writing to the protest explaining the basis for its resolution of the protest. It is good practice to provide a copy of the response to all bidders. Following the agency's evaluation of the protest, it may affirm its prior award, modify the award, or choose to re-bid the project, whichever the agency deems is in the best interest of the public.

In its discretion, the governing board of the agency may reject all bids received by the agency and re-bid the project. I.C. § 67-2805(2)(b)(xi). Alternatively, the governing board may decide that it is more economical to procure the services on the open market. To do so, the governing board must pass a resolution, which includes findings of fact, establishing that the work can be accomplished more economically through the open market. If the agency receives no bids, it may make the expenditure without further competitive bidding. If identical bids are received, the agency may, in its discretion, select which contractor to award the bid to. I.C. § 67-2805(2)(b)(ix).

If the successful bidder fails to execute the contract, the agency may elect to deposit the bidder's security into a designated account to pay for obtaining a different contractor to complete the work. I.C. § 67-2805(2)(b)(x). If the agency elects to award the bid to the next lowest qualified bidder, the low bidder's security may be used to fund the difference between the lowest and next lowest bids. Any remaining amount of the security must be returned to the low bidder minus any administrative costs. Administrative costs cannot exceed 25% of the total amount of the low bidder's security.

## **E. Design-Build Projects**

Idaho Code section 67-2309 permits local entities to use the design-build method of construction:

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The design-build method of construction may be employed by public officials in contracts for the construction, repair, or improvement of public works, public buildings, public places or other work.

However, no additional information, guidance, or restrictions are included in that code section.

State entities are also permitted to utilize the design-build method of construction, which is discussed in Idaho Code section 67-5711A:

[A] design-build contract is a contract between the state of Idaho and a nongovernmental party in which the nongovernmental party contracting with the state of Idaho agrees to both design and build the structure, roadway, or other items specified in the contract[.]

I.C. § 67-5711A(1) (emphasis added). Local entities may choose to look to the state process as a model, given the lack of guidance in the code section relating to local entities.

As the solicitation includes the design and build of the structure, and since Idaho Code section 67-2320, discussed in Section IV.H below, requires selection of design professionals on the basis of qualifications and demonstrated competence—these are awarded to the most qualified bidder as long as the award is to a design professional or design professional team, not the lowest cost bid. To ensure compliance with the statute, entities may want to require a partnership or project-partnership agreement for the project so that the qualifications of the design professional, not just the contractor, are the basis for the award. Entities may also want to require the design professional to submit the solicitation proposal, not just a contractor. There is little guidance or caselaw about the design-build process, so the limits or prohibitions relating to the method are somewhat untested.

A design-build solicitation may follow the process for Construction Manager/General Contractor (“CM/GC”), selection of design-professionals, and RFP’s rather than Design-Bid-Build projects, or requests for quotes on the basis of price. The State follows a similar two-stage approach, like Category B of the Design-Bid-Build process. The governmental entity will review proposals on the basis of qualifications, but unlike Category B, it will rank the interested bidders on the basis of qualifications. It will then negotiate cost and legal terms with the most qualified bidder. If the parties cannot come to an agreement, then the governmental entity will move to the second-most qualified bidder to

negotiate, and on down the line, until the governmental entity reaches an agreement with a bidder. The State approach appears permitted by Idaho Code section 67-2309.

## **F. Construction Manager/General Contractor Dual Role**

Title 67, chapter 28, Idaho Code, does not preclude local government agencies from using other procurement procedures that are authorized by law. One procedure is the Construction Manager/General Contractor (“CM/GC”) model authorized under title 54, chapter 45, Idaho Code. This process allows the local agency to hire a licensed construction manager and the construction manager’s affiliated construction firm to act as both a construction manager and the general contractor on the project. The construction manager must be either a principal of the construction firm or a full-time employee. Additionally, the firm must have a valid public works contractor license.

The selection process for design professionals contained in Idaho Code section 67-2320 is used to select the CM/GC, including negotiating compensation. The contract between the local agency and the CM/GC must be in writing and include terms for management fees, incentive compensation, and disposition of any contingency funds, along with any other terms deemed necessary by the local agency. Additionally, the CM/GC is required to provide to the local agency the performance and payment bonds required under Idaho Code section 54-1926.

Once the design for the project, or a phase of the project, is complete, the construction cost for work, materials, and equipment for the construction phase of the project are incorporated into the construction phase contract with the CM/GC and may include a maximum guaranteed price to place a cap on the potential cost to the local agency. The costs to be included in the construction phase contract are based on bids solicited by the CM/GC for the construction work, materials, and equipment. Bids for the construction work must be from licensed public works contractors.

To obtain bids, the CM/GC is required to solicit bids from at least three contractors or suppliers the CM/GC has determined are qualified to perform the work or provide the materials and equipment. The bids must be opened publicly, and a representative of the local agency must be present at the bid opening. Once opened, the bids are public records and must be disclosed upon receipt of a public records request unless the bid is otherwise exempt from disclosure under title 74, chapter 1, Idaho Code. The bid must be awarded to the lowest responsive bidder. If the CM/GC

can demonstrate good cause, the local agency may approve a bid solicitation to fewer than three prospective bidders.

Unless limited by the contract with the local agency, the CM/GC, and its affiliated companies or subsidiaries, are entitled to bid to perform the construction work or provide the materials or equipment for the project. However, the CM/GC must possess the appropriate class of public works contractor's license for any construction work on which it intends to bid. Additionally, the work to be constructed or the materials and equipment to be supplied by the CM/GC must also be of a type that the CM/CG customarily performs or supplies. Bids from the CM/CG and its subsidiaries or affiliated companies must be opened at the same time as other bids received by the CM/GC.

## **G. Qualifications-Based Selection of Design Professionals**

Idaho Code section 67-2320 requires qualifications-based selection ("QBS") of design professionals, including architects, engineers, landscape architects, land surveyors, and construction managers. QBS is based on "qualifications and demonstrated competence" rather than price-based competitive bidding. I.C. § 67-2320.

For projects exceeding \$50,000, the governmental entity must use the process outlined below. I.C. § 67-2320(2). For convenience, it has been broken into the qualifications phase (Phase 1) and the negotiation phase (Phase 2).

### **Phase 1**

1. Provide a general description of the services being solicited and encourage persons or firms engaged in the services being solicited to submit statements of qualifications and past performance data. I.C. § 67-2320(2)(a).
2. Publish a Request for Qualifications ("RFQ"). No price information is listed since this is negotiated in the second phase. The RFQ must include "the criteria and the procedures to be used for measurable scoring, ranking, and selection of qualified persons or firms to perform such services[.]" I.C. § 67-2320(2)(b). It may also include:

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- a. A brief project description specifying the type, scope, and location of the project, as well as the projected project completion date.
  - b. A description of the professional services required.
  - c. The criteria used to evaluate persons or firms submitting statements of qualifications, specifically: prior experience in similar projects, familiarity with federal and state laws and regulations, experience with certain types of grants, or other factors.
  - d. A notice that specifications, instructions, and other documents are available.
  - e. A notice that interested applicants should submit statements of qualifications which may include: a brief history of the firm; experience in similar projects; capability to undertake the project; the names and qualifications of the project team; familiarity with the city; project approach; and preliminary schedule.
  - f. The deadline for submission of statements of qualifications, the address to which statements should be sent, and the name of a contact person to answer questions and provide specifications and instructions.
3. The governmental entity ranks the applicants and selects the person or firm it determines to be the best qualified according to the established criteria.

### **Phase 2**

1. The governmental entity negotiates price and legal terms with the highest-ranked person or firm to perform the services.
2. If the governmental entity and the selected person or firm are unable to agree on contract terms, the governmental entity may negotiate with the second ranked person or firm, and if unable to agree on contract terms continue with that process of contacting the next qualified person or firm until an agreement is reached.

Where a governmental entity has previously awarded a professional services contract to a person or firm for an associated or phased project, the governmental entity may, in its discretion and in accordance with the provisions of Idaho Code section 59-1026, negotiate an extended or new professional services contract with that person or firm. I.C. § 67-2320(4).

Idaho Code section 67-2320(2)(i) permits governmental entities to establish a list of prequalified persons or firms as long as the list consists of two or more listings. For each project, the governmental entity may rank and choose the top-ranked listing from the prequalified list to avoid the public notice and RFQ process. The list remains valid for five years unless the governmental entity determines cancellation would be in the public's interest. I.C. § 67-2320(2)(j).

For projects under the \$50,000 threshold, the governmental entity may use the above process, or establish its own. I.C. § 67-2320(3).

## **H. Use of Governmental Entities and Volunteers**

A political subdivision may use volunteers or internal staff for public works construction projects without any bidding requirements. The local procurement requirements are not applicable where the contract or purchase expenditures are less than \$50,000. I.C. § 67-2803(2). Volunteer services, which by definition are provided free of charge, are likely not expenditures because no public funds have been provided to the volunteer. For public works projects, the political subdivision may use its own employees to complete public works construction projects. Idaho Code section 67-2804(2) states:

Nothing in this section shall be deemed to prohibit a political subdivision from performing construction or repair work on the political subdivision's own facilities.

Professional licensure, insurance, worker's compensation, permitting, and other issues still must be addressed.

## **I. Residency Requirement**

Idaho Code section 44-1001 requires that public works projects must employ:

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1. Ninety-five percent bona fide Idaho residents, except for emergency or sole source procurements authorized in section 67-2808(2), or
2. Under contracts where 50 or less persons are employed, the contractor may employ 10% nonresidents, but must give preference to the employment of bona fide Idaho residents.

The section carves out work involving the expenditure of federal aid funds, or federal statutory labor preferences to veterans which have conflicting requirements.

A relevant issue is whether this residency requirement violates the dormant commerce clause. *See* U.S. Const. art. 1, § 8, cl. 3. The dormant commerce clause is used to prohibit state legislation that discriminates against or unduly burdens interstate or international commerce. Courts first determine whether a state regulation discriminates on its face against interstate commerce or whether it has the purpose or effect of discriminating against interstate commerce. If the statute is discriminatory, the state has the burden to justify both the local benefits flowing from the statute and to show the state has no other means of advancing the legitimate local purpose.

A public entity should analyze the intersection of the dormant commerce clause and the residency requirements found in Idaho Code section 44-1001. Idaho Code section 44-1001 is not a regulatory provision and only restricts the spending of public funds for public projects. The public entity may also be a “market participant,” and fall under that applicable exception to the dormant commerce clause. *See Dunn v. Idaho State Tax Comm’n*, 162 Idaho 673, 678–79, 403 P.3d 309, 314–15 (2017).

If the public entity finds that the residency requirement violates the dormant commerce clause as applied to its situation, Idaho Code section 44-1001 is likely preempted. A sample certification term is included below.

<i>Example Term</i>
<u>Employment of Bona Fide Idaho Residents.</u> If this Agreement contemplates public works construction, [Contractor] agrees to employ ninety-five percent (95%) bona fide Idaho residents, as that term is defined in Idaho Code section 44-103, as employees on [Project] in order to comply with the requirements of chapter 10, title 44, Idaho Code. If [Contractor] employs less than fifty (50) employees on [Project], [Contractor] may employ up to ten

percent (10%) nonresidents on [Project]. In all cases, [Contractor] agrees to give a preference to bona fide Idaho residents. The parties agree that if [Project] involves the expenditure of federal aid funds, that this clause will not be enforced in a manner that conflicts with federal statutes prescribing a labor preference for veterans or prohibiting unlawful discrimination or preferences among United States citizens.

## **J. Indemnity, Sole Negligence<sup>13</sup>**

Idaho Code section 29-114 provides that a contract relating to the “construction, alteration, repair or maintenance of a building, structure, highway, appurtenance and appliance, including moving, demolition and excavating connected therewith,” which purports to indemnify the promisee against liability for personal injury or property damage arising out of the sole negligence of the promisee, is void.

The section does appear to permit clauses that require the vendor to indemnify and defend the governmental entity, as long as the vendor is not required to hold harmless the governmental entity for damages attributed to the entity.

## **V. Bid Protests**

Participating bidders may submit a “bid protest” or “challenge” to the award of a competitively bid agreement. I.C. § 67-2806(2)(j). If any participating bidder objects to the award of a contract, that bidder must respond in writing within seven calendar days of the date the award notice is transmitted. The objecting bidder’s response must set forth the reason(s) that it believes the award decision of the governing board is in error. The governing board must stay performance of the procurement until after it addresses the bid protest. The governing board must review its decision and determine whether to affirm its prior award, modify the award, or choose to re-bid, setting forth its reason(s) for the decision made. After completing the review process, the political subdivision may proceed as it deems to be in the public interest.

The Administrative Procedure Act only applies to final actions expressly authorized by statute. I.R.C.P. 84(a)(1). There exists no express statute providing authority to appeal bid protest decisions to district court. *But see* discussion in Section VI on penalties for violation; I.C. §§ 59-

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<sup>13</sup> For a more complete discussion on indemnification, see Section II.B.

1026, 18-315. Courts have upheld this. *Black Labrador Investing, LLC v. Kuna City Council*, 147 Idaho 92, 205 P.3d 1228 (2009). Confirm with your municipality whether other rights exist in city code.

## **VI. Penalties for Violation**

The legislative intent behind procurement regulations for political subdivisions is “[e]fficient and cost-effective procurement of goods, services and public works construction” by way of “a publicly accountable process that respects the shared goals of economy and quality.” I.C. § 67-2801. Title 67, chapter 28 applies to all political subdivisions of the State of Idaho. I.C. § 67-2802.

At the municipal level, there are multiple penalties for failing to comply with procurement statutes. Foremost, any official of any municipality that “willfully or knowingly avoid[s] compliance with procurement or competitive bidding statutes” exposes the public official to “civil penalties not to exceed five thousand dollars (\$5,000) for each offense[.]” I.C. § 59-1026.

Additionally, “[e]very wil[l]ful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor.” I.C. § 18-315. While fines are a civil penalty, they are not a punishment levied upon the violator—thus the public officer may also be subject to a misdemeanor charge for willful violations of state procurement laws.

In addition to these penalties, municipalities may have codes regarding procurement, which may include additional penalties, as well as ethical regulations for their employees—be sure to check for all local and state laws and regulations as applicable.

## **VII. Other Applicable Laws**

### **A. Open Meetings Law**

When a governing board awards a contract or discusses matters related to awarding a contract, the governing board must make that decision or have deliberations in an open meeting. This is a result of the Open Meetings Law’s requirement that “all meetings of a governing body of a public agency shall be open to the public[.]” I.C. § 74-203(1). A meeting is “the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter.” I.C. § 74-

202(6). Further details on open meetings can be found in the Office of the Attorney General’s Open Meeting Manual, including the requirements for notice, agendas, and recordkeeping.

Some of the decisions a governing board may make in an open meeting are expressly referred to in the local procurement statutes. For example, Idaho Code section 67-2803(2) provides that contracts less than \$50,000 are excluded from the procurement requirements when the governing board determines that contract is in the best interests of the political subdivision. A governing board can also accept the lowest responsive bid for a public works contract or reject all bids. I.C. § 67-2805(1)(d), (2)(a)(v), (2)(b)(xi). These decisions must also occur in an open meeting. These are just a few examples of the many different types of procurement decisions that a governing board must make in an open meeting.

## **K. Public Records**

### **Generally**

Idaho Code section 74-102 provides that “all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.” This applies to all “public agencies,” which includes any local agency. I.C. § 74-101(11). A local agency is defined as “a county, city, school district, municipal corporation, independent public body corporate and politic, district, public health district, political subdivision, or any agency thereof, or any committee of a local agency, or any combination thereof.” I.C. § 74-101(8). Thus, local government agencies must comply with the Idaho public records law.

The law broadly defines a public record as including, but not limited to, “any writing containing information relating to the conduct or administration of the public’s business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics.” I.C. § 74-101(13). The definition specifically says personal notes created by a public official solely for his own use are not public records as long as those notes are not shared with any other person or entity. Given the broad definition of a public record, most documents related to procurement, including solicitation for bids and awarded contracts, are public records.<sup>14</sup>

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<sup>14</sup> Some of the local procurement statutes expressly reiterate this premise and go further in requiring availability for public inspection in specific situations.

Most procurement documents are therefore subject to public disclosure, unless a statutory exemption applies. Whether an exemption applies depends on the circumstances. One exemption specific to bidding and contracts applies to a public agency estimate “that details the cost of a public project[.]” I.C. § 74-107(4). These estimates are exempt until an agency discloses the estimate “or bids are opened, or upon award of the contract for construction of the public project.” Another exemption that may sometimes apply to procurement documents is for trade secrets. I.C. § 74-107(1). A “trade secret” is information, including a formula, pattern, compilation, program, computer program, device, method, technique, process, or unpublished or in-progress research that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

It is possible that other exemptions apply to procurement documents, and the agency responding to the public records request should evaluate each situation to determine whether additional exemptions may apply.

Even if an exemption applies to information within a public record, public agencies are required to separate information exempt from disclosure. I.C. § 74-112. This ensures that the agency still provides access to the nonexempt information. Further details on the Public Records Act can be found in the Office of the Attorney General’s Idaho Public Records Law Manual.

### **Trade Secrets and Procurements**

The questions evaluators use during a solicitation may be a trade secret from which the governmental entity derives independent economic value, whether actual or potential, from these questions not being known until the notice of intent to award has been issued to all bidders—which bidders may need in order to be able to properly challenge an award. A governmental entity may want to analyze whether the solicitation

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For example, Idaho Code section 67-2806A(4) provides that records compiled in the scoring process for a request for proposal “shall be made available for public inspection when a procurement recommendation is made to the governing board.”

evaluation questions or criteria are trade secrets that shall not be released until the notice of intent to award is issued.

## **L. Conflicts of Interest and Ethics**

As noted above, there are potential civil and criminal penalties associated with violating Idaho's procurement statutes. *See, e.g.*, I.C. §§ 54-1914(2) (concerning unlicensed contractors and bids that do not comply with State law); 54-1920(2) (addressing contracts with unlicensed contractors); and 59-1026 (concerning compliance with Idaho's competitive bidding statutes). Additionally, the Ethics in Government Act of 2015 governs conflicts of interest and includes fines for certain violations. I.C. § 74-406(1) ("Any public official who intentionally fails to disclose a conflict of interest . . . shall be guilty of a civil offense . . ."). As explained in Idaho Code section 74-402, the purpose of the Ethics in Government Act is to:

- (1) Protect the integrity of government throughout the state of Idaho while at the same time facilitating recruitment and retention of personnel needed within government;
- (2) Assure independence, impartiality and honesty of public officials in governmental functions;
- (3) Inform citizens of the existence of personal interests which may present a conflict of interest between an official's public trust and private concerns;
- (4) Prevent public office from being used for personal gain contrary to the public interest;
- (5) Prevent special interests from unduly influencing governmental action; and
- (6) Assure that governmental functions and policies reflect, to the maximum extent possible, the public interest.

A "conflict of interest" is defined as "any official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person's household, or a business with which the person or a member of the person's household is associated, unless" an exception applies. I.C. § 74-403(4). The term "public official" includes elected officials, appointed officials, public employees, and certain consultants. I.C. § 74-403(10).

If, after consulting with legal counsel, it is determined that a real or potential conflict of interest exists, a public official must disclose the conflict prior to taking any official action or making any formal decision or recommendation. I.C. § 74-404. The method of disclosure varies. An elected city or county official must disclose the conflict of interest prior to acting on a matter and follow the “rules of the body of which he/she is a member . . . .” I.C. § 74-404(4). Appointed officials, public employees, and consultants must “prepare a written statement describing the matter required to be acted upon and the nature of the potential conflict, and shall deliver the statement to [the] appointing authority.” I.C. § 74-404(5).

Importantly, the Ethics in Government Act does not preclude a public official from taking action or making a recommendation or decision; rather, the Act requires the public official to (1) disclose the real or potential conflict of interest and (2) adhere to the governmental entity’s rules concerning conflicts. A public official who fails to comply with the disclosure requirements set forth in the Act, however, is subject to potential fines. “Any public official who intentionally fails to disclose a conflict of interest . . . shall be guilty of a civil offense, the penalty for which may be a fine not to exceed five hundred dollars (\$500) . . . .” I.C. § 74-406(1).

In addition to the Ethics in Government Act, there are two additional statutes that directly or indirectly concern ethical issues relating to procurement. The first is Idaho Code title 74, chapter 5, which pertains to contracts involving city and county officers.<sup>15</sup> Unless an exception applies, a city or county officer “must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.” I.C. § 74-501. Contracts made in violation of this provision are voidable. I.C. § 74-504. Moreover, a violation is a misdemeanor and shall be punishable by a fine, incarceration, or both. I.C. § 74-509. The second statute is Idaho Code title 18, chapter 13, which concerns bribery and corruption. The Bribery and Corrupt Practices Act covers a wide range of issues, such as bribery and utilizing a public position for personal gain. A violation of the Act is a misdemeanor. I.C. § 18-1360. Additionally, “any person who violates the provisions of [the Act] may be required to forfeit his office and may be ordered to make restitution of any benefit received by him to the governmental entity from which it was obtained.”

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<sup>15</sup> Idaho Code title 74, chapter 5 utilizes the term “public officer” instead of “public official.” It is not clear if the two terms are synonymous.

## VIII. Terms to Include in Solicitations

### A. Limitations of Liability

As government entities representing the citizens of the respective geographic areas, limitations of liability are matters of public policy. Limitations of liability are only appropriate where there is a risk that the non-governmental entity or other party should have to bear more than a reasonable apportionment of liability. In most agreements, a limitation of liability is not necessary or prudent.

While often not necessary, the following term is occasionally used to apportion liability to the parties.

<i>Example Term</i>
<p><b><u>Liability.</u></b> Each party shall be responsible for its own acts and omissions and shall not be responsible for the acts and omissions of the other party. With respect to any claim or action arising out of any services performed under or pursuant to this Agreement, each party shall only be liable for payment of that portion of any and all claims, liabilities, costs, expenses, demands, settlements, or judgments resulting from the negligence, actions or omissions of itself and its employees.</p>

If there is a risk that the non-governmental entity may have to bear more than its share of the liability or for risks outside of its control, then there are some types of risk that should be excluded from the general limit of liability. In most scenarios, limitations of liability for death, personal injury, or damage to real property should not be accepted. One potential approach is listed below.

<i>Example Term</i>
<p><b><u>Limitation of Liability.</u></b> Contractor's liability for damages to the [Governmental Entity] for any cause whatsoever is limited to [dollar amount]; provided, however, that the following shall not be subject to the foregoing limit:</p> <ol style="list-style-type: none"> <li>1. Patent and copyright indemnity required by the Contract;</li> <li>2. Liquidated damages assessed under the Contract;</li> <li>3. Claims for personal injury, including death;</li> <li>4. Claims for damage to real property or tangible or intangible property arising from the Contractor's acts or omissions under the Contract;</li> <li>5. The insurance coverage required by the Contract;</li> </ol>

6. Damages arising from the gross negligence or willful misconduct of the Contractor, its employees, its subcontractors, or its agents; and
7. Government fines and penalties not imposed by the State.

## M. Public Records Law

The Idaho Public Records Act, at Idaho Code title 74, chapter 1, applies to all records maintained by the governmental entities defined therein. Many private sector contractors request or require a confidentiality term in the agreements, many of which run afoul of the Idaho Public Records Act. The following term is one approach as an alternative.

### *Example Term*

Except as provided in the Idaho Public Records Act, Idaho Code title 74, chapter 1, and Section [##] of this Agreement, both Parties agree to keep the other Party's information confidential and will protect the information from unauthorized use.

Some private sector contractors claim that their information is a trade secret and exempt from public disclosure under section 74-107. To avoid requiring government entity staff to make complex determinations about trade secrets, the following term has been used to allow the contractor to designate records as exempt but agree to pay for the defense of that designation.

### *Example Term*

Public Records. Under the Idaho Public Records Act, Idaho Code title 74, chapter 1, records received from the [Contractor] and certain records produced by the [Contractor] in the performance of the Agreement may be open to public inspection and copying unless exempt from disclosure. Upon request, the [Contractor] shall provide records subject to inspection under Idaho Code section 74-102 and not maintained by the [Government Entity]. In any record provided to the [Government Entity], the [Contractor] shall clearly designate individual portions of records that it desires to keep exempt as "exempt" on each page of the documents and shall indicate the basis for the exemption. The [Government Entity] will not accept a legend or statement on one page that all, or substantially all, of a document

is exempt from disclosure. The [Contractor] shall indemnify and defend the [Government Entity] against all liability, claims, damages, losses, expenses, actions, attorney fees, and suits whatsoever for honoring the [Contractor]’s designation of exempt records or for the [Contractor]’s failure to designate records as exempt. The [Contractor]’s failure to designate as exempt any record that is released by the [Government Entity] shall constitute a complete waiver of any and all claims for damages caused by any the release. If the [Governmental Entity] receives a request for materials claimed to be exempt by the [Contractor], the [Contractor] shall provide the legal defense for the claim and pay all expenses incurred by the [Governmental Entity] in connection with the request.

## **N. Appropriation/Budget Issues**

Local entities are subject to governmental budgetary restrictions based on available funding, taxation, fees, and the approval of the governing board. For agreements that span across the end of one budget year and into the next budget year, the continuation of an agreement may depend upon funding availability. The following term may be added to agreements to address this scenario.

### *Example Term*

This Agreement is contingent upon the [Government Entity] receiving the necessary funding to cover the obligations of the [Government Entity]. In the event that funding is not received or appropriated, then, and in that event, the [Government Entity]’s obligations under this Agreement shall cease and each Party shall be released from further performance under this Agreement without any liability to the other Party, and [Contractor] shall be entitled to receive just and equitable compensation for any work satisfactorily completed hereunder.

## **O. Taxes**

The State of Idaho and local governments are exempt from Idaho sales and use taxes. Many government entities include a term stating that the contractor or vendor is responsible for all taxes assessed against it as a result of doing business with the governmental entity. Tax exempt entities must provide merchants with a completed Sales Tax Resale or Exemption Certificate (ST-101). The following is a sample term that may be used.

*Example Term*

The [Government Entity] is generally exempt from payment of state sales and use taxes and from personal property tax for property purchased for its use. The [Government Entity] shall furnish exemption certificates upon written request by the [Contractor].

## QUESTIONS AND ANSWERS

### I. Purpose

Question: What is the purpose of competitive procurement processes?

Answer: The legislative intent in the Idaho Code states:

Efficient and cost-effective procurement of goods, services and public works construction is an important aspect of local government operations. Local public agencies should endeavor to buy goods, services and public works construction by way of a publicly accountable process that respects the shared goals of economy and quality. Political subdivisions of the state shall endeavor to purchase goods and services from vendors with a significant Idaho economic presence.

I.C. § 67-2801.

### II. The Structure of the Procurement Law

Question: Where are the procurement requirements found?

Answer: Most of the statutory requirements for local governmental entities are found in title 67, chapter 23, Idaho Code. However, as indicated in this Manual, there are many other requirements found elsewhere in Idaho's laws. A list of generally relevant governmental requirements is included at the back of this Manual, but there may be others.

### III. Procurement Types and Basics

Question: What solicitation type should a governmental entity use if it knows the type of good it requires?

Answer: An RFQ or "low-bid" solicitation works well in these situations.

Question: What solicitation type should a governmental entity use if it desires complex goods, services, or a combination of goods and services?

Answer: A request for proposals, or RFP, works well in this situation where cost alone is not the only determinative factor. Developing specific and reasoned evaluation criteria will be important when utilizing an RFP where differing bids must be fairly evaluated on the same scale.

Question: What solicitation type should a governmental entity use if it is not sure what solution or service it desires?

Answer: One option is to publish a request for information, to receive information about the types of solutions and services available, or to hire an expert consultant to assist in developing the requirements. Note that any expert used in developing the solicitation is barred from bidding.

#### **IV. Exclusions, Emergencies, Sole Source**

Question: If there is a life-threatening danger, does the governmental entity have to publish the sole source notice?

Answer: No. The notice requirement does not apply to situations where the sole source expenditure is necessary to address a life-threatening situation or a situation that is immediately detrimental to the public welfare or property.

#### **V. Government Contract Requirements**

Question: Does the Anti-Boycott of Israel certification need to be included in agreements under the employee or dollar limit threshold?

Answer: Probably. Contractors can add employees and contracts can be amended, extended, or expanded in scope. The safest course is to include this certification on all agreements, regardless of size, to avoid inadvertently violating this statute.

Question: For the No Public Funds for Abortion Act (“NPFAA”), can we include the contract term instead of the letter?

Answer: Since the activity occurs at the time of signing, signing an agreement with a NPFAA term but with no due diligence may not be sufficient. As no cases have been litigated, the answer is unclear at this time.

Question: For p-card purchases, airline tickets, hotel lodging, gas, or other similar purchases that often do not have a written agreement outside of the receipt, must governmental entities send the No Public Funds for Abortion Act (“NPFAA”) pre-agreement letter?

Answer: The NPFAA law states: “The state, a county, a city, a public health district, a public school district, or any local political subdivision thereof may not enter into any contract or commercial transaction with an abortion provider or an affiliate of an abortion provider.” I.C. § 18-8703(1). It is unclear whether this prohibition relates to p-card uses. The more due diligence performed, the more protected the government entity might be—which may include research about potential gas station chains, hotels, etc. Where possible, the acknowledgement should be sent.

Question: Does the No Public Funds for Abortion Act (“NPFAA”) apply if the company being contracting with is unrelated to the healthcare field?

Answer: While it may appear as though the entity is not an abortion provider or affiliate, as defined under Idaho Code section 18-8702, many corporations have layers of “parent-child,” subsidiary or “sibling” corporation relationships. The most conservative approach is to send the acknowledgement language regardless of the industry or company.

Question: What is the process for giving the Idaho Commission for the Blind and Visually Impaired notice that a public entity is interested in allowing a food service facility?

Answer: The process to acquire a food service facility is to first contact the Business Enterprise Program (“BEP”), in writing, communicating the public entity’s desire to allow a food service facility in a public building. The BEP will conduct a site survey and see if the public entity’s location is a viable location for a vendor licensed through BEP. If the site is a viable option, a vendor will be selected for the site, equipment will be ordered for the approved vendor, and BEP will enter into an agreement with the public entity for authorizing the placement of a food service facility in the public agency’s building. If the BEP finds the site is not suitable for one of its vendors, or is unable to find a vendor to service the public entity at a particular site, the public entity is then permitted to seek another licensed vendor to provide the service.

Question: What is the process for having a food service facility with a vendor from the BEP moved out of the public building?

Answer: The process to have a food service facility removed from a public building is to contact the BEP in writing to explain the need for the removal. BEP will then make arrangements to have the food service facility removed.

Question: Who do I contact if the vending machine is out of order?

Answer: Contact BEP to express concerns of any issues related to the vending machine and BEP will ensure that the machine is fixed.

## **VI. Public Works**

Question: For Design-Build Agreements, can the contractor submit a proposal and include a list of potential architects to be used?

Answer: Qualifications-based selection can only occur for licensed professionals. The architect or other licensed professional should be formally connected to the proposal in the ways listed above, and the award criteria should focus on the qualifications of the entire design team.

## **VII. Bid Protests**

Question: How long does the governmental entity have to respond to bid protests?

Answer: There is no time limit for the governmental entity's response; however, the procurement award is stayed until the governmental entity issues its written response.

Question: What is the standard the bid protest will be decided upon?

Answer: Idaho Code section 67-2806(2)(j) states: "After completion of the review process, the political subdivision may proceed as it deems to be in the public interest."

Question: Can the governing board's decision on bid protests be appealed?

Answer: The Administrative Procedure Act only applies to final actions expressly authorized by statute. I.R.C.P. 84(a)(1). There exists no express statute providing authority to appeal bid protest decisions to district court. *But see* Section VI on penalties for violation; *see also* I.C. §§ 18-315, 59-1026. Confirm with your municipality whether other rights exist in city code.

## **VIII. Penalties For Violation**

Question: What if I accidentally violate the local procurement laws?

Answer: Fines and criminal penalties are both assessed only for willfully or knowingly avoiding the procurement requirements.

## **IX. Open Meetings Law**

Question: Who enforces the Open Meetings Law?

Answer: The prosecuting attorney of the various counties have the duty to enforce the Open Meetings Law within their respective jurisdictions.

## **X. Public Records**

Question: Must a governmental entity release records regarding responses to a solicitation prior to the issuance of a notice of intent to award?

Answer: The governmental entity may consider whether these records fall under the trade secrets exemption found in Idaho Code section 74-104.

Question: Must a governmental entity release business records related to the solicitation that could disadvantage the State, including questions evaluators use during an evaluation?

Answer: The governmental entity may consider whether these records fall under the trade secrets exemption found in Idaho Code section 74-104. If they are a trade secret, they would be released after the notice of intent to award a contract to allow bidders to use them in a challenge to the notice.

## **XI. Ethics in Government Act of 2015**

Question: What exceptions exist, if any, to the definition of “conflict of interest” under the Ethics in Government Act?

Answer: Under Idaho Code section 74-403(4), there is no real or potential conflict of interest if the monetary benefit to the public official stems from:

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(a) An interest or membership in a particular business, industry, occupation or class required by law as a prerequisite to the holding by the person of the office or position;

(b) Any action in the person's official capacity which would affect to the same degree a class consisting of an industry or occupation group in which the person, or a member of the person's household or business with which the person is associated, is a member or is engaged;

(c) Any interest which the person has by virtue of his profession, trade or occupation where his interest would be affected to the same degree as that of a substantial group or class of others similarly engaged in the profession, trade or occupation; [or]

(d) Any action by a public official upon any revenue measure, any appropriation measure or any measure imposing a tax, when similarly situated members of the general public are affected by the outcome of the action in a substantially similar manner and degree.

Question: May a public officer with a "remote interest" contract with the governmental entity?

Answer: Under Idaho law, a public officer with a remote interest, as defined, is not precluded from contracting with the governmental agency:

A public officer shall not be deemed to be interested in a contract . . . if he has only a remote interest in the contract and if the fact and extent of such interest is disclosed to the body of which he is an officer and noted in the official minutes or similar records prior to the formation of the contract, and thereafter the governing body authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer having the remote interest.

I.C. § 74-502(1). Importantly, however, the public officer cannot "influence or attempt to influence any other officer of the board of which he is an officer to enter into the contract." I.C. § 74-502(2). A violation

of this provision is a misdemeanor. Additionally, the contract in question is, as a matter of law, void.

Question: May an uncompensated public official contract with the governmental entity?

Answer: Under Idaho Code section 74-510, an uncompensated public official “shall not be prohibited from having an interest in any contract made or entered into by the board of which he is a member, if he strictly observes the procedure set out in section 18-1361A, Idaho Code.” Idaho Code section 18-1361A, in turn, lists the following necessary procedures:

(1) The contract is competitively bid and the public servant or his relative submits the low bid; and

(2) Neither the public servant nor his relative takes any part in the preparation of the contract or bid specifications, and the public servant takes no part in voting on or approving the contract or bid specifications; and

(3) The public servant makes full disclosure, in writing, to all members of the governing body, council or board of said public body of his interest or that of his relative and of his or his relative’s intention to bid on the contract; and

(4) Neither the public servant nor his relative has violated any provision of Idaho law pertaining to competitive bidding or improper solicitation of business.

## THE STATUTES

<b>Section</b>	<b>Section Title</b>
18-315.	Omission of Public Duty.
18-1360.	Penalties.
18-1361A.	Noncompensated Appointed Public Servant – Relatives of Public Servant – Exception.
18-5702.	Grading and Punishment for Misuse of Funds.
18-8702.	Definitions.
18-8703.	Government Contracts with Abortion Providers or Their Affiliates Prohibited.
18-8705.	Use of Public Funds for Abortion Prohibited.
18-8709.	Penalty for Violation.
29-110.	Limitations on Right to Sue Under Contract or Franchise Agreement.
29-114.	Indemnification of Promisee for Negligence – Effect on Existing Agreements.
44-1001.	Employment of Residents of Idaho – Wage Scale – Federal Funds.
49-1601.	Unlicensed Dealers and Salesmen Prohibited.
54-1901.	Legislative Intent – Definitions.
54-1902	Unlawful to Engage in Public Works Contracting Without License – Investigations.
54-1903.	Exemptions.
54-1904.	Classes of Licenses – Rights Granted Under Licenses – Fees.
54-1920.	Penalties – Injunction.
54-1926.	Performance and Payment Bonds Required of Contractors for Public Buildings and Public Works of the State, Political Subdivisions and Other Public Instrumentalities – Requirements for Bonds – Governmental Obligations.
54-1926A.	Use of Government Obligations Instead of Surety Bonds.
54-1927.	Claims for Labor or Material Furnished or Equipment Supplied – Suit on Contractor's Payment Bond – Procedure – Limitation.
54-1928.	Liability of Public Body for Failure to Obtain Payment Bond.
54-1929.	Attorney's Fees Allowed.

<b>Section</b>	<b>Section Title</b>
54-4511.	Award of Contracts – Dual Capacity.
59-514.	Publication of Contractee, Amount and Purpose of Personal Service Contracts – Definition.
59-1026.	Willful and Knowing Avoidance of Competitive Bidding and Procurement Statutes – Civil Penalties.
60-106.	Qualifications of Newspapers Printing Legal Notices.
60-106A.	Electronic Publication of Legal Notices by Newspapers.
67-2309.	Written Plans and Specifications for Work to be Made by Officials – Availability.
67-2310.	Subcontractors to be Listed on Bid of General Contractor – Exceptions.
67-2319.	Purchasing Products of Rehabilitation Facilities.
67-2320.	Professional Service Contracts with Design Professionals, Construction Managers, and Professional Land Surveyors.
67-2346.	Anti-Boycott Against Israel Act.
67-2347.	Prohibition on Environmental, Social, and Governance Standards in Public Contracts.
67-2348.	Preference for Idaho Domiciled Contractors on Public Works.
67-2349.	Preference for Idaho Suppliers and Recycled Paper Products for Purchases.
67-2359.	Contract with a Company Owned or Operated by the Government of China Prohibited.
67-2801.	Legislative Intent.
67-2802.	Applicability.
67-2802A.	Discrimination in Procurement Prohibited.
67-2803.	Exclusions.
67-2804.	Waiver.
67-2805.	Procurement of Public Works Construction.
67-2806.	Procuring Services or Personal Property.
67-2806A.	Request for Proposal.
67-2807.	Cooperative Purchasing.
67-2808.	Emergency Expenditures and Sole Source Expenditures.
67-2809.	Legislative Intent – Public Works – Agreements – Savings – Severability.

<b>Section</b>	<b>Section Title</b>
67-5411.	Commission as Sole Licensing Agency under the Provisions of the Randolph-Sheppard Vending Stand Act.
67-5711A.	Design-Build Contracting Authorized.
67-5711C.	Construction of Public Projects – Competitive Sealed Bidding.
67-6902.	Definitions.
67-6903.	Food Service Facilities in Public Buildings.
67-9203.	Definitions.
67-9210.	Award of Contract.
67-9225.	Procurement by State Institutions of Higher Education.
74-101.	Definitions.
74-102.	Public Records – Right to Examine.
74-107.	Records Exempt from Disclosure – Trade Secrets, Production Records, Appraisals, Bids, Proprietary Information, Tax Commission, Unclaimed Property, Petroleum Clean Water Trust Fund.
74-112.	Exempt and Nonexempt Public Records to be Separated.
74-202.	Open Public Meetings – Definitions.
74-203.	Governing Bodies – Requirement for Open Public Meetings.
74-402.	Policy and Purpose.
74-403.	Definitions.
74-404	Required Action in Conflicts.
74-406.	Civil Penalty.
74-501.	Officers Not to be Interested in Contracts.
74-502.	Remote Interests.
74-504.	Prohibited Contracts Voidable.
74-509.	Violation.
74-510.	Noncompensated Public Official – Exception.
Title 18, chapter 13.	Bribery and Corrupt Practices Act.
Title 18, chapter 87.	No Public Funds for Abortion Act.
Title 54, chapter 45.	Public Works Construction Management Licensing Act of 1998.

<b>Section</b>	<b>Section Title</b>
Title 74, chapter 1.	Public Records Act.
Title 74, chapter 5.	Prohibitions Against Contracts with Officers Act.

## **CONSTITUTION**

<b>Section</b>	<b>Section Title</b>
Const. art. VIII, § 1.	Limitation on Public Indebtedness.
Const. art. VIII, § 3.	Limitations on County and Municipal Indebtedness.

## **RULES**

<b>Rule</b>	<b>Rule Title</b>
I.R.C.P. 84.	Judicial Review of Agency Actions by the District Court.
IDAPA 15.02.30.010.	Rules of the Business Enterprise Program, Definitions.

## SUMMARY OF SELECTED DECISIONS

### **I. Summary of decisions interpreting title 67, chapter 28, Idaho Code**

#### **A. Reported Decisions**

*Hillside Landscape Constr., Inc. v. City of Lewiston*, 151 Idaho 749, 264 P.3d 388 (2011).

The Court held a city could not reject a bid for a public works project based on the low bidder's insufficient experience because Idaho Code section 67-2805's "Category A" statutory bidding procedure did not allow the city to consider experience. The Court explained that a political subdivision could not add experience as an additional requirement under Category "A." This was because the statute restricted discretion with the words "may only consider the amount bid, bidder compliance with administrative requirements of the bidding process, and whether the bidder holds the requisite license."

*Walco, Inc. v. County of Idaho*, 159 Idaho 131, 357 P.3d 856 (2015) (citing Idaho Code section 67-2801, but determining whether a county's request for proposal was actually an invitation to bid was not an issue on appeal).

#### **B. Unreported Decision**

*Timberline Title & Escrow, Inc. v. Adams County*, No. CV-207-2037, 2007 WL 5552023 (Adams County D. Ct. Mar. 22, 2007).

This case arose from a county's approval of a contract for a title company to pay the county an initial sum to copy the county's digital documents, and a per-page rate for future documents. Another title company challenged the county's approval, and the court dismissed that challenge. First, the court determined that the contract did not have to be bid under Idaho Code section 67-2806 because a matter only needs to be bid if a county seeks an expenditure. The court explained that the county was not seeking an expenditure, but instead was being paid and receiving copies of the documents. The court also explained that Idaho Code section 67-2803 specifically excluded contracts below a certain amount and services provided by an independent contractor. Further, the court reasoned that Idaho Code section 67-2801's legislative intent was for "efficient and cost effective procurement," and it would not be cost

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effective for the county to put up for bid every ministerial contract it entered into.

## CONTRACT CHECKLIST

### Authority

- \_\_\_\_\_ Does the governmental entity have statutory authority to enter the contract?
- \_\_\_\_\_ Does the other party have authority to enter the contract?
- \_\_\_\_\_ Is the contract one that must be bid—either formally or informally?
- \_\_\_\_\_ Has there been an Invitation to Bid, RFP, or RFQ?
- \_\_\_\_\_ Is the purchase exempt from bidding?
  - \_\_\_\_\_ Small Purchase
  - \_\_\_\_\_ Emergency
  - \_\_\_\_\_ Sole Source
  - \_\_\_\_\_ Other Circumstances
    - \_\_\_\_\_ Acquisition from federal government
    - \_\_\_\_\_ Acquisition from rehabilitation agency
    - \_\_\_\_\_ Acquisition from Correctional Industries
    - \_\_\_\_\_ Purchase from GSA federal supply contractor
    - \_\_\_\_\_ Purchase from existing open contract
- \_\_\_\_\_ If not exempt from bidding, have the statutory bidding requirements been met?
- \_\_\_\_\_ Have there been any protests that delay the contract?

### Recitals

- \_\_\_\_\_ Agency name and address.
- \_\_\_\_\_ Full name and legal status of other party and address.
- \_\_\_\_\_ Parties defined in short form (“City” or “Vendor”).
- \_\_\_\_\_ Clauses explaining background and intent, including procurement method used.

### Terms and Conditions

- \_\_\_\_\_ Scope of work or goods to be delivered (with reference to and incorporation of Invitation to Bid, RFP or specifications), *if applicable*.
- \_\_\_\_\_ Effective date.
- \_\_\_\_\_ Term of contract (beginning and ending date).
- \_\_\_\_\_ Dollar limit, *if applicable*.
- \_\_\_\_\_ Method, time, and rate of payment.
- \_\_\_\_\_ Termination provisions.
- \_\_\_\_\_ Termination for convenience of governmental entity.
- \_\_\_\_\_ Termination for cause.

\_\_\_\_\_ Effect of termination.  
\_\_\_\_\_ Inspection and acceptance provisions, *if applicable*.  
\_\_\_\_\_ Limitation of liability, *if applicable*.  
\_\_\_\_\_ Indemnification by vendor *specific to transaction*.  
\_\_\_\_\_ Insurance requirements *specific to transaction*.  
\_\_\_\_\_ Aircraft liability  
\_\_\_\_\_ Automobile liability  
\_\_\_\_\_ Builder's risk insurance  
\_\_\_\_\_ Commercial general liability  
\_\_\_\_\_ Employee dishonesty  
\_\_\_\_\_ Employment practices liability  
\_\_\_\_\_ Employer's liability  
\_\_\_\_\_ Errors and Omissions coverage  
\_\_\_\_\_ Garage-keepers' coverage  
\_\_\_\_\_ Marine protection and indemnity/pollution  
\_\_\_\_\_ Pollution liability  
\_\_\_\_\_ Professional liability  
\_\_\_\_\_ Umbrella/excess liability  
\_\_\_\_\_ Worker's compensation  
\_\_\_\_\_ Wrap up insurance  
\_\_\_\_\_ Bond clause(s) *specific to transaction*.  
\_\_\_\_\_ Liquidated damages clause *specific to transaction*.  
\_\_\_\_\_ Remedies *specific to transaction*.  
\_\_\_\_\_ Representations *specific to transaction*.  
\_\_\_\_\_ Warranties *specific to transaction*.  
\_\_\_\_\_ Sufficient appropriation.  
\_\_\_\_\_ Work product, *if applicable*.  
\_\_\_\_\_ Confidential information, *if applicable*.  
\_\_\_\_\_ Nondisclosure agreement, *if applicable*.  
\_\_\_\_\_ Assignment.  
\_\_\_\_\_ Governing law (choice of law) and venue.  
\_\_\_\_\_ Attorney fees.  
\_\_\_\_\_ Independent contractor, *if applicable*.  
\_\_\_\_\_ Key employees, *if applicable*.  
\_\_\_\_\_ Force majeure.  
\_\_\_\_\_ Risk of loss, *if applicable*.  
\_\_\_\_\_ No personal liability.  
\_\_\_\_\_ No waiver.  
\_\_\_\_\_ Public records.  
\_\_\_\_\_ Notice.  
\_\_\_\_\_ Entire agreement.  
\_\_\_\_\_ Amendments by written agreement.  
\_\_\_\_\_ Extensions or renewals.  
\_\_\_\_\_ Arbitration and mediation.

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Records and Audit.  
Survival.  
Compliance with law.  
Execution in counterparts.  
Priority of documents, *if applicable*.  
Severability.

Execution Lines

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Colored ink or electronic signature.  
Names and titles typewritten.  
Signatures match name.  
If vendor is a corporation, document is signed by an officer or an authorizing resolution is attached.  
If vendor is a partnership, a general partner signs.  
If vendor is a limited liability company, a member or manager signs.  
If other party is a public entity, an authorized person signs.  
If there is a question about authority, ask for documentation.  
Notarized or acknowledged, *if applicable*.

Statutorily Required Terms (as of 2023)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Israel Boycott Certification.  
Ownership by the Government of China.  
Pre-Contract Acknowledgement Letter Delivered to Vendor – No Public Funds for Abortion.

Other

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\_\_\_\_\_  
\_\_\_\_\_  
If recitals are used, make unambiguous, consistent, and factually correct.  
Make sure all references to parties are internally consistent.  
Make sure any cross-references to sections are internally consistent.  
Make sure all terms are unambiguous or clearly defined.  
Use defined terms consistently.  
Use active voice.  
Use “shall” and “must” when a party is obligated and “may” when there is discretion.  
Use “and” only for the conjunctive and “or” only in the

disjunctive.

Do not use “and/or.”

Make sure modifying and dependent clauses are properly placed.

If particulars are listed, make clear if the list is not exhaustive by using “including, but not limited to.”

Check for mistakes in addition or other mistakes in payment obligations or other numbers.

Make sure all attachments are incorporated by reference, properly marked, and attached.

Make sure pages, sections, and paragraphs are numbered correctly.