

Part 12 Contracts and Change Orders

63G-6a-1201 Title.

This part is known as "Contracts and Change Orders."

Enacted by Chapter 347, 2012 General Session

63G-6a-1202 Standard contract clauses encouraged.

A procurement unit is encouraged to establish standard contract clauses to assist the procurement unit and to help contractors and potential contractors to understand applicable requirements.

Repealed and Re-enacted by Chapter 196, 2014 General Session

63G-6a-1203 Certain indemnification provisions forbidden -- Exceptions.

- (1) A contract, including an amendment to an existing contract, entered into under this chapter may not require that a design professional indemnify another from liability claims that arise out of the design professional's services, unless the liability claim arises from the design professional's negligent act, wrongful act, error or omission, or other liability imposed by law.
- (2) Subsection (1) may not be waived by contract.
- (3) Notwithstanding Subsections (1) and (2), a design professional may be required to indemnify a person for whom the design professional has direct or indirect control or responsibility.

Amended by Chapter 218, 2015 General Session

63G-6a-1204 Multiyear contracts.

- (1) Except as provided in Subsection (7), a procurement unit may enter into a multiyear contract resulting from an invitation for bids or a request for proposals, if:
 - (a) the procurement officer determines, in the discretion of the procurement officer, that entering into a multiyear contract is in the best interest of the procurement unit; and
 - (b) the invitation for bids or request for proposals:
 - (i) states the term of the contract, including all possible renewals of the contract;
 - (ii) states the conditions for renewal of the contract; and
 - (iii) includes the provisions of Subsections (3) through (5) that are applicable to the contract.
- (2) In making the determination described in Subsection (1)(a), the procurement officer shall consider whether entering into a multiyear contract will:
 - (a) result in significant savings to the procurement unit, including:
 - (i) reduction of the administrative burden in procuring, negotiating, or administering contracts;
 - (ii) continuity in operations of the procurement unit; or
 - (iii) the ability to obtain a volume or term discount;
 - (b) encourage participation by a person who might not otherwise be willing or able to compete for a shorter term contract; or
 - (c) provide an incentive for a bidder or offeror to improve productivity through capital investment or better technology.
- (3)

- (a) The determination described in Subsection (1)(a) is discretionary and is not required to be in writing or otherwise recorded.
- (b) Except as provided in Subsections (4) and (5), notwithstanding any provision of an invitation for bids, a request for proposals, or a contract to the contrary, a multiyear contract, including a contract that was awarded outside of an invitation for bids or request for proposals process, may not continue or be renewed for any year after the first year of the multiyear contract if adequate funds are not appropriated or otherwise available to continue or renew the contract.
- (4) A multiyear contract that is funded solely by federal funds may be continued or renewed for any year after the first year of the multiyear contract if:
 - (a) adequate funds to continue or renew the contract have not been, but are expected to be appropriated by, and received from, the federal government;
 - (b) continuation or renewal of the contract before the money is appropriated or received is permitted by the federal government; and
 - (c) the contract states that it may be cancelled or suspended, without penalty, if the anticipated federal funds are not appropriated or received.
- (5) A multiyear contract that is funded in part by federal funds may be continued or renewed for any year after the first year of the multiyear contract if:
 - (a) the portion of the contract that is to be funded by funds of a public entity are appropriated;
 - (b) adequate federal funds to continue or renew the contract have not been, but are expected to be, appropriated by, and received from, the federal government;
 - (c) continuation or renewal of the contract before the federal money is appropriated or received is permitted by the federal government; and
 - (d) the contract states that it may be cancelled or suspended, without penalty, if the anticipated federal funds are not appropriated or received.
- (6) A procurement unit may not continue or renew a multiyear contract after the end of the multiyear contract term or the renewal periods described in the contract, unless the procurement unit engages in a new standard procurement process or complies with an exception, described in this chapter, to using a standard procurement process.
- (7) A multiyear contract, including any renewal periods, may not exceed a period of five years, unless:
 - (a) the procurement officer determines, in writing, that:
 - (i) a longer period is necessary in order to obtain the procurement item;
 - (ii) a longer period is customary for industry standards; or
 - (iii) a longer period is in the best interest of the procurement unit; and
 - (b) the written determination described in Subsection (7)(a) is included in the file relating to the procurement.
- (8) This section does not apply to a contract for the design or construction of a facility, a road, a public transit project, or a contract for the financing of equipment.

Amended by Chapter 196, 2014 General Session

63G-6a-1204.5 Multiple award contracts.

- (1)
 - (a) The division or a procurement unit with independent procurement authority may enter into multiple award contracts with bidders or offerors.
 - (b) The applicable rulemaking authority may make rules, consistent with this section, regulating the use of multiple award contracts.

- (2) Multiple award contracts may be in a procurement unit's best interest if award to two or more bidders or offerors for similar procurement items is needed or desired for adequate delivery, service, availability, or product compatibility.
- (3) A procurement unit that enters into multiple award contracts under this section shall:
 - (a) exercise care to protect and promote competition among bidders or offerors when seeking to enter into multiple award contracts;
 - (b) name all eligible users of the multiple award contracts in the invitation for bids or request for proposals; and
 - (c) if the procurement unit anticipates entering into multiple award contracts before issuing the invitation for bids or request for proposals, state in the invitation for bids or request for proposals that the procurement unit may enter into multiple award contracts at the end of the procurement process.
- (4) A procurement unit that enters into multiple award contracts under this section shall:
 - (a) obtain, under the multiple award contracts, all of its normal, recurring requirements for the procurement items that are the subject of the contracts until the contracts terminate; and
 - (b) reserve the right to obtain the procurement items described in Subsection (4)(a) separately from the contracts if:
 - (i) there is a need to obtain a quantity of the procurement items that exceeds the amount specified in the contracts; or
 - (ii) the procurement officer makes a written finding that the procurement items available under the contract will not effectively or efficiently meet a nonrecurring special need of a procurement unit.
- (5) An applicable rulemaking authority may make rules to further regulate a procurement under this section.

Renumbered and Amended by Chapter 445, 2013 General Session

63G-6a-1205 Regulation of contract types -- Permitted and prohibited contract types.

- (1) Except as otherwise provided in this section, and subject to rules made under this section by the applicable rulemaking authority, a procurement unit may use any type of contract that will promote the best interests of the procurement unit.
- (2) An applicable rulemaking authority:
 - (a) may make rules governing, placing restrictions on, or prohibiting the use of any type of contract; and
 - (b) may not make rules that permit the use of a contract:
 - (i) that is prohibited under this section; or
 - (ii) in a manner that is prohibited under this section.
- (3) A procurement officer, the head of an issuing procurement unit, or a designee of either, may not use a type of contract, other than a firm fixed price contract, unless the procurement officer makes a written determination that:
 - (a) the proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated;
 - (b) the proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles; and
 - (c) the use of a specified type of contract, other than a firm fixed price contract, is in the best interest of the procurement unit, taking into consideration the following criteria:
 - (i) the type and complexity of the procurement item;

- (ii) the difficulty of estimating performance costs at the time the contract is entered into, due to factors that may include:
 - (A) the difficulty of determining definitive specifications;
 - (B) the difficulty of determining the risks, to the contractor, that are inherent in the nature of the work to be performed; or
 - (C) the difficulty to clearly determine other factors necessary to enter into an accurate firm fixed price contract;
 - (iii) the administrative costs to the procurement unit and the contractor;
 - (iv) the degree to which the procurement unit is required to provide technical coordination during performance of the contract;
 - (v) the impact that the choice of contract type may have upon the level of competition for award of the contract;
 - (vi) the stability of material prices, commodity prices, and wage rates in the applicable market;
 - (vii) the impact of the contract type on the level of urgency related to obtaining the procurement item;
 - (viii) the impact of any applicable governmental regulation relating to the contract; and
 - (ix) other criteria that the procurement officer determines may relate to determining the contract type that is in the best interest of the procurement unit.
- (4) Contract types that, subject to the provisions of this section and rules made under this section, may be used by a procurement unit include the following:
- (a) a fixed price contract;
 - (b) a fixed price contract with price adjustment;
 - (c) a time and materials contract;
 - (d) a labor hour contract;
 - (e) a definite quantity contract;
 - (f) an indefinite quantity contract;
 - (g) a requirements contract;
 - (h) a contract based on a rate table in accordance with industry standards; or
 - (i) a contract that includes one of the following construction delivery methods:
 - (i) design-build;
 - (ii) design-bid-build; or
 - (iii) construction manager/general contractor.
- (5) Except as it applies to a change order, a procurement unit may not enter into a cost-plus-percentage-of-cost contract, unless:
- (a) use of a cost-plus-percentage-of-cost contract is approved by the procurement officer;
 - (b) it is standard practice in the industry to obtain the procurement item through a cost-plus-percentage-of-cost contract; and
 - (c) the percentage and the method of calculating costs in the contract are in accordance with industry standards.
- (6) A procurement unit may not enter into a cost-reimbursement contract, unless the procurement officer makes a written determination that:
- (a)
 - (i) a cost-reimbursement contract is likely to cost less than any other type of permitted contract; or
 - (ii) it is impracticable to obtain the procurement item under any other type of permitted contract; and
 - (b) the proposed contractor's accounting system:

- (i) will timely develop the cost data in the form necessary for the procurement unit to timely and accurately make payments under the contract; and
- (ii) will allocate costs in accordance with generally accepted accounting principles.

Amended by Chapter 196, 2014 General Session

63G-6a-1206 Rules and regulations to determine allowable incurred costs -- Required information.

- (1)
 - (a) The applicable rulemaking authority may, by rule, establish the cost principles to be included in a cost-reimbursement contract to determine incurred costs for the purpose of calculating a reimbursement.
 - (b) The cost principles established by rule under Subsection (1)(a) may be modified, by contract, if the procurement officer or the head of the issuing procurement unit approves the modification.
- (2) Except as provided in Subsection (5), a person who seeks to be, or is, a party in a cost-based contract with a procurement unit shall:
 - (a) submit cost or pricing data relating to determining the cost or pricing amount; and
 - (b) certify that, to the best of the contractor's knowledge and belief, the cost or pricing data submitted is accurate and complete as of the date specified by the procurement unit.
- (3) The procurement officer shall ensure that the date specified under Subsection (2)(b) is before:
 - (a) the pricing of any contract awarded by a standard procurement process or pursuant to a sole source procurement, if the total contract price is expected to exceed an amount established by rule made by the applicable rulemaking authority; or
 - (b) the pricing of any change order that is expected to exceed an amount established by rule made by the applicable rulemaking authority.
- (4) A contract or change order that requires a certification described in Subsection (2) shall include a provision that the price to the procurement unit, including profit or fee, shall be adjusted to exclude any significant sums by which the procurement unit finds that the price was increased because the contractor provided cost or pricing data that was inaccurate, incomplete, or not current as of the date specified by the procurement officer.
- (5) A procurement unit is not required to comply with Subsection (2) if:
 - (a) the contract price is based on adequate price competition;
 - (b) the contract price is based on established catalogue prices or market prices;
 - (c) the contract price is set by law or rule; or
 - (d) the procurement states, in writing:
 - (i) that, in accordance with rules made by the applicable rulemaking authority, the requirements of Subsection (2) may be waived; and
 - (ii) the reasons for the waiver.

Amended by Chapter 355, 2016 General Session

63G-6a-1206.3 Auditing of books of contractor or subcontractor.

- (1) A procurement officer or an audit entity under contract with the procurement unit may audit the books and records of a contractor or subcontractor.
- (2) An audit under Subsection (1):
 - (a) is limited to the books and records that relate to the applicable contract or subcontract; and
 - (b) may occur only at a reasonable time and place.

- (3) A contractor shall maintain all 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 all audits initiated under this section within the six-year period have been completed, whichever is later.
- (4) A subcontractor shall maintain all books and records relating to a subcontract for six years after the day on which the subcontractor receives the final payment under the subcontract, or until all audits initiated under this section within the six-year period have been completed, whichever is later.

Enacted by Chapter 355, 2016 General Session

63G-6a-1206.5 Change in contract price.

A contractor may:

- (1) increase the contract price only in accordance with the terms of the contract; and
- (2) lower the contract price at any time during the time a contract is in effect.

Amended by Chapter 355, 2016 General Session

63G-6a-1207 Certification of change order.

- (1) Under a construction contract, a change order that increases the contract amount may not be made without prior written certification that the change order is within the determined project or contract budget by:
 - (a) the fiscal officer of the entity responsible for funding the project or contract; or
 - (b) the official responsible for monitoring and reporting upon the status of the costs of the total project or contract budget.
- (2) If a change order will result in an increase in the total project or contract budget, the change order may not be made, unless:
 - (a) sufficient funds are added to the project contract or budget; or
 - (b) the scope of the project or contract is adjusted to permit the degree of completion feasible within the total project or contract budget as it existed before the change order under consideration.
- (3) Notwithstanding any other provision of this section, it shall be presumed that this section has been complied with if the contractor reasonably relies on an executed change order.

Renumbered and Amended by Chapter 347, 2012 General Session

63G-6a-1208 Installment payments -- Contract prepayments.

- (1) A contract entered into by a procurement unit may provide for installment payments, including interest charges, over a period of time, if the procurement officer makes a written finding that:
 - (a) the use of installment payments are in the interest of the procurement unit;
 - (b) installment payments are not used as a method of avoiding budgetary constraints;
 - (c) the procurement unit has obtained all budgetary approvals and other approvals required for making the installment payments;
 - (d) all aspects of the installment payments required in the contract are in accordance with the requirements of law; and
 - (e) for a contract awarded through an invitation for bids or a request for proposals, the invitation for bids or request for proposals indicates that installment payments are required or permitted.
- (2) A procurement unit may not pay for a procurement item before the procurement item is received by the procurement unit, unless the procurement officer makes a written finding that it

is necessary or beneficial for the procurement unit to pay for the procurement item before the procurement item is received by the procurement unit.

- (3) Circumstances where prepayment may be necessary for, or beneficial to, the procurement unit include:
 - (a) when it is customary in the industry to prepay for the procurement item;
 - (b) if the procurement unit will receive an identifiable benefit by prepaying, including reduced costs, additional procurement items, early delivery, better service, or better contract terms; or
 - (c) other circumstances permitted by rule made by the applicable rulemaking authority.
- (4) The applicable rulemaking authority may make rules governing prepayments.
- (5) A prepaid expenditure shall be supported by documentation indicating:
 - (a) the amount of the prepayment;
 - (b) the prepayment schedule;
 - (c) the procurement items to which each prepayment relates;
 - (d) the remedies for a contractor's noncompliance with requirements relating to the provision of the procurement items; and
 - (e) all other terms and conditions relating to the payments and the procurement items.
- (6) The procurement officer or the procurement officer's designee may require a performance bond, of up to 100% of the prepayment amount, from the person to whom the prepayments are made.

Enacted by Chapter 445, 2013 General Session

63G-6a-1209 Leases.

- (1) As used in this section, "lease" means for a procurement unit to lease or lease-purchase a procurement item from a person.
- (2) This section does not apply to the lease of real property.
- (3) A procurement unit may not lease a procurement item unless the procurement unit complies with the requirements of this section.
- (4) A procurement unit may lease a procurement item if:
 - (a) the procurement officer determines that it is in the best interest of the procurement unit to lease the procurement item, after the procurement officer:
 - (i) investigates alternative means of obtaining the procurement item; and
 - (ii) considers the costs and benefits of the alternative means of obtaining the procurement item;
 - (b) all conditions for renewal and cost are included in the lease;
 - (c) the lease is awarded through a standard procurement process, or an exception to a standard procurement process described in Part 8, Exceptions to Procurement Requirements;
 - (d) for a standard procurement process, the invitation for bids, request for proposals, or request for quotes states:
 - (i) that the procurement unit is seeking, or willing to consider, a lease; and
 - (ii) for a lease purchase, that the procurement unit is seeking, or willing to consider, a lease-purchase;
 - (e) the lease is not used to avoid competition; and
 - (f) the lease complies to all other provisions of law or rule applicable to the lease.

Enacted by Chapter 445, 2013 General Session

63G-6a-1210 Contract provisions for incentives, damages, and penalties.

A procurement unit may include in a contract terms that provide for:

- (1) incentives, including bonuses;
- (2) payment of damages, including liquidated damages; or
- (3) penalties.

Enacted by Chapter 445, 2013 General Session