

Part 8 Exceptions to Procurement Requirements

63G-6a-801 Title.

This part is known as "Exceptions to Procurement Requirements."

Enacted by Chapter 347, 2012 General Session

63G-6a-802 Award of contract without engaging in a standard procurement process -- Notice -- Duty to negotiate contract terms in best interest of procurement unit.

- (1) A procurement unit may award a contract for a procurement item without engaging in a standard procurement process if the procurement official determines in writing that:
 - (a) there is only one source for the procurement item;
 - (b)
 - (i) transitional costs are a significant consideration in selecting a procurement item; and
 - (ii) the results of a cost-benefit analysis demonstrate that transitional costs are unreasonable or cost-prohibitive, and that the award of a contract without engaging in a standard procurement process is in the best interest of the procurement unit;
 - (c) the award of a contract is under circumstances, described in rules adopted by the rulemaking authority, that make awarding the contract through a standard procurement process impractical and not in the best interest of the procurement unit; or
 - (d) the procurement item is intended to be used for, or in connection with the establishment of, a state store, as defined in Section 32B-1-102.
- (2) Transitional costs associated with a trial use or testing of a procurement item under a trial use contract awarded under Section 63G-6a-802.3 may not be included in a consideration of transitional costs under Subsection (1)(b).
- (3)
 - (a) Subject to Subsection (3)(b), a rulemaking authority shall make rules regarding the publication of notice for a procurement under this section that, at a minimum, require publication of notice of the procurement, in accordance with Section 63G-6a-112, if the cost of the procurement exceeds \$50,000.
 - (b) Publication of notice under Section 63G-6a-112 is not required for:
 - (i) the procurement of public utility services pursuant to a sole source contract; or
 - (ii) other procurements under this section for which an applicable rule provides that notice is not required.
- (4) A procurement official who awards a contract under this section shall negotiate with the contractor to ensure that the terms of the contract, including price and delivery, are in the best interest of the procurement unit.

Amended by Chapter 406, 2021 General Session

63G-6a-802.3 Trial use contracts.

- (1) A procurement unit may award a trial use contract without engaging in a standard procurement process if:
 - (a) the purpose of the contract is to:
 - (i) determine whether the procurement item will benefit the procurement unit;
 - (ii) assess the feasibility of a procurement item that:

- (A) is new or innovative; or
- (B) has a proposed use or application that is novel or unproven; or
- (iii) evaluate whether to conduct a standard procurement process for the procurement item being tested; and
- (b) the contract is:
 - (i) awarded for a procurement item that is not already available to the procurement unit under an existing contract;
 - (ii) restricted to the procurement of a procurement item in the minimum quantity and for the minimum period of time necessary to test the procurement item;
 - (iii) the only trial use contract for that procurement unit for the same procurement item; and
 - (iv) not used to circumvent the purposes and policies of this chapter as set forth in Section 63G-6a-102.
- (2) The period of trial use or testing of a procurement item under a trial use contract may not exceed 24 months, unless the procurement official provides a written exception documenting the reason for a longer period.
- (3) A trial use contract shall:
 - (a) state that the contract is strictly for the trial use or testing of a procurement item;
 - (b) state that the contract terminates upon completion of the trial use or testing period;
 - (c) state that the procurement unit is not obligated to purchase or enter into a contract for the procurement item, regardless of the trial use or testing result;
 - (d) state that any purchase of the procurement item that is the subject of the trial use contract will be made in accordance with this chapter; and
 - (e) include, as applicable:
 - (i) test schedules;
 - (ii) deadlines and a termination date;
 - (iii) measures that will be used to evaluate the performance of the procurement item;
 - (iv) any fees and associated expenses or an explanation of the circumstances warranting a waiver of those fees and expenses;
 - (v) the obligations of the procurement unit and vendor;
 - (vi) provisions regarding the ownership of the procurement item during and after the trial use or testing period;
 - (vii) an explanation of the grounds upon which the contract may be terminated;
 - (viii) a provision relating to any required bond or security deposit; and
 - (ix) other requirements unique to the procurement item for trial use or testing.
- (4) Publication of notice under Section 63G-6a-112 is not required for a trial use contract.
- (5) A rulemaking authority may make rules pertaining to a trial use contract.

Amended by Chapter 257, 2020 General Session

63G-6a-802.7 Extension of a contract without engaging in a standard procurement process.

A procurement official may extend an existing contract without engaging in a standard procurement process:

- (1) for a period of time not to exceed 120 days, if:
 - (a) an extension of the contract is necessary to:
 - (i) avoid a lapse in a critical government service; or
 - (ii) to mitigate a circumstance that is likely to have a negative impact on public health, safety, welfare, or property; and
 - (b)

- (i)
 - (A) the procurement unit is engaged in a standard procurement process for a procurement item that is the subject of the contract being extended; and
 - (B) the standard procurement process is delayed due to an unintentional error;
- (ii) a change in an industry standard requires one or more significant changes to specifications for the procurement item; or
- (iii) an extension is necessary:
 - (A) to prevent the loss of federal funds;
 - (B) to mitigate the effects of a delay of a state or federal appropriation;
 - (C) to enable the procurement unit to continue to receive a procurement item during a delay in the implementation of a contract awarded pursuant to a procurement that has already been conducted; or
 - (D) to enable the procurement unit to continue to receive a procurement item during a period of time during which negotiations with a vendor under a new contract for the procurement item are being conducted;
- (2) for the period of a protest, appeal, or court action, if the protest, appeal, or court action is the reason for delaying the award of a new contract; or
- (3) for a period of time exceeding 120 days, if, after consulting with the attorney general or the procurement unit's attorney, the procurement official determines in writing that the contract extension does not violate state or federal antitrust laws and is consistent with the purpose of ensuring the fair and equitable treatment of all persons who deal with the procurement system.

Amended by Chapter 257, 2020 General Session

63G-6a-803 Emergency procurement.

- (1) As used in this section, "natural disaster" means an event where:
 - (a) one or more of the following has caused widespread damage:
 - (i) an explosion;
 - (ii) fire;
 - (iii) a flood;
 - (iv) a storm;
 - (v) a tornado;
 - (vi) winds;
 - (vii) an earthquake;
 - (viii) lightning; or
 - (ix) other adverse weather event; and
 - (b) the president of the United States has declared an emergency or major disaster in the state, or the governor has declared a state of emergency under Title 53, Chapter 2a, Part 2, Disaster Response and Recovery Act.
- (2) Notwithstanding any other provision of this chapter and subject to Subsection (4), a procurement official may authorize a procurement unit to engage in an emergency procurement without using a standard procurement process if the procurement is necessary to:
 - (a) avoid a lapse in a critical government service;
 - (b) mitigate a circumstance that is likely to have a negative impact on public health, safety, welfare, or property, including a natural disaster; or
 - (c) protect the legal interests of a public entity.
- (3) A procurement unit conducting an emergency procurement under Subsection (2) shall:

- (a) ensure that the procurement is made with as much competition as reasonably practicable while:
 - (i) avoiding a lapse in a critical government service;
 - (ii) avoiding harm, or a risk of harm, to the public health, safety, welfare, or property; or
 - (iii) protecting the legal interests of a public entity; and
 - (b) make the following publicly available on the procurement unit's website within 14 days of the emergency procurement:
 - (i) a written document describing the specific emergency that necessitated the emergency procurement;
 - (ii) the name of the highest ranking government official that approved the emergency procurement; and
 - (iii) each written contract related to the emergency procurement.
- (4)
- (a) Except as provided in Subsections (4)(b), (5), and (6), the term of a contract entered into for an emergency procurement under this section may be no longer than 30 days.
 - (b) The term of a contract entered into for an emergency procurement under this section related to a natural disaster may be no longer than 60 days.
- (5)
- (a) Subject to Subsection (5)(b), the requirements described in Subsection (4) do not apply to an emergency procurement for legal services.
 - (b) A person hired through an emergency procurement to provide legal services may not, under the contract entered into through the emergency procurement, hire or otherwise provide remuneration to a consultant for services related to any topic that is not directly related to the legal services for which the person was hired.
- (6) The requirements described in Subsection (4) do not apply to an emergency procurement by the Department of Human Services related to the:
- (a) placement of a client with a residential service provider; or
 - (b) provision of medical services for a client.

Amended by Chapter 30, 2021 General Session

63G-6a-804 Purchase of prison industry goods.

- (1) As used in this section:
- (a) "Applicable procurement unit" means a procurement unit that is not:
 - (i) a political subdivision of the state; or
 - (ii) the Utah Schools for the Deaf and the Blind.
 - (b) "Correctional industries division" means the Division of Correctional Industries, created in Section 64-13a-4.
 - (c) "Correctional industries director" means the director of the correctional industries division, appointed under Section 64-13a-4.
- (2)
- (a) An applicable procurement unit shall purchase goods and services produced by the correctional industries division as provided in this section.
 - (b) A procurement unit that is not an applicable procurement unit may, and is encouraged to, purchase goods and services under this section.
 - (c) A procurement unit is not required to use a standard procurement process to purchase goods or services under this section.
- (3) On or before July 1 of each year, the correctional industries director shall:

- (a) publish and distribute to all procurement units and other interested public entities a catalog of goods and services produced by the correctional industries division, including a description and price of each item offered for sale; and
 - (b) update and revise the catalog described in Subsection (3)(a) during the year as the correctional industries director considers necessary.
- (4)
- (a) An applicable procurement unit may not purchase any goods or services provided by the correctional industries division from any other source unless the correctional industries director and the procurement official or, in the case of institutions of higher education, the institutional procurement officer, determine in writing that purchase from the correctional industries division is not feasible due to one of the following circumstances:
 - (i) the good or service offered by the correctional industries division does not meet the reasonable requirements of the procurement unit;
 - (ii) the good or service cannot be supplied within a reasonable time by the correctional industries division; or
 - (iii) the cost of the good or service, including basic price, transportation costs, and other expenses of acquisition, is not competitive with the cost of procuring the item from another source.
 - (b) In cases of disagreement under Subsection (4)(a):
 - (i) the decision may be appealed to a board consisting of:
 - (A) the director of the Department of Corrections;
 - (B) the director of Administrative Services; and
 - (C) a neutral third party agreed upon by the other two members of the board;
 - (ii) in the case of an institution of higher education of the state, the president of the institution, or the president's designee, shall make the final decision; or
 - (iii) in the case of any of the following entities, a person designated by the rulemaking authority shall make the final decision:
 - (A) a legislative procurement unit;
 - (B) a judicial procurement unit; or
 - (C) a public transit district.

Amended by Chapter 257, 2020 General Session

63G-6a-805 Purchase from community rehabilitation programs.

- (1) As used in this section:
- (a) "Advisory board" means the Purchasing from Persons with Disabilities Advisory Board created under this section.
 - (b) "Central not-for-profit association" means a group of experts designated by the advisory board to do the following, under guidelines established by the advisory board:
 - (i) assist the advisory board with its functions; and
 - (ii) facilitate the implementation of advisory board policies.
 - (c)
 - (i) "Community rehabilitation program" means a program that is operated primarily for the purpose of the employment and training of persons with a disability by a government agency or qualified nonprofit organization which is an income tax exempt organization under 26 U.S.C. Sec. 501(c)(3) of the Internal Revenue Code.
 - (ii) A community rehabilitation program:

- (A) maintains an employment ratio of at least 75% of the program employees under the procurement contract in question have severe disabilities;
 - (B)
 - (I) complies with any applicable occupational health and safety standards prescribed by the United States Department of Labor; or
 - (II) is a supported employment program approved by the Utah State Office of Rehabilitation created in Section 35A-1-202;
 - (C) has its principal place of business in Utah;
 - (D) produces any good provided under this section in Utah; and
 - (E) provides any service that is provided by individuals with a majority of whom domiciled in Utah.
- (d) "Person with a disability" means a person with any disability as defined by and covered under the Americans with Disabilities Act of 1990, 42 U.S.C. 12102.
- (2) There is created within the division the Purchasing from Persons with Disabilities Advisory Board.
- (3) The advisory board shall consist of three members, as follows:
- (a) the director of the division or the director's designee;
 - (b) the director of the Utah State Office of Rehabilitation or the director's designee; and
 - (c) a representative of the private business community who shall be appointed to a three-year term by the governor with the advice and consent of the Senate.
- (4) The advisory board shall meet, as needed, to facilitate the procurement of goods and services from community rehabilitation programs by a procurement unit under this chapter by:
- (a) identifying goods and services that are available from community rehabilitation programs in accordance with the requirements of Subsection (7);
 - (b) approving prices in accordance with Subsection (7)(c) for goods and services that are identified under Subsection (4)(a);
 - (c) developing, maintaining, and approving a preferred procurement contract list of goods and services identified and priced under Subsections (4)(a) and (b);
 - (d) reviewing bids received by a community rehabilitation program; and
 - (e) awarding and renewing specified contracts for set contract times, without competitive bidding, for the purchase of goods and services under Subsection (7).
- (5) The provisions of Subsections (4) and (7)(a) are an exception to the procurement provisions under this chapter.
- (6)
- (a) The advisory board may designate a central not-for-profit association, appoint its members, and establish guidelines for its duties.
 - (b) The designated central not-for-profit association serves at the pleasure of the advisory board. The central not-for-profit association or its individual members may be removed by the advisory board at any time by a majority vote of the advisory board.
 - (c) Subject to the advisory board guidelines and discretion, a designated central not-for-profit association may be assigned to perform the following duties:
 - (i) identify qualified community rehabilitation programs and the goods and services that they provide or have the potential to provide;
 - (ii) help ensure that goods and services are provided at reasonable quality and delivery levels;
 - (iii) recommend pricing for goods and services;
 - (iv) review bids and recommend the award of contracts under the advisory board's direction;
 - (v) collect and report program data to the advisory board and to the division; and
 - (vi) other duties specified by the advisory board.

- (7) Except as provided under Subsection (9), notwithstanding any provision of this chapter to the contrary, each procurement unit shall purchase goods and services produced by a community rehabilitation program using the preferred procurement contract list approved under Subsection (4)(c) if:
- (a) the good or service offered for sale by a community rehabilitation program reasonably conforms to the needs and specifications of the procurement unit;
 - (b) the community rehabilitation program can supply the good or service within a reasonable time; and
 - (c) the price of the good or service is reasonably competitive with the cost of procuring the good or service from another source.
- (8) Each community rehabilitation program:
- (a) may submit a bid to the advisory board at any time and not necessarily in response to an invitation for bids; and
 - (b) shall certify on any bid it submits to the advisory board or to a procurement unit under this section that it is claiming a preference under this section.
- (9) During a fiscal year, the requirement for a procurement unit to purchase goods and services produced by a community rehabilitation program under the preferred procurement list under Subsection (7) does not apply if the division determines that the total amount of procurement contracts with community rehabilitation programs has reached \$5 million for that fiscal year.
- (10) In the case of conflict between a purchase under this section and a purchase under Section 63G-6a-804, this section prevails.

Amended by Chapter 271, 2016 General Session

63G-6a-806 Exception for public transit district contracting with a county or municipality.

A public transit district, organized under Title 17B, Chapter 2a, Part 8, Public Transit District Act, may, without going through a standard procurement process or another exception to a standard procurement process described in this part:

- (1) contract with a county or municipality to receive money from the county or municipality; and
- (2) use the money described in Subsection (1) to fund a transportation project or a transit-related program in accordance with rules made by the rulemaking authority.

Amended by Chapter 257, 2020 General Session