

Part 2
Division of Facilities Construction and Management

63A-5-201 Creation -- Administration.

There is created within the department the Division of Facilities Construction and Management, to be administered by a director.

Renumbered and Amended by Chapter 212, 1993 General Session

63A-5-202 Definitions.

As used in this part:

- (1) "Director" means director of the Division of Facilities Construction and Management.
- (2) "Division" means Division of Facilities Construction and Management.

Enacted by Chapter 212, 1993 General Session

63A-5-203 Director of division -- Appointment.

The executive director shall appoint the director of the division with the approval of the governor.

Renumbered and Amended by Chapter 212, 1993 General Session

63A-5-204 Specific powers and duties of director.

- (1) As used in this section, "capitol hill facilities" and "capitol hill grounds" have the same meaning as provided in Section 63C-9-102.
- (2)
 - (a) The director shall:
 - (i) recommend rules to the executive director for the use and management of facilities and grounds owned or occupied by the state for the use of its departments and agencies;
 - (ii) supervise and control the allocation of space, in accordance with legislative directive through annual appropriations acts or other specific legislation, to the various departments, commissions, institutions, and agencies in all buildings or space owned, leased, or rented by or to the state, except capitol hill facilities and capitol hill grounds and except as otherwise provided by law;
 - (iii) comply with the procedures and requirements of Title 63A, Chapter 5, Part 3, Division of Facilities Construction and Management Leasing;
 - (iv) except as provided in Subsection (2)(b), acquire, as authorized by the Legislature through the appropriations act or other specific legislation, and hold title to, in the name of the division, all real property, buildings, fixtures, or appurtenances owned by the state or any of its agencies;
 - (v) adopt and use a common seal, of a form and design determined by the director, and of which courts shall take judicial notice;
 - (vi) file a description and impression of the seal with the Division of Archives;
 - (vii) collect and maintain all deeds, abstracts of title, and all other documents evidencing title to or interest in property belonging to the state or any of its departments, except institutions of higher education and the School and Institutional Trust Lands Administration;

- (viii) report all properties acquired by the state, except those acquired by institutions of higher education, to the director of the Division of Finance for inclusion in the state's financial records;
 - (ix) before charging a rate, fee, or other amount for services provided by the division's internal service fund to an executive branch agency, or to a subscriber of services other than an executive branch agency:
 - (A) submit the proposed rates, fees, and cost analysis to the Rate Committee established in Section 63A-1-114; and
 - (B) obtain the approval of the Legislature as required by Section 63J-1-410;
 - (x) conduct a market analysis by July 1, 2005, and periodically thereafter, of proposed rates and fees, which analysis shall include a comparison of the division's rates and fees with the fees of other public or private sector providers where comparable services and rates are reasonably available;
 - (xi) implement the State Building Energy Efficiency Program under Section 63A-5-701;
 - (xii) convey, lease, or dispose of the real property or water rights associated with the Utah State Developmental Center according to the Utah State Developmental Center Board's determination, as described in Subsection 62A-5-206.6(5); and
 - (xiii) take all other action necessary for carrying out the purposes of this chapter.
- (b) Legislative approval is not required for acquisitions by the division that cost less than \$250,000.
- (3)
- (a) The director shall direct or delegate maintenance and operations, preventive maintenance, and facilities inspection programs and activities for any agency, except:
 - (i) the State Capitol Preservation Board; and
 - (ii) state institutions of higher education.
 - (b) The director may choose to delegate responsibility for these functions only when the director determines that:
 - (i) the agency has requested the responsibility;
 - (ii) the agency has the necessary resources and skills to comply with facility maintenance standards approved by the State Building Board; and
 - (iii) the delegation would result in net cost savings to the state as a whole.
 - (c) The State Capitol Preservation Board and state institutions of higher education are exempt from Division of Facilities Construction and Management oversight.
 - (d) Each state institution of higher education shall comply with the facility maintenance standards approved by the State Building Board.
 - (e) Except for the State Capitol Preservation Board, agencies and institutions that are exempt from division oversight shall annually report their compliance with the facility maintenance standards to the division in the format required by the division.
 - (f) The division shall:
 - (i) prescribe a standard format for reporting compliance with the facility maintenance standards;
 - (ii) report agency compliance or noncompliance with the standards to the Legislature; and
 - (iii) conduct periodic audits of exempt agencies and institutions to ensure that they are complying with the standards.
- (4)
- (a) In making any allocations of space under Subsection (2), the director shall:
 - (i) conduct studies to determine the actual needs of each agency; and
 - (ii) comply with the restrictions contained in this Subsection (4).
 - (b) The supervision and control of the legislative area is reserved to the Legislature.

- (c) The supervision and control of the judicial area is reserved to the judiciary for trial courts only.
 - (d) The director may not supervise or control the allocation of space for entities in the public and higher education systems.
 - (e) The supervision and control of capitol hill facilities and capitol hill grounds is reserved to the State Capitol Preservation Board.
- (5) The director may:
- (a) hire or otherwise procure assistance and services, professional, skilled, or otherwise, that are necessary to carry out the director's responsibilities, and may expend funds provided for that purpose either through annual operating budget appropriations or from nonlapsing project funds;
 - (b) sue and be sued in the name of the division; and
 - (c) hold, buy, lease, and acquire by exchange or otherwise, as authorized by the Legislature, whatever real or personal property that is necessary for the discharge of the director's duties.
- (6) Notwithstanding the provisions of Subsection (2)(a)(iv), the following entities may hold title to any real property, buildings, fixtures, and appurtenances held by them for purposes other than administration that are under their control and management:
- (a) the Office of Trust Administrator;
 - (b) the Department of Transportation;
 - (c) the Division of Forestry, Fire, and State Lands;
 - (d) the Department of Natural Resources;
 - (e) the Utah National Guard;
 - (f) any area vocational center or other institution administered by the State Board of Education;
 - (g) any institution of higher education; and
 - (h) the Utah Science Technology and Research Governing Authority.
- (7) The director shall ensure that any firm performing testing and inspection work governed by the American Society for Testing Materials Standard E-329 on public buildings under the director's supervision shall:
- (a) fully comply with the American Society for Testing Materials standard specifications for agencies engaged in the testing and inspection of materials known as ASTM E-329; and
 - (b) carry a minimum of \$1,000,000 of errors and omissions insurance.
- (8) Notwithstanding Subsections (2)(a)(iii) and (iv), the School and Institutional Trust Lands Administration may hold title to any real property, buildings, fixtures, and appurtenances held by it that are under its control.

Amended by Chapter 298, 2016 General Session

Amended by Chapter 300, 2016 General Session

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

- (1) As used in this section:
- (a) "Capital developments" means the same as that term is defined in Section 63A-5-104.
 - (b) "Capital improvements" means the same as that term is defined 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" means the same as that term is defined in Section 31A-1-301.

- (e) "Qualified health insurance coverage" means the same as that term is defined in Section 26-40-115.
- (f) "Subcontractor" means the same as that term is defined in Section 63A-5-208.
- (2) In accordance with Title 63G, Chapter 6a, Utah Procurement Code, the director may:
 - (a) subject to Subsections (3) and (4), 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) Except as provided in Subsection (4), 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:
 - (a) applies to a prime contractor if the prime contract is in the amount of \$2,000,000 or greater at the original execution of the contract; and
 - (b) applies to a subcontractor if the subcontract is in the amount of \$1,000,000 or greater at the original execution of the contract.
- (4) Subsection (3) does not apply:
 - (a) if the application of Subsection (3) jeopardizes the receipt of federal funds;
 - (b) if the contract is a sole source contract;
 - (c) if the contract is an emergency procurement; or
 - (d) 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).
- (5) A person who intentionally uses change orders or contract modifications to circumvent the requirements of Subsection (3) is guilty of an infraction.
- (6)
 - (a) A contractor subject to Subsection (3) 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.
 - (b) If a subcontractor of the contractor is subject to Subsection (3), the contractor shall:
 - (i) place a requirement in the subcontract that the subcontractor shall obtain and maintain an offer of qualified health insurance coverage for the subcontractor's employees and the employees' dependants during the duration of the subcontract; and
 - (ii) certify 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 during the duration of the prime contract.
 - (c)
 - (i) A contractor who fails to meet the requirements of Subsection (6)(a) during the duration of the contract is subject to penalties in accordance with administrative rules adopted by the division under Subsection (7).
 - (ii) A contractor is not subject to penalties for the failure of a subcontractor to meet the requirements of Subsection (6)(b).
 - (iii) A subcontractor who fails to meet the requirements of Subsection (6)(b) during the duration of the contract is subject to penalties in accordance with administrative rules adopted by the division under Subsection (7).
 - (iv) A subcontractor is not subject to penalties for the failure of a contractor to meet the requirements of Subsection (6)(a).
- (7) The division shall adopt administrative rules:
 - (a) in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act;
 - (b) in coordination with:
 - (i) the Department of Environmental Quality in accordance with Section 19-1-206;

- (ii) the Department of Natural Resources in accordance with Section 79-2-404;
 - (iii) a public transit district in accordance with Section 17B-2a-818.5;
 - (iv) the State Capitol Preservation Board in accordance with Section 63C-9-403;
 - (v) the Department of Transportation in accordance with Section 72-6-107.5; and
 - (vi) the Legislature's Administrative Rules Review Committee; and
- (c) that establish:
- (i) the requirements and procedures a contractor must follow to demonstrate to the director compliance with Subsections (3) through (10) that shall include:
 - (A) that a contractor shall demonstrate compliance with Subsection (6)(a) or (b) at the time of the execution of each initial contract described in Subsection (3);
 - (B) that the contractor's compliance is subject to an audit by the division or the Office of the Legislative Auditor General; and
 - (C) 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, which is not more than one year old, regarding the contractor's offer of qualified health coverage from an actuary selected by the contractor or the contractor's insurer, or an underwriter who is responsible for developing the employer group's premium rates;
 - (ii) the penalties that may be imposed if a contractor or subcontractor intentionally violates the provisions of Subsections (3) through (10), which may include:
 - (A) a three-month suspension of the contractor or subcontractor from entering into future contracts with the state upon the first violation;
 - (B) a six-month suspension of the contractor or subcontractor from entering into future contracts with the state upon the second violation;
 - (C) an action for debarment of the contractor or subcontractor in accordance with Section 63G-6a-904 upon the third or subsequent violation; and
 - (D) 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
 - (iii) a website on which the department shall post the commercially equivalent benchmark, for the qualified health insurance coverage identified in Subsection (1)(e), that is provided by the Department of Health, in accordance with Subsection 26-40-115(2).
- (8)
- (a) In addition to the penalties imposed under Subsection (7)(c), 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.
 - (b) An employer has an affirmative defense to a cause of action under Subsection (8)(a) if:
 - (i) the employer relied in good faith on a written statement of actuarial equivalency provided by:
 - (A) an actuary; or
 - (B) an underwriter who is responsible for developing the employer group's premium rates; or
 - (ii) the department determines that compliance with this section is not required under the provisions of Subsection (4).
 - (c) An employee has a private right of action only against the employee's employer to enforce the provisions of this Subsection (8).
- (9) Any penalties imposed and collected under this section shall be deposited into the Medicaid Restricted Account created by Section 26-18-402.

- (10) The failure of a contractor or subcontractor to provide qualified health insurance coverage as required by this section:
 - (a) may not be the basis for a protest or other action from a prospective bidder, offeror, or contractor under Section 63G-6a-1602 or any other provision in Title 63G, Chapter 6a, Utah Procurement Code; and
 - (b) 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.
- (11) The judgment of the director as to the responsibility and qualifications of a bidder is conclusive, except in case of fraud or bad faith.
- (12) 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.
- (13) 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.

Amended by Chapter 20, 2016 General Session
Amended by Chapter 355, 2016 General Session

63A-5-206 Construction, alteration, and repair of state facilities -- Powers of director -- Exceptions -- Expenditure of appropriations -- Notification to local governments for construction or modification of certain facilities.

- (1) As used in this section:
 - (a) "Capital developments" and "capital improvements" have the same meaning as provided in Section 63A-5-104.
 - (b) "Compliance agency" has the same meaning as provided in Section 15A-1-202.
 - (c)
 - (i) "Facility" means any building, structure, or other improvement that is constructed on property owned by the state, its departments, commissions, institutions, or agencies.
 - (ii) "Facility" does not mean an unoccupied structure that is a component of the state highway system.
 - (d) "Life cycle cost-effective" means, as provided for in rules adopted by the State Building Board, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the most prudent cost of owning and operating a facility, including the initial cost, energy costs, operation and maintenance costs, repair costs, and the costs of energy conservation and renewable energy systems.
 - (e) "Local government" means the county, municipality, or local school district that would have jurisdiction to act as the compliance agency if the property on which the project is being constructed were not owned by the state.
 - (f) "Renewable energy system" means a system designed to use solar, wind, geothermal power, wood, or other replenishable energy source to heat, cool, or provide electricity to a building.
- (2)
 - (a)
 - (i) Except as provided in Subsections (3) and (4), the director shall exercise direct supervision over the design and construction of all new facilities, and all alterations, repairs, and improvements to existing facilities if the total project construction cost, regardless of the funding source, is greater than \$100,000, unless there is memorandum of understanding between the director and an institution of higher education that permits the institution of

- higher education to exercise direct supervision for a project with a total project construction cost of not greater than \$250,000.
- (ii) A state entity may exercise direct supervision over the design and construction of all new facilities, and all alterations, repairs, and improvements to existing facilities if:
 - (A) the total project construction cost, regardless of the funding sources, is \$100,000 or less; and
 - (B) the state entity assures compliance with the division's forms and contracts and the division's design, construction, alteration, repair, improvements, and code inspection standards.
 - (b) The director shall prepare or have prepared by private firms or individuals designs, plans, and specifications for the projects administered by the division.
 - (c) Before proceeding with construction, the director and the officials charged with the administration of the affairs of the particular agency shall approve the location, design, plans, and specifications.
- (3) Projects for the construction of new facilities and alterations, repairs, and improvements to existing facilities are not subject to Subsection (2) if the project:
- (a) occurs on property under the jurisdiction of the State Capitol Preservation Board;
 - (b) is within a designated research park at the University of Utah or Utah State University;
 - (c) occurs within the boundaries of This is the Place State Park and is administered by This is the Place Foundation except that This is the Place Foundation may request the director to administer the design and construction; or
 - (d) is for the creation and installation of art under Title 9, Chapter 6, Part 4, Utah Percent-for-Art Act.
- (4)
- (a)
 - (i) The State Building Board may authorize the delegation of control over design, construction, and all other aspects of any project to entities of state government on a project-by-project basis or for projects within a particular dollar range and a particular project type.
 - (ii) The state entity to whom control is delegated shall assume fiduciary control over project finances, shall assume all responsibility for project budgets and expenditures, and shall receive all funds appropriated for the project, including any contingency funds contained in the appropriated project budget.
 - (iii) Delegation of project control does not exempt the state entity from complying with the codes and guidelines for design and construction adopted by the division and the State Building Board.
 - (iv) State entities that receive a delegated project may not access, for the delegated project, the division's statewide contingency reserve and project reserve authorized in Section 63A-5-209.
 - (b) For facilities that will be owned, operated, maintained, and repaired by an entity that is not a state agency and that are located on state property, the State Building Board may authorize the owner to administer the design and construction of the project instead of the division.
- (5) Notwithstanding any other provision of this section, if a donor donates land to an eligible institution of higher education and commits to build a building or buildings on that land, and the institution agrees to provide funds for the operations and maintenance costs from sources other than state funds, and agrees that the building or buildings will not be eligible for state capital improvement funding, the higher education institution may:
- (a) oversee and manage the construction without involvement, oversight, or management from the division; or

- (b) arrange for management of the project by the division.
- (6)
 - (a) The role of compliance agency as provided in Title 15A, State Construction and Fire Codes Act, shall be provided by:
 - (i) the director, for projects administered by the division;
 - (ii) the entity designated by the State Capitol Preservation Board, for projects under Subsection (3)(a);
 - (iii) the local government, for projects exempt from the division's administration under Subsection (3)(b) or administered by This is the Place Foundation under Subsection (3)(c);
 - (iv) the state entity or local government designated by the State Building Board, for projects under Subsection (4); or
 - (v) the institution, for projects exempt from the division's administration under Subsection (5)(a).
 - (b) For the installation of art under Subsection (3)(d), the role of compliance agency shall be provided by the entity that is acting in this capacity for the balance of the project as provided in Subsection (6)(a).
 - (c) The local government acting as the compliance agency under Subsection (6)(a)(iii) may:
 - (i) only review plans and inspect construction to enforce the State Construction Code or an approved code under Title 15A, State Construction and Fire Codes Act; and
 - (ii) charge a building permit fee of no more than the amount it could have charged if the land upon which the improvements are located were not owned by the state.
 - (d)
 - (i) The use of state property and any improvements constructed on state property, including improvements constructed by nonstate entities, is not subject to the zoning authority of local governments as provided in Sections 10-9a-304 and 17-27a-304.
 - (ii) The state entity controlling the use of the state property shall consider any input received from the local government in determining how the property shall be used.
- (7) Before construction may begin, the director shall review the design of projects exempted from the division's administration under Subsection (4) to determine if the design:
 - (a) complies with any restrictions placed on the project by the State Building Board; and
 - (b) is appropriate for the purpose and setting of the project.
- (8) The director shall ensure that state-owned facilities, except for facilities under the control of the State Capitol Preservation Board, are life cycle cost-effective.
- (9) The director may expend appropriations for statewide projects from funds provided by the Legislature for those specific purposes and within guidelines established by the State Building Board.
- (10)
 - (a) The director, with the approval of the Office of Legislative Fiscal Analyst, shall develop standard forms to present capital development and capital improvement cost summary data.
 - (b) The director shall:
 - (i) within 30 days after the completion of each capital development project, submit cost summary data for the project on the standard form to the Office of Legislative Fiscal Analyst; and
 - (ii) upon request, submit cost summary data for a capital improvement project to the Office of Legislative Fiscal Analyst on the standard form.
- (11) Notwithstanding the requirements of Title 63J, Chapter 1, Budgetary Procedures Act, the director may:
 - (a) accelerate the design of projects funded by any appropriation act passed by the Legislature in its annual general session;

- (b) use any unencumbered existing account balances to fund that design work; and
- (c) reimburse those account balances from the amount funded for those projects when the appropriation act funding the project becomes effective.

(12)

- (a) The director, the director's designee, or the state entity to whom control has been designated under Subsection (4), shall notify in writing the elected representatives of local government entities directly and substantively affected by any diagnostic, treatment, parole, probation, or other secured facility project exceeding \$250,000, if:
 - (i) the nature of the project has been significantly altered since prior notification;
 - (ii) the project would significantly change the nature of the functions presently conducted at the location; or
 - (iii) the project is new construction.
- (b) At the request of either the state entity or the local government entity, representatives from the state entity and the affected local entity shall conduct or participate in a local public hearing or hearings to discuss these issues.

(13)

- (a)
 - (i) Before beginning the construction of student housing on property owned by the state or a public institution of higher education, the director shall provide written notice of the proposed construction, as provided in Subsection (13)(a)(ii), if any of the proposed student housing buildings is within 300 feet of privately owned residential property.
 - (ii) Each notice under Subsection (13)(a)(i) shall be provided to the legislative body and, if applicable, the mayor of:
 - (A) the county in whose unincorporated area the privately owned residential property is located; or
 - (B) the municipality in whose boundaries the privately owned residential property is located.
- (b)
 - (i) Within 21 days after receiving the notice required by Subsection (13)(a)(i), a county or municipality entitled to the notice may submit a written request to the director for a public hearing on the proposed student housing construction.
 - (ii) If a county or municipality requests a hearing under Subsection (13)(b)(i), the director and the county or municipality shall jointly hold a public hearing to provide information to the public and to allow the director and the county or municipality to receive input from the public about the proposed student housing construction.

Amended by Chapter 298, 2016 General Session

63A-5-207 Availability of appropriated funds -- Excessive obligations prohibited -- Exceptions.

- (1) The director shall assure, unless otherwise specifically instructed by the terms of the appropriation of a particular project, that no obligations beyond the authorized funding are incurred in the construction of any project authorized by the Legislature.
- (2) The director may consent to the drafting of a plan or the awarding of a contract that will exceed in cost the funding currently available for the project in question only if the Legislature has specifically provided for extending construction of a building or the completion of a project into future fiscal periods.

Amended by Chapter 231, 2000 General Session

63A-5-208 Definitions -- Certain public construction bids to list subcontractors -- Changing subcontractors -- Bidders as subcontractors -- Dispute resolution process -- Penalties.

- (1) As used in this section:
 - (a) "First-tier subcontractor" means a subcontractor who contracts directly with the prime contractor.
 - (b)
 - (i) "Subcontractor" means any person or entity under contract with a contractor or another subcontractor to provide services or labor for the construction, installation, or repair of an improvement to real property.
 - (ii) "Subcontractor" includes a trade contractor or specialty contractor.
 - (iii) "Subcontractor" does not include suppliers who provide only materials, equipment, or supplies to a contractor or subcontractor.
- (2) The director shall apply the provisions of this section to achieve fair and competitive bidding and to discourage bid-shopping by contractors.
- (3)
 - (a)
 - (i)
 - (A) On each public construction project, the director shall require the apparent lowest three bidders to submit a list of their first-tier subcontractors indicating each subcontractor's name, bid amount, and other information required by rule.
 - (B) Other bidders who are not one of the apparent lowest three bidders may also submit a list of their first-tier subcontractors containing the information required by this Subsection (3).
 - (C) The director may not consider any bid submitted by a bidder if the bidder fails to submit a subcontractor list meeting the requirements of this section.
 - (ii) On projects where the contractor's total bid is less than \$500,000, subcontractors whose bid is less than \$20,000 need not be listed.
 - (iii) On projects where the contractor's total bid is \$500,000 or more, subcontractors whose bid is less than \$35,000 need not be listed.
 - (b)
 - (i) The bidders shall submit this list within 24 hours after the bid opening time, not including Saturdays, Sundays, and state holidays.
 - (ii) This list does not limit the director's right to authorize a change in the listing of any subcontractor.
 - (c) The bidders shall verify that all subcontractors listed as part of their bids are licensed as required by state law.
 - (d) Twenty-four hours after the bid opening, the contractor may change the contractor's subcontractors only after:
 - (i) receiving permission from the director; and
 - (ii) establishing that:
 - (A) the change is in the best interest of the state; and
 - (B) the contractor establishes reasons for the change that meet the standards established by the State Building Board.
 - (e) If the director approves any changes in subcontractors that result in a net lower contract price for subcontracted work, the total of the prime contract may be reduced to reflect the changes.
- (4)
 - (a) A bidder may list himself as a subcontractor when the bidder is currently licensed to perform the portion of the work for which the bidder lists himself as a subcontractor and:

- (i) the bidder intends to perform the work of a subcontractor himself; or
 - (ii) the bidder intends to obtain a subcontractor to perform the work at a later date because the bidder was unable to:
 - (A) obtain a bid from a qualified subcontractor; or
 - (B) obtain a bid from a qualified subcontractor at a cost that the bidder considers to be reasonable.
- (b)
- (i) When the bidder intends to perform the work of a subcontractor himself, the director may, by written request, require that the bidder provide the director with information indicating the bidder's:
 - (A) previous experience in the type of work to be performed; and
 - (B) qualifications for performing the work.
 - (ii) The bidder must respond in writing within five business days of receiving the director's written request.
 - (iii) If the bidder's submitted information causes the director to reasonably believe that self-performance of the portion of the work by the bidder is likely to yield a substandard finished product, the director shall:
 - (A) require the bidder to use a subcontractor for the portion of the work in question and obtain the subcontractor bid under the supervision of the director; or
 - (B) reject the bidder's bid.
- (c)
- (i) When the bidder intends to obtain a subcontractor to perform the work at a later date, the bidder shall provide documentation with the subcontractor list describing:
 - (A) the bidder's efforts to obtain a bid of a qualified subcontractor at a reasonable cost; and
 - (B) why the bidder was unable to obtain a qualified subcontractor bid.
 - (ii) If the bidder who intends to obtain a subcontractor to perform the work at a later date is awarded a contract, the director shall supervise the bidder's efforts to obtain a qualified subcontractor bid.
 - (iii) The director may not adjust the amount of the contract awarded in order to reflect the actual amount of the subcontractor's bid.
- (5) The division may not disclose any subcontractor bid amounts obtained under this section until the division has awarded the project to a contractor.
- (6)
- (a) The director shall, in consultation with the State Building Board, prepare draft rules establishing a process for resolving disputes involved with contracts under the division's procurement authority.
 - (b) The director shall consider, and the rules may include:
 - (i) requirements regarding preliminary resolution efforts between the parties directly involved with the dispute;
 - (ii) requirements for the filing of claims, including notification, timeframes, and documentation;
 - (iii) identification of the types of costs eligible for allocation and a method for allocating costs among the parties to the dispute;
 - (iv) required time periods, not to exceed 60 days, for the resolution of the claim;
 - (v) provision for an independent hearing officer, panel, or arbitrator to extend the time period for resolution of the claim by not to exceed 60 additional days for good cause;
 - (vi) provision for the extension of required time periods if the claimant agrees;
 - (vii) requirements that decisions be issued in writing;
 - (viii) provisions for administrative appeals of the decision;

- (ix) provisions for the timely payment of claims after resolution of the dispute, including any appeals;
 - (x) a requirement that the final determination resulting from the dispute resolution process provided for in the rules is a final agency action subject to judicial review as provided in Sections 63G-4-401 and 63G-4-402;
 - (xi) a requirement that a claim or dispute that does not include a monetary claim against the division or its agents is not limited to the dispute resolution process provided for in this Subsection (6);
 - (xii) requirements for claims and disputes to be eligible for this dispute resolution process;
 - (xiii) the use of an independent hearing officer, panel, arbitration, or mediation; and
 - (xiv) the circumstances under which a subcontractor may file a claim directly with the division.
- (c) Persons pursuing claims under the process required by this Subsection (6):
- (i) are bound by the decision reached under this process unless the decision is properly appealed; and
 - (ii) may not pursue claims or disputes under the dispute resolution process established in Title 63G, Chapter 6a, Utah Procurement Code.
- (7) In addition to all other reasons allowed by law or rule, the director may reject all bids if none of the bidders whose bid is within the budget of the project submit a subcontractor list that meets the requirements of this section.
- (8) Any violation of this section, or any fraudulent misrepresentation by a contractor, subcontractor, or supplier, may be grounds for:
- (a) the contractor, subcontractor, or supplier to be suspended or debarred by the director; or
 - (b) the contractor or subcontractor to be disciplined by the Division of Professional and Occupational Licensing.

Amended by Chapter 348, 2016 General Session

63A-5-209 Building appropriations supervised by director -- Contingencies -- Disposition of project reserve funds -- Set aside for Utah Percent-for-Art Program.

- (1) The director shall:
- (a)
 - (i) supervise the expenditure of funds in providing plans, engineering specifications, sites, and construction of the buildings for which legislative appropriations are made; and
 - (ii) specifically allocate money appropriated when more than one project is included in any single appropriation without legislative directive;
 - (b)
 - (i) expend the amount necessary from appropriations for planning, engineering, and architectural work; and
 - (ii)
 - (A) allocate amounts from appropriations necessary to cover expenditures previously made from the planning fund under Section 63A-5-211 in the preparation of plans, engineering, and specifications; and
 - (B) return the amounts described in Subsection (1)(b)(ii)(A) to the planning fund; and
 - (c) hold in a statewide contingency reserve the amount budgeted for contingencies:
 - (i) in appropriations for the construction or remodeling of facilities; and
 - (ii) which may be over and above all amounts obligated by contract for planning, engineering, architectural work, sites, and construction contracts.
- (2)

- (a) The director shall base the amount budgeted for contingencies on a sliding scale percentage of the construction cost ranging from:
 - (i) 4-1/2% to 6-1/2% for new construction; and
 - (ii) 6% to 9-1/2% for remodeling projects.
- (b) The director shall hold the statewide contingency funds to cover:
 - (i) costs of change orders; and
 - (ii) unforeseen, necessary costs beyond those specifically budgeted for the project.
- (c)
 - (i) The Legislature shall annually review the percentage and the amount held in the statewide contingency reserve.
 - (ii) The Legislature may reappropriate to other building needs, including the cost of administering building projects, any amount from the statewide contingency reserve that is in excess of the reserve required to meet future contingency needs.
- (3)
 - (a) The director shall hold in a separate reserve those state appropriated funds accrued through bid savings and project residual as a project reserve.
 - (b) The director shall account for the funds accrued under Subsection (3)(a) in separate accounts as follows:
 - (i) bid savings and project residual from a capital improvement project, as defined in Section 63A-5-104; and
 - (ii) bid savings and project residual from a capital development project, as defined in Section 63A-5-104.
 - (c) The State Building Board may authorize the use of project reserve funds in the account described in Subsection (3)(b)(i) for a capital improvement project:
 - (i) approved under Section 63A-5-104; and
 - (ii) for which funds are not allocated.
 - (d) The director may:
 - (i) authorize the use of project reserve funds in the accounts described in Subsection (3)(b) for the award of contracts in excess of a project's construction budget if the use is required to meet the intent of the project; and
 - (ii) transfer money from the account described in Subsection (3)(b)(i) to the account described in Subsection (3)(b)(ii) if a capital development project has exceeded its construction budget.
 - (e) The director shall report to the Office of the Legislative Fiscal Analyst within 30 days:
 - (i) an authorization under Subsection (3)(c); or
 - (ii) a transfer under Subsection (3)(d).
 - (f) The Legislature shall annually review the amount held in the project reserve for possible reallocation by the Legislature to other building needs, including the cost of administering building projects.
- (4) If any part of the appropriation for a building project, other than the part set aside for the Utah Percent-for-Art Program under Title 9, Chapter 6, Part 4, Utah Percent-for-Art Act, remains unencumbered after the award of construction and professional service contracts and establishing a reserve for fixed and moveable equipment, the balance of the appropriation is dedicated to the project reserve and does not revert to the General Fund.
- (5)
 - (a) One percent of the amount appropriated for the construction of any new state building or facility may be appropriated and set aside for the Utah Percent-for-Art Program administered by the Division of Fine Arts under Title 9, Chapter 6, Part 4, Utah Percent-for-Art Act.

- (b) The director shall release to the Division of Fine Arts any funds included in an appropriation to the division that are designated by the Legislature for the Utah Percent-for-Art Program.
- (c) Funds from appropriations for any state building or facility of which any part is derived from the issuance of bonds, to the extent it would jeopardize the federal income tax exemption otherwise allowed for interest paid on bonds, may not be set aside.

Amended by Chapter 163, 2010 General Session

63A-5-211 Planning Fund expenditures authorized -- Ceiling on expenditures -- Recovery.

- (1) The Planning Fund shall be used to make payments for engineering, architectural, and other planning expenses necessary to make a meaningful cost estimate of any facility or improvement with a demonstrable or immediate need.
- (2) The director may make expenditures from the Planning Fund in order to provide planning information to the State Building Board, the governor, and the Legislature, up to a maximum of \$350,000 in outstanding Planning Fund commitments.
- (3)
 - (a) The director shall authorize all payments made from the Planning Fund.
 - (b) These payments shall be a charge on the project for which they were drawn.
 - (c) The amount paid shall be credited to the Planning Fund when the Legislature appropriates money for any building project for which planning costs have previously been paid from the Planning Fund.
- (4)
 - (a) Money may also be expended from the Planning Fund for architectural and engineering services incident to the planning and preparation of applications for funds on construction financed by other than state sources, including federal grants.
 - (b) However, upon approval of such financing, the money spent for architectural and engineering services shall be returned as a reimbursement to the Planning Fund.

Amended by Chapter 303, 2011 General Session

63A-5-215 Disposition of proceeds received by division from sale of property.

- (1) The money received by the division from the sale or other disposition of property shall be paid into the state treasury and becomes a part of the funds provided by law for carrying out the building program of the state, and are appropriated for that purpose.
- (2) The proceeds from sales of property belonging to or used by a particular state agency shall, to the extent practicable, be expended for the construction of buildings or in the performance of other work for the benefit of that agency.

Amended by Chapter 298, 2016 General Session

63A-5-216 Gifts, grants, and donations to division.

Gifts, grants, and donations may be received by the division or by the state to further the purposes of this part, and shall not revert to the General Fund.

Renumbered and Amended by Chapter 212, 1993 General Session

63A-5-219 Transfer from project reserve money.

- (1) With the approval of and through an appropriation by the Legislature, the division shall transfer at least \$100,000 annually from the project reserve money to the General Fund to pay for personal service expenses associated with the management of construction projects.
- (2) With the approval of and as directed by the Legislature, the division shall transfer additional money from the project reserve money to pay administrative costs associated with the management of construction projects and other division responsibilities.

Amended by Chapter 20, 2002 Special Session 5

Amended by Chapter 20, 2002 Special Session 5

63A-5-222 Critical land near state prison -- Definitions -- Preservation as open land -- Management and use of land -- Restrictions on transfer -- Wetlands development -- Conservation easement.

(1) For purposes of this section:

(a) "Corrections" means the Department of Corrections created under Section 64-13-2.

(b) "Critical land" means:

- (i) a parcel of approximately 250 acres of land owned by the division and located on the east edge of the Jordan River between about 12300 South and 14600 South in Salt Lake County, approximately the southern half of whose eastern boundary abuts the Denver and Rio Grande Western Railroad right-of-way; and
- (ii) any parcel acquired in a transaction authorized under Subsection (3)(c) as a replacement for a portion of the parcel described in Subsection (1)(b)(i) that is conveyed as part of the transaction.

(c)

(i) "Open land" means land that is:

(A) preserved in or restored to a predominantly natural, open, and undeveloped condition;
and

(B) used for:

(I) wildlife habitat;

(II) cultural or recreational use;

(III) watershed protection; or

(IV) another use consistent with the preservation of the land in or restoration of the land to a predominantly natural, open, and undeveloped condition.

(ii)

(A) "Open land" does not include land whose predominant use is as a developed facility for active recreational activities, including baseball, tennis, soccer, golf, or other sporting or similar activity.

(B) The condition of land does not change from a natural, open, and undeveloped condition because of the development or presence on the land of facilities, including trails, waterways, and grassy areas, that:

(I) enhance the natural, scenic, or aesthetic qualities of the land; or

(II) facilitate the public's access to or use of the land for the enjoyment of its natural, scenic, or aesthetic qualities and for compatible recreational activities.

(2)

(a)

(i) The critical land shall be preserved in perpetuity as open land.

- (ii) The long-term ownership and management of the critical land should eventually be turned over to the Department of Natural Resources created under Section 79-2-201 or another agency or entity that is able to accomplish the purposes and intent of this section.
- (b) Notwithstanding Subsection (2)(a)(i) and as funding is available, certain actions should be taken on or with respect to the critical land, including:
 - (i) the development and implementation of a program to eliminate noxious vegetation and restore and facilitate the return of natural vegetation on the critical land;
 - (ii) the development of a system of trails through the critical land that is compatible with the preservation of the critical land as open land;
 - (iii) the development and implementation of a program to restore the natural features of and improve the flows of the Jordan River as it crosses the critical land;
 - (iv) the preservation of the archeological site discovered on the critical land and the development of an interpretive site in connection with the archeological discovery;
 - (v) in restoring features on the critical land, the adoption of methods and plans that will enhance the critical land's function as a wildlife habitat;
 - (vi) taking measures to reduce safety risks on the critical land; and
 - (vii) the elimination or rehabilitation of a prison dump site on the critical land.
- (3)
 - (a) Except as provided in Subsections (3)(b) and (c), no interest in the critical land may be sold, assigned, leased, or otherwise transferred unless measures are taken to ensure that the critical land that is transferred will be preserved as open land in perpetuity.
 - (b) Notwithstanding Subsection (3)(a), exchanges of property may be undertaken to resolve boundary disputes with adjacent property owners and easements may be granted for trails and other purposes consistent with Subsection (2)(b) and with the preservation of the critical land as open land.
 - (c) The Department of Natural Resources may transfer title to a portion of the critical land described in Subsection (1)(b)(i) in exchange for a parcel of land if:
 - (i) the parcel being acquired is:
 - (A) open land; and
 - (B) located within one mile of the portion of critical land being transferred; and
 - (ii) the purpose of the exchange is to facilitate the development of a commuter rail transit station and associated transit oriented development.
- (4) The division shall use the funds remaining from the appropriation under Laws of Utah 1998, Chapter 399, for the purposes of:
 - (a) determining the boundaries and legal description of the critical land;
 - (b) determining the boundaries and legal description of the adjacent property owned by the division;
 - (c) fencing the critical land and adjacent land owned by the division where appropriate and needed; and
 - (d) assisting to carry out the intent of this section.
- (5)
 - (a) Notwithstanding Subsection (2)(a)(i), the division or its successor in title to the critical land may develop or allow a public agency or private entity to develop more wetlands on the critical land than exist naturally or existed previously.
 - (b)
 - (i) Subject to Subsections (3)(a) and (5)(b)(ii), the division or its successor in title may transfer jurisdiction of all or a portion of the critical land to a public agency or private entity to provide for the development and management of wetlands and designated wetland buffer areas.

- (ii) Before transferring jurisdiction of any part of the critical land under Subsection (5)(b)(i), the division or its successor in title shall assure that reasonable efforts are made to obtain approval from the appropriate federal agency to allow mitigation credits in connection with the critical land to be used for impacts occurring anywhere along the Wasatch Front.
- (6) Notwithstanding any other provision of this section, corrections shall have access to the cooling pond located on the critical land as long as that access to and use of the cooling pond are not inconsistent with the preservation of the critical land as open land.
- (7) The Department of Corrections, the division, and all other state departments, divisions, or agencies shall cooperate together to carry out the intent of this section.
- (8) In order to ensure that the land referred to in this section is preserved as open land, the division shall, as soon as practicable, place the land under a perpetual conservation easement in favor of an independent party such as a reputable land conservation organization or a state or local government agency with experience in conservation easements.

Amended by Chapter 53, 2009 General Session
Amended by Chapter 344, 2009 General Session

63A-5-223 Contracts -- Certain indemnification provisions forbidden.

- (1) As used in this section, "design professional" means:
 - (a) an architect, licensed under Title 58, Chapter 3a, Architects Licensing Act;
 - (b) a landscape architect, licensed under Title 58, Chapter 53, Landscape Architects Licensing Act; and
 - (c) a professional engineer or professional land surveyor, licensed under Title 58, Chapter 22, Professional Engineers and Professional Land Surveyors Licensing Act.
- (2)
 - (a) Beginning May 12, 2009, a contract, including an amendment to an existing contract, entered into under authority of 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.
 - (b) Subsection (2)(a) may not be waived by contract.
 - (c) Notwithstanding Subsections (2)(a) and (b), a design professional may be required to indemnify a person for whom the design professional has direct or indirect control or responsibility.

Enacted by Chapter 217, 2009 General Session

63A-5-224 Authority to transfer land for commuter rail station and related development.

The division may transfer title to a parcel of land it owns in a county of the first class to a public transit district for the purpose of facilitating the development of a commuter rail transit station and associated transit oriented development if:

- (1) the parcel is within one mile of the proposed commuter rail transit station and associated transit oriented development; and
- (2) the division receives in return fair and adequate consideration.

Enacted by Chapter 53, 2009 General Session

63A-5-225 Development of new correctional facilities.

- (1) As used in this section:
 - (a) "Commission" means the Prison Development Commission, created in Section 63C-16-201.
 - (b) "New correctional facilities" means a new prison and related facilities to be constructed to replace the state prison located in Draper.
 - (c) "Prison project" means all aspects of a project for the design and construction of new correctional facilities on the selected site, including:
 - (i) the acquisition of land, interests in land, easements, or rights-of-way;
 - (ii) site improvement; and
 - (iii) the acquisition, construction, equipping, or furnishing of facilities, structures, infrastructure, roads, parking facilities, utilities, and improvements, whether on or off the selected site, that are necessary, incidental, or convenient to the development of new correctional facilities on the selected site.
 - (d) "Selected site" means the same as that term is defined in Section 63C-16-102.
- (2) In consultation with the commission, the division shall oversee the prison project, as provided in this section.
- (3)
 - (a) In accordance with Title 63G, Chapter 6a, Utah Procurement Code, and this section, the division shall:
 - (i) enter into contracts with persons providing professional and construction services for the prison project;
 - (ii) in determining contract types for the prison project, consult with and consider recommendations from the commission or the commission's designee;
 - (iii) provide reports to the commission regarding the prison project, as requested by the commission; and
 - (iv) consider input from the commission on the prison project, subject to Subsection (3)(b).
 - (b) The division may not consult with or receive input from the commission regarding:
 - (i) the evaluation of proposals from persons seeking to provide professional and construction services for the prison project; or
 - (ii) the selection of persons to provide professional and construction services for the prison project.
 - (c) A contract with a project manager or person with a comparable position on the prison project shall include a provision that requires the project manager or other person to provide reports to the commission regarding the prison project, as requested by the commission.
- (4) All contracts associated with the design or construction of new correctional facilities shall be awarded and managed by the division in accordance with Title 63G, Chapter 6a, Utah Procurement Code, and this section.
- (5) The division shall coordinate with the Department of Corrections, created in Section 64-13-2, and the State Commission on Criminal and Juvenile Justice, created in Section 63M-7-201, during the prison project to help ensure that the design and construction of new correctional facilities are conducive to and consistent with, and help to implement any reforms of or changes to, the state's corrections system and corrections programs.
- (6)
 - (a) There is created within the General Fund a restricted account known as the "Prison Development Restricted Account."
 - (b) The account created in Subsection (6)(a) is funded by legislative appropriations.
 - (c)
 - (i) The account shall earn interest or other earnings.

- (ii) The Division of Finance shall deposit interest or other earnings derived from the investment of account funds into the account.
 - (d) Upon appropriation from the Legislature, money from the account shall be used to fund the Prison Project Fund created in Subsection (7).
- (7)
- (a) There is created a capital projects fund known as the "Prison Project Fund."
 - (b) The fund consists of:
 - (i) money appropriated to the fund by the Legislature; and
 - (ii) proceeds from the issuance of bonds authorized in Section 63B-25-101 to provide funding for the prison project.
 - (c)
 - (i) The fund shall earn interest or other earnings.
 - (ii) The Division of Finance shall deposit interest or other earnings derived from the investment of fund money into the fund.
 - (d) Money in the fund shall be used by the division to fund the prison project.

Enacted by Chapter 182, 2015 General Session

63A-5-226 Report to Infrastructure and General Government Appropriations Subcommittee.

The division shall, beginning in 2016, and in every even-numbered year after 2016, on or before the third Wednesday in November, present a written report to the Infrastructure and General Government Appropriations Subcommittee that identifies state land and buildings that are no longer needed and can be sold by the state.

Enacted by Chapter 298, 2016 General Session

63A-5-227 Contract for the design and construction of a state fair park arena.

- (1) The division may enter into a contract for the design and construction of an approximately 10,000 chair-seat arena at the state fair park, as defined in Section 63H-6-102, without engaging in a standard procurement process, as defined in Section 63G-6a-103, and without using a procurement process described in Title 63G, Chapter 6a, Part 8, Exceptions to Procurement Requirements, if:
 - (a) the state is not obligated to pay more than 65% of the cost of the arena;
 - (b) the contract does not provide for the payment of a developer fee; and
 - (c) the contract requires the construction of the arena to be completed no later than July 1, 2017.
- (2) In contracting for the design and construction of an arena under Subsection (1), the division shall:
 - (a) ensure that the process of selecting subcontractors and vendors for the construction project includes as much competition as reasonably possible while meeting the construction completion deadline of July 1, 2017; and
 - (b) use the division's best efforts to ensure the best value to the state under the contract.

Enacted by Chapter 2, 2016 Special Session 3