

### **R33. Government Operations, Purchasing and General Services.**

#### **R33-1. Utah Procurement Rules, General Procurement Provisions.**

##### **R33-1-1. Definitions.**

- (1) Terms used in the procurement rules are defined in Section 63G-6a-103.
- (2) In addition:
  - (a) "Bias" means:
    - (i) a predisposition or a preconceived opinion that prevents an individual from impartially performing any duty or responsibility in Title 63G, Chapter 6a, Utah Procurement Code, or other applicable law or rule; or
    - (ii) a prejudice in favor of or against a thing, individual, or group that results in an action or treatment that a reasonable person would consider to be unfair or have the appearance of being unfair.
  - (b) "Bid Bond" is an insurance agreement, accompanied by a monetary commitment, by which a third party accepts liability and guarantees that the bidder will not withdraw the bid. The bidder will furnish bonds in the required amount and if the contract is awarded to the bonded bidder, the bidder will accept the contract as bid, or else the surety will pay a specific amount.
  - (c) "Bid Rigging" means an agreement among potential competitors to manipulate the competitive bidding process, for example, by agreeing not to bid, to bid a specific price, to rotate bidding, or to give kickbacks.
  - (d) "Bid Security" means the deposit of cash, certified check, cashier's check, bank draft, money order, or bid bond submitted with a bid and serving to guarantee to the owner that the bidder, if awarded the contract, will execute such contract in accordance with the bidding requirements and the contract documents.
  - (e) "Brand Name or Equal Specification" means a specification which uses a brand name specification to describe the standard of quality, performance, and other characteristics being solicited, and which invites the submission of equivalent products.
  - (f) "Brand Name Specification" means a specification identifying one or more products by manufacturer name, product name, unique product identification number, product description, SKU or catalog number.
  - (g) "Collusion" means when two or more persons act together to achieve a fraudulent or unlawful act. Collusion inhibits free and open competition in violation of law.
  - (h) "Cost Analysis" means the evaluation of cost data to arrive at estimates of costs to be incurred, prices to be paid, costs to be reimbursed, or costs actually incurred.
  - (i) "Cost Data" means factual information concerning the cost of labor, material, overhead, and other cost elements expected to be incurred or that have been actually incurred by the contractor in performing the contract.
  - (j) "Evaluation Criteria" means the objective or subjective criteria that will be used to evaluate a vendor's solicitation response.
  - (k) "Mandatory Requirement" means a condition set out in the specifications or statement of work that must be met without exception.
  - (l) "New Technology" means any invention, discovery, improvement, or innovation, that was not available to the acquiring agency on the effective date of the contract, whether or not patentable, including:
    - (i) new processes, emerging technology, machines, and improvements to, or new applications of, existing processes, machines, manufactures and software;
    - (ii) new computer programs, and improvements to, or new applications of, existing computer programs, whether or not copyrightable; and;
    - (iii) any new process, machine, including software, and improvements to, or new applications of, existing processes, machines, manufactures and software.
  - (m) "Objective Criteria" means the solicitation criteria that will be evaluated and scored based solely on the measurable and verifiable facts, evidence, and documentation provided in each vendor's solicitation response.
  - (n) "Payment Bond" is a bond that guarantees payment for labor and materials expended on the contract.
  - (o) "Performance Bond" means a promise to pay the obligee or owner a certain amount if the principal or contractor fails to meet some obligation, such as fulfilling the terms of a contract.
  - (p) "Person" means:
    - (q) an individual;
    - (ii) an association;
    - (iii) an institution;
    - (iv) a corporation;
    - (v) a company;
    - (vi) a trust;
    - (vii) a limited liability company;
    - (viii) a partnership;
    - (ix) a political subdivision;
    - (x) a government office, department, division, bureau, or other body of government; and
    - (xi) any other organization or entity.

- (r) "Price Analysis" means the evaluation of price data without analysis of the separate cost components and profit.
- (s) "Price Data" means factual information concerning prices for procurement items.
- (t) "Reasonable Person Standard" means an objective test to determine if a reasonably prudent person who exercises an average degree of care, skill, and judgment would be justified in drawing the same conclusions under the same circumstances or having knowledge of the same facts.
- (u) "Subjective Criteria" means the solicitation criteria that will be evaluated and scored based on the personal judgment, interpretations, and opinions of the evaluators after reviewing and analyzing the information provided in each vendor's solicitation response.
- (v) "Steering a Contract to a Favored Vendor" is defined as a person involved in any phase of the procurement process who acts with bias or prejudice in violation of the law to favor one vendor over another vendor in awarding a government contract. Steering a contract to a favored vendor includes:
  - (i) taking part in collusion or manipulation of the procurement process;
  - (ii) accepting any form of illegal gratuity, bribe or kickback from a vendor in exchange for a contract award;
  - (iii) awarding a contract to a vendor without engaging in a standard procurement process without proper justification;
  - (iv) involvement in a bid rigging scheme;
  - (v) writing specifications that are overly restrictive, beyond the reasonable needs of the procurement unit, or that gives an unfair advantage to a particular vendor without proper justification;
  - (vi) intentionally dividing a purchase to avoid engaging in a standard competitive procurement process as set forth in Subsection 63G-6a-506(8);
  - (vii) leaking solicitation or other information to a particular vendor that is prejudicial to other vendors;
  - (viii) improperly avoiding engaging in a standard procurement process to extend the duration of a vendor's existing contract through means of a contract extension; or
  - (ix) participating in the procurement process while having a financial conflict of interest as set forth in Section R33-24-105.
- (w) "Technology" means any type of technology defined as "Information Technology" in Subsection 63A16-102(8).

#### **R33-1-2. Applicability of Rules.**

- (1) Title R33 shall apply to:
  - (a) a procurement unit for which the Utah State Procurement Policy Board is identified in Section 63G-6a-103 as the applicable rulemaking authority, except to the extent the procurement unit has adopted its own administrative rules as authorized under Subsection 63G-6a-103(77); and
  - (b) a procurement unit with independent procurement authority or a procurement unit for which the Utah State Procurement Policy Board is not identified in Section 63G-6a-103 as the applicable rulemaking authority, and the procurement unit has adopted Title R33 or a portion of Title R33 by rule, ordinance, policy, or other authorized means.

#### **R33-1-2.5. Use of Similar Laws and Rules to Establish Precedent or Extrapolate Legal Intent.**

- (1) When making a determination and a specific law or rule pertaining to the issue does not exist, the procurement official may refer to other applicable laws that are similar in nature to the issue to establish a precedent or extrapolation of legal intent to assist in making a determination based on the reasonable person standard in Section R33-1-1.

#### **R33-1-3. Determinations by Procurement Official.**

- (1) Unless specifically stated otherwise, determinations under Title 63G, Chapter 6a and Title R33 shall be made by the procurement official.
- (2) A determination by the procurement official shall be made:
  - (a) in accordance with the provisions set forth in Sections 63G-6a-106 and 63G-6a-303 and other rules and laws if applicable; or
  - (b) by applying the reasonable person standard to determine:
    - (i) if the actions of a person involved in the procurement process would cause a reasonable person to conclude that the person has acted in violation of Title 63G, Chapter 6a, or Title R33;
    - (ii) if the circumstances surrounding a procurement would cause a reasonable person to conclude that a violation of Title 63G, Chapter 6a, or Title R33 has occurred; or
    - (iii) if the evidence presented would cause a reasonable person to conclude that certain facts associated with a procurement are true.

#### **R33-1-4. Competitive Procurement Required for Expenditure of Public Funds or Use of Public Property or Other Public Assets to Acquire a Procurement Item Unless Exception is Authorized.**

- (1) Unless the procurement official issues a written exception in accordance with Title 63G, Chapter 6a, and applicable rules documenting why a competitive procurement process is not required and why it is in the best interest of the procurement

unit to award a contract without engaging in a standard procurement process, a procurement unit shall conduct a standard procurement process when:

- (a) public funds are expended or used to acquire a procurement item; or
- (b) a procurement unit's property, name, influence, assets, resources, programs, or other things of value are used as consideration in the formation of a contract for a procurement item.

**R33-1-12. Mandatory Minimum Requirements in a Solicitation.**

(1) Mandatory minimum requirements may be used in a solicitation to assist the conducting procurement unit in identifying the most qualified vendors responding to a solicitation and to limit the number of vendors eligible to move forward to subsequent stages in the solicitation or evaluation process.

**R33-1-13. Pre-Solicitation Conferences and Site Visits.**

(1) A pre-solicitation conference and site visit may be held to explain the procurement requirements in accordance with the following:

- (a) Persons submitting a solicitation response must attend pre-solicitation conferences and site visits, except as authorized in writing by the procurement official.
- (b) Pre-solicitation conferences or site visits may be attended in person or via any of the following electronic means:
  - (i) teleconference;
  - (ii) webinar; or
  - (iii) other electronic media approved by the procurement official.
- (c) Pre-solicitation conferences and site visits must be attended by an authorized representative of the vendor submitting a response and as may be further specified in the procurement documents.
- (d) If the pre-solicitation conference or site visit is mandatory, the solicitation must state that failure to attend shall result in the disqualification of any vendor that does not have an authorized representative present for the entire duration of the pre-solicitation conference or site visit.

(e) An audio or video recording of a pre-solicitation conference and site visit may be made at the discretion of the procurement unit.

(f) Listening to or viewing an audio or video recording of a mandatory pre-solicitation conference or site visit may not be substituted for attendance, unless the procurement official grants an exception to the mandatory requirement in writing.

(2)(a) If a pre-solicitation conference or site visit is held, the procurement unit shall maintain:

- (i) an attendance log including the name of each attendee, the entity the attendee is representing, and the attendee's contact information;
  - (ii) minutes of the pre-solicitation conference or site visit; and
  - (iii) a copy of any document distributed by the procurement unit to the attendees.
- (b) After the pre-solicitation conference or site visit, the procurement unit shall publish an addendum to the solicitation that includes:
- (i) the attendance log;
  - (ii) minutes of the pre-bid conference or site visit;
  - (iii) a copy of any document distributed to attendees; and
  - (iv) any verbal modification made to any solicitation document during the pre-solicitation conference or site visit.

**R33-1-14. Addenda to Solicitation.**

(1) Before the deadline for receipt of a solicitation response, a procurement unit may issue addenda modifying any aspect of the solicitation.

(a) Addenda shall be distributed within a reasonable time to allow a person to consider the addenda in preparing a response to the solicitation.

(b) After the due date and time for submitting a response, at the discretion of the procurement official, addenda to the solicitation may be limited to vendors who submitted a solicitation response, provided the addenda does not make a change to the solicitation that, in the opinion of the procurement official, likely would have impacted the number of persons responding to the solicitation.

**R33-1-15. Rejection of a Late Response -- Delivery and Time Requirements.**

(1) Except as provided in Subsection (4), a procurement unit may not accept a response after the deadline for receipt of solicitation responses.

(2) When submitting a response electronically, vendors must allow sufficient time to complete the online forms and finish uploading all documents before the closing time posted in the electronic system. Solicitation responses still in the process of being uploaded at the posted closing time will not be accepted.

(3) When submitting a solicitation response by physical delivery, which includes U.S. Mail, courier service, hand-delivery, or other physical means the vendor is solely responsible for meeting the deadline. Any delay caused by a delivery service or other physical means will not be considered an acceptable reason for a response being late.

(4) Responses received by physical delivery will be date and time stamped by the procurement unit.

(5) If an error by the procurement unit or an employee of a procurement unit results in a response not being received by the established due date and time, the response shall be accepted as being on time.

**R33-1-16. Voluntary Withdrawal of a Response.**

(1) A vendor may voluntarily withdraw a response at any time before a contract is awarded with respect to the solicitation for which the response was submitted provided the vendor is not engaged in any type of bid rigging, collusion or other anti-competitive practice made unlawful under other applicable law.

**R33-1-17. Errors Discovered After the Award of Contract.**

(1) An error discovered after the award of a contract may only be corrected if, after consultation with the procurement official and the applicable legal counsel, it is determined that correction of the error does not violate the requirements of Title 63G, Chapter 6a, or these Title R33.

(2) Any correction made under this subsection must be supported by a written determination signed by the procurement official.

**KEY: government purchasing, Utah procurement rules, general procurement provisions, definitions**

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**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Administrative Services, Purchasing and General Services.**

**R33-2. Rules of Procedure for Procurement Policy Board.**

**R33-2-1. Purpose.**

(1) The purpose of this rule is to establish procedures for the meetings of the Procurement Policy Board. All definitions in the Utah Procurement Code shall apply to this Rule unless otherwise specified in this rule. This administrative rule provides additional requirements and procedures and must be used in conjunction with the Procurement Code.

**R33-2-2. Authority.**

(1) This rule R33-2 is authorized under Subsection 63G-6a-202(5) which directs that the Procurement Policy Board "adopt rules of procedure for conducting its business." The Procurement Policy Board is also authorized to make rules under Section 63G-6a-203 et. seq.

**R33-2-4. Composition of Board.**

(1) The Board consists of 15 voting members, as well as a nonvoting secretary appointed by the Chief Procurement Officer, who must be an employee of the Division.

(2) The Secretary shall not be considered as part of the quorum requirement for Board meetings or determinations.

**R33-2-5. Calling Meetings.**

(1) The Chair or any three voting members may call meetings of the Board.

**R33-2-6. Chair, Presiding Officer and Basic Responsibilities.**

(1) The Chair shall be the Presiding Officer at all Board meetings.

(2) The Chair may designate, either because of unavailability or any other reason, an alternate Presiding Officer, who is a member of the Board.

(3) The Presiding Officer may make motions and have a vote on each matter before the Board. The Presiding Officer may second motions.

(4) Unless otherwise directed by vote of the Board, the Presiding Officer shall be responsible for the operation of the meeting, shall have control over the items on the agenda, the order of the agenda, time limits that are needed, and other matters that relate to the orderly running of the meeting. Notwithstanding this, the Director or any three voting members may also place items on the Board agenda.

(5) The Chair shall be elected by the Board and serve for one year. The Chair may be elected to succeeding terms.

**R33-2-7. Secretary to the Board.**

(1) The Chief Procurement Officer shall appoint an employee of the Division to serve as Secretary to the Board. The Secretary shall be present at each meeting of the Board, shall provide the posting of notice, minutes, any required recording, and all secretarial related requirements related to the Open and Public Meetings Act. The Secretary shall coordinate with others as needed for compliance with the Open and Public Meetings Act.

(2) The Secretary shall maintain a record of Board meetings which shall include minutes, agendas and submitted documents, including those submitted electronically, that shall be available at reasonable times to the public.

**R33-2-8. Meetings.**

(1) The date, time and location of a meeting may be identified or modified by the Chair and Director at any time when it is in the interest of the Board and the public.

**R33-2-9. Compliance with Open and Public Meetings Act.**

(1) All meetings of the Board shall be conducted in accordance with the Open and Public Meetings Act. All meetings are open to the public unless closed in whole or in part pursuant to the requirements of the Open and Public Meetings Act.

**R33-2-10. Notice and Agenda.**

(1) Notice of each meeting shall be given in accordance with the Title 52, Chapter 4, Open and Public Meetings Act.

(2) The Director or Presiding Officer may determine items to be placed on the agenda. A vote of the Board may also place an item on an agenda for a future meeting. A Board member may also contact the Chair or Director to request that an item be placed on the agenda.

(3) The order of business shall be in the order placed on the agenda, unless the Presiding Officer or vote of the Board alters the order of business and there is no prejudice to interested persons.

(4) A member of the Board, the Division, governmental agency and the public may submit a request to the Secretary to the Board for an item to be placed on the agenda subject to review and approval by the Presiding Officer or Director.

(5) Each agenda shall include an agenda item that allows a Board member to request that an item be placed on a future agenda.

**R33-2-11. Attendance, Quorum and Voting.**

(1) Eight members of the Board are required for a quorum to transact business.

(2) Any determination of the Board must be approved by a majority vote of those voting members present and must receive an affirmative vote from at least five members.

(3) Voting shall be expressed publicly when called for by the Presiding Officer. An affirmative vote shall be recorded for each Board member present that neither vote negatively nor specifically abstain. The number of affirmative, negative and abstaining votes shall be announced by the Presiding Officer, and the vote of each member shall be recorded by the Secretary.

(4) A member must be in attendance, either in person or by electronic means in accordance with this rule, to vote.

**R33-2-12. Motions, Second to a Motion, Discussion, Continuances and Resolutions.**

(1) Any voting member may make or second a motion.

(2) Items may be continued to any subsequent meeting by vote of the Board.

(3) A second to a motion is required before discussion by Board members.

(4) After a motion is seconded, the Presiding Officer shall ask for discussion of the matter. The Presiding Officer shall call upon those who request to discuss the matter. The Presiding Officer retains the authority to place reasonable restrictions on the discussion to assure that the discussion is orderly and relevant to the motion. After the discussion, or if no Board member desires to discuss the matter, the Board shall proceed to vote on the matter without the need for a formal call to question.

(5) The Board may enact resolutions.

**R33-2-13. Committees and Appeals Panel.**

(1) The Board Chair may appoint committees to investigate or report on any matter which is of concern to the Board. The appointment of an Appeals Panel is described in Rule R33-17.

**R33-2-14. Order at Meetings.**

(1) The Presiding Officer shall preserve order and decorum at all meetings of the Board and shall determine questions of order, which may be subject to a vote of the Board.

(2) A person creating a disturbance or otherwise obstructing the orderly process of a Board meeting may be ordered to leave the meeting.

**R33-2-15. Rules of Order.**

(1) All matters not covered by this rule shall be determined by Robert's Rules of Order, latest published edition; an abbreviated edition of Robert's Rules of Order as determined by the Presiding Officer; or abbreviated procedures as determined by the Presiding Officer.

**R33-2-16. Electronic Meetings.**

(1) Purpose. Section 52-4-207 requires any public body that convenes or conducts an electronic meeting to adopt a rule governing the use of electronic meetings. This rule establishes procedures for conducting Board meetings by electronic means.

(2) Procedure. The following provisions govern any meeting at which one or more Board members appear electronically pursuant to Section 52-4-207:

(a) If one or more members of the Board desire to participate electronically, such members shall contact the Director or Secretary. The Director shall assess the practicality of facility requirements needed to conduct the meeting electronically in a manner that allows for the attendance, participation and monitoring as required by this rule. If it is practical, the Presiding Officer or Director shall determine whether to allow for such electronic participation, and the public notice of the meeting shall so indicate. In addition, the notice shall specify the anchor location where the members of the Board not participating electronically will be present and where interested persons and the public may attend, monitor, and participate in the open portions of the meeting.

(b) Notice of the meeting and the agenda shall be posted at the anchor location and be provided in accordance with the Open and Public Meetings Act. The anchor location is the physical location where the electronic meeting originates or where the participants are connected. The anchor location shall be identified in the public notice for the meeting. Unless otherwise designated in the notice, the anchor location shall be a room at the Taylorsville State Office Building where the Board would normally meet if the Board was not holding an electronic meeting.

(c) Notice of the possibility of an electronic meeting shall be given to the Board members at least 24 hours before the meeting. In addition, the notice shall describe how a Board member may participate in the meeting electronically.

(d) When notice is given of the possibility of a Board member participating electronically, any Board member may do so and any voting Board member, whether at the anchor location or participating electronically, shall be counted as present for purposes of a quorum and may fully participate and vote. At the commencement of the meeting, or at such time as any Board member initially appears electronically, the Presiding Officer shall identify for the record all those who are participating electronically. Votes by members of the Board who are not at the anchor location of the meeting shall be confirmed by the Presiding Officer.

(e) The anchor location will have space and facilities so that interested persons and the public may attend, monitor and participate in the open portions of the meeting, as appropriate.

**R33-2-17. Suspension of the Rules.**

(1) By a vote of the Board, and to the extent allowed by law, any requirement of sections R33-2-1 through R33-2-17 may be suspended when necessary to better serve the public in the conduct of a Board meeting.

**KEY: government purchasing, Procurement Policy Board, rules of procedure**

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**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Purchasing and General Services.**

**R33-3. Procurement Organization.**

**R33-3-101. Delegation of Authority of the Chief Procurement Officer.**

(1) Pursuant to Title 63G, Chapter 6a, Part 3, Chief Procurement Officer, the Chief Procurement Officer may delegate in writing any authority under Section 63G-6a-304 as deemed appropriate to any employees of the office of the chief procurement officer or of an executive branch procurement unit. These delegations shall remain in effect unless modified or revoked in writing.

**KEY: government purchasing, chief procurement officer, delegation of authority**

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**R33. Government Operations, Purchasing and General Services.**

**R33-4. Supplemental Procurement Procedures.**

**R33-4-103. Specifications.**

- (1) A public entity shall include in solicitation documents specifications for the procurement item sought.
- (2)(a) Each specification shall be drafted with the objective of clearly describing the procurement unit's requirements and encouraging competition.
  - (b) Each specification shall emphasize the functional or performance criteria necessary to meet the needs of the procurement unit.
  - (3) A person with a conflict of interest, or who anticipates responding to the proposal for which the specifications are written, may not participate in writing specifications. A procurement unit may retain the services of a person to assist in writing specifications, scopes of work, requirements, qualifications, or other components of a solicitation. The person retained to assist in writing specifications may not, at any time during the procurement process, be employed in any capacity by, nor have an ownership interest in, an individual, public or private corporation, governmental entity, partnership, or unincorporated association bidding on or submitting a proposal in response to the solicitation.
    - (a) Subsection R33-4-103(3) does not apply to the following:
      - (i) a design build construction project; and
      - (ii) other procurements determined in writing by the procurement official.
    - (b) Violations of this Subsection R33-4-103(3) may result in:
      - (i) the bidder or offeror being declared ineligible for award of the contract;
      - (ii) the solicitation being canceled;
      - (iii) termination of an awarded contract; or
      - (iv) any other action determined to be appropriate by the procurement official.
  - (4) Requirements for brand name and equal specifications are as follows:
    - (a) Brand name or equal specifications may be used when:
      - (i) the phrase "or equivalent" is included within the specification; and,
      - (ii) as many other brand names as practicable are also included in the specification.
    - (b) Brand name or equal specifications shall include a description of the particular design and functional or performance characteristics required. Specifications unique to the brands shall be described in sufficient detail that another person can respond with an equivalent brand.
      - (c) When a manufacturer's specification is used in a solicitation, the solicitation shall state the minimum acceptable requirements of an equivalent. When practicable, the procurement unit shall name at least three manufacturer's specifications.
  - (5) A brand name may be required if:
    - (a) only one brand can meet the requirements set forth in the specifications, and the procurement unit solicits from as many providers of the brand as practicable; and
    - (b) there is only one provider that can meet the requirements set forth in the specifications and the procurement unit conducts the procurement in accordance with Section 63G-6a-802 and Section R33-8-101.

**R33-4-109. Procedures When Two Bids, Quotes, or Statement of Qualifications Cannot Be Obtained.**

- (1) The requirement that a procurement unit obtain a minimum of two bids, quotes, or statements of qualifications is waived when only one vendor submits a bid, provides a quote, or submits a statement of qualifications under the following circumstances:
  - (a) a solicitation meeting the public notice requirements of Section 63G-6a-112 results in only one vendor submitting a solicitation response;
  - (b) vendors on a multiple award contract, prequalification, or approved vendor list fail to respond to the procurement unit; or
  - (c) a procurement unit makes a reasonable effort to invite each vendor known to the procurement unit to submit a solicitation response.
    - (i) "Reasonable effort" as used in Subsection (c) means:
      - (A) public notice under Section 63G-6a-112;
      - (B) an electronic or manual search for vendors within the specific industry;
      - (C) contacting industry-specific associations or manufacturers for the names of vendors within that industry; or
      - (D) a determination by the procurement official that a reasonable effort has been made.
- (2) Before accepting a solicitation response from only one vendor, the procurement official, shall consider:
  - (a) whether pricing is fair and reasonable;
  - (b) canceling the procurement; and
  - (c) a bid security requirement.
- (3) The procurement official shall maintain records documenting the circumstances and reasons why fewer than two solicitation responses were obtained.

**R33-4-110. Use of Electronic, Telephone, or Written Quotes.**

- (1) "Quote" means a purchasing process that solicits pricing information from several sources.
- (2) "Quotation" means a statement of price, terms of sale, and description of the procurement item offered by a vendor to a procurement unit. A quotation is nonbinding and does not obligate a procurement unit to make a purchase or a vendor to make a sale.
- (3) "Electronic" quote means a price quotation provided by a vendor through electronic means such as the internet, online sources, email, an interactive web-based market center, or other technology.
- (4) A procurement unit may use electronic, telephone, or written quotes to obtain pricing and other information for a procurement item within the small purchase or approved vendor threshold limits established by rule provided:
  - (a) quotations are for the same procurement item, including terms of sale, description, and quantity of goods or services;
  - (b) the procurement unit informs the vendor that the quote is for a governmental entity and an inquiry is made as to whether the vendor is willing to provide a price discount to a governmental entity; and
  - (c) the procurement unit maintains a public record that includes:
    - (i) the name of each vendor supplying a quotation; and
    - (ii) the amount of each vendor's quotation.
- (5) An executive branch procurement unit, subject to this rule:
  - (a) may obtain electronic, telephone, or written quotations for a procurement item costing less than \$10,000, unless the procurement official determines a lower amount by policy;
  - (b) shall send a request to obtain quotations for a procurement item costing more than \$10,000, unless the procurement official determines a lower amount by policy, to the Division of Purchasing who shall obtain quotations for executive branch procurement units for procurement items costing more than \$10,000; and
  - (c) may not obtain quotations for a procurement item available on a state contract unless otherwise specified in the terms of a solicitation or contract or authorized by rule or statute.

**KEY: government purchasing, general procurement provisions, specifications, small purchases**

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### **R33. Government Operations, Purchasing and General Services.**

#### **R33-5. Other Standard Procurement Processes.**

##### **R33-5-101. Request for Information.**

(1) In addition to the requirements of Title 63G, Chapter 6a, Part 5, Other Standard Procurement Processes, a request for information should show the procedure for business confidentiality claims and other protections provided by Title 63G, Chapter 2, Utah Government Records and Access Management Act.

##### **R33-5-104. Small Purchases.**

- (1) A small purchase shall be conducted in accordance with Section 63G-6a-506 and this administrative rule.
- (2) Unless otherwise required as part of another standard procurement process being used pursuant to the small purchase rule, small purchases conducted under this rule do not require a solicitation or public notice.
- (3) The Individual Procurement Item threshold is \$5,000 unless the procurement official determines a lower amount. When purchasing an individual procurement item costing up to \$5,000, a procurement unit may select the best source by direct award without seeking competitive bids or quotes.
- (4) The Single Procurement Aggregate threshold is \$10,000 for multiple individual procurement items purchased from one source at one time unless the procurement official determines a lower amount; and
- (5) The Annual Cumulative threshold for purchases made from the same source is \$50,000.
- (6) When practicable, the Division and procurement units shall use a rotation system or other system designed to allow for competition when using the small purchases process.

##### **R33-5-105. Small Purchases Threshold for Design Professional Services.**

- (1) The small purchase threshold for design professional services is a maximum amount of \$100,000 per project.
- (2) Design professional services of \$100,000 or less may be procured by direct negotiation after reviewing the qualifications of a minimum of three design professional firms.
- (3)(a) To ensure the fair and equitable treatment of each vendor on an approved vendor list, a procurement unit shall when using this rule in conjunction with an approved vendor list, select a minimum of three design professional firms from the approved vendor list using one or more of the following methods:
  - (i) a rotation system, organized alphabetically, numerically, or randomly;

- (ii) assignment of vendors to a specified geographic area;
- (iii) assignment of vendors based on each vendor's particular expertise or field; or
- (iv) another method approved by the procurement official.

(b) After selecting a minimum of three firms from the approved vendor list using one of the methods specified in Subsection (3)(a), the procurement unit shall rank the firms in order and begin fee negotiations, up to \$100,000, with the highest ranked firm. If an agreement cannot be reached with the highest ranked firm, the procurement unit shall move to the next highest ranked firm and so on until a fee agreement is reached.

(c) If a fee agreement cannot be reached with any of the firms in the first group of firms selected, the procurement unit may select additional firms from the approved vendor list using the same process set forth in Subsection (3)(a) and (b) or the procurement unit may cancel the procurement.

(d) Each procurement unit using an approved vendor list under this rule shall document that each vendor on the approved vendor list has a fair and equitable opportunity to obtain a contract.

(4) A procurement unit shall include minimum specifications when using the small purchases threshold for design professional services.

(5) Executive Branch procurement units, to the extent they do not have independent procurement authority, shall involve the Division in the qualification process described under Section 63G-6a-410, the approved vendor list process described under Section 63G-6a-507, and the evaluation and fee negotiation process described in Title 63G, Chapter 6a, Part 15, Design Professional Services, in the procurement of design professional services.

#### **R33-5-106. Small Purchases Threshold for Construction Projects.**

(1) The small purchase threshold for an individual construction project is \$100,000 for direct construction costs, including design and allowable furniture or equipment costs;

(2) A procurement unit shall include minimum specifications when using the small purchases threshold for construction projects.

(3) Executive Branch procurement units, to the extent they do not have independent procurement authority, shall involve the Division in the qualification process described under Section 63G-6a-410, the approved vendor list process described under Section 63G-6a-507, and the obtaining of quotes, bids or proposals in the procurement of small construction projects.

(4) The procurement official may procure individual small construction projects up to a maximum of \$25,000 by direct award without seeking competitive bids or quotes after documenting that all building code approvals, licensing requirements, permitting and other construction related requirements are met. The awarded contractor must certify that it is capable of meeting the minimum specifications of the project.

(5) The procurement official may procure individual small construction projects costing more than \$25,000 up to a maximum of \$100,000 by obtaining a minimum of two competitive quotes that include minimum specifications and shall award to the contractor with the lowest quote that meets the specifications after documenting that all applicable building code approvals, licensing requirements, permitting and other construction related requirements are met.

#### **R33-5-106.5. Small Purchases Threshold for Construction Projects Using an Approved Vendor List.**

(1) The small construction project threshold per individual project using an approved vendor list is a maximum of \$2,500,000 for direct construction costs, including design and allowable furniture or equipment costs;

(2) To ensure the fair and equitable treatment of all vendors on an approved vendor list, a procurement unit shall:

(a) For individual construction projects up to a maximum of \$25,000 contract with a vendor or contractor by direct award using one of the following methods to select the vendor or contractor:

- (i) A rotation system, organized alphabetically, numerically, or randomly;
- (ii) Assignment of vendors to a specified geographic area;
- (iii) Assignment of vendors based on each vendor's particular expertise or field; or
- (iv) Another method approved by the procurement official;

(b) For individual construction projects over \$25,000 up to a maximum of \$100,000 by obtaining a minimum of two competitive quotes from vendors or contractors on the approved vendor list;

(i) Procurement units shall use one of the following methods to select vendors from whom quotes are obtained:

- (A) A rotation system, organized alphabetically, numerically, or randomly;
- (B) Assignment of vendors to a specified geographic area;
- (C) Assignment of vendors based on each vendor's particular expertise or field; or
- (D) Another method approved by the procurement official;

(ii) When using one of the methods listed in Subsection (2)(b) to select vendors to provide quotes, a procurement unit may also obtain an additional quote from the vendor that provided the lowest quote on the most recently completed procurement conducted by the procurement unit using the approved vendor list;

(iii) When quotes or bids are obtained under Subsection (2)(b), procurement units shall purchase the procurement item from the vendor or contractor on the approved vendor list that provides the lowest quote for the procurement item; or

(c) For individual construction projects over \$100,000 up to a maximum of \$2.5 million, by inviting all vendors or contractors on the approved vendor list to submit bids in accordance with the provisions set forth in Title 63G, Chapter 6a, Part 6, Bidding, except public notice requirements in Part 6 are waived.

**R33-5-107. Quotes for Small Purchases from \$5,000 to \$50,000.**

(1) For individual procurement items where the cost is greater than \$5,000 but up to a maximum of \$10,000, unless the procurement official determines a lower amount, a procurement unit shall obtain a minimum of two competitive quotes that include minimum specifications and shall purchase the procurement item from the responsible vendor offering the lowest quote that meets the specifications.

(2) For procurement items where the aggregate cost is greater than \$10,000 up to a maximum of \$50,000, unless the procurement official determines a lower amount, a procurement unit with independent procurement authority or the Division on behalf of an executive branch procurement unit without independent procurement authority, as applicable, shall obtain a minimum of two competitive quotes that include minimum specifications and shall purchase the procurement item from the responsible vendor offering the lowest quote that meets the specifications.

(3) For procurement items with an aggregate cost over \$50,000, a procurement unit with independent procurement authority or the Division on behalf of an executive branch procurement unit without independent procurement authority, as applicable, shall conduct an invitation for bids or other procurement process outlined in the Utah Procurement Code.

(4) The Division may delegate limited purchasing authority for small purchases up to a maximum of \$50,000, to an executive branch procurement unit provided that the executive branch procurement unit enters into an agreement with the Division outlining the duties and responsibilities of the unit to comply with applicable laws, rules, policies and other requirements of the Division.

(5) The names of the vendors offering quotations and bids and the date and amount of each quotation or bid shall be recorded and maintained as a governmental record.

(6)(a) To ensure the fair and equitable treatment of all vendors on an approved vendor list, a procurement unit shall, when using this rule in conjunction with an approved vendor list, obtain a minimum of two quotes from vendors on the approved vendor list using one or more of the following methods to select vendors from whom to obtain quotes:

- (i) A rotation system, organized alphabetically, numerically, or randomly;
- (ii) Assignment of vendors to a specified geographic area;
- (iii) Assignment of vendors based on each vendor's particular expertise or field; or
- (iv) Another method approved by the procurement official;

(b) Each procurement unit using an approved vendor list under this rule shall document that all vendors on the approved vendor list have a fair and equitable opportunity to obtain a contract;

(c) When using one of the methods listed in Subsection (6)(a) to select vendors to provide quotes, a procurement unit may also obtain an additional quote from the vendor that provided the lowest quote on the most recently completed procurement conducted by the procurement unit using the approved vendor list;

(d) When practicable, procurement units may obtain quotes from all vendors on an approved vendor list; and

(e) Procurement units shall purchase the procurement item from the vendor on the approved vendor list that provides the lowest quote for the procurement item.

**R33-5-108. Small Purchases of Professional Service Providers and Consultants.**

(1) The small purchase threshold for professional service providers and consultants is a maximum amount of \$100,000 per project by direct negotiation after reviewing the qualifications of a minimum of three firms or individuals.

(2) The small purchase threshold for medical providers is a maximum of \$100,000 per year, by direct negotiation after reviewing the qualification of medical providers.

(3)(a) Approved Vendor List: To ensure the fair and equitable treatment of all vendors on an approved vendor list, a procurement unit shall, when using this rule in conjunction with an approved vendor list, select a minimum of three professional service providers or consultants from the approved vendor list using one or more of the following methods:

- (i) A rotation system, organized alphabetically, numerically, or randomly;
- (ii) Assignment of vendors to a specified geographic area;
- (iii) Assignment of vendors based on each vendor's particular expertise or field;
- (iv) Another method approved by the procurement official;

(b) After selecting a minimum of three firms or individuals from the approved vendor list using one of the methods specified in Subsection (4)(a), the procurement unit shall rank the firms or individuals in order and begin fee negotiations, up to \$100,000 with the highest ranked firm or individual. If an agreement cannot be reached with the highest ranked firm or individual, the procurement unit shall move to the next highest ranked firm or individual and so on until a fee agreement is reached.

(5) Executive Branch procurement units, to the extent they do not have independent procurement authority, shall involve the Division of Purchasing at the beginning of the quote or solicitation process, in the procurement of professional services or consulting services.

**R33-5-202. Contract Award Based on Established Terms.**

(1) In accordance with Section 63G-6a-113 and Subsection 63G-6a-507(6)(b), a procurement unit may award a contract to a vendor on an approved vendor list at an established price based on:

- (a) A price list, rate schedule, or pricing catalog;
- (i) Submitted by a vendor and accepted by the procurement unit; or
- (ii) Mandated by the procurement unit or a federal agency; or
- (b) A federal regulation for a health and human services program.

(2) When awarding a contract to an approved vendor based on a price list, rate schedule, or pricing catalog submitted by the vendor, the procurement unit shall, as applicable:

(a) Assign work or purchase from the approved vendor with the lowest price, rate or catalog price;

(i) In case of a tie for the lowest price, the procurement unit shall follow the process described in Section R33-6-111 to resolve the tie; and

(ii) If the lowest-cost approved vendor cannot provide the procurement item or quantity needed, then work shall be assigned or the purchase made from the next lowest-cost vendor, and so on, until the procurement unit's needs are met;

(b) Establish a cost threshold based on cost analysis as set forth in Section R33-12-603 and 604, and assign work or purchase from an approved vendor meeting the cost threshold using one of the following methods:

- (i) A rotation system, organized alphabetically, numerically, or randomly;
- (ii) Assignment of vendors to a specified geographic area;
- (iii) Assignment of vendors based on each vendor's particular expertise or field; or
- (iv) Another method approved by the procurement official; and

(c) In accordance with Section 63G-6a-1206.5, an approved vendor may lower its price, rate, or catalog price at any time during the time a contract is in effect to be assigned work or receive purchases under Subsections (i) and (ii).

(3) When awarding a contract to an approved vendor based on a price list, rate schedule, or pricing catalog mandated by the procurement unit or a federal agency, the procurement unit shall use one of the following methods to assign work or purchase from a vendor on an approved vendor list:

- (a) A rotation system, organized alphabetically, numerically, or randomly;
- (b) Assignment of vendors to a specified geographic area;
- (c) Assignment of vendors based on each vendor's particular expertise or field; or
- (d) Another method approved by the procurement official;

(4) When awarding a contract to an approved vendor based on a price list, rate schedule, or pricing catalog based on a federal regulation for a health and human services program the procurement unit shall follow the requirements set forth in the applicable federal regulation to assign work or make a purchase.

(5) In accordance with the provisions set forth in Section 63G-6a-2105, the procurement official may award a contracts to vendors on an approved vendor list on a statewide, regional, or combined statewide and regional basis.

**R33-5-203. Performance Rating System for Vendors.**

(1) A procurement unit may develop a performance rating system to evaluate the performance of vendors, provided the performance rating system is described in the solicitation and includes:

(a) the minimum performance rating threshold that approved vendors must achieve to remain in good standing; and

(b) a statement indicating that vendors whose performance does not meet the minimum performance rating threshold may be subject to a corrective action plan, which may include termination of the contract.

(2) A procurement unit that places a vendor on a corrective action plan shall:

- (a) make a written finding that:
  - (i) describes the performance rating system;
  - (ii) identifies the minimum performance rating threshold; and
  - (iii) explains the performance rating achieved by the vendor; and
- (b) provide a copy of the written finding to the vendor.

**R33-5-204. Approved Vendor Lists -- Using Small Purchase Process.**

(1) When awarding a contract to an approved vendor using the small purchasing process, the procurement unit shall follow the small purchase requirements set forth in Section 63G-6a-506 and the following Administrative Rules as applicable:

- (a) Section R33-5-104. Small Purchases;
- (b) Section R33-5-105. Small Purchases Threshold for Design Professional Services;
- (c) Section R33-5-106. Small Purchases Threshold for Construction Projects;

- (d) Section R33-5-107. Quotes for Small Purchases from \$1,001, to \$50,000;
- (e) Section R33-5-108. Small Purchases of Professional Service Providers and Consultants;
- (2) Executive branch employees are required to use state contracts for all small purchases for procurement items available on state contracts.

**KEY: government purchasing, procurements, request for information**

**Date of Last Change: May 23, 2022**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

### **R33. Government Operations, Purchasing and General Services.**

#### **R33-6. Bidding.**

##### **R33-6-101. Competitive Sealed Bidding; Multiple Stage Bidding.**

(1) Competitive sealed bidding shall be conducted in accordance with the requirements in Title 63G, Chapter 6a, Part 6, Bidding. Definitions in Title 63G, Chapter 6a, Utah Procurement Code shall apply to this rule unless otherwise specified in this rule. This rule provides requirements and procedures and must be used in conjunction with Title 63G, Chapter 6a.

##### **R33-6-108. Re-solicitation of a Bid.**

- (1) Re-solicitation of a bid may occur only if the procurement official determines that:
  - (a) a material change in the scope of work or specifications has occurred;
  - (b) procedures outlined in Title 63G, Chapter 6a were not followed;
  - (c) additional public notice is desired;
  - (d) there was a lack of adequate competition; or
  - (e) other reasons exist that are in the best interests of the procurement unit.
- (2) Re-solicitation may not be used to avoid awarding a contract to a qualified vendor in an attempt to steer the award of a contract to a favored vendor.

##### **R33-6-110. Multiple or Alternate Bids.**

- (1) Multiple or alternate bids will not be accepted, unless otherwise specifically required or allowed in the invitation for bids.
- (2) If a bidder submits multiple or alternate bids that are not requested in the invitation for bids, the procurement official will only accept the bidder's first bid and will not accept any other bids constituting multiple or alternate bids.

##### **R33-6-111. Methods to Resolve Tie Bids.**

- (1) In accordance with Section 63G-6a-608, in the event of tie bids, and only one of the tie bids was submitted by a Utah resident bidder, the contract shall be awarded to the Utah resident bidder, provided the bidder indicated on the invitation to bid form that it is a Utah resident bidder.
- (2) If a Utah resident bidder is not identified, the preferred method for resolving tie bids shall be for the procurement official to toss a coin in the presence of a minimum of three witnesses with the bidder first in alphabetical order being designated as "heads" for the coin toss.
- (3) Other methods to resolve a tie bid may be used as deemed appropriate by the procurement official.

##### **R33-6-112. Publication of Award.**

- (1) The procurement unit shall, on the day on which the award of a contract is announced, make available to each bidder and to the public a notice that includes:
  - (a) the name of the bidder to which the contract is awarded and the price of the procurement item; and
  - (b) the names and the prices of each bidder to which the contract is not awarded.

**KEY: government purchasing, sealed bidding, multiple stage bidding, reverse auction**

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### **R33. Government Operations, Purchasing and General Services.**

#### **R33-7. Request for Proposals.**

##### **R33-7-101. Conducting the Request for Proposals Standard Procurement Process.**

(1) The request for proposals standard procurement process shall be conducted in accordance with the requirements set forth in Utah Procurement Code 63G-6a, Part 7. The request for proposals process may be used by a procurement unit to select the proposal that provides the best value or is the most advantageous to the procurement unit. All definitions in the Utah Procurement Code shall apply to this rule unless otherwise specified in this rule. This administrative rule provides additional requirements and procedures and must be used in conjunction with the Procurement Code.

**R33-7-104. Exceptions to Terms and Conditions Published in the RFP.**

(1) Offerors requesting exceptions or additions to the standard terms and conditions published in the request for proposal (RFP) must include the exceptions or additions with the proposal response.

(2) Exceptions or additions submitted after the date and time for receipt of proposals will not be considered unless there is only one offeror that responds to the RFP, the exceptions or additions have been approved by the Attorney General's Office or other applicable legal counsel, and it is determined by the procurement official that it is not beneficial to the procurement unit to republish the solicitation.

(3) Offerors may not submit requests for exceptions or additions by reference to a vendor's website or URL.

(4) A procurement unit may refuse to negotiate exceptions or additions:

(a) that are determined to be excessive;

(b) that are inconsistent with similar contracts of the procurement unit;

(c) to warranties, insurance, or indemnification provisions that are necessary to protect the procurement unit after consultation with the Attorney General's Office or other applicable legal counsel;

(d) where the solicitation specifically prohibits exceptions or additions; or

(e) that are not in the best interest of the procurement unit.

(5) If negotiations are permitted, a procurement unit may negotiate exceptions or additions with offerors, beginning in order with the offeror submitting the fewest exceptions or additions to the offeror submitting the greatest number of exceptions or additions. Contracts may become effective as negotiations are completed.

(6) If, in the negotiations of exceptions or additions with a particular offeror, an agreement is not reached after a reasonable amount of time as determined by the procurement unit, the negotiations may be terminated and a contract not awarded to that offeror and the procurement unit may move to the next eligible offeror.

**R33-7-105. Protected Records.**

(1) The following are protected records and may be redacted by the vendor subject to the procedures described in this section in accordance with the Governmental Records Access and Management Act (GRAMA) Title 63G, Chapter 2.

(a) Trade Secrets, as defined in Section 13-24-2.

(b) Commercial information or non-individual financial information subject to Subsection 63G-2-305(2).

(c) Other Protected Records under GRAMA.

(2) Process For Requesting Non-Disclosure. Any person requesting that a record be protected shall include with the proposal or submitted document:

(a) a written indication of which provisions of the proposal or submitted document are claimed to be considered for business confidentiality or protected, including trade secrets or other reasons for non-disclosure under GRAMA; and

(b) a concise statement of the reasons supporting each claimed provision of business confidentiality or protected record.

**R33-7-106. Notification.**

(1) A person who complies with Section R33-7-105 shall be notified by the procurement unit before the public release of any information for which a claim of confidentiality has been asserted.

(2) Except as provided by court order, the procurement unit to whom the request for a record is made under GRAMA may not disclose a record claimed to be protected under Section R33-7-105 but which the procurement unit or State Records Committee determines should be disclosed until the period in which to bring an appeal expires or the end of the appeals process, including judicial appeal, is reached. Section R33-7-106 does not apply where the claimant, after notice, has waived the claim by not appealing or intervening before the State Records Committee. To the extent allowed by law, the parties to a dispute regarding the release of a record may agree in writing to an alternative dispute resolution process.

(3) Any allowed disclosure of public records submitted in the request for proposal process will be made only after the selection of the successful offeror has been made public.

**R33-7-107. Process for Submitting Proposals with Protected Business Confidential Information.**

(1) If an offeror submits a proposal that contains information claimed to be business confidential or protected information, the offeror must submit two separate proposals:

(a) One redacted version for public release, with all protected business confidential information either blacked-out or removed, clearly marked as "Redacted Version"; and

- (b) One non-redacted version for evaluation purposes clearly marked as "Protected Business Confidential."
- (i) Pricing may not be classified as business confidential and will be considered public information.
- (ii) An entire proposal may not be designated as "PROTECTED," "CONFIDENTIAL" or "PROPRIETARY" and shall be considered non-responsive unless the offeror removes the designation.

**R33-7-501.5. Minimum Score Thresholds.**

- (1) A procurement unit may establish minimum score thresholds to advance proposals from one stage in the RFP process to the next, including contract award.
- (2) If used, minimum score thresholds must be set forth in the RFP and clearly describe the minimum score threshold that proposals must achieve to advance to the next stage in the RFP process or to be awarded a contract.
- (3)(a) Thresholds may be based on:
  - (i) Minimum scores for each evaluation category;
  - (ii) The total of each minimum score in each evaluation category based on the total points available; or
  - (iii) A combination of (i) and (ii).
- (b) Thresholds may not be based on:
  - (i) A natural break in scores that was not defined and set forth in the RFP; or
  - (ii) A predetermined number of offerors, unless authorized in writing by the procurement official.

**R33-7-601. Best and Final Offers.**

- (1) Best and Final Offers (BAFO) shall be conducted in accordance with the requirements set forth in Section 63G-6a-707.5 of the Utah Procurement Code. Rule R33-7 provides additional requirements and procedures and must be used in conjunction with the Procurement Code.
  - (a) BAFO process is an optional step in the evaluation phase of the request for proposals process in which offerors are requested to modify their proposals.
  - (b) The BAFO offers process may not be conducted as part of the contract negotiation process. It may only be conducted during the evaluation phase of the request for proposal process.
  - (c) A procurement unit may not use the BAFO process to allow offerors a second opportunity to respond to the entire request for proposals.

**R33-7-701. Cost-benefit Analysis Exception: CM/GC.**

- (1) A cost-benefit analysis is not required if the contract is awarded solely on the qualifications of the construction manager or general contractor and the management fee described in Section 63G-6a-707 provided:
  - (a) a competitive process is maintained by the issuance of a request for proposals that requires the offeror to provide, at a minimum:
    - (i) a management plan;
    - (ii) references;
    - (iii) statements of qualifications; and
    - (iv) a management fee.
  - (b) the management fee contains only the following:
    - (i) preconstruction phase services;
    - (ii) monthly supervision fees for the construction phase; and
    - (iii) overhead and profit for the construction phase.
  - (c) the evaluation committee may, as described in the solicitation, weight and score the management fee as a fixed rate or a fixed percentage of the estimated contract value.
  - (d) the contract awarded must be in the best interest of the procurement unit.

**R33-7-703. Evaluation Committee Procedures for Scoring Non-Priced Technical Criteria.**

- (1)(a) The procurement unit may conduct a review of proposals to determine if:
  - (i) the person submitting the proposal is responsible;
  - (ii) the proposal is responsive; and
  - (iii) the proposal meets the mandatory minimum requirements set forth in the request for proposal.
- (b) An evaluation committee may not evaluate proposals deemed non-responsive or not meeting the mandatory minimum requirements of the RFP, or from vendors determined to be not responsible.
- (2) Before the evaluation and scoring of proposals, the procurement unit will meet to:
  - (a) Explain the evaluation and scoring process;
  - (b) Discuss requirements and prohibitions pertaining to:
    - (i) socialization with vendors as set forth in Section R33-24-104;
    - (ii) financial conflicts of interest as set forth in Section R33-24-105;

- (iii) personal relationships, favoritism, or bias as set forth in Section R33-24-106;
  - (iv) disclosing confidential information contained in proposals or the deliberations and scoring of the evaluation committee; and
  - (v) ethical standards for an employee of a procurement unit involved in the procurement process as set forth in Section R33-24-108.
- (c) review the scoring sheet and evaluation criteria set forth in the RFP; and
  - (d) provide a copy of Section R33-7-703 to the evaluation committee, employees of the procurement unit involved in the procurement, and any other person that will have access to the proposals.
- (3) Before participating in any phase of the RFP process, all members of the evaluation committee must sign a written statement certifying that they do not have a conflict of interest.
- (4) At each stage of the procurement process, the conducting procurement unit shall ensure that evaluation committee members, employees of the procurement unit and any other person participating in the procurement process:
- (a) do not have a conflict of interest with any of the offerors;
  - (b) do not contact or communicate with an offeror concerning the procurement outside the official procurement process; and
  - (c) conduct or participate in the procurement process in a manner that ensures a fair and competitive process and avoids the appearance of impropriety.
- (5) Unless an exception is authorized by the head of the procurement unit, the evaluation committee is prohibited from knowing, or having access to, any information relating to the cost, or the scoring of the cost, of a proposal until after the evaluation committee has finalized its scoring of non-price technical criteria for each proposal and submitted those scores to the procurement unit as set forth in Section 63G-6a-707.
- (6)(a) In accordance with Section 63G-6a-707, the procurement unit shall appoint an evaluation committee to evaluate each responsive proposal submitted by a responsible offeror that has not been rejected from consideration under the Title 63G-6a, using the criteria described in the RFP.
- (b) The evaluation committee shall exercise independent judgment in the evaluation and scoring of the non-priced technical criteria in each proposal.
  - (c) Proposals must be evaluated solely on the criteria listed in the RFP.
  - (d) The evaluation committee may receive assistance from an expert or consultant authorized by the procurement unit in accordance with the provisions set forth in Subsection 63G-6a-707(6).
- (7) After each proposal has been independently evaluated by each member of the evaluation committee, each committee member independently shall assign a preliminary draft score for each proposal for each of the non-priced technical criteria listed in the RFP.
- (a) After completing the preliminary draft scoring of the non-priced technical criteria for each proposal, the evaluation committee shall enter into deliberations to:
    - (i) review each evaluation committee member's preliminary draft scores;
    - (ii) resolve any factual disagreements;
    - (iii) modify their preliminary draft scores based on their updated understanding of the facts; and
    - (iv) derive the committee's final recommended consensus score for the non-priced technical criteria of each proposal.
  - (b) During the evaluation process, the evaluation committee may make a recommendation to the procurement unit that:
    - (i) a proposal be rejected for:
      - (A) being non-responsive;
      - (B) not meeting the mandatory minimum requirements; or
      - (C) not meeting any applicable minimum score threshold; or
    - (ii) an offeror be rejected for not being responsible.
  - (c) If an evaluation committee member does not attend an evaluation committee meeting, the meeting may be canceled and rescheduled.
  - (d) To score proposals fairly, an evaluation committee member must be present at each evaluation committee meeting and must review each proposal, including if applicable oral presentations. If an evaluation committee member fails to attend an evaluation committee meeting or leaves a meeting early or fails for any reason to fulfill the duties and obligations of a committee member, that committee member shall be removed from the committee. The remainder of the evaluation committee members may proceed with the evaluation, provided there are at least three evaluation committee members remaining.
  - (e) Attendance or participation on an evaluation committee via electronic means such as a conference call, a webcam, an online business application, or other electronic means is permissible.
- (8)(a) The evaluation committee shall derive its final recommended consensus score for the non-priced technical criteria of each proposal using the following methods:
- (i) the total of each individual evaluation committee member's scores for each proposal shall be the consensus score for the evaluation committee; or

(ii) an average of each individual evaluation committee member's scores for each proposal shall be the consensus score for the evaluation committee.

(b) The evaluation committee shall submit its final score sheet, signed and dated by each committee member, to the procurement unit for review.

(9) The evaluation committee may not change its consensus final recommended scores of the non-priced technical criteria for each proposal after the scores have been submitted to the procurement unit, unless the procurement unit authorizes that a best and final offer process is to be conducted.

(10) In accordance with Section 63G-6a-707, the issuing procurement unit shall:

(a) review the evaluation committee's final recommended scores for each proposal's non-priced technical criteria and correct any errors, scoring inconsistencies, and reported noncompliance with this chapter or cancel the solicitation;

(b) score the cost of each proposal based on the applicable scoring formula; and

(c) calculate the total combined score for each proposal.

(11) The evaluation committee may, with approval from the procurement unit, request BAFO from responsible offerors who have submitted responsive proposals that meet the minimum qualifications, evaluation criteria, or applicable score thresholds identified in the RFP.

(12)(a) The procurement official may remove a member of an evaluation committee for:

(i) having a conflict of interest or the appearance of a conflict of interest with a person responding to a solicitation;

(ii) having an unlawful bias or the appearance of unlawful bias for or against a person responding to a solicitation;

(iii) having a pattern of arbitrary, capricious, or clearly erroneous scores that are unexplainable or unjustifiable;

(iv) having inappropriate contact or communication with a person responding to a solicitation;

(v) socializing inappropriately with a person responding to a solicitation;

(vi) engaging in any other action or having any other association that causes the procurement official to conclude that the individual cannot fairly evaluate a solicitation response; or

(vii) any other violation of a law, rule, or policy.

(b) The procurement official may reconstitute an evaluation committee in any way deemed appropriate to correct an impropriety described in Subsection (12)(a). If an impropriety cannot be cured by replacing a member, the head of the issuing procurement unit may appoint a new evaluation committee, cancel the procurement or cancel and reissue the procurement.

#### **R33-7-704. Scoring of Evaluation Criteria, Other Than Cost, for Proposals in the RFP Process.**

(1) Scoring shall be based upon each applicable evaluation criteria as set forth in the RFP.

#### **R33-7-705. Evaluation Committee Members Required to Exercise Independent Judgment.**

(1)(a) Evaluators are required to exercise independent judgment in a manner that is not dependent on anyone else's opinions or wishes.

(b) Evaluators must not allow their scoring to be inappropriately influenced by another person's wishes that additional or fewer points be awarded to a particular offeror.

(c) Evaluators may seek to increase their knowledge before scoring by asking questions and seeking appropriate information from the procurement unit. Otherwise, evaluators should not discuss proposals or the scoring of proposals with other persons not on the evaluation committee.

(2)(a) The exercise of independent judgment applies not only to possible inappropriate influences from outside the evaluation committee, but also to inappropriate influences from within the committee. It is acceptable for there to be discussion and debate within the committee regarding how well a proposal meets the evaluation criteria. However, open discussion and debate may not lead to coercion or intimidation by one committee member to influence the scoring of another committee member.

(b) Evaluators may not act on their own or in concert with another evaluation committee member to inappropriately steer an award to a favored vendor or to disfavor a particular vendor.

(c) Evaluators are required to report any attempts by others to improperly influence any evaluator's scoring to favor or disfavor a particular offeror.

(d) If an evaluator feels that the evaluator's independence has been compromised, the evaluator must recuse themselves from the evaluation process.

#### **R33-7-802. Publicizing Awards.**

(1) The following shall be disclosed after receipt of a GRAMA request and payment of any lawfully enacted and applicable fees:

(a) the contract entered into as a result of the selection and the successful proposal, except for those portions that are to be non-disclosed under Section R33-7-105;

(b) the unsuccessful proposals, except for those portions that are to be non-disclosed under Section R33-7-105;

(c) the rankings of the proposals;

- (d) the names of the members of any evaluation committee;
- (e) the final scores used by the evaluation committee to make the selection, except that the names of the individual scorers shall not be associated with their individual scores or rankings; and
- (f) the written justification statement supporting the selection, except for those portions that are to be non-disclosed under Section R33-7-105.

(2) After due consideration and public input, the following has been determined by the Procurement Policy Board to impair governmental procurement proceedings or give an unfair advantage to any person proposing to enter into a contract or agreement with a governmental entity, and will not be disclosed by the governmental entity at any time to the public including under any GRAMA request:

- (a) the names of individual scorers or evaluators in relation to their individual scores or rankings;
- (b) any individual scorer's or evaluator's notes, drafts, and working documents;
- (c) non-public financial statements; and
- (d) past performance and reference information, which is not provided by the offeror and which is obtained as a result of the efforts of the governmental entity. To the extent such past performance or reference information is included in the written justification statement; it is subject to public disclosure.

#### **R33-7-900. Public-Private Partnerships.**

(1) Except as provided in Section 63G-6a-802, a procurement unit shall award a contract for a public-private partnership, as defined in Section 63G-6a-103, by the request for proposals standard procurement process set forth in Section 63G-6a, Part 7, Requests for Proposals.

**KEY: government purchasing, request for proposals, standard procurement process**

**Date of Last Change: May 23, 2022**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

### **R33. Government Operations, Purchasing and General Services.**

#### **R33-8. Exceptions to Standard Procurement Process.**

##### **R33-8-101. Award of Contract Without Engaging in a Standard Procurement Process.**

(1) Under the provisions set forth in Section 63G-6a-802, the procurement official may award a contract without engaging in a standard procurement process under the following circumstances:

- (a) There is only one source for the procurement item;
- (b) Transitional costs are a significant consideration in selecting a procurement item and the results of a cost-benefit analysis document that transitional costs are unreasonable or cost-prohibitive and awarding a contract without engaging in a standard procurement process is in the best interest of the procurement unit; or
- (c) Other circumstances described by the applicable rulemaking authority that make awarding a contract through a standard procurement process impractical and not in the best interest of the procurement unit.

##### **R33-8-101a. Sole Source Contract Awards.**

(1) The underlying purposes and policies of Title 63G, Chapter 61, Utah Procurement Code, are to ensure the fair and equitable treatment of each person who deals with the procurement system and to foster effective broad-based competition within the free enterprise system. The most effective way to achieve this is by conducting a standard procurement process when public funds are expended for a procurement item. Sole source contract awards do not involve a standard procurement process and should only be used when justified after reasonable research has been conducted by the procurement unit to determine if there are other available sources and an analysis has been conducted to determine if a sole source award is cost justified.

(2) Circumstances for which a sole source contract award may be justified include procurements for:

- (a) a procurement item for which there is no comparable product or service, such as a one-of-a-kind item available from only one vendor;
- (b) a component or replacement part for which there is no commercially available substitute, and which can be obtained only directly from the manufacturer; or
- (c) an exclusive maintenance, service, or warranty agreement.

(3) Before awarding a sole source contract, the procurement official shall, when practicable, conduct a price analysis in accordance with Section R33-12-603.

(4) An urgent or unexpected circumstance or requirement for a procurement item does not justify the award of a contract without engaging in a standard procurement process.

##### **R33-8-101b. Transitional Costs -- Cost-Benefit Analysis.**

- (1) For this section, the following definitions shall apply:
  - (a) "Competing type of procurement item" means a type of procurement item that is the same, equivalent, or superior to the existing type of procurement item currently under contract in all material aspects including:
    - (i) performance;
    - (ii) specifications;
    - (iii) scope of work; and
    - (iv) provider qualifications, certifications, and licensing.
  - (b) "Competing provider" means another provider other than the existing provider under contract that provides a competing type of procurement item.
  - (c) "Significant," "unreasonable or cost-prohibitive" transitional costs are defined as costs associated with changing from an existing provider of a procurement item to another provider of that procurement item or from an existing type of procurement item to another type that:
    - (i) constitute a measurably large amount that would likely have an influence or effect on the award of a contract if a competitive procurement were to be conducted for the procurement item being considered; and
    - (ii) provides a compelling justification for not conducting a competitive standard procurement process.
- (2) Transitional costs that must be considered in a cost-benefit analysis include:
  - (a) costs that are directly associated with changing from an existing provider of a procurement item to a competing provider of that procurement item or from an existing type of procurement item to a competing type of procurement item; and
  - (b) a full lifecycle cost analysis of the existing type of procurement item and competing type of procurement items to determine which procurement item is more cost-effective.
- (3) Transitional costs that may be considered in a cost-benefit analysis include:
  - (a) costs identified in Section 63G-6a-103;
  - (b) costs offered by a competing provider for a competing type of procurement item in a competitive bid or request for proposals process conducted within the last 12 months;
  - (c) costs offered by a competing provider for a competing type of procurement item in a competitive bid or RFP process conducted before the most recent 12 months, updated using an applicable price index;
  - (d) written cost estimates obtained by the procurement unit from a competing provider for a competing type of procurement item; and
  - (e) other transitional costs determined to be applicable by the procurement official.
- (4) Transitional costs or other information that may not be considered in a cost-benefit analysis include:
  - (a) costs prohibited in Section 63G-6a-103;
  - (b) data provided by the existing provider for establishing:
    - (i) the market value of the existing type of procurement item; or
    - (ii) a competing provider's price for a competing type of procurement item;
  - (c) costs associated with any other procurement item other than the existing type of procurement item or a competing type of procurement item;
  - (d) non-monetary factors, such as the provider's performance, agency preference, and other data or information not specific to the transitional costs associated with the existing type of procurement item or a competing type of procurement item;
  - (e) factors other than the monetary transitional costs directly associated with changing from an existing provider of a procurement item to a competing provider of that procurement item or from an existing type of procurement item to a competing type of procurement item; and
  - (f) other transitional costs or other information deemed inappropriate by the procurement official.
- (5) The conducting procurement unit shall complete a written cost-benefit analysis and submit it to the issuing procurement unit for approval.
- (6) The cost-benefit analysis should not be overly time-consuming to complete or involve hiring costly consultants or financial analysts.

**R33-8-101c. Other Circumstances That May Make Awarding a Contract Through a Standard Procurement Process Impractical.**

- (1) In accordance with Subsection 63G-6a-802(1)(c), the procurement official may consider, as applicable, the following circumstances when making a determination as to whether awarding a contract through a standard procurement process is impractical and not in the best interest of the procurement unit:
  - (a) a contract award to a specific supplier, service provider, or contractor is a condition of a donation or grant that will fund the full cost of the supply, service, or construction item;
  - (b) public utility services, when only one public utility service is available in an area;
  - (c) an item where compatibility is the overriding consideration; or
  - (d) a used procurement item that presents a unique, specialized, or time-limited buying opportunity.

**R33-8-101d. Notice of Intent to Award a Contract Without Engaging in a Standard Procurement Process.**

(1)(a) The division shall make available a form titled: "Notice of Intent to Award a Contract without Engaging in a Standard Procurement Process" that requires the procurement unit to provide, at a minimum, the following information:

- (i) a description of the procurement item, including, when applicable, the proposed scope of work;
- (ii) the total dollar value of the procurement item, including, when applicable, the actual or estimated full lifecycle cost of maintenance and service agreements;
- (iii) the duration of the proposed contract;
- (iv) the signature of an authorized official of the procurement unit; and
- (v) research completed by the procurement unit documenting that:
  - (A) there are no other competing vendors or sources for the procurement item in accordance with the provisions set forth in Section R33-8-101a;

(B) transitional costs are a significant consideration in selecting a procurement item and the results of a cost-benefit analysis documenting that transitional costs are unreasonable or cost-prohibitive and awarding a contract without engaging in a standard procurement process is in the best interest of the procurement unit in accordance with the provisions set forth in Section R33-8-101b; or

(C) Other circumstances that make awarding a contract through a standard procurement process impractical and not in the best interest of the procurement unit in accordance with the provisions set forth in Section R33-8-101c.

(b) A procurement unit with independent procurement authority may use the division's notice of intent to award a contract without engaging in a standard procurement process form or develop its own form to provide notice of intent to award a contract without engaging in a standard procurement process that contains, at a minimum, the same basic information in Subsection (1)(a).

(c) The conducting procurement unit shall submit in writing a completed notice of intent to award a contract without engaging in a standard procurement process form to the procurement official for approval to award a contract without engaging in a standard procurement process.

**R33-8-101e. Public Notice -- Waiver of Public Notice.**

(1) Except as provided in Subsection (2), publication of a notice of intent to award a contract without engaging in a standard procurement process shall be published in accordance with Section 63G-6a-112 if the cost of the procurement being considered under this rule exceeds \$50,000.

(2)(a) When making a determination under Sections R33-8-101a, R33-8-101b, or R33-8-101c, the procurement official may waive the requirement to publish the "Notice of intent to award a contract without engaging in a standard procurement process" for the following procurements:

- (i) procurements of \$50,000 or less;
- (ii) public utility services;
- (iii) conference and convention facilities with unique or specialized amenities, abilities, location, or services;
- (iv) conference fees, including materials;
- (v) speakers or trainers with unique or proprietary presentations or training materials;
- (vi) hosting of in-state, out-of-state, and international dignitaries;
- (vii) international, national, or local promotion of the state or a public entity;
- (viii) an award when the Legislature identifies the intended recipient of a contract;
- (ix) an award to a specific supplier, service provider, or contractor if the award is a condition of a donation or grant that will fund the full cost of the supply, service, or construction item;
- (x) catering services at government functions where the event requires a caterer with unique and specialized qualifications, skills, and abilities; or
- (xi) other circumstances as determined in writing by the procurement official.

(b) The procurement official may require publication of a notice of intent to award a contract without engaging in a standard procurement process for any procurement identified in Subsection (2)(a) if deemed necessary to uphold the fair and equitable treatment of all persons who deal with the procurement system.

**R33-8-101f. Contesting a Notice of Intent to Award a Contract Without Engaging in a Standard Procurement Process.**

(1) A person may contest the notice of intent to award a contract without engaging in a standard procurement process before the closing of the public notice period set forth in Section 63G-6a-112 by submitting the following information in writing to the procurement official:

- (a) the name of the contesting person; and
- (b) a detailed explanation of the challenge, including documentation that:
  - (i) there are other competing sources for the procurement item;
  - (ii) transitional costs are not significant, unreasonable, or cost-prohibitive; or
  - (iii) a standard procurement process is in the best interest of the conducting procurement unit.

(2) Upon receipt of a challenge contesting an award of a contract without engaging in a standard procurement process, the procurement official shall conduct an investigation to determine the validity of the challenge and make a written determination either supporting or denying the challenge.

(a) If a challenge is upheld, the procurement unit shall conduct a standard procurement process for the procurement item being considered or cancel the procurement;

(b) If a challenge is not upheld, the procurement unit may proceed with awarding a contract without engaging in a standard procurement process.

(3) A vendor's right to file a protest under Title 63G, Chapter 6a; Part 16, Protests, is not waived by a vendor's actions to contest or challenge a procurement unit's notice of intent to award a contract without engaging in a standard procurement process under Section R33-8-101f.

#### **R33-8-110. Extension of a Contract Without Engaging in a Standard Procurement Process.**

(1) One of the underlying purposes and policies of Title 63G-6a is to ensure the fair and equitable treatment of all persons who deal with the procurement system and to foster effective broad-based competition within the free enterprise system. The most effective way to achieve this is by conducting a standard procurement process when public funds are expended for a procurement item. A contract extension does not involve a standard procurement process and should only be used after thorough analysis and proper justification.

(2) Pursuant to Section 63G-6a-103, "contract administration" is a duty of the procurement unit and includes all functions, duties, and responsibilities associated with closing out a contract. In fulfillment of these duties, the procurement unit shall maintain a process or system for tracking contract expiration dates to determine well in advance of a contract expiration date if there is a continuing need for the procurement item. If the procurement unit determines there is a continuing need for the procurement item, the procurement unit shall when practicable:

(a)(i) initiate a standard procurement process no later than 90 days before the contract expiration date of an existing contract; and

(ii) no later than 45 days before the contract expiration date, publish, if applicable, a solicitation for the procurement item; or

(b)(i) if the procurement unit determines that a procurement will be complex or involve a change in industry standards or new specifications requiring negotiations, no later than 180 days before the contract expiration date, initiate a standard procurement process; and

(ii) no later than 45 days before the contract expiration date, publish, if applicable, a solicitation for the procurement item.

(3) The following do not justify an extension of a contract under Section 63G-6a-802.7:

(a) a procurement unit's intentional delay in conducting a standard procurement process to award a contract to replace an expiring contract; and

(b) a procurement unit or vendor's intentional delay in executing a contract to replace an expiring contract.

(4) Improperly avoiding engaging in a standard procurement process to extend the duration of a vendor's existing contract through means of a contract extension, may be classified as steering a contract to a favored vendor which is reportable as unlawful conduct under Section 63G-6a-2407.

#### **R33-8-201. Trial Use or Testing of a Procurement Item, Including New Technology.**

(1) The trial use or testing of a procurement item, including new technology, shall be conducted as set forth in Section 63G-6a-802.3, Utah Procurement Code.

#### **R33-8-401. Emergency Procurement.**

(1) Emergency procurements shall be conducted in accordance with the requirements set forth in Section 63G-6a-803, and this rule.

(2) An emergency procurement is a procurement procedure where the procurement unit may obtain a procurement item without using a standard competitive procurement process.

(3) An emergency procurement may only be used when circumstances create harm or risk of harm to public health, welfare, safety, or property.

(a) Circumstances that may create harm or risk to health, welfare, safety, or property include:

(i) damage to a facility or infrastructure resulting from flood, fire, earthquake, storm, or explosion;

(ii) failure or imminent failure of a public building, equipment, road, bridge or utility;

(iii) terrorist activity;

(iv) epidemics;

(v) civil unrest;

(vi) events that impair the ability of a public entity to function or perform required services;

(vii) situations that may cause harm or injury to life or property; or

(viii) other conditions as determined in writing by the procurement official, or as applicable, the head of a procurement unit with independent procurement authority.

(4) Emergency procurements are limited to those procurement items necessary to mitigate the emergency.

(5) While a standard procurement process is not required under an emergency procurement, when practicable, procurement units should seek to obtain as much competition as possible through use of phone quotes, internet quotes, limited invitations to bid, or other selection methods while avoiding harm, or risk of harm, to the public health, safety, welfare, property, or impairing the ability of a public entity to function or perform required services.

(6) The procurement unit shall make a written determination documenting the basis for the emergency and the selection of the procurement item. A record of the determination and selection shall be kept in the contract file. The documentation may be made after the emergency condition has been alleviated.

**R33-8-501. Declaration of "Official State of Emergency."**

(1) Upon a declaration of an "Official State of Emergency" by the authorized state official, the procurement official shall implement the division's Continuity of Operations Plan. When activated, the division shall follow the procedures outlined in the plan and take appropriate actions as directed by the procurement unit responsible for authorizing emergency acquisitions of procurement items.

**KEY: government purchasing, exceptions to procurement requirements, emergency procurements**

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**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Purchasing and General Services.**

**R33-9. Cancellations, Rejections, and Debarment.**

**R33-9-101. Cancellation Before Opening.**

(1) A solicitation under a standard procurement process may be canceled before the deadline for receipt of a solicitation response when it is in the best interests of the procurement unit as determined by the procurement official. In the event a solicitation is cancelled, the reasons for cancellation shall be made part of the procurement file and shall be available for public inspection and the procurement unit shall:

- (a) re-solicit new responses to a solicitation using a standard procurement process using the same or revised specifications; or,
- (b) withdraw the requisition for the procurement item.

**R33-9-102. Re-solicitation.**

- (1) In the event there is no response to an initial solicitation, the procurement official may:
  - (a) contact the known supplier community to determine why there were no responses to the solicitation;
  - (b) research the potential vendor community; and,
  - (c) based upon the information in Subsections (a) and (b) require the procurement unit to modify the solicitation documents.
- (2) If the procurement unit has modified the solicitation documents and after the re-issuance of a solicitation, there is still no competition or there is insufficient competition, the procurement official shall:
  - (a) require the procurement unit to further modify the procurement documents; or,
  - (b) cancel the requisition for the procurement item.
- (3) An executive branch procurement unit may not reissue a canceled solicitation unless:
  - (a) The procurement official determines the issues identified in the written justification for canceling the solicitation set forth in R33-9-103 have been resolved.

**R33-9-103. Cancellation Before Award but After Opening.**

- (1) A solicitation under a standard procurement process may be cancelled before award but after the opening of solicitation responses when the issuing procurement unit determines in writing that:
  - (a) the scope of work or other requirements contained in the solicitation documents were not met by any person and all solicitation responses have been determined to be either nonresponsive or not responsible;
  - (b) an infraction of code, rule, or policy has occurred;
  - (c) inadequate, erroneous, or ambiguous specifications or requirements were cited in the solicitation;
  - (d) the specifications in the solicitation have been or must be revised;
  - (e) the procurement item being solicited are no longer required;

- (f) the solicitation did not provide for consideration of all factors of cost to the procurement unit, such as cost of transportation, warranties, service and maintenance;
  - (g) solicitation responses received show that the needs of the procurement unit can be satisfied by a less expensive procurement item differing from that in the solicitation;
  - (h) except as provided in Section 63G-6a-607, all otherwise acceptable solicitation responses received are at unreasonable prices, or only one solicitation response is received and the procurement official cannot determine the reasonableness of the bid price or cost proposal;
  - (i) other reasons specified in 63G-6a or Administrative Rule; or
  - (j) other circumstances deemed to constitute reasonable cause by the procurement official.
- (2) Notwithstanding, R33-9-103(1), a procurement unit may not cancel and reissue a solicitation:
- (a) To steer a contract to a favored vendor; or
  - (b) Except as permitted under the protest and appeal provisions set forth in 63G-6a Parts 16, Protests and 17, Procurement Appeals Board, to make a vendor who was previously disqualified or rejected in a solicitation for the procurement item eligible for a contract award for the same procurement item.

**R33-9-104. Alternative to Cancellation.**

(1) In the event administrative difficulties are encountered before award but after the deadline for receipt of solicitation responses that may delay award beyond the bidders', offerors', or person's acceptance periods, the bidders, offerors, or persons should be requested, before expiration of their solicitation responses, to extend in writing the acceptance period, with consent of sureties, if any, to avoid the need for cancellation.

**R33-9-105. Award of a Contract After Cancellation for Cause or by Mutual Agreement.**

(1) If a contract awarded through a standard procurement process is cancelled for cause or by mutual agreement within the first 12 months of the contract term and the procurement item is still needed by the procurement unit, the procurement official shall make a determination as to whether it is in the best interest of the procurement unit to award a contract for the balance of the scope of work, as set forth in the solicitation, to:

- (a) the responsible vendor with a responsive solicitation response, meeting all minimum score thresholds set forth in the solicitation:
  - (i) having the next lowest bid in an invitation for bids procurement process and in accordance with the provisions set forth in 63G-6a, Part 6 Bidding, and Title R33; or
  - (ii) with the next highest total score or other authorized method to award a contract in accordance with:
    - (A) the request for proposals procurement process set forth in 63G-6a, Part 7, Requests for Proposals and Title R33;
    - (B) the approved vendor list procurement process set forth in 63G-6a-507 and R33; or
    - (C) the design professional procurement process set forth in 63G-6a, Part 15, Design Professional Services and Title R33; or

- (b) issue a new solicitation for the procurement item.
- (2) The procurement official shall consider the following when making a determination under Subsection (1):
  - (a) the fair and equitable treatment of all persons currently involved or that may be involved in the procurement process pertaining to the procurement item;
  - (b) the length of time that has passed between the initial procurement and cancellation of the awarded contract;
  - (c) the applicability and competitiveness of prices submitted in response to the initial procurement;
  - (d) the willingness of the vendor to maintain prices submitted in the vendor's initial response to the solicitation for the full scope of work or, as applicable, remaining proportionate scope of work;
  - (e) the vendor's availability and ability to perform the work;
  - (f) the existence of additional or new vendors who may be available and willing to submit responses to a new solicitation for the procurement item;
  - (g) costs and time delays to the procurement unit associated with conducting a new procurement; and
  - (h) other applicable issues unique to the solicitation or procurement item.
- (3) This rule may not be used:
  - (a) If a contract is cancelled by a procurement unit for convenience;
  - (b) To extend the contract beyond the contract period identified in the solicitation; or
  - (c) If a contract is cancelled after the first 12 months of the contract period.

**R33-9-201. Rejection of a Solicitation Response.**

(1) An issuing procurement unit may reject any or all solicitation responses, in whole or in part, as may be specified in the solicitation, when it is in the best interest of the procurement unit. In the event of a rejection of any or all bids, offers or other submissions, in whole or in part, the reasons for rejection shall be made part of the procurement file and shall be available for public inspection.

**R33-9-202. Conformity to Solicitation Requirements.**

- (1)(a) Any solicitation response that fails to conform to the essential requirements of the solicitation shall be rejected.
- (b) Any solicitation response that does not conform to the applicable specifications shall be rejected unless the solicitation authorized the submission of alternate solicitation responses and the procurement item offered as alternates meet the requirements specified in the solicitation.
- (c) Any solicitation response that fails to conform to the delivery schedule or permissible alternates stated in the solicitation shall be rejected.

**R33-9-204. Rejection for Nonresponsibility or Nonresponsiveness.**

- (1) The procurement official:
  - (a) Shall, subject to Section 63G-6a-903 and, as applicable, Section 63G-6a-604, reject a bid if the bid is determined not responsive or the bid is submitted by a bidder determined to be not responsible;
  - (b) May reject a solicitation response to any other type of standard procurement process if the solicitation response is determined to be not responsive or the solicitation response is submitted by a person determined to be not responsible; and
  - (c) Subsections (a) and (b) shall be conducted in accordance with the definitions of Responsible and Responsive set forth in Section 63G-6a-103.
- (2) When a bid security is required and a bidder fails to furnish the security in accordance with the requirements of the invitation for bids, the bid shall be rejected.
- (3) All written findings with respect to such rejections shall be made part of the procurement file and available for public inspection.

**R33-9-301. Rejection for Suspension or Debarment.**

- (1) Solicitation responses received from any person that is suspended, debarred, or otherwise ineligible as of the deadline for receipt of solicitation responses shall be rejected.

**KEY: government purchasing, cancellations, rejections, debarment**

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**R33. Government Operations, Purchasing and General Services.**

**R33-10. Preferences.**

**R33-10-101. Providers of State Products.**

- (1) In addition to the reciprocal preference requirements contained in Section 63G-6a-1002 for the providers of procurement items produced, manufactured, mined, grown, or performed in Utah, Rule R33-10 outlines the process for award of a contract when there is more than one equally low preferred bidder. All definitions at Section 63G-6a-103 shall apply to this rule unless otherwise specified in this rule. This rule provides additional requirements and procedures and must be used in conjunction with Sections 63G-6a-608 and 63G-6a-1003.
- (2) In the event there is more than one equally low preferred bidder, the procurement official shall consider the preferred bidders as tie bidders and shall follow the process specified in Section 63G-6a-608 and Section R33-6-110.

**R33-10-102. Preference for Resident Contractors.**

- (1) In addition to the reciprocal preference requirements contained in Section 63G-6a-1003 for resident Utah contractors, this rule outlines the process for award of a contract when there is more than one equally low preferred resident contractor.
- (2) In the event there is more than one equally low preferred resident contractor, the procurement official shall consider the preferred resident contractors as tie bidders and shall follow the process specified in Section 63G-6a-608 and Section R33-6-110.

**KEY: preferences for resident contractors, reciprocal preferences, state products**

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**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Purchasing and General Services.**

**R33-11. Form of Bonds.**

**R33-11-101. Definitions.**

(1)(a) Whenever used in this Rule, the terms "bid", "bidder" and "bid security" apply to all procurements, including non-construction procurements, when the procurement documents, regardless of the procurement type, require securities and/or bonds.

(b) All definitions in the Utah Procurement Code shall apply to this Rule unless otherwise specified in this Rule. This administrative rule provides additional requirements and procedures and must be used in conjunction with the Procurement Code.

**R33-11-201. Bid Security Requirements for Projects.**

(1) Invitations for bids and requests for proposals for construction contracts estimated to exceed \$50,000 shall require the submission of bid bond in an amount equal to at least 5% of the bid, at the time the bid is submitted.

(2) Invitations for Bids and Requests for Proposals for other procurements may require the submission of a bid security, including specifications for the form and type of bid security, when the procurement official determines it is in the best interest of the procurement unit.

(3) If a person fails to include the required bid security, the bid shall be deemed nonresponsive and ineligible for consideration of award except as provided by Sections R33-6-108, R33-6-109 or R33-11-202.

(4) The procurement official may require an acceptable bid security on projects that are for amounts less than the standard amount set forth in Subsection R33-11-201(1).

**R33-11-202. Acceptable Bid Security Not Furnished.**

(1) If acceptable bid security is not furnished, the bid shall be rejected as nonresponsive, unless the failure to comply is determined by the procurement officer to be nonsubstantial. Failure to submit an acceptable bid security may be deemed nonsubstantial if:

(a) the bid security is submitted on a form other than the required bid bond form and the bid security meets all other requirements including being issued by a surety meeting the requirements of Subsection R33-11-303(1)(b) and the contractor provides acceptable bid security by the close of business of the next succeeding business day after the procurement notified the contractor of the defective bid security; or

(b) only one bid is received, and there is not sufficient time to re-solicit; or

(c) the amount of the bid security submitted, though less than the amount required by the Invitation for Bids, is equal to or greater than the difference in the price stated in the next higher acceptable bid; or

(d) the bid security becomes inadequate as a result of the correction of a mistake in the bid or bid modification, if the bidder increases the amount of guarantee to required limits within 48 hours after the bid opening.

(2) If the successful bidder fails or refuses to enter into the contract or furnish the additional bonds required under Section R33-11-2, then the bidder's bid security may be forfeited.

**R33-11-301. Performance Bonds for Construction Contracts.**

A performance bond is required for all construction contracts in excess of \$50,000, in the amount of 100% of the contract price. The performance bond shall be delivered by the contractor to the procurement unit within fourteen days of the contractor receiving notice of the award of the construction contract. If a contractor fails to deliver the required performance bond, the contractor's bid/offer shall be rejected, its bid security may be enforced, and award of the contract may be made to the responsible bidder or offeror with the next lowest responsive bid or highest ranked offer.

**R33-11-302. Surety or Performance Bonds for Non-construction Procurement Items.**

(1) A surety or performance bond may be required on any non-construction contract if the procurement official deems it necessary to guarantee the satisfactory completion of a contract, provided:

(a) the solicitation contains a statement that a surety or performance bond is required in an amount:

(i) equal to the amount of the bid, offer, or other response;

(ii) equal to the project budget or estimated project cost, if the budget or estimated project cost is published in the solicitation documents;

(iii) equal to the previous contract cost, if the previous contract cost is published in the solicitation documents; or

(iv) the Invitation for Bids or Request for Proposals contains a statement that a surety or performance bond, in an amount less than the amounts contained in (a), is required; and

(b) The solicitation contains a detailed description of the work to be performed for which the surety or performance bond is required.

(2) Surety or performance bonds should not be used to unreasonably eliminate competition or be of such unreasonable value as to eliminate competition.

**R33-11-303. Payment Bonds.**

(1) A payment bond is required for all construction contracts in excess of \$50,000, in the amount of 100% of the contract price. If a contractor fails to deliver the required payment bond, the contractor's bid or offer shall be rejected, its bid

security may be enforced, and award of the contract shall be made to the responsible bidder or offeror with the next lowest responsive bid or highest ranked offer. For executive branch procurement units:

(a) bid bonds, payment bonds and performance bonds submitted by vendors to executive branch procurement units must be from sureties meeting the requirements of Subsection R33-11-303(1)(b) and must be on the required bond forms; and

(b) a surety firm must be authorized to do business in Utah and be listed in the U.S. Department of the Treasury Circular 570, "Companies Holding Certificates of Authority as Acceptable Securities on Federal Bonds and as Acceptable Reinsuring Companies," for an amount not less than the amount of the bond to be issued.

(2) The procurement official may waive any bonding requirement if it is determined in writing by the procurement official that:

(a) bonds cannot reasonably be obtained for the work involved;

(b) the cost of the bond exceeds the risk to the procurement unit; or

(c) bonds are not necessary to protect the interests of the procurement unit.

(3) If the procurement unit fails to obtain a payment bond it shall be subject to Section 14-1-19.

**KEY: bid security, performance bonds, payment bonds, procurement procedures**

**Date of Last Change: April 7, 2022**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

### **R33. Government Operations, Division of Purchasing and General Services.**

#### **R33-12. Terms and Conditions, Contracts, Change Orders and Costs.**

##### **R33-12-101. Required Contract Clauses.**

(1) Public entities shall comply with Section 63G-6a-1202 considering clauses for contracts. All definitions in the Utah Procurement Code shall apply to this rule unless otherwise specified in this rule. This administrative rule provides additional requirements and procedures and must be used in conjunction with the Procurement Code.

##### **R33-12-201. Establishment of Terms and Conditions.**

(1) Executive branch procurement units without independent procurement authority shall be required to use the standard terms and conditions adopted by the division for each particular procurement, unless exceptions or additions are granted by the procurement official after consultation with the Attorney General's Office. Public entities, other than executive branch procurement units, may enact similar requirements. Terms and conditions may be established for:

(a) a category of procurement items;

(b) a specific procurement item;

(c) general use in procurements;

(d) the special needs of a procurement unit; or

(e) the requirements of federal funding.

(2) In addition to the required standard terms and conditions, executive branch procurement units without independent procurement authority may submit their own additional special terms and conditions subject to the following:

(a) the chief procurement officer may reject terms and conditions submitted by a conducting procurement unit if:

(i) the terms and conditions are unduly restrictive;

(ii) will unreasonably increase the cost of the procurement item; or

(iii) places the state at increased risk.

(b) the procurement official may require the conducting procurement unit's Assistant Attorney General to approve any additional special terms and conditions.

##### **R33-12-301. Awarding a Multiple Award Contract.**

(1) A multiple award contract is a procurement process where two or more bidders or offerors are awarded a contract under a single solicitation. Purchases are made through an order placed with a vendor on a multiple award contract pursuant to the procedures established in Section R33-12-301b.

(2) As authorized under Section 63G-6a-1204.5, the division or a procurement unit with independent procurement authority may enter into multiple award contracts.

(3) A multiple award contract may be awarded under a single solicitation when two or more bidders or offerors for similar procurement items are needed for:

(a) coverage on a statewide, regional, combined statewide and regional basis, agency specific requirement, or other criteria specified in the solicitation such as:

(i) delivery;

(ii) service;

- (iii) product availability; or
  - (iv) compatibility with existing equipment or infrastructure.
- (4) In addition to the requirements set forth in Sections 63G-6a-603 and 63G-6a-703, when it is anticipated that a procurement will result in multiple contract awards, the solicitation shall include a statement that:
- (a) indicates that contracts may be awarded to more than one bidder or offeror;
  - (b) specifies whether contracts will be awarded on a statewide, regional, combined statewide and regional basis, or agency specific requirement; and
  - (c) describes specific methodology or a formula that will be used to determine the number of contract awards.
- (5) A multiple award contract in an invitation for bids shall be conducted and awarded in accordance with Title 63G-6a, Part 6, Other Standard Procurement Processes to the lowest responsive and responsible bidder who meet the objective criteria described in the invitation for bids and may be awarded to provide adequate regional, statewide, or combined regional and statewide coverage, agency specific requirement, or delivery, or product availability using the following methods:
- (a) lowest bids for procurement items solicited provided the solicitation indicates that multiple contracts will be awarded to the lowest bidders for procurement items being solicited as determined by the following methods:
    - (i) bids within a specified percentage, not to exceed 5%, of the lowest responsive and responsible bid, unless otherwise approved in writing by the procurement official;
    - (ii) responsive and responsible bidders will be awarded a contract, provided the contract specifically directs that orders must be placed first with low bidder unless the lowest bidder cannot provide the needed procurement item, then with the second lowest bidder unless the second lowest bidder cannot provide the needed procurement item, then with the third lowest bidder unless the third lowest bidder cannot provide the needed procurement item, and so on in order from the lowest responsive and responsible bidder to the highest responsive and responsible bidder; or
    - (iii) other methodology described in the solicitation to award contracts;
  - (b) lowest bid by category provided:
    - (i) the solicitation indicates that a contract will be awarded based on the lowest bid per category; and
    - (ii) only one bidder may be awarded a contract per category;
  - (c) lowest bid by line item provided:
    - (i) the solicitation indicates that a contract will be awarded based on the lowest bid per line item, task or service; and
    - (ii) only one bidder may be awarded a contract per line item, task or service; or
    - (d) other specific objective methodology described in the solicitation, such as Section R33-12-302 for primary and secondary contracts, approved by the procurement official.
- (6) Multiple award contracts in a request for proposals shall be conducted and awarded in accordance with Title 63G - 6a, Part 7, Requests for Proposals, and may be awarded on a statewide, regional, combination statewide and regional basis, agency specific requirement, or other criteria set forth in the solicitation and in accordance with point thresholds and other methodology set forth in the request for proposals describing how multiple award contracts will be awarded with enough specificity as to avoid the appearance of any favoritism affecting the decision of whether to award a multiple contract and who should receive a multiple award contract.

**R33-12-301a. Multiple Award Contracts for Unidentified Procurement Items.**

- (1) An unidentified procurement item is defined as a procurement item when the solicitation is issued:
  - (a) Has not been specifically identified but will be identified in the future, such as an approved vendor list or approved consultant list;
  - (b) Does not have a clearly defined project or procurement specific scope of work; and
  - (c) Does not have a clearly defined project or procurement specific budget.
- (2) Unidentified procurement items may be procured under the approved vendor list thresholds established by the applicable rule making authority or Section R33-4-102.
- (3) An RFP, request for statements of qualifications, or multi-stage solicitation issued for a multiple award contract for unidentified procurement item must specify the methodology that the procurement unit will use to determine which vendor under the multiple award contract will be selected.
  - (a) The methodology must include a procedure to document that the procurement unit is obtaining best value, including an analysis of cost and other evaluation criteria outlined in the solicitation.
  - (b) The methodology must also ensure the fair and equitable treatment of each multiple award contract vendor, including using methods to select a vendor such as:
    - (i) a rotation system, organized alphabetically, numerically, or randomly;
    - (ii) assigning a potential vendor or contractor to a specified geographical area;
    - (iii) classifying each potential vendor or contractor based on the potential vendor's or contractor's field or area of expertise; or
    - (iv) obtaining quotes or bids from two or more vendors or contractors.

**R33-12-301b. Ordering From a Multiple Award Contract.**

(1)(a) When buying a procurement item from a multiple award contract solicited through an invitation for bids, a procurement unit shall:

(i) obtain a minimum of two quotes for the procurement item if the contract was awarded based on the method described in Subsection R33-12-301(5)(a)(i) and place the order for the procurement item with the vendor or contractor with the lowest quoted price;

(ii) place the order for the procurement item with the lowest bidder on contract unless the lowest bidder cannot provide the needed procurement item, then the order may be placed with the second lowest bidder unless the second lowest bidder cannot provide the needed procurement item and on, in order, from lowest bidder to highest bidder as described in Subsection R33-12-301(5)(a)(ii);

(iii) place the order in accordance with instructions contained in the contract for the procurement item if the contract was awarded based on the method described in Subsection R33-12-301(5)(a)(iii);

(iv) place the order for the procurement item if the contract was awarded based on the method described in Subsection R33-12-301(5)(b); or

(v) place the order for the procurement item if the contract was awarded based on the method described in Subsection R33-12-301(5)(c);

(b) The requirement to obtain two or more quotes in Subsection (1)(a)(i) is waived when there is only one bidder award for the particular procurement item or only one bidder is awarded per geographical area.

(2) When buying a procurement item from a multiple award contract solicited through an RFP, a procurement unit may place orders with any vendor or contractor under contract based on which procurement item best meets the needs of the procurement unit. Contracts awarded through the RFP process are awarded based on best value as determined by cost and non-price criteria specified in the RFP. As a result, all vendors, contractors and procurement items under contract issued through an RFP have been determined to provide best value to procurement units buying from these contracts.

(3) A procurement unit may not use a multiple award contract to steer purchases to a favored vendor or use any other means or methods that do not result in fair consideration being given to all vendors that have been awarded a contract under a multiple award.

**R33-12-302. Primary and Secondary Contracts.**

(1) Designations of multiple award contracts as primary and secondary may be made provided a statement to that effect is contained in the solicitation documents.

(2) When the procurement official determines that the need for procurement items will exceed the capacity of any single primary contractor, secondary contracts may be awarded to additional contractors.

(3) Purchases under primary and secondary contracts shall be made initially to the primary contractor offering the lowest contract price until the primary contractor's capacity has been reached or the items are not available from the primary contractor, then to secondary contractors in progressive order from lowest price or availability to the next lowest price or availability.

**R33-12-303. Intent to Use.**

(1) If a multiple award is anticipated before issuing a solicitation, the method of award shall be stated in the solicitation.

**R33-12-401. Contracts and Change Orders -- Contract Types.**

(1) A procurement unit may use contract types to the extent authorized under Section 63G-6a-1205.

**R33-12-402. Prepayments.**

(1) Prepayments are subject to the restrictions contained in Section 63G-6a-1208.

**R33-12-403. Leases of Personal Property.**

(1) Leases of personal property are subject to the following:

(a) Leases shall be conducted in accordance with Division of Finance rules and Section 63G-6a-1209.

(b) A lease may be entered into provided the procurement unit complies with Section 63G-6a-1209 and:

(i) it is in the best interest of the procurement unit;

(ii) all conditions for renewal and costs of termination are set forth in the lease; and

(iii) the lease is not used to avoid a competitive procurement.

(c) Lease contracts shall be conducted with as much competition as practicable.

(d) Executive Branch Procurement Unit Leases with Purchase Option. A purchase option in a lease may be exercised if the lease containing the purchase option was awarded under an authorized procurement process. Before exercising this option, the procurement unit shall:

- (i) investigate alternative means of procuring comparable procurement items; and
- (ii) compare estimated costs and benefits associated with the alternative means and the exercise of the option, for example, the benefit of buying new state of the art data processing equipment compared to the estimated, initial savings associated with exercise of a purchase option.

**R33-12-404. Multi-Year Contracts.**

(1) Procurement units may issue multi-year contracts for any solicitation process in accordance with Section 63G-6a-1204.

**R33-12-405. Installment Payments.**

(1) Procurement units may make installment payments in accordance with Section 63G-6a-1208.

**R33-12-501. Change Orders.**

(1) In addition to the requirements in Section 63G-6a-1207, for executive branch procurement units without independent procurement authority, the certifications required under Subsections 63G-6a-1207(1) and 63G-6a-1207(2) must be submitted in writing by the procurement unit to the procurement official before the commencement of any work to be performed under a contract change order unless:

(a) the procurement unit has authority Subsection 63G-6a-304(1) and Section R33-3-101 to authorize contract change orders up to the amount delegated; or

(b) The change order is:

(i) requisite to avert an emergency; or

(ii) required as an emergency.

(2) For purposes of Subsection (1)(b) "emergency" is described in Subsection R33-8-401(3) and is subject to Section 63G-6a-803.

(3) Any contract change order authorized by a procurement unit under Subsection R33-12-501(1)(c) shall, as soon as practicable, be submitted to the procurement official and included in the division's contract file.

**R33-12-502. Contract Modifications for New Technology and Technological Upgrades.**

(1) A contract for a procurement item may be modified to include new technology or technological upgrades associated with the procurement item, provided:

(a) The solicitation contains a statement indicating that:

(i) the awarded contract may be modified to incorporate new technology or technological upgrades associated with the procurement item being solicited, including new or upgraded:

(A) systems;

(B) apparatuses;

(C) modules;

(D) components; and

(E) other supplementary items;

(ii) a maintenance or service agreement associated with the procurement item under contract may be modified to include any new technology or technological upgrades; and

(iii) Any contract modification incorporating new technology or technological upgrades is specific to the procurement item being solicited and substantially within the scope of the original procurement or contract.

(2) Any contract modification incorporating new technology or technological upgrades is agreed upon by all parties and is executed using the process set forth in the contract for other contract modifications.

(3) Before executing a contract modification incorporating new technology or technological upgrades, executive branch procurement units shall obtain the approval of the Director of the Division of Technology Services.

(4) A contract modification for new technology or technology upgrades may not extend the term of the contract except as provided in the Utah Procurement Code.

**R33-12-601. Requirements for Cost or Pricing Data.**

(1) For contracts that expressly allow price adjustments, cost or pricing data shall be required in support of a proposal leading to the adjustment of any contract pricing.

(2) Cost or pricing data exceptions:

(a) need not be submitted when the terms of the contract state established market indices, catalog prices or other benchmarks are used as the basis for contract price adjustments or when prices are set by law or rule;

(b) if a contractor submits a price adjustment higher than established market indices, catalog prices or other benchmarks established in the contract, the procurement official may request additional cost or pricing data; or

(c) the procurement official may waive the requirement for cost or pricing data provided a written determination is made supporting the reasons for the waiver. A copy of the determination shall be kept in the contract file.

**R33-12-602. Defective Cost or Pricing Data.**

(1) If defective cost or pricing data was used to adjust a contract price, the vendor and the procurement unit may enter into discussions to negotiate a settlement.

(2) If a settlement cannot be negotiated, either party may seek relief through the courts.

**R33-12-603. Price Analysis.**

(1) Price analysis may be used to determine if a price is reasonable and competitive, such as when:

- (a) there are a limited number of vendors, bidders or offerors;
- (b) awarding a sole source or other contract without engaging in a standard procurement process; or
- (c) identifying price that are significantly lower or higher than other vendors, bidders, or offerors.

(2) Price analysis involves a comparison of prices for the same or similar procurement items, including quality, warranties, service agreements, delivery, contractual provisions, terms and conditions, and so on.

(3) Examples of a price analysis include:

- (a) prices submitted by other prospective bidders or offerors;
- (b) price quotations;
- (c) previous contract prices;
- (d) comparisons to the existing contracts of other public entities; and,
- (e) prices published in catalogs or price lists.

**R33-12-604. Cost Analysis.**

(1) Cost analysis includes the verification of cost data. Cost analysis may be used to evaluate:

- (a) specific elements of costs;
- (b) total cost of ownership and life-cycle cost;
- (c) supplemental cost schedules;
- (d) market basket cost of similar items;
- (e) the necessity for certain costs;
- (f) the reasonableness of allowances for contingencies;
- (g) the basis used for allocation of indirect costs; and,
- (h) the reasonableness of the total cost or price.

**R33-12-605. Right to Audit.**

(1) As used in this rule:

- (a) "Authorized representative" includes:
  - (i) a purchasing procurement unit;
  - (ii) an internal auditor or other employee of the procurement unit;
  - (iii) an audit firm, consultant or examiner under contract with the procurement unit;
  - (iv) the State Auditor;
  - (v) the Legislative Auditor General; or
  - (vi) federal auditors.
- (b) "Books and records" mean written or electronic information pertaining to the applicable contract between the

procurement unit and the contractor including:

- (i) accounting information, financial statements, files, invoices, reports, and statements;
- (ii) pricing data;
- (iii) usage reports;
- (iv) transaction histories;
- (v) delivery logs;
- (vi) contracts, contract amendments, and other legal documents; and
- (vii) performance evaluations.

(2) Any contract between a contractor and a procurement unit that involves the expenditure of public funds may include or incorporate by reference a right to audit clause that may contain the following provisions:

(a) a statement indicating that the procurement unit or its authorized representative has the right to audit the books and records of a contractor or any subcontractor under any contract or subcontract to the extent that the books and records relate to the performance of the contract or subcontract;

(b) notification procedures for initiating an audit and reporting audit findings;

- (c) dispute resolution procedures, including, to the extent practicable, negotiation, settlement, and final resolution of audit findings;
- (d) a statement requiring the contractor and its subcontractors to:
  - (i) maintain books and records relating to a contract for six years after the day on which the contractor receives the final payment under the contract, or until audits initiated under this section within the six-year period have been completed, whichever is later;
  - (ii) establish and maintain an accounting and record-keeping system that enables the procurement unit or its authorized representative to readily have access to the contractor's books and records in both written and electronic format;
  - (iii) upon request, provide to the procurement unit or its authorized representative an electronic copy of the contractor's books and records within 30 days of the request;
  - (iv) allow the procurement unit or its authorized representative to interview the contractor's employees, agents, subcontractors, partners, resellers, and any other person who might reasonably have information related to the contractor's performance of the contract;
  - (v) correct errors and repay overcharges to the contracting procurement unit within 30 days of receiving written notice of the errors or overcharges documented in an audit finding;
    - (A) payments relating to overcharges or other audit findings involving state cooperative contracts shall be repaid to the Utah Division of Purchasing; and
    - (vi) if contract errors or overcharges are in dispute, correct errors and repay overcharges within 30 days of receipt of a notice of decision issued by the procurement official after a hearing has been conducted to attempt to resolve the dispute, or a court order;
  - (e) a statement indicating that:
    - (i) the procurement unit or its authorized representative have the right to audit the contract at any time during or after the term of the contract between the contractor and the procurement unit; including the right to examine, make copies of, or extract data from any record required to be maintained by the contractor; and
    - (ii) an audit or other request shall:
      - (A) be limited to records or other information related to or pertaining to the applicable contract;
      - (B) include access to records necessary to properly account for the contractor's performance under the contract and the payments made by the procurement unit to the contractor; and
      - (C) be carried out at a reasonable time and place;
    - (f) a notice that if a contractor fails to maintain or provide records in accordance with the contract, the procurement unit may:
      - (i) consider the contractor to be in breach of its contract with the procurement unit;
      - (ii) enter into negotiations with the contractor to initiate a corrective action plan to bring the contractor into compliance; or
      - (iii) cancel the contract;
      - (g) a notice that the procurement unit may initiate debarment or suspension proceedings against a contractor under Section 63G-6a-904, or pursue other legal action, for any of the following:
        - (i) failure to respond to an audit;
        - (ii) failure to correct errors or repay overcharges;
        - (iii) an illegal act or fraud documented in an audit; or
        - (iv) other reasons as determined by the procurement official.

**R33-12-607. Applicable Credits.**

(1) Applicable credits are receipts or price reductions which offset or reduce expenditures allocable to contracts as direct or indirect costs. Examples include purchase discounts, rebates, allowance, recoveries or indemnification for losses, sale of scrap and surplus equipment and materials, adjustments for overpayments or erroneous charges, and income from employee recreational or incidental services and food sales.

**R33-12-608. Use of Federal Cost Principles.**

(1) In dealing with contractors operating according to federal cost principles, the procurement official may use the federal cost principles, including the determination of allowable, allocable, and reasonable costs, as guidance in contract negotiations.

(2) In contracts not awarded under a program which is funded by federal assistance funds, the procurement official may explicitly incorporate federal cost principles into a solicitation and thus into any contract awarded pursuant to that solicitation. The procurement official and the contractor by mutual agreement may incorporate federal cost principles into a contract during negotiation or after award.

(3) In contracts awarded under a program which is financed in whole or in part by federal assistance funds, requirements set forth in the assistance document including specified federal cost principles, must be satisfied. To the extent that

the cost principles specified in the grant document conflict with the cost principles issued pursuant to Section 63G-6a-1206, the cost principles specified in the grant shall control.

**R33-12-609. Authority to Deviate from Cost Principles.**

(1) If a procurement unit desires to deviate from the cost principles set forth in this rule, a written determination shall be made by the procurement official specifying the reasons for the deviation and the written determination shall be made part of the contract file.

**R33-12-701. Inspections.**

(1) Circumstances under which the procurement unit may perform inspections include inspections of the contractor's manufacturing or production facility or place of business, or any location where the work is performed:

- (a) whether the definition of "responsible," has been met or is capable of being met; and
- (b) if the contract is being performed in accordance with its terms.

**R33-12-702. Access to Contractor's Manufacturing or Production Facilities.**

(1) The procurement unit may enter a contractor's or subcontractor's manufacturing or production facility or place of business to:

- (a) inspect procurement items for acceptance by the procurement unit pursuant to the terms of a contract;
- (b) audit cost or pricing data or audit the books and records of any contractor or subcontractor pursuant to Section R33-12-605; and
- (c) investigate in connection with an action to debar or suspend a person from consideration for award of contracts.

**R33-12-703. Inspection of Supplies and Services.**

(1) Contracts may provide that the procurement unit or procurement official may inspect procurement items at the contractor's or subcontractor's facility and perform tests to determine whether the procurement items conform to solicitation and contract requirements.

**R33-12-704. Conduct of Inspections.**

(1) Inspections or tests shall be performed so as not to unduly delay the work of the contractor or subcontractor. No inspector may change the specifications or the contract without written authorization of the procurement official. The presence or absence of an inspector or an inspection, shall not relieve the contractor or subcontractor from any requirements of the contract.

(2) When an inspection is made, the contractor or subcontractor shall provide without charge all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing.

**KEY: terms and conditions, contracts, change orders, costs**

**Date of Last Change: May 23, 2022**

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**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Purchasing and General Services.**

**R33-13. General Construction Provisions.**

**R33-13-101. Purpose.**

(1) The purpose of this rule is to comply with the provisions of Sections 63G-6a-1302 and 1303 of the Utah Procurement Code. All definitions in the Utah Procurement Code shall apply to this Rule unless otherwise specified in this Rule. This administrative rule provides additional requirements and procedures and must be used in conjunction with the Utah Procurement Code.

**R33-13-201. Construction Management Rule.**

- (1) As required by Section 63G-6a-1302, this rule contains provisions applicable to:
- (a) selecting the appropriate method of management for construction contracts;
  - (b) documenting the selection of a particular method of construction contract management; and
  - (c) the selection of a construction manager/general contractor.

**R33-13-202. Application.**

(1) The provisions of Rules R33-13-201 through R33-13-205 shall apply to all procurements of construction. Rule R33-5-106 establishes the requirements and thresholds for small construction projects. Construction procurement bid security and bonding requirements are contained in Part 11 of the Utah Procurement Code and Rule R33-11.

**R33-13-203. Methods of Construction Contract Management.**

(1) This section contains provisions applicable to the selection of the appropriate type of construction contract management.

(2) It is intended that the procurement official have sufficient flexibility in formulating the construction contract management method for a particular project to fulfill the needs of the procurement unit. The methods for achieving the purposes set forth in this rule are not to be construed as an exclusive list.

(3) Before choosing the construction contracting method to use, a careful assessment must be made by the procurement official of requirements the project shall consider, at a minimum, the following factors:

- (a) when the project must be ready to be occupied;
- (b) the type of project, for example, housing, offices, labs, heavy or specialized construction;
- (c) the extent to which the requirements of the procurement unit and the way in which they are to be met are known;
- (d) the location of the project;
- (e) the size, scope, complexity, and economics of the project;
- (f) the amount and type of financing available for the project, including whether the budget is fixed or what the source of funding is, for example, general or special appropriation, federal assistance moneys, general obligation bonds or revenue bonds, lapsing or nonlapsing status and legislative intent language;
- (g) the availability, qualification, and experience of the procurement unit's personnel to be assigned to the project and how much time the procurement unit's personnel can devote to the project;
- (h) the availability, qualifications and experience of outside consultants and contractors to complete the project under the various methods being considered;
- (i) the results achieved on similar projects in the past and the methods used; and
- (j) the comparative advantages and disadvantages of the construction contracting method and how they might be adapted or combined to fulfill the needs of the procuring agencies.

(4) The following descriptions are provided for the more common construction contracting management methods which may be used by the procurement unit. The methods described are not mutually exclusive and may be combined on a project. These descriptions are not intended to be fixed in respect to construction projects. In each project, these descriptions may be adapted to fit the circumstances of that project.

(a) **Single Prime (General) Contractor.** The single prime contractor method is typified by one business, acting as a general contractor, contracting with the procurement unit to timely complete an entire construction project in accordance with drawings and specifications provided by the procurement unit. Generally the drawings and specifications are prepared by an architectural or engineering firm under contract with the procurement unit. Further, while the general contractor may take responsibility for successful completion of the project, much of the work may be performed by specialty contractors with whom the prime contractor has entered into subcontracts.

(b) **Multiple Prime Contractors.** Under the multiple prime contractor method, the procurement unit contracts directly with a number of general contractors or specialty contractors to complete portions of the project in accordance with the procurement unit's drawings and specifications. The procurement unit may have primary responsibility for successful completion of the entire project, or the contracts may provide that one or more of the multiple prime contractors has this responsibility.

(c) **Design-Build.** In a design-build project, an entity, often a team of a general contractor and a designer, contract directly with a procurement unit to meet the procurement unit's requirements as described in a set of performance specifications and/or a program. Design responsibility and construction responsibility both rest with the design-build contractor. This method can include instances where the design-build contractor supplies the site as part of the package.

(d) **Construction Manager Not at Risk.** A construction manager is a person experienced in construction that has the ability to evaluate and to implement drawings and specifications as they affect time, cost, and quality of construction and the ability to coordinate the construction of the project, including the administration of change orders as well as other responsibilities as described in the contract.

(e) **Construction Manager or General Contractor (Construction Manager at Risk).** The procurement unit may contract with the construction manager early in a project to assist in the development of a cost effective design. In a Construction Manager/General Contractor (CM/GC) method, the CM/GC becomes the general contractor and is at risk for the responsibilities of a general contractor for the project, including meeting the specifications, complying with applicable laws, rules and regulations, that the project will be completed on time and will not exceed a specified maximum price.

**R33-13-204. Selection of Construction Method Documentation.**

(1) The procurement official shall include in the contract file a written statement describing the facts that led to the selection of a particular method of construction contract management for each project.

**R33-13-205. Special Provisions Regarding Construction Manager/General Contractor.**

(1) In the selection of a construction manager/general contractor, a standard procurement process as defined in Section 63G-6a-103 may be used or an exception allowed under Title 63G, Chapter 6a, Part 8, Exceptions to Procurement Requirements.

(2) When the CM/GC enters into any subcontract that was not specifically included in the construction manager or general contractor's cost proposal, the CM/GC shall procure the subcontractor by using a standard procurement process as defined in Section 63G-6a-103 of the Procurement Code or an exception to the requirement to use a standard procurement process, described in Title 63G, Chapter 6a, Part 8, Exceptions to Procurement Requirements.

(3)(a) As used in this rule, "management fee" includes only the following fees of the CM/GC:

- (i) preconstruction phase services;
- (ii) monthly supervision fees for the construction phase; and
- (iii) overhead and profit for the construction phase.

(b) When selecting a CM/GC for a construction project, the evaluation committee:

(i) may score a CM/GC based upon criteria contained in the solicitation, including qualifications, performance ratings, references, management plan, certifications, and other project specific criteria described in the solicitation;

(ii) may, as described in the solicitation, weight and score the management fee as a fixed rate or as a fixed percentage of the estimated contract value;

(iii) may, at any time after the opening of the responses to the request for proposals, have access to, and consider, the management fee proposed by the offerors; and

(iv) except as provided in Section 63G-6a-707, may not know or have access to any other information relating to the cost of construction submitted by the offerors, until after the evaluation committee submits its final recommended scores on other criteria to the procurement unit.

### **R33-13-301. Drug and Alcohol Testing Required for State Contracts: Definitions.**

(1) The following definitions shall apply to any term used in Rules R33-13-301 through R33-13-304:

(a) "Covered individual" means an individual who:

(i) on behalf of a contractor or subcontractor provides services directly related to design or construction under a state construction contract; and

(ii) is in a safety sensitive position, including a design position, that has responsibilities that directly affect the safety of an improvement to real property that is the subject of a state construction contract.

(b) "Drug and alcohol testing policy" means a policy under which a contractor or subcontractor tests a covered individual to establish, maintain, or enforce the prohibition of:

(i) the manufacture, distribution, dispensing, possession, or use of drugs or alcohol, except the medically prescribed possession and use of a drug; or

(ii) the impairment of judgment or physical abilities due to the use of drugs or alcohol.

(c) "Random testing" means that a covered individual is subject to periodic testing for drugs and alcohol:

(i) in accordance with a drug and alcohol testing policy; and

(ii) on the basis of a random selection process.

(d) For purposes of Subsection R33-13-302(5), "state" includes any of the following of the state:

(i) a department;

(ii) a division;

(iii) an agency;

(iv) a board including the Procurement Policy Board;

(v) a commission;

(vi) a council;

(vii) a committee; and

(viii) an institution, including a state institution of higher education, as defined under Section 53B-3-102.

(e) "State construction contract" means a contract for design or construction entered into by a state public procurement unit that is subject to this Rule R33-13-302 through R33-13-304.

(2) In addition:

(a) "Board" means the Procurement Policy Board created under provisions of the Utah Procurement Code.

(b) "State Public Procurement Unit" means a State of Utah public procurement unit that is subject to Section 63G-6a-1303.

(c) "State" as used throughout this Rule R33-13-302 through R33-13-304 means the State of Utah except that it also includes those entities described in Subsection R33-13-302(1)(e) as the term "state" is used in Subsection R33-13-302(5).

### **R33-13-302. Drug and Alcohol Testing.**

(1) Except as provided in Section R33-13-303, on and after July 1, 2010, a State Public Procurement Unit may not enter into a state construction contract (includes a contract for design or construction) unless the state construction contract requires the following:

(a) A contractor shall demonstrate to the State Public Procurement Unit that the contractor:

(i) has and will maintain a drug and alcohol testing policy during the period of the state construction contract that applies to the covered individuals hired by the contractor;

(ii) posts in one or more conspicuous places notice to covered individuals hired by the contractor that the contractor has the drug and alcohol testing policy described in Subsection R33-13-302(1)(a)(i); and

(iii) subjects the covered individuals to random testing under the drug and alcohol testing policy described in Subsection R33-13-302(1)(a)(i) if at any time during the period of the state construction contract there are ten or more individuals who are covered individuals hired by the contractor.

(b) A contractor shall demonstrate to the State Public Procurement Unit, which shall be demonstrated by a provision in the contract where the contractor acknowledges these Rules R-33-13-302 through 304 and agrees to comply with all aspects of these Rules R-33-13-302 through 304, that the contractor requires that as a condition of contracting with the contractor, a subcontractor, which includes consultants under contract with the designer:

(i) and will maintain a drug and alcohol testing policy during the period of the state construction contract that applies to the covered individuals hired by the subcontractor;

(ii) posts in one or more conspicuous places notice to covered individuals hired by the subcontractor that the subcontractor has the drug and alcohol testing policy described in Subsection R33-13-302(1)(b)(i); and

(iii) subjects the covered individuals hired by the subcontractor to random testing under the drug and alcohol testing policy described in Subsection R33-13-302(1)(b)(i) if at any time during the period of the state construction contract there are ten or more individuals who are covered individuals hired by the subcontractor.

(2)(a) Except as otherwise provided in this Subsection R33-13-302(2), if a contractor or subcontractor fails to comply with Subsection R33-13-302(1), the contractor or subcontractor may be suspended or debarred in accordance with these Rules R33-13-302 through R33-13-304.

(b) On and after July 1, 2010, a State Public Procurement Unit shall include in a state construction contract a reference to these Rules R33-13-302 through R33-13-304.

(c)(i) A contractor is not subject to penalties for the failure of a subcontractor to comply with Subsection R33-13-302(1).

(ii) A subcontractor is not subject to penalties for the failure of a contractor to comply with Subsection R33-13-302(1).

(3)(a) The requirements and procedures a contractor shall follow to comply with Subsection R33-13-302(1) is that the contractor, by executing the construction contract with the State Public Procurement Unit, is deemed to certify to the State Public Procurement Unit that the contractor, and all subcontractors under the contractor that are subject to Subsection R33-13-302(1), shall comply with all provisions of these Rules R33-13-302 through R33-13-304 as well as Section 63G-6a-1303; and that the contractor shall on a semi-annual basis throughout the term of the contract, report to the State Public Procurement Unit in writing information that indicates compliance with the provisions of these Rules R33-13-302 through R33-13-304 and Section 63G-6a-1303.

(b) A contractor or subcontractor may be suspended or debarred in accordance with the applicable Utah statutes and rules, if the contractor or subcontractor violates a provision of Section 63G-6a-1303. The contractor or subcontractor shall be provided reasonable notice and opportunity to cure a violation of Sections 63G-6a-1303 before suspension or debarment of the contractor or subcontractor in light of the circumstances of the state construction contract or the violation. The greater the risk to person(s) or property as a result of noncompliance, the shorter this notice and opportunity to cure shall be, including the possibility that the notice may provide for immediate compliance if necessary to protect person(s) or property.

(4) The failure of a contractor or subcontractor to meet the requirements of Subsection R33-13-302(1):

(a) may not be the basis for a protest or other action from a prospective bidder, offeror, or contractor under the Utah Procurement Code; and

(b) may not be used by a State Public Procurement Unit, a prospective bidder, an offeror, a contractor, or a subcontractor as a basis for an action that would suspend, disrupt, or terminate the design or construction under a state construction contract.

(5)(a) After a State Public Procurement Unit enters into a state construction contract in compliance with Section 63G-6a-1303, the state is not required to audit, monitor, or take any other action to ensure compliance with Section 63G-6a-1303.

(b) The state is not liable in any action related to Section 63G-6a-1303 and these Rules R33-13-302 through R33-13-304, including not being liable in relation to:

(i) a contractor or subcontractor having or not having a drug and alcohol testing policy;

(ii) failure to test for a drug or alcohol under a contractor's or subcontractor's drug and alcohol testing policy;

(iii) the requirements of a contractor's or subcontractor's drug and alcohol testing policy;

(iv) a contractor's or subcontractor's implementation of a drug and alcohol testing policy, including procedures for:

(A) collection of a sample;

(B) testing of a sample;

(C) evaluation of a test; or

(D) disciplinary or rehabilitative action on the basis of a test result;

(v) an individual being under the influence of drugs or alcohol; or

(vi) an individual under the influence of drugs or alcohol harming another person or causing property damage.

### **R33-13-303. Non-applicability.**

(1) These Rules R33-13-302 through R33-13-304 and Section 63G-6a-1303 does not apply if the State Public Procurement Unit determines that the application of these Rules R33-13-302 through R33-13-304 or Section 63G-6a-1303 would severely disrupt the operation of a state agency to the detriment of the state agency or the general public, including:

- (a) jeopardizing the receipt of federal funds;
- (b) the state construction contract being a sole source contract; or
- (c) the state construction contract being an emergency procurement.

**R33-13-304. Not Limit Other Lawful Policies.**

(1) If a contractor or subcontractor meets the requirements of Section 63G-6a-1303 and these Rules R33-13-302 through R33-13-304, this Rule R33-13 may not be construed to restrict the contractor's or subcontractor's ability to impose or implement an otherwise lawful provision as part of a drug and alcohol testing policy.

**KEY: construction management, general construction provisions, drug and alcohol testing, state contracts**

**Date of Last Change: January 22, 2021**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Purchasing and General Services.**

**R33-14. Procurement of Design-Build Transportation Project Contracts.**

**R33-14-1. Procurement of Design-Build Transportation Project Contracts.**

(1) In accordance with Section 63G-6a-1402(3)(a)(ii), the Utah Department of Transportation shall make rules governing the procurement of design-build transportation projects. Rule R916-3 provides guidance under which the Utah Department of Transportation may use the design-build approach for transportation projects.

**KEY: design-build transportation projects, contracts, procurement**

**Date of Last Change: July 8, 2014**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Purchasing and General Services.**

**R33-15. Procurement of Design Professional Services.**

**R33-15-101. Application.**

(1) Title 63G, Chapter 6a, Part 15, Design Professional Services applies to each procurement of services within the scope of the practice of architecture as defined by Section 58-3a-102, or professional engineering as defined in Section 58-22-102, except as authorized by Section R33-4-109. definitions in the Utah Procurement Code shall apply to this rule unless otherwise specified in this rule. This administrative rule provides additional requirements and procedures and must be used in conjunction with the procurement code.

**R33-15-201. Architect-Engineer Evaluation Committee.**

(1) The procurement official shall designate members of the Architect-Engineer Evaluation Committee. The evaluation committee must consist of at least three members who are qualified under Section 63G-6a-707, at least one of which is well qualified in the profession of architecture or engineering.

**R33-15-301. Request for Statement of Qualifications.**

- (1) A procurement unit shall issue a public notice for a request for a statement of qualifications to rank architects or engineers.
- (2) A procurement unit that issues a request for statement of qualifications shall:
  - (a) state in the request for statement of qualifications:
    - (i) the type of procurement item to which the request for statement of qualifications relates;
    - (ii) the scope of work to be performed;
    - (iii) the instructions and the deadline for providing information in response to the request for statement of qualifications;
    - (iv) criteria used to evaluate statements of qualifications including:
      - (A) basic information about the person or firm;
      - (B) experience and work history;
      - (C) management and staff;
      - (D) qualifications and certification;
      - (E) licenses and certifications;

- (F) applicable performance ratings;
- (G) financial statements; and
- (H) other pertinent information.

(b) Key personnel identified in the statement of qualifications may not be changed without the advance written approval of the procurement unit.

- (3) Architects and engineers shall not include cost in a response to a request for statement of qualifications

**R33-15-302. Evaluation of Statement of Qualifications.**

(1) The evaluation committee shall evaluate statements of qualifications in accordance with Section 63G-6a-707 to rank (score) architects or engineers.

**R33-15-303. Negotiation and Award of Contract.**

(1) The procurement official shall negotiate a contract with the most qualified firm for the required services at compensation determined to be fair and reasonable.

**R33-15-304. Failure to Negotiate Contract With the Highest Ranked Firm.**

(1) If fair and reasonable compensation, contract requirements, and contract documents cannot be agreed upon with the highest ranked firm, the procurement official shall advise the firm in writing of the termination of negotiations.

(2) Upon failure to negotiate a contract with the highest ranked firm, the procurement official shall proceed in accordance with Section 63G-6a-1505.

**R33-15-305. Notice of Award.**

- (1) The procurement official shall award a contract to the highest ranked firm with which the fee negotiation was successful.
- (2) Notice of the award shall be made available to the public.

**R33-15-401. Written Justification Statements.**

(1) Executive branch procurement units shall issue a statement justifying the ranking of the firm with which fee negotiation was successful.

**KEY: architects, engineers, government purchasing**

**Date of Last Change: January 22, 2021**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Division of Purchasing and General Services.**

**R33-16. Protests.**

**R33-16-101. Conduct.**

(1) Protests shall be conducted in accordance with the requirements set forth in Utah Code 63G-6a, Part 16. All definitions in the Utah Procurement Code shall apply to this Rule. This administrative rule provides additional requirements and procedures and must be used in conjunction with the Procurement Code.

**R33-16-101a. Grounds for a Protest.**

- (1) This rule applies to protests filed under Section 63G-6a-1602.

(2) In accordance with the requirements in Section 63G-6a-1602, a person filing a protest must include a concise statement of the grounds upon which the protest is made.

(a) A concise statement of the grounds for a protest must include the relevant facts and evidence leading the protestor to contend that a grievance has occurred, including:

- (i) an alleged violation of Title 63G, Chapter 6a, Utah Procurement Code;
- (ii) an alleged violation of Title R33 or other applicable rule;
- (iii) a provision of the solicitation allegedly not being followed;
- (iv) a provision of the solicitation alleged to be:
  - (A) ambiguous;
  - (B) confusing;
  - (C) contradictory;
  - (D) unduly restrictive;
  - (E) erroneous;
  - (F) anticompetitive; or

- (G) unlawful;
  - (v) an alleged error made by the evaluation committee or procurement unit;
  - (vi) an allegation of bias or discrimination by officials representing the procurement unit or the evaluation committee or an individual committee member; or
  - (vii) a scoring criterion allegedly not being correctly applied or calculated.
- (b) "Relevant Facts and Evidence" as referred to in Section 63G-6a-1602, must be specific enough to enable the protest officer to determine, if such facts and evidence are proven to be true, whether a legitimate basis for the protest exists.
- (c) None of the following qualify as a concise statement of the grounds for a protest:
- (i) claims made after the applicable deadlines set forth in law, rule, or the solicitation document, that the specifications, terms and conditions, or other elements of a solicitation are ambiguous, confusing, contradictory, unduly restrictive, erroneous, or anticompetitive;
    - (ii) vague or unsubstantiated claims or allegations that do not reference specific facts and evidence including, but not limited to, vague or unsubstantiated claims or allegations such as:
      - (A) the protestor should have received a higher score;
      - (B) another vendor should have received a lower score;
      - (C) a service or product provided by a protestor is better than another vendor's service or product;
      - (D) another vendor cannot provide the procurement item for the price bid or perform the services described in the solicitation;
      - (E) the procurement unit's eProcurement system or other electronic procurement system:
        - (I) was slow, not operating properly, or was difficult to use or understand;
        - (II) could not be accessed or did not allow documents to be downloaded; or
        - (III) did not allow a response to be submitted after the deadline for receiving responses expired;
      - (F) the protestor did not receive individual notice of a solicitation or was otherwise unaware of a solicitation when a procurement unit has complied with the public notice requirement in Section 63G-6a-112; or
      - (G) officials representing the procurement unit or the evaluation committee or an individual committee member acted in a biased or discriminatory manner against the protestor;
    - (iii) filing a protest requesting:
      - (A) a detailed explanation of the thinking and scoring of evaluation committee members, beyond the official justification statement described in Section 63G-6a-708;
      - (B) protected information beyond what is provided under the disclosure provisions of Title 63G, Chapter 6a; or
      - (C) other information, documents, or explanations reasonably deemed to be not in compliance with the Utah Code or this rule by the protest officer.
- (3) Each of the claims and allegations listed in Subsection (2)(c)(ii) could serve as legitimate grounds for filing a protest if properly supported by relevant facts and evidence.
- (4) In accordance with Section 63G-6a-1603, a protest officer may dismiss a protest if the concise statement of the grounds for filing a protest does not comply with Title 63G, Chapter 6a, Part 16, Protests, or this rule.

**R33-16-201. Verification of Legal Authority.**

(1) A person filing a protest may be asked to verify that the person has legal authority to file a protest on behalf of the public or private corporation, governmental entity, sole proprietorship, partnership, or unincorporated association. A person without legal authority shall be deemed to not have standing to file a protest.

**R33-16-301. Intervention in a Protest.**

(1) Application. This Rule contains provisions applicable to intervention in a protest, including who may intervene and the time and manner of intervention.

(2) Period of Time to File. After a timely protest is filed in accordance with the Utah Procurement Code, the Protest Officer shall notify awardees of the subject procurement and may notify others of the protest. A Motion to Intervene must be filed with the Protest Officer no later than ten days from the date such notice is sent by the Protest Officer. Only those Motions to Intervene made within the time prescribed in this Rule will be considered timely. The entity or entities who conducted the procurement and those who are the intended beneficiaries of the procurement are automatically considered a Party of Record and need not file any Motion to Intervene.

(3) Contents of a Motion to Intervene. A copy of the Motion to Intervene shall also be mailed or emailed to the person protesting the procurement.

(4) Any Motion to Intervene must state, to the extent known, the position taken by the person seeking intervention and the basis in fact and law for that position. A motion to intervene must also state the person's interest in sufficient factual detail to demonstrate that:

(a) the person seeking to intervene has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;

(b) the person seeking to intervene has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:

- (i) consumer;
- (ii) customer;
- (iii) competitor;
- (iv) security holder of a party; or
- (v) the person's participation is in the public interest.

(5) Granting of Status. If no written objection to the timely Motion to Intervene is filed with the Protest Officer within seven calendar days after the Motion to Intervene is received by the protesting person, the person seeking intervention becomes a party at the end of this seven day period. If an objection is timely filed, the person seeking intervention becomes a party only when the motion is expressly granted by the Protest Officer based on a determination that a reason for intervention exists as stated in this Rule. Notwithstanding any provision of this Rule, an awardee of the procurement that is the subject of a protest will not be denied their Motion to Intervene, regardless of its content, unless it is not timely filed with the Protest Officer.

(6) Late Motions. If a motion to intervene is not timely filed, the motion shall be denied by the Protest Officer.

**R33-16-401. Protest Officer May Correct Noncompliance, Errors and Discrepancies.**

(1) At any time during the protest process, if it is discovered that a procurement is out of compliance with any part of Title 63G, Chapter 6a, or rules established by the applicable rule making authority, including errors or discrepancies, the protest officer, procurement official may take administrative action to correct or amend the procurement to bring it into compliance, correct errors or discrepancies or cancel the procurement.

**KEY: conduct, controversies, government purchasing, protests**

**Date of Last Change: April 7, 2022**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Purchasing and General Services.**

**R33-17. Procurement Appeals Panel.**

**R33-17-101. Statutory Requirements.**

(1) Appeals of a protest decision shall be conducted in accordance with the requirements set forth in 63G-6a, Part 17, Utah Procurement Code. This administrative rule provides additional requirements and procedures and must be used in conjunction with the Procurement Code. All definitions in the Utah Procurement Code shall apply to this Rule.

**R33-17-101.1. Definitions.**

(1) "Administrative review" as used in this rule means, in accordance with the provisions set forth in Utah Code 63G-6a-1702, an examination conducted by a procurement appeals panel of:

- (a) The notice of appeal;
- (b) The protest appeal record pertaining to a protest officer's written decision;
- (c) If an optional informal hearing was held, responses to questions asked by a procurement appeals panel to assist the panel in understanding the basis of the appeal and information contained in the protest appeal record, but otherwise without taking any additional evidence or any additional ground for the appeal.

(2)(a) "Appeal" as used in this rule means: a protestor filing a notice of appeal requesting an administrative review of the protest appeal record pertaining to a protest officer's decision in accordance with all provisions set forth in Utah Code 63G-6a, Part 17; and

(b) Does not include the appeal of a debarment or suspension under 63G-6a-904.

(3) "Protestor" as used in this rule means: a person who files a protest under Utah Code 63G-6a, Part 16, including any intervening party authorized under Utah Code 63G-6a-1603 and Rule R33-16-301.

(4) "Uphold the Decision of the Protest Officer" as used in this rule means: to support and maintain the decision of the protest officer, including giving deference to the protest officer's decision on questions of fact because the protest officer stands in a superior position, in terms of understanding the procurement, the needs of the agency, applicable laws, rules, ordinances, and policies, from which to evaluate and weigh the evidence and assess the credibility and accuracy of the facts, evidence, laws, and, if applicable, witnesses.

**R33-17-101.5. Procedures for Filing a Notice of Appeal.**

(1) When filing a notice of appeal, a protestor shall:

(a) File the notice of appeal in accordance with the requirements set forth in Utah Code 63G-6a, Part 17 and the following procedures:

(b) File the notice of appeal with the chair of the procurement policy board by the deadline for filing and include:

- (i) The address of record and email address of record of the party filing the notice of appeal;
- (ii) A statement indicating that:
  - (A) The protestor is filing a notice of appeal; and
  - (B) Requesting an administrative review of the protest officer's decision;
- (iii) A copy of the written protest decision;
- (iv) If applicable, the required security deposit or bond; and
- (v) Any other requirement set forth in Utah Code 63G-6a, Part 17;
- (c) Not base a notice of appeal on a ground not specified in the person's protest under Section 63G-6a-1602 or new or additional evidence not considered by the protest officer.

(2) Any part of a notice of appeal that fails to comply with each of the requirements set forth in Utah Code 63G-6a, Part 17, this rule, a ground not specified in the person's protest under Section 63G-6a-1602, or new or additional evidence not considered by the protest officer shall be dismissed by the chair of the procurement policy board or the procurement appeals panel appointed to conduct the administrative review.

- (3) The protest appeal record is restricted to the following:
  - (a) A copy of the protest officer's written decision;
  - (b) All documentation and other evidence the protest officer relied upon in reaching the protest officer's decision;
  - (c) The recording of the hearing, if the protest officer held a hearing;
  - (d) A copy of the protestor's written protest; and
  - (e) All documentation and other evidence submitted by the protestor supporting the protest or the protestor's claim of standing.

**R33-17-101.8. Procedures for Conducting an Administrative Review.**

- (1) When conducting an administrative review of a protest officer's decision, a procurement appeals panel:
  - (a) shall:
    - (i) Comply with all requirements set forth in Utah Code 63G-6a, Part 17 and this rule;
    - (ii) Conduct an administrative review of the appeal within 30 days after the day on which the procurement appeals panel is appointed, or before a later agreed to date, unless the appeal is dismissed by the chair of the procurement policy board;
    - (iii) Consider and decide the appeal based solely on:
      - (A) Without conducting a hearing:
        - (I) the notice of appeal; and
        - (II) the protest appeal record; or
      - (B) If an informal hearing is held:
        - (I) responses received during the informal hearing,
        - (II) the notice of appeal; and
        - (III) the protest appeal record; and
    - (iv) Not otherwise take any additional evidence or consider any additional ground for the appeal;
    - (v) Not consider any claim in the notice of appeal dismissed by the chair of the procurement policy board in consultation with the attorney general's office for noncompliance with Sections 63G-6a-1702(2)(3)(4), or 1703;
    - (vi) Uphold a protest officer's decision unless the procurement appeals panel determines that the protest officer's decision is arbitrary and capricious or clearly erroneous; and
    - (vii) Within seven days after the day on which the procurement appeals panel concludes the administrative review:
      - (A) issue a written decision of the appeal; and
      - (B) mail, email, or had deliver the written decision on the appeal to the parties to the appeal and to the protest officer; and
    - (b) May:
      - (i) Consult with the assistant attorney general assigned to the appeal;
      - (ii) Conduct the administrative review without conducting a hearing;
      - (iii) At the sole discretion of the procurement appeals panel, conduct an informal hearing if the procurement appeals panel considers a hearing to be necessary:
        - (A) ask questions and receive responses during the informal hearing to assist the procurement appeals panel in understanding the basis of the appeal and information contained in the protest appeal record;
        - (B) not take any additional evidence or consider any additional ground for the appeal; and
        - (iv) Dismiss an appeal if the appeal does not comply with the requirements of Utah Code 63G-6a.

**R33-17-101.10. Determination Regarding Arbitrary and Capricious.**

- (1) If, after reviewing the notice of appeal, the protest appeal record and, if applicable, responses received during an informal hearing, the protest appeals panel determines that:
  - (a) There is a reasonable basis for the decision made by the protest officer and, given the same facts and evidence as those reviewed by the protest officer, a reasonable person could have reached the same decision as the protest officer, then the protest appeals

panel shall conclude that the protest officer's decision was not arbitrary and capricious and shall uphold the decision of the protest officer; or

(b) There is no reasonable basis for the protest officer's decision and, given the same facts and evidence as those reviewed by the protest officer, a reasonable person could not have reached the same decision as the protest officer, then the protest appeals panel shall conclude that the protest officer's decision was arbitrary and capricious and shall remand the matter to the protest officer to cure the problem or render a new decision.

(2) Minor errors and omissions committed by a protest officer during the protest decision process that are irrelevant, immaterial, or inconsequential to the overall protest decision may not be considered sufficient grounds for making a determination that the protest officer's decision was arbitrary and capricious.

**R33-17-101.13. Determination Regarding Clearly Erroneous.**

(1) If, after reviewing the notice of appeal, the protest appeal record and, if applicable, responses received during an informal hearing, the protest appeals panel determines that:

(a) There is a reasonable basis for the decision made by the protest officer and, given the same facts, evidence, and laws as those reviewed by the protest officer, a reasonable person could have reached the same decision as the protest officer, then the protest appeals panel shall conclude that the protest officer's decision was not clearly erroneous and shall uphold the decision of the protest officer; or

(b) There is no reasonable basis for the decision made by the protest officer and, given the same facts, evidence, and laws as those reviewed by the protest officer, a reasonable person could not have reached the same decision as the protest officer, then the protest appeals panel shall conclude that the protest officer's decision was clearly erroneous and shall remand the matter to the protest officer to cure the problem or render a new decision.

(2) Minor errors and omissions committed by a protest officer during the protest decision process that are irrelevant, immaterial, or inconsequential to the overall protest decision may not be considered sufficient grounds for making a determination that the protest officer's decision was clearly erroneous.

**R33-17-102. Verification of Legal Authority.**

(1) A person filing an appeal to a protest decision may be asked to verify that the person has legal authority to file an appeal on behalf of the public or private corporation, governmental entity, sole proprietorship, partnership, or unincorporated association. A person without legal authority shall be deemed to not have standing to file a notice of appeal.

**R33-17-103. Informal Hearing.**

(1) A hearing conducted under Part 17 shall be an informal procedure wherein the rules of evidence and civil procedures do not apply.

(2) A procurement appeals panel shall establish procedures for conducting an informal hearing including:

(a) establishing time limits and deadlines;

(b) determining who may address the procurement appeals panel; and

(c) determining other procedural matters.

(3) All communication during the informal hearing shall be directed to the coordinator of the procurement appeals panel.

(a) A recording shall be made of each informal hearing held on an appeal under Utah Code 63G-6a, Part 17.

**R33-17-104. Expedited Proceedings.**

(1) A party to a protest having standing may submit a written request to the coordinator of the procurement appeals panel requesting that the administrative review be expedited. The coordinator of the procurement appeals panel shall consider the request and, if possible and practical, accommodate the request.

**R33-17-105. Electronic Participation.**

(1) Any panel member or, if applicable, participant may participate electronically if:

(a) a request to participate electronically is submitted to the coordinator of the panel at least 24 hours in advance of the proceeding;

(b) the means for electronic participation, by phone, computer or otherwise, is available at the location; and

(c) the electronic means allows other members of the panel and, if applicable, other participants to hear the person or persons participating electronically.

**KEY: hearings, Procurement Appeals Board, verification of legal authority**

**Date of Last Change: June 21, 2017**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Purchasing and General Services.**

**R33-18. Appeals to Court and Court Proceedings.**

**R33-18-101. Process.**

(1) A person who receives an adverse decision, or a procurement unit, may appeal a decision of a procurement appeals panel to the Utah Court of Appeals within seven days after the day on which the decision is issued.

(2) All appeals to the Utah Court of Appeals are subject to the provisions of the requirements set forth in Utah Code 63G-6a, Part 18. All definitions in the Utah Procurement Code shall apply to this Rule unless otherwise specified in this Rule. This administrative rule provides additional requirements and procedures and must be used in conjunction with the Procurement Code.

**R33-18-201. Appeals by Procurement Units -- Limitations.**

(1) A procurement unit may only appeal a procurement appeals panel decision in accordance with Section 63G-6a-1802(2).

**KEY: appeals, protests, Utah Court of Appeals**

**Date of Last Change: June 21, 2017**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Purchasing and General Services.**

**R33-19. General Provisions Related to Protest or Appeal.**

**R33-19-101. Encouraged to Obtain Legal Advice From Legal Counsel.**

(1) All definitions in Title 63G, Chapter 6a, Utah Procurement Code, shall apply to this rule unless otherwise specified in this rule. This rule provides additional requirements and procedures and must be used in conjunction with Title 63G, Chapter 6a.

(2) Title 63G, Chapter 6a, Part 19 contains provisions regarding:

(a) limitations on challenges of:

(i) a procurement;

(ii) a procurement process;

(iii) the award of a contract relating to a procurement;

(iv) a debarment; or

(v) a suspension;

(b) the effect of a timely protest or appeal;

(c) the costs to or against a protester;

(d) the effect of prior determinations by employees, agents, or other persons appointed by the procurement unit;

(e) the effect of a violation found after award of a contract;

(f) the effect of a violation found prior to the award of a contract;

(g) interest rates; and

(h) a listing of determinations that are final and conclusive unless they are arbitrary and capricious or clearly erroneous.

(3) Due to the complex nature of protests and appeals, any person involved in the procurement process, protest or appeal, is encouraged to seek advice from the person's own legal counsel.

(4) The procurement unit will not assist in writing or provide statutory interpretation to the vendor in the filing of a protest or appeal.

**KEY: appeals, protests, general provisions, procurement code**

**Date of Last Change: January 22, 2021**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Purchasing and General Services.**

**R33-20. Records.**

**R33-20-101. General Provisions Related to Records.**

(1) General provisions related to records are in Part 20 of the Utah Procurement Code and in Rule R33-12.

**KEY: records, general provisions, procurement code**

**Date of Last Change: July 8, 2014**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Purchasing and General Services.**

**R33-21. Interaction Between Procurement Units.**

**R33-21-101. Cooperative Purchasing.**

(1) Cooperative purchasing shall be conducted in accordance with the requirements set forth in Section 63G-6a-2105. All definitions in the Utah Procurement Code shall apply to this Rule unless otherwise specified in this Rule. This Rule provides additional requirements and procedures and must be used in conjunction with the Utah Procurement Code.

**R33-21-201. State Cooperative Contracts.**

(1) An executive branch procurement unit shall obtain procurement items from state cooperative contracts whether statewide or regional unless the chief procurement officer determines, in accordance with Section 63G-6a-506(5)(b)(i), that it is in the best interest of the state to obtain an individual procurement item outside the state contract.

(2) In accordance with Section 63G-6a-2105, public entities, nonprofit organizations, and agencies of the federal government may obtain procurement items from state cooperative contracts awarded by the chief procurement officer.

**R33-21-201e. Division May Charge Administrative Fees on State Cooperative Contracts -- Prohibition Against Other Procurement Units Charging Fees on State Contracts.**

(1) In accordance with Section 63A-1-109.5, 63A-2-103, 63G-6a-303(2), and other applicable State of Utah law, the Director of the Division of Purchasing and General Services serving as the chief procurement officer of the state shall administer the state's cooperative purchasing program and may impose or assess an administrative fee on contractors and vendors on state cooperative contracts as part of its internal service fund authorization.

(2) The Division shall include a provision in each state cooperative contract prohibiting any other procurement unit from charging any type of fee, surcharge, or rebate on a state cooperative contract issued by the chief procurement officer.

**R33-21-301. Discount Pricing for Large Volume Purchases for Items on State Contract.**

(1) Eligible users of state cooperative contracts may seek to obtain additional volume discount pricing for large volume orders provided state cooperative contractors are willing to offer additional discounts for large volume orders.

(a) Eligible users may not coerce, intimidate or in any way compel vendors on state cooperative contracts to offer additional discount pricing.

(b) Eligible users seeking additional pricing discounts for large volume purchases shall issue a "Request for Price Quotations" to each vendor on a state cooperative contract for the procurement item being purchased.

(c) Executive branch procurement units without independent procurement authority shall contact the division to issue the request for price quotations.

(d) The request for price quotations shall include:

(i) a detailed description of the procurement item;

(ii) the estimated number or volume of procurement items that will be purchased;

(iii) the period of time that price quotations will be accepted, including the date and time price quotations will be opened;

(iv) the manner in which price quotations will be accepted;

(v) the place where price quotations shall be submitted; and

(vi) the period of time the price quotation must be guaranteed.

(e) Price quotations shall be kept confidential until the date and time of the opening and may not be disclosed to other vendors on state cooperative contracts until after the date and time of the opening. Email quotations are acceptable.

(f) Price quotations will be opened in the presence of a minimum of two witnesses.

(g) Price quotations will become public at the time of the opening.

(2) All terms and conditions of the state cooperative contract shall remain in effect unless the chief procurement officer approves the modification.

(3) This process may not be used for:

(a) an anti-competitive practice such as:

(i) bid rigging;

(ii) steering a contract to a preferred state cooperative contractor;

(iii) utilizing auction techniques where price quotations are improperly disclosed and contractors bid against each other's price;

(iv) disclosing pricing or other confidential information prior to the date and time of the opening; or

(v) any other practice prohibited by the Utah Procurement Code.

(4) All sales resulting from the quotations received under the process conducted in accordance with Section R33-21-301 shall be recorded as usage under the existing state cooperative contract, are subject to the administrative fee associated with the state cooperative contract, and shall be reported to the division.

**KEY: cooperative purchasing, state contracts, procurement units**  
**Date of Last Change: June 21, 2017**  
**Notice of Continuation: July 8, 2019**  
**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Administrative Services, Purchasing and General Services.**

**R33-22. Reserved.**

**R33-22-101. Reserved.**

(1) Part 22 of Title 63G, Chapter 6a, the Utah Procurement Code, does not exist at this point in time. Rules R33-1 through R33-24 are designed to match the corresponding Part of the Utah Procurement Code. When Part 22 of the Utah Procurement Code contains statutory language, the Board will consider whether to prepare draft rules for rulemaking process.

**KEY: government purchasing, reserved**

**Date of Last Change: July 8, 2014**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Administrative Services, Purchasing and General Services.**

**R33-23. Reserved.**

**R33-23-101. Reserved.**

(1) Part 23 of Title 63G, Chapter 6a, the Utah Procurement Code, does not exist at this point in time. Rules R33-1 through R33-24 are designed to match the corresponding Part of the Utah Procurement Code. When Part 23 of the Utah Procurement Code contains statutory language, the Board will consider whether to prepare draft rules for the rulemaking process.

**KEY: government purchasing, reserved**

**Date of Last Change: July 8, 2014**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Purchasing and General Services.**

**R33-24. Unlawful Conduct and Ethical Standards.**

**R33-24-101. Unlawful Conduct.**

(1) Unlawful conduct shall be governed in accordance with the requirements set forth in Sections 63G-6a-2401 through 2407. All definitions in the Utah Procurement Code shall apply to this rule unless otherwise specified in this rule. This administrative rule provides additional requirements and procedures and must be used in conjunction with the Procurement Code.

**R33-24-102. Laws and Executive Orders Pertaining to Gifts, Meals, and Gratuities for Executive Branch Procurement Professionals.**

(1) Each executive branch employee classified as a "Procurement Professional" shall be governed by:

- (a) Part 24 of the Utah Procurement Code, "Unlawful Conduct and Penalties;"
- (b) Executive Order EO/002/2014 issued by the Governor;
- (c) Title 67, Part 16 "Utah Public Officers' and Employees' Ethics Act;"
- (d) Section 76-8-103, "Bribery or Offering a Bribe;" and
- (e) any other applicable law.

**R33-24-103. Laws and Executive Orders Pertaining to Gifts, Meals, and Gratuities for Executive Branch Employees.**

(1) Each executive branch employee not classified as a "Procurement Professional" shall be governed by:

- (a) Executive Order EO/002/2014 issued by the Governor;
- (b) Title 67, Part 16 "Utah Public Officers' and Employees' Ethics Act;"
- (c) Section 76-8-103, "Bribery or Offering a Bribe;" and
- (d) any other applicable law.

**R33-24-104. Socialization with Vendors and Contractors.**

(1) A procurement professional shall not:

- (a) participate in social activities with vendors or contractors that will interfere with the proper performance of the procurement professional's duties;
  - (b) participate in social activities with vendors or contractors that will lead to unreasonably frequent disqualification of the procurement professional from the procurement process; or
  - (c) participate in social activities with vendors or contractors that would appear to a reasonable person to undermine the procurement professional's independence, integrity, or impartiality.
- (2) If a procurement professional participates in a social activity prohibited under Subsection R33-24-104(1), or has a close personal relationship with a vendor or contractor, the procurement professional shall promptly notify their supervisor and the supervisor shall take the appropriate action, which may include removal of the procurement professional from the procurement or contract administration process that is affected.

**R33-24-105. Financial Conflict of Interests Prohibited.**

- (1) A procurement conflict of interest occurs when the potential exists for an employee's personal financial interests, or for the personal financial interests of a family member, to influence, or have the appearance of influencing, the employee's judgment in the execution of the employee's duties and responsibilities when conducting a procurement or administering a contract.
- (2) To preserve the integrity of the state's procurement process, an executive branch employee may not take part in any procurement process, contracting or contract administration decision:
- (a) relating to the employee or a family member of the employee; or
  - (b) relating to any entity in which the employee or a family member of the employee is an officer, director or partner, or in which the employee or a family member of the employee owns or controls 10% or more of the stock of such entity or holds or directly or indirectly controls an ownership interest of 10% or more in such entity.
- (3) If a procurement process, contracting or contract administration matter arises relating to the employee or a family member of the employee, the employee must advise their supervisor of the relationship, and must be recused from any discussions or decisions relating to the procurement, contracting or administration matter. The employee must also comply with all disclosure requirements in Title 67 Chapter 16, Utah Public Officers' and Employees' Ethics Act.

**R33-24-106. Personal Relationship, Favoritism, or Bias Participation Prohibitions.**

- (1) Employees are prohibited from participating in discussions or decisions relating to the procurement, contracting or administration process if they have any type of personal relationship, favoritism, or bias that would appear to a reasonable person to influence their independence in performing their assigned duties and responsibilities relating to the procurement process, contracting or contract administration or prevent them from fairly and objectively evaluating a proposal in response to a bid, RFP or other solicitation. This provision shall not be construed to prevent an employee from having a bias based on the employee's review of a response to the solicitation in regard to the criteria in the solicitation.
- (2) If an employee has a personal relationship, favoritism, or bias toward any individual, group, organization, or vendor responding to a bid, RFP or other solicitation, the employee must make a written disclosure to the supervisor and the supervisor shall take appropriate action, which may include recusing the employee from discussions or decisions relating to the solicitation, contracting or administration matter in question. This provision shall not be construed to prevent an employee from having a bias based on the employee's review of a response to the solicitation in regard to the criteria in the solicitation.

**R33-24-107. Professional Relationships and Social Acquaintances Not Prohibited.**

- (1) It is not a violation for an executive branch employee who participates in discussions or decisions relating to the procurement, contracting or administration process to have a professional relationship or social acquaintance with a person, contractor or vendor responding to a solicitation, or that is under contract with the State, provided that there is compliance with Section R33-24-105, Section R33-24-106, the Utah Public Officers' and Employees' Ethics Act, The Governor's Executive Order, EO 002 2014, "Establishing an Ethics Policy for Executive Branch Agencies and Employees," and other applicable State laws.

**R33-24-108. Ethical Standards for an Employee of a Procurement Unit Involved in the Procurement Process.**

- (1) An employee of a procurement unit involved in the procurement process shall uphold and promote the independence, integrity, and impartiality of the procurement process as required in the Utah Procurement Code and, as applicable, Title R33 and shall avoid impropriety and the appearance of impropriety.

**KEY: executive branch employees, procurement code, procurement professionals, unlawful conduct**

**Date of Last Change: May 23, 2022**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Purchasing and General Services.**

**R33-25. Executive Branch Insurance Procurement.**

**R33-25-101. Applicability and Standard Procurement Method.**

- (1) This rule only applies to executive branch procurement units.
- (2) All new or renewal insurance purchases will be made in accordance with this Rule and the Utah Procurement Code.
- (3) A procurement unit may use the request for proposals procurement process set forth in Utah Code 63G-6a, Part 7 to award a contract for insurance agents, brokers, and underwriting companies.
- (4) A procurement unit may consider the following criteria to qualify agents, brokers, and underwriting companies to move on to a subsequent stage in a request for proposals procurement process:
  - (a) financial resources of agent, broker and underwriting company;
  - (b) quality of prior service rendered to the state;
  - (c) service facilities available in-state;
  - (d) service reputation;
  - (e) experience and expertise in providing similar types of insurance;
  - (f) coverages and services to be provided;
  - (g) qualifications of key personnel; and
  - (h) any other criteria that will help to ensure the best possible coverage and service to the procurement unit.
- (5) A procurement unit may establish minimum requirements and score thresholds to qualify agents, brokers, and underwriting companies to move on to a subsequent stage in the request for proposals procurement process.
- (6) During the evaluation process, the evaluation committee may make a recommendation to the procurement unit that an agent, broker, or underwriting company be rejected for being deemed not responsible, not meeting the mandatory minimum requirements, not meeting any applicable minimum score threshold or whose proposal is not responsive.

**R33-25-102. Alternate Multiple Stage Bid Process.**

- (1) This rule only applies to executive branch procurement units.
- (2) To avoid oversaturation of limited primary or reinsurance markets, a multiple stage bid process may be used at the option of the procurement unit.
- (3) Agents, brokers, and underwriting companies must be qualified according to the evaluation criteria described in R33-25-101.
- (4) The three highest ranked agents, brokers, or underwriting companies, as determined by the evaluation committee, will be deemed qualified to proceed to the final stage.
- (5) Agents, brokers or underwriting companies who are qualified to proceed to the final stage must submit a list of markets in order of preference to the procurement unit. The procurement unit will, as equitably as practicable, assign no more than five and no less than three markets to each final bidder, based upon their preferences.
- (6) Qualified agents, brokers or underwriting companies must then submit a responsive bid for each assigned market.
- (7) Upon receipt of the bids, the procurement and contract award shall be conducted in accordance with Part 6 of the Utah Procurement Code.

**KEY: alternate multiple stage bid process, executive branch insurance procurement, procurement methods, government purchasing**

**Date of Last Change: June 21, 2017**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63G-6a**

**R33. Government Operations, Purchasing and General Services.**

**R33-26. State Surplus Property.**

**R33-26-101. State-Owned Surplus Property -- General.**

(1) This rule sets forth policies and procedures which govern the acquisition and disposition of State-owned and federal surplus property items, and vehicles. It applies to all State and local public agencies and eligible non-profit educational and health institutions when dealing with federal surplus property. It also applies to all state agencies unless specifically exempted by law and to the general public when dealing with the State Surplus Property agency.

**R33-26-102. Requirements.**

(1) Under the provisions of Section 63A-2-103, the Division of Purchasing and General Services shall manage and administer the State's surplus property program, including:

(a) The federal surplus property program as the Utah State Agency for Surplus Property and in compliance with 41 CFR 102-37 and Public Law 94-519 through a State Plan of Operation. The standards and procedures governing the contract between the state and the federal government are contained in the Plan of Operation.

(b) The disposition of state-owned surplus property items, including vehicles and non-vehicle surplus property and information technology equipment.

**R33-26-103. Definitions.**

(1) All definitions in Section 63A-2-101.5 shall apply to Rule R33-26. In addition the following definitions shall apply to Rule R33-26:

(a) "All-terrain type I vehicle" means any motor vehicle 52 inches or less in width, having an unladen dry weight of 1,500 pounds or less, traveling on three or more low pressure tires, having a seat designed to be straddled by the operator, and designed for or capable of travel over unimproved terrain;

(b) "All-terrain type II vehicle" means any other motor vehicle, not defined in Section 103 designed for or capable of travel over unimproved terrain and includes a class A side-by-side vehicle. "All-terrain type II vehicle" does not include golf carts, any vehicle designed to carry a person with a disability, any vehicle not specifically designed for recreational use, or farm tractors as defined under Section 41-1a-102.

(c) "Aircraft" means any contrivance now known or in the future invented, used, or designed for navigation of or flight in the air.

(d) "Bundled sale" means the act of packaging or grouping multiple State-owned surplus property items together for the purpose of offering those items for sale in a single transaction in which the buyer receives all surplus property items bundled together and sold in the transaction.

(e) "Camper" means any structure designed, used, and maintained primarily to be mounted on or affixed to a motor vehicle that contains a floor and is designed to provide a mobile dwelling, sleeping place, commercial space, or facilities for human habitation or for camping.

(f) "Disposition" means the act of selling, disposing, or transferring state-owned vehicle and non-vehicle property, declared to be surplus property, to the care, custody, or possession of another person.

(g) "Division" means the Division of Purchasing and General Services within the Department of Government Operations created under Section 63A-2-101.

(h) "Farm tractor" means every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.

(i) "Motorboat" means any vessel propelled by machinery, whether or not the machinery is the principal source of propulsion.

(j) "Motorcycle" means a motor vehicle having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground.

(k) "Motor vehicle" means a self-propelled vehicle intended primarily for use and operation on the highways.

(l) "Off-highway vehicle" means any snowmobile, all-terrain type I vehicle, all-terrain type II vehicle, or motorcycle.

(m) As used in this section "Personal handheld electronic device":

(i) means an electronic device that is designed for personal handheld use and permits the user to store or access information, the primary value of which is specific to the user of the device; and,

(ii) includes a mobile phone, pocket personal computer, personal digital assistant, wireless, or similar device.

(n) "Personal Watercraft" means a motorboat that is:

(i) less than 16 feet in length;

(ii) propelled by a water jet pump; and

(iii) designed to be operated by a person sitting, standing or kneeling on the vessel, rather than sitting or standing inside the vessel.

(o)(i) "Pickup truck" means a two-axle motor vehicle with motive power manufactured, remanufactured, or materially altered to provide an open cargo area.

(ii) "Pickup truck" includes motor vehicles with the open cargo area covered with a camper, camper shell, tarp, removable tarp, or similar structure.

(p) "Reconstructed vehicle" means every vehicle type required to be registered in this state that is materially altered from its original construction by the removal, addition, or substitution of essential parts, new or used.

(q)(i) "Recreational vehicle" means a vehicular unit other than a mobile home, primarily designed as a temporary dwelling for travel, recreational, or vacation use, that is either self-propelled or pulled by another vehicle.

(ii) "Recreational vehicle" includes:

(A) a travel trailer;

(B) a camping trailer;

(C) a motor home;

(D) a fifth wheel trailer; and

(E) a van.

(r) "Road tractor" means every motor vehicle designed and used for drawing other vehicles and constructed so it does not carry and load either independently or any part of the weight of a vehicle or load this is drawn.

(s) "Sailboat" means any vessel having one or more sails and propelled by wind.

(t) "Semitrailer" means every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and constructed so that some part of its weight and its load rests or is carried by another vehicle.

(v)(i) "Special mobile equipment" means every vehicle:

(A) not designed or used primarily for the transportation of persons or property;

(B) not designed to operate in traffic; and

(C) only incidentally operated or moved over the highways.

(ii) "special mobile equipment" includes:

(A) farm tractors;

(B) on or off-road motorized construction or maintenance equipment including backhoes, bulldozers, compactors, graders, loaders, road rollers, tractors, and trenchers;

(C) ditch-digging apparatus; and

(D) forklifts, warehouse equipment, golf carts, electric carts, etc.

(v) "State agency" means any executive branch department, division, or other agency of the state.

(w) "Trailer" means a vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and constructed so that no part of its weight rests upon the towing vehicle.

(x) "Travel trailer," "camping trailer," or "fifth wheel trailer" means a portable vehicle without motive power, designed as a temporary dwelling for travel, recreational, or vacation use that does not require a special highway movement permit when drawn by a self-propelled motor vehicle.

(y) "Truck tractor" means a motor vehicle designed and used primarily for drawing other vehicles and not constructed to carry a load other than a part of the weight of the vehicle and load that is drawn.

(z) "Vehicle" means:

(i) all-terrain vehicle type I and II,

(ii) aircraft,

(iii) camper,

(iv) farm tractor,

(v) motor boat,

(vi) motorcycle,

(vii) motor vehicle,

(viii) off highway vehicle,

(ix) personal watercraft,

(x) pickup truck,

(xi) reconstructed vehicle,

(xii) recreational vehicle,

(xiii) road tractor,

(xiv) sailboat,

(xv) semitrailer,

(xvi) special mobile equipment,

(xvii) trailer,

(xviii) travel trailer,

(xix) truck tractor,

(xx) vessel; and

(aa) "Vessel" means every type of watercraft, other than a seaplane on the water, used or capable of being used as a means of transportation on water.

### **R33-26-200. Disposition of State-Owned Surplus Property Items.**

(1) The State surplus property program shall determine the appropriate method for disposing of state surplus property.

(2) When a state agency determines to dispose of state surplus property that is a non-vehicle item it shall, in order to comply with Subsection 63A-2-401(2), complete Form SP-1 and electronically transmit it to the State Surplus Property agency.

(3) Each state agency with state surplus property will be responsible for:

(a) Storing state surplus property on site until:

(i) picked up by the person to whom the item has been sold;

(ii) disposed of or donated by the state agency; or

(iii) picked up by State Surplus property program;

(b) Assigning an employee of the agency to assist the public and State Surplus with the sale of the State-owned property; and

(c) Developing internal policies regarding employees:

- (i) assisting the public with lifting and transporting State-owned surplus property items; and
- (ii) transporting State-owned surplus property items with a minimal value to charities for donation.
- (4) State Surplus property with a minimal value as described in 63A-2-411 may be disposed of by:
  - (a) destroying the surplus property;
  - (b) disposing of the surplus property as waste; or
  - (c) donating the surplus property to:
    - (i) a public entity;
    - (ii) a charitable organization; or
    - (iii) another person or entity approved by the director of state surplus.
- (5) The State Surplus Property program is not authorized to accept or dispose of hazardous waste or any item containing hazardous waste. State agencies must dispose of hazardous waste and items containing hazardous waste in accordance with applicable laws.

**R33-26-201. Non-vehicle Disposition Procedures.**

- (1) State-owned, non-vehicle personal property shall not be destroyed, sold, transferred, traded-in, traded, discarded, donated or otherwise disposed of unless the procedures set forth in this Rule are followed.
- (2) This rule applies to and includes any residue that may be remaining from agency cannibalization of property.
- (3) When a state agency determines that state-owned non-vehicle personal property is in excess of current needs, it will:
  - (a) transfer the state-owned, non-vehicle surplus property items directly to another state agency without involvement of the division; or
  - (b) notify the State Surplus Property agency that the agency has a State-owned surplus property item.

**R33-26-202. Disposal of State-Owned Surplus Electronic Data Devices.**

- (1) For the purpose of this rule, Electronic Data Device means any informational technology device identified by the Department of Technology Services.
- (2) Each State agency shall ensure that all surplus property that is considered an electronic data device is disposed of in accordance with the following procedures identified in this Rule.
- (3) Prior to selling or transferring of an electronic data device, the following requirements shall be completed:
  - (a) remove, or cause to be removed, from the electronic data device any:
    - (i) software owned or licensed by the agency as required by the software license agreement;
    - (ii) information that is classified as protected, private, or controlled under the Title 63G, Chapter 2, Government Records Access and Management Act; and
    - (iii) any other state-owned records and data.
  - (b) receive written confirmation from the Department of Technology Services that subsection (A) has been completed;
  - (c) submit an SP-1 to State Surplus Property agency with a description of the items to be included in the sale of the electronic data device including the make, model, serial number, specifications (if available), list of accessories, software; and
  - (d) Ensure in writing that the service contract is null and void to the agency or transferable to the purchaser.
- (4) In coordination with the Department of Technology Services, the State Surplus program may decide on limitations on the selling or transferring of electronic data devices.
- (5) Electronic Data devices that not are sold or transferred must be disposed of in accordance with the Department of Technology Services.

**R33-26-204. Federal Surplus Property.**

- (1) Federal surplus property items are not available for sale to the general public. Donation of federal surplus property shall be administered in accordance with the procedures identified in the State Plan of Operation for the Federal Property Assistance Program.
- (2) Public auctions of federal surplus property are authorized under certain circumstances and conditions. The division shall coordinate such auctions when deemed necessary or appropriate. Federal surplus property auctions are primarily conducted online, but are regulated and accomplished by the U.S. General Services Administration.

**R33-26-205. Related Party Transactions.**

- (1) The division has a duty to the public to ensure that State-owned surplus property is disposed of in accordance with Title 63A, Chapter 2. A conflict of interest may exist or appear to exist when a related party attempts to purchase a State-owned surplus property item.
- (2) A related party is defined as someone who may fit into any of the following categories pertaining to the State-owned surplus property item in question:
  - (a) has purchasing authority;
  - (b) has maintenance authority;
  - (c) has disposition or signature authority;

- (d) has authority regarding the disposal price;
- (e) has access to restricted information; and
- (f) may be perceived to be a related party using other criteria which may prohibit independence.

**R33-26-206. Priorities.**

- (1) Public agencies are given priority for the purchase of State-owned surplus property items.
- (2) Property that is determined by the Division to be unique, in short supply or in high demand by public agencies may be held for a period of up to 30 days before being offered for sale to the general public by Surplus Property.
- (3) For this rule, the entities listed below, in priority order, are considered to be public agencies:
  - (a) state agencies;
  - (b) state universities, colleges, and community colleges;
  - (c) other tax supported educational agencies or political subdivisions in the State of Utah including cities, towns, counties and local law enforcement agencies;
  - (d) other tax-supported educational entities; then
  - (e) non-profit health and educational institutions.
- (4) State-owned surplus property items that are not purchased by or transferred to public agencies may be offered for public sale.
- (5) The division shall make the determination as to whether property is subject to hold period. The decision shall consider the following:
  - (a) the cost to the State;
  - (b) the potential liability to the State;
  - (c) the overall best interest of the State.

**R33-26-301. Accounting and Reimbursement Procedures.**

- (1) The division will record and maintain records of all transactions related to the acquisition and sale of all State and federal surplus property items.
- (2) The division may maintain a federal working capital reserve not to exceed one year's operating expenses. In the event the division accumulates funds in excess of the allowable working capital reserve, they will reduce the Retained Earnings balance accordingly. The only exception is where the division is accumulating excess funds in anticipation of the purchase of new facilities or capital items. Prior to the accumulation of excess funds, the division must obtain the written approval of the Executive Director of the Department of Government Operations.

**R33-26-302. Reimbursement.**

- (1) Reimbursement to state agencies from the sale of their surplus property items will be made through the Division of Finance via interagency transfers or warrant requests.
- (2) The State Surplus Property program is authorized to charge a rate for the services provided to an agency.

**R33-26-401. Public Sale of State-Owned Vehicles.**

- (1) State-owned excess vehicles may be purchased at any time by the general public, subject to any holding period that may be assigned by the division and subject to the division's operating days and hours.
- (2) Federal surplus property auctions to the general public may be accomplished on occasions and subject to the limitations as indicated previously.
- (3) The frequency of public auctions, for either State-owned vehicles or federal surplus property will be regulated by current law as applicable, the volume of items held in inventory by the division, and the profitability of conducting auctions versus other approaches to disposing of surplus property.
- (4) State-owned vehicles available for sale may not have any ancillary or component parts or equipment removed, destroyed, or detached, from the vehicle prior to sale without the approval of the division.
- (5) State agencies are prohibited from removing ancillary or component parts or equipment from vehicles intended for surplus unless:
  - (a) the state agency intends on using the ancillary or component parts or equipment on other agency vehicles;
  - (b) the state agency in possession of the vehicle intends to transfer the ancillary or component parts or equipment to another state agency; or
  - (c) the state agency has obtained prior approval from the division to remove ancillary or component parts or equipment from the vehicle intended for surplus.

**R33-26-601. Utah State Agency for Surplus Property Adjudicative Proceedings.**

- (1) As required by the Utah Administrative Procedures Act, this Rule provides the procedures for adjudicating disputes brought before the division under the authority granted by Section 63A-2-401 and Title 63G, Chapter 4, et seq.

**R33-26-602. Proceedings to Be Informal.**

(1) All matters over which the division has jurisdiction including bid validity determination and sales issues, which are subject to Title 63G, Chapter 4, will be informal in nature for purposes of adjudication. The Director of the Division of Purchasing and General Services or his designee will be the presiding officer.

**R33-26-603. Procedures Governing Informal Adjudicatory Proceedings.**

- (1) No response needs to be filed to the notice of agency action or request for agency action.
- (2) The division may hold a hearing at the discretion of the director of the Division of Purchasing and General Services or his designee unless a hearing is required by statute. A request for hearing must be made within ten days after receipt of the notice of agency action or request for agency action.
- (3) Only the parties named in the notice of agency action or request for agency action will be permitted to testify, present evidence and comment on the issues.
- (4) A hearing will be held only after timely notice of the hearing has been given.
- (5) No discovery, either compulsory or voluntary, will be permitted except that all parties to the action shall have access to information and materials not restricted by law.
- (6) No person may intervene in an agency action unless federal statute or rule requires the agency to permit intervention.
- (7) Any hearing held under this rule is open to all parties.
- (8) Within thirty days after the close of any hearing, the director of the Division of Purchasing and General Services or his designee shall issue a written decision stating the decision, the reasons for the decision, time limits for filing an appeal with the director of the superior agency, notice of right of judicial review, and the time limits for filing an appeal to the appropriate district court.
- (9) The decision rendered by the Director of the Division of Purchasing and General Services or his designee shall be based on the facts in the division file and if a hearing is held, the facts based on evidence presented at the hearing.
- (10) The agency shall notify the parties of the agency order by promptly mailing a copy thereof to each at the address indicated in the file.
- (11) Whether a hearing is held or not, an order issued under the provisions of this rule shall be the final order and then may be appealed to the appropriate district court.

**R33-26-900. Charges and Fees Assessed for State Surplus Property Agency Services.**

- (1) In accordance with Section 63A-2-405, the State Surplus Property agency will charge rates and fees, as approved by the Rate Setting Committee as set forth in Sections 63J-1-410 and 504, for services associated with the disposition of surplus property items.
- (2) The current approved rate and fee schedule is available at: [surplus.utah.gov](http://surplus.utah.gov).

**KEY: government purchasing, procurement rules, state surplus property, general procurement provisions**

**Date of Last Change: May 20, 2020**

**Notice of Continuation: July 8, 2019**

**Authorizing, and Implemented or Interpreted Law: 63A-2**