

**Effective 5/13/2014**

**Superseded 3/17/2016**

**63A-5-205 Contracting powers of director -- Retainage -- Health insurance coverage.**

- (1) As used in this section:
  - (a) "Capital developments" has the same meaning as provided in Section 63A-5-104.
  - (b) "Capital improvements" has the same meaning as provided in Section 63A-5-104.
  - (c) "Employee" means an "employee," "worker," or "operative" as defined in Section 34A-2-104 who:
    - (i) works at least 30 hours per calendar week; and
    - (ii) meets employer eligibility waiting requirements for health care insurance which may not exceed the first day of the calendar month following 60 days from the date of hire.
  - (d) "Health benefit plan" has the same meaning as provided in Section 31A-1-301.
  - (e) "Qualified health insurance coverage" is as defined in Section 26-40-115.
  - (f) "Subcontractor" has the same meaning provided for in Section 63A-5-208.
- (2) In accordance with Title 63G, Chapter 6a, Utah Procurement Code, the director may:
  - (a) subject to Subsection (3), enter into contracts for any work or professional services which the division or the State Building Board may do or have done; and
  - (b) as a condition of any contract for architectural or engineering services, prohibit the architect or engineer from retaining a sales or agent engineer for the necessary design work.
- (3)
  - (a) Except as provided in Subsection (3)(b), this Subsection (3) applies to all design or construction contracts entered into by the division or the State Building Board on or after July 1, 2009, and:
    - (i) applies to a prime contractor if the prime contract is in the amount of \$1,500,000 or greater; and
    - (ii) applies to a subcontractor if the subcontract is in the amount of \$750,000 or greater.
  - (b) This Subsection (3) does not apply:
    - (i) if the application of this Subsection (3) jeopardizes the receipt of federal funds;
    - (ii) if the contract is a sole source contract;
    - (iii) if the contract is an emergency procurement; or
    - (iv) to a change order as defined in Section 63G-6a-103, or a modification to a contract, when the contract does not meet the threshold required by Subsection (3)(a).
  - (c) A person who intentionally uses change orders or contract modifications to circumvent the requirements of Subsection (3)(a) is guilty of an infraction.
  - (d)
    - (i) A contractor subject to Subsection (3)(a) shall demonstrate to the director that the contractor has and will maintain an offer of qualified health insurance coverage for the contractor's employees and the employees' dependents.
    - (ii) If a subcontractor of the contractor is subject to Subsection (3)(a), the contractor shall demonstrate to the director that the subcontractor has and will maintain an offer of qualified health insurance coverage for the subcontractor's employees and the employees' dependents.
  - (e)
    - (i)
      - (A) A contractor who fails to meet the requirements of Subsection (3)(d)(i) during the duration of the contract is subject to penalties in accordance with administrative rules adopted by the division under Subsection (3)(f).

- (B) A contractor is not subject to penalties for the failure of a subcontractor to meet the requirements of Subsection (3)(d)(ii).
- (ii)
  - (A) A subcontractor who fails to meet the requirements of Subsection (3)(d)(ii) during the duration of the contract is subject to penalties in accordance with administrative rules adopted by the division under Subsection (3)(f).
  - (B) A subcontractor is not subject to penalties for the failure of a contractor to meet the requirements of Subsection (3)(d)(i).
- (f) The division shall adopt administrative rules:
  - (i) in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act;
  - (ii) in coordination with:
    - (A) the Department of Environmental Quality in accordance with Section 19-1-206;
    - (B) the Department of Natural Resources in accordance with Section 79-2-404;
    - (C) a public transit district in accordance with Section 17B-2a-818.5;
    - (D) the State Capitol Preservation Board in accordance with Section 63C-9-403;
    - (E) the Department of Transportation in accordance with Section 72-6-107.5; and
    - (F) the Legislature's Administrative Rules Review Committee; and
  - (iii) which establish:
    - (A) the requirements and procedures a contractor must follow to demonstrate to the director compliance with this Subsection (3) which shall include:
      - (I) that a contractor will not have to demonstrate compliance with Subsection (3)(d)(i) or (ii) more than twice in any 12-month period; and
      - (II) that the actuarially equivalent determination required for the qualified health insurance coverage in Subsection (1) is met by the contractor if the contractor provides the department or division with a written statement of actuarial equivalency from either:
        - (Aa) the Utah Insurance Department;
        - (Bb) an actuary selected by the contractor or the contractor's insurer; or
        - (Cc) an underwriter who is responsible for developing the employer group's premium rates;
    - (B) the penalties that may be imposed if a contractor or subcontractor intentionally violates the provisions of this Subsection (3), which may include:
      - (I) a three-month suspension of the contractor or subcontractor from entering into future contracts with the state upon the first violation;
      - (II) a six-month suspension of the contractor or subcontractor from entering into future contracts with the state upon the second violation;
      - (III) an action for debarment of the contractor or subcontractor in accordance with Section 63G-6a-904 upon the third or subsequent violation; and
      - (IV) monetary penalties which may not exceed 50% of the amount necessary to purchase qualified health insurance coverage for an employee and the dependents of an employee of the contractor or subcontractor who was not offered qualified health insurance coverage during the duration of the contract; and
    - (C) a website on which the department shall post the benchmark for the qualified health insurance coverage identified in Subsection (1)(e).
- (g)
  - (i) In addition to the penalties imposed under Subsection (3)(f)(iii), a contractor or subcontractor who intentionally violates the provisions of this section shall be liable to the employee for health care costs that would have been covered by qualified health insurance coverage.
  - (ii) An employer has an affirmative defense to a cause of action under Subsection (3)(g)(i) if:

- (A) the employer relied in good faith on a written statement of actuarial equivalency provided by:
  - (I) an actuary; or
  - (II) an underwriter who is responsible for developing the employer group's premium rates; or
- (B) the department determines that compliance with this section is not required under the provisions of Subsection (3)(b).
- (iii) An employee has a private right of action only against the employee's employer to enforce the provisions of this Subsection (3)(g).
- (h) Any penalties imposed and collected under this section shall be deposited into the Medicaid Restricted Account created by Section 26-18-402.
- (i) The failure of a contractor or subcontractor to provide qualified health insurance coverage as required by this section:
  - (i) may not be the basis for a protest or other action from a prospective bidder, offeror, or contractor under Section 63G-6a-1603 or any other provision in Title 63G, Chapter 6a, Utah Procurement Code; and
  - (ii) may not be used by the procurement entity or a prospective bidder, offeror, or contractor as a basis for any action or suit that would suspend, disrupt, or terminate the design or construction.
- (4) The judgment of the director as to the responsibility and qualifications of a bidder is conclusive, except in case of fraud or bad faith.
- (5) The division shall make all payments to the contractor for completed work in accordance with the contract and pay the interest specified in the contract on any payments that are late.
- (6) If any payment on a contract with a private contractor to do work for the division or the State Building Board is retained or withheld, it shall be retained or withheld and released as provided in Section 13-8-5.