

1 **CONSTRUCTION PROCUREMENT USING CONSTRUCTION**
2 **MANAGER/GENERAL CONTRACTOR**

3 2012 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: Stephen E. Sandstrom**

6 Senate Sponsor: _____

8 **LONG TITLE**

9 **General Description:**

10 This bill amends provisions of the Utah Code relating to procurements by the Division
11 of Facilities Construction and Management, or a local school board, that involve
12 contracting with a construction manager/general contractor.

13 **Highlighted Provisions:**

14 This bill:

- 15 ▶ defines the term "construction manager/general contractor";
- 16 ▶ provides that, when the Division of Facilities Construction and Management, or a
17 local school board (when the total estimated accumulative cost exceeds \$80,000),
18 contracts with a construction manager/general contractor, the procurement shall be
19 made using a request for proposals process, in accordance with the sealed fee
20 method or fixed fee method described in this bill; and
- 21 ▶ makes technical changes.

22 **Money Appropriated in this Bill:**

23 None

24 **Other Special Clauses:**

25 None

26 **Utah Code Sections Affected:**

27 AMENDS:



28 **53A-20-101**, as last amended by Laws of Utah 2008, Chapter 382
 29 **63A-5-208**, as last amended by Laws of Utah 2008, Chapter 382
 30 **63G-6-501**, as renumbered and amended by Laws of Utah 2008, Chapter 382

31 ENACTS:

32 **63A-5-207.5**, Utah Code Annotated 1953



34 *Be it enacted by the Legislature of the state of Utah:*

35 Section 1. Section **53A-20-101** is amended to read:

36 **53A-20-101. Construction and alteration of schools and plants -- Advertising for**
 37 **bids -- Payment and performance bonds -- Contracts -- Bidding limitations on local**
 38 **school boards -- Interest of local school board members.**

39 (1) As used in this section[~~, the word "sealed"~~]:

40 (a) "Construction manager/general contractor" is as defined in Section 63G-6-103.

41 (b) "Sealed" does not preclude acceptance of electronically sealed and submitted bids
 42 or proposals in addition to bids or proposals manually sealed and submitted.

43 (2) (a) Prior to the construction of any school or the alteration of any existing school
 44 plant, if the total estimated accumulative building project cost exceeds \$80,000, a local school
 45 board shall advertise for bids on the project at least 10 days before the bid due date.

46 (b) The board shall have the advertisement published in a newspaper having general
 47 circulation throughout the state and in appropriate construction trade publications that offer
 48 free listings.

49 (c) A similar advertisement is required in a newspaper published or having general
 50 circulation in any city or county that would be affected by the proposed project.

51 (d) The advertisement shall:

52 (i) require sealed proposals for the building project in accordance with plans and
 53 specifications furnished by the local school board;

54 (ii) state where and when the proposals will be opened and shall reserve the right of the
 55 board to reject any and all proposals; and

56 (iii) require a certified check or bid bond of not less than 5% of the bid to accompany
 57 the bid.

58 (3) (a) The board shall meet at the time and place specified in the advertisement and

59 publicly open and read all received proposals.

60 (b) If satisfactory bids are received, the board shall award the contract to the lowest
61 responsible bidder.

62 (c) If none of the proposals are satisfactory, all shall be rejected.

63 (d) The board shall again advertise in the manner provided in this section.

64 (e) If, after advertising a second time no satisfactory bid is received, the board may
65 proceed under its own direction with the required project.

66 (4) (a) The check or bond required under Subsection (2)(d) shall be drawn in favor of
67 the local school board.

68 (b) If the successful bidder fails or refuses to enter into the contract and furnish the
69 additional bonds required under this section, then the bidder's check or bond is forfeited to the
70 district.

71 (5) A local school board shall require payment and performance bonds of the
72 successful bidder as required in Section 63G-6-505.

73 (6) (a) A local school board may require in the proposed contract that at least 10% of
74 the contract price be withheld until the project is completed and accepted by the board.

75 (b) If money is withheld, the board shall place it in an interest bearing account, and the
76 interest accrues for the benefit of the contractor and subcontractors.

77 (c) This money shall be paid upon completion of the project and acceptance by the
78 board.

79 (7) (a) A local school board may not bid on projects within the district if the total
80 accumulative estimated cost exceeds \$80,000.

81 (b) The board may use its resources if no satisfactory bids are received under this
82 section.

83 (8) If the local school board determines in accordance with Section 63G-6-501 to use a
84 construction manager/general contractor as its method of construction contracting management
85 on projects where the total estimated accumulative cost exceeds \$80,000, it shall select the
86 construction manager/general contractor [~~using one of the source selection methods provided~~
87 ~~for in Sections 63G-6-401 through 63G-6-501;~~] by using a request for proposals process,
88 described in Section 63G-6-408, in accordance with one of the following methods:

89 (a) the sealed fee method, described in Subsection (10); or

90 (b) the fixed fee method, described in Subsection (11).

91 (9) A local school board member may not have a direct or indirect financial interest in
92 the construction project contract.

93 (10) (a) The sealed fee method requires each responder to the request for proposals to
94 submit:

95 (i) the responder's qualifications for the project; and

96 (ii) a sealed envelope that contains the fee that the responder is proposing to charge.

97 (b) The board or evaluation committee shall rank each responsible, responsive
98 responder, based on qualifications, from highest to lowest before unsealing or opening an
99 envelope described in Subsection (10)(a)(ii).

100 (c) After the responders are ranked under Subsection (10)(b), the board shall:

101 (i) open only the envelope described in Subsection (10)(a)(ii) that was submitted by the
102 highest ranked responder; and

103 (ii) negotiate a fee with the highest ranked responder that:

104 (A) may be equal to or lower than the fee proposed by the highest ranked responder;

105 and

106 (B) may not be higher than the fee proposed by the highest ranked responder.

107 (d) If the board and the highest ranked responder are able to negotiate a fee that is
108 acceptable to the board and the highest ranked responder, the board shall:

109 (i) award the contract to that responder, unless other legitimate grounds exist for not
110 awarding the contract to that responder; or

111 (ii) cancel the request for proposals.

112 (e) If the board and the highest ranked responder are not able to negotiate a fee that is
113 acceptable to the division and the highest ranked responder, the board shall:

114 (i) open only the envelope described in Subsection (10)(a)(ii) that was submitted by the
115 next highest ranked responder; and

116 (ii) negotiate a fee with the next highest ranked responder that:

117 (A) may be equal to or lower than the fee proposed by that responder;

118 (B) may not be higher than the fee proposed by that responder; and

119 (C) except as described in Subsection (10)(h), shall be lower than the lowest fee
120 proposed during negotiations with the higher ranked responders.

- 121 (f) If the board and the responder described in Subsection (10)(e)(i) are able to
122 negotiate a fee that is acceptable to the division and that responder, the board shall:
- 123 (i) award the contract to that responder, unless other legitimate grounds exist for not
124 awarding the contract to that responder; or
- 125 (ii) cancel the request for proposals.
- 126 (g) If the board and the responder described in Subsection (10)(e)(i) are not able to
127 negotiate a fee that is acceptable to the division and that responder, the board shall:
- 128 (i) repeat the process described in Subsections (10)(e) and (f) with respect to each next
129 highest ranked responder until the board awards the contract; or
- 130 (ii) cancel the request for proposals.
- 131 (h) The fee limitation described in Subsection (10)(e)(ii)(C) does not apply with
132 respect to a higher ranked responder to whom the contract was not awarded based on legitimate
133 grounds other than the fee amount.
- 134 (11) (a) The fixed fee method requires the board to state, in the request for proposals,
135 the fee that the board is willing to pay for the construction project.
- 136 (b) A responder to a request for proposals described in this Subsection (11):
- 137 (i) shall agree to charge the fee set by the board under Subsection (11)(a); and
- 138 (ii) may not require or offer a fee that is higher or lower than the fee set by the board
139 under Subsection (11)(a).
- 140 (c) The board shall reject as nonresponsive a response that does not strictly comply
141 with the requirements of Subsection (11)(b).
- 142 (d) The board or evaluation committee shall rank each responsible, responsive
143 responder, based on qualifications, from highest to lowest.
- 144 (e) The board shall:
- 145 (i) award the contract to the highest qualified responsible, responsive responder; or
146 (ii) cancel the request for proposals.
- 147 Section 2. Section **63A-5-207.5** is enacted to read:
- 148 **63A-5-207.5. Selection of construction manager/general contractor by division.**
- 149 (1) As used in this section, "construction manager/general contractor" is as defined in
150 Section 63G-6-103.
- 151 (2) If the division uses a construction manager/general contractor for a construction

152 project, the division shall select the construction manager/general contractor by using a request
153 for proposals process in accordance with one of the following methods:

154 (a) the sealed fee method, described in Subsection (3); or

155 (b) the fixed fee method, described in Subsection (4).

156 (3) (a) The sealed fee method requires each responder to the request for proposals to
157 submit:

158 (i) the responder's qualifications for the project; and

159 (ii) a sealed envelope that contains the fee that the responder is proposing to charge.

160 (b) The evaluation committee shall rank each responsible, responsive responder, based
161 on qualifications, from highest to lowest before unsealing or opening an envelope described in
162 Subsection (3)(a)(ii).

163 (c) After the responders are ranked under Subsection (3)(b), the division shall:

164 (i) open only the envelope described in Subsection (3)(a)(ii) that was submitted by the
165 highest ranked responder; and

166 (ii) negotiate a fee with the highest ranked responder that:

167 (A) may be equal to or lower than the fee proposed by the highest ranked responder;

168 and

169 (B) may not be higher than the fee proposed by the highest ranked responder.

170 (d) If the division and the highest ranked responder are able to negotiate a fee that is
171 acceptable to the division and the highest ranked responder, the division shall:

172 (i) award the contract to that responder, unless other legitimate grounds exist for not
173 awarding the contract to that responder; or

174 (ii) cancel the request for proposals.

175 (e) If the division and the highest ranked responder are not able to negotiate a fee that
176 is acceptable to the division and the highest ranked responder, the division shall:

177 (i) open only the envelope described in Subsection (3)(a)(ii) that was submitted by the
178 next highest ranked responder; and

179 (ii) negotiate a fee with the next highest ranked responder that:

180 (A) may be equal to or lower than the fee proposed by that responder;

181 (B) may not be higher than the fee proposed by that responder; and

182 (C) except as described in Subsection (3)(h), shall be lower than the lowest fee

183 proposed during negotiations with the higher ranked responders.

184 (f) If the division and the responder described in Subsection (3)(e)(i) are able to
185 negotiate a fee that is acceptable to the division and that responder, the division shall:

186 (i) award the contract to that responder, unless other legitimate grounds exist for not
187 awarding the contract to that responder; or

188 (ii) cancel the request for proposals.

189 (g) If the division and the responder described in Subsection (3)(e)(i) are not able to
190 negotiate a fee that is acceptable to the division and that responder, the division shall:

191 (i) repeat the process described in Subsections (3)(e) and (f) with respect to each next
192 highest ranked responder until the division awards the contract; or

193 (ii) cancel the request for proposals.

194 (h) The fee limitation described in Subsection (3)(e)(ii)(C) does not apply with respect
195 to a higher ranked responder to whom the contract was not awarded based on legitimate
196 grounds other than the fee amount.

197 (4) (a) The fixed fee method requires the division to state, in the request for proposals,
198 the fee that the division is willing to pay for the construction project.

199 (b) A responder to a request for proposals described in this Subsection (4):

200 (i) shall agree to charge the fee set by the division under Subsection (4)(a); and

201 (ii) may not require or offer a fee that is higher or lower than the fee set by the division
202 under Subsection (4)(a).

203 (c) The division shall reject as nonresponsive a response that does not strictly comply
204 with the requirements of Subsection (4)(b).

205 (d) The evaluation committee shall rank each responsible, responsive responder, based
206 on qualifications, from highest to lowest.

207 (e) The division shall:

208 (i) award the contract to the highest qualified responsible, responsive responder; or

209 (ii) cancel the request for proposals.

210 Section 3. Section **63A-5-208** is amended to read:

211 **63A-5-208. Definitions -- Certain public construction bids to list subcontractors --**
212 **Changing subcontractors -- Bidders as subcontractors -- Dispute resolution process --**
213 **Penalties.**

214 (1) As used in this section:

215 (a) "Construction manager/general contractor" is as defined in Section 63G-6-103.

216 ~~[(a)]~~ (b) "First-tier subcontractor" means a subcontractor who contracts directly with
217 the prime contractor.

218 ~~[(b)]~~ (c) "Subcontractor" means any person or entity under contract with a contractor or
219 another subcontractor to provide services or labor for the construction, installation, or repair of
220 an improvement to real property.

221 ~~[(c)]~~ (d) "Subcontractor" includes a trade contractor or specialty contractor.

222 ~~[(d)]~~ (e) "Subcontractor" does not include suppliers who provide only materials,
223 equipment, or supplies to a contractor or subcontractor.

224 (2) (a) The director shall apply the provisions of this section to achieve fair and
225 competitive bidding and to discourage bid-shopping by contractors.

226 (b) If the division uses a construction manager/general contractor for a construction
227 project, the requirements of this section relating to the apparent lowest three bidders shall
228 apply, instead, to the three most qualified, responsible, responsive responders, regardless of the
229 proposed or fixed fee.

230 (3) (a) ~~[(i)]~~ ~~(A)~~ On each public construction project, the director shall require the
231 apparent lowest three bidders to submit a list of their first-tier subcontractors indicating each
232 subcontractor's name, bid amount, and other information required by rule.

233 ~~[(B)]~~ (b) Other bidders who are not one of the apparent lowest three bidders may also
234 submit a list of their first-tier subcontractors containing the information required by this
235 Subsection (3).

236 ~~[(C)]~~ (c) The director may not consider any bid submitted by a bidder if the bidder fails
237 to submit a subcontractor list meeting the requirements of this section.

238 ~~[(i)]~~ (d) On projects where the contractor's total bid is less than \$500,000,
239 subcontractors whose bid is less than \$20,000 need not be listed.

240 ~~[(iii)]~~ (e) On projects where the contractor's total bid is \$500,000 or more,
241 subcontractors whose bid is less than \$35,000 need not be listed.

242 ~~[(b)]~~ ~~(i) The bidders]~~ (f) A bidder shall submit ~~[this]~~ the list described in this
243 Subsection (3) within 24 hours after the bid opening time, not including Saturdays, Sundays,
244 and state holidays.

245 ~~[(ii) This]~~ (g) The list described in this Subsection (3) does not limit the director's
246 right to authorize a change in the listing of any subcontractor.

247 ~~[(e)]~~ (h) The bidders shall verify that all subcontractors listed as part of their bids are
248 licensed as required by state law.

249 ~~[(d)]~~ (i) Twenty-four hours after the bid opening, the contractor may change the
250 contractor's subcontractors only after:

251 (i) receiving permission from the director; and

252 (ii) establishing that:

253 (A) the change is in the best interest of the state; and

254 (B) the contractor establishes reasons for the change that meet the standards established
255 by the State Building Board.

256 ~~[(e)]~~ (j) If the director approves any changes in subcontractors that result in a net lower
257 contract price for subcontracted work, the total of the prime contract may be reduced to reflect
258 the changes.

259 (4) (a) A bidder may list himself or herself as a subcontractor when the bidder is
260 currently licensed to perform the portion of the work for which the bidder lists himself or
261 herself as a subcontractor and:

262 (i) the bidder intends to perform the work of a subcontractor himself; or

263 (ii) the bidder intends to obtain a subcontractor to perform the work at a later date
264 because the bidder was unable to:

265 (A) obtain a bid from a qualified subcontractor; or

266 (B) obtain a bid from a qualified subcontractor at a cost that the bidder considers to be
267 reasonable.

268 (b) ~~[(i)]~~ When the bidder intends to perform the work of a subcontractor himself or
269 herself, the director may, by written request, require that the bidder provide the director with
270 information indicating the bidder's:

271 ~~[(A)]~~ (i) previous experience in the type of work to be performed; and

272 ~~[(B)]~~ (ii) qualifications for performing the work.

273 ~~[(ii)]~~ (c) The bidder ~~[must]~~ shall respond in writing within five business days ~~[of~~
274 receiving] after the day on which the bidder receives the director's written request.

275 ~~[(iii)]~~ (d) If the bidder's submitted information causes the director to reasonably believe

276 that self-performance of the portion of the work by the bidder is likely to yield a substandard
277 finished product, the director shall:

278 ~~[(A)]~~ (i) require the bidder to use a subcontractor for the portion of the work in
279 question and obtain the subcontractor bid under the supervision of the director; or

280 ~~[(B)]~~ (ii) reject the bidder's bid.

281 ~~[(e)-(i)]~~ (e) When the bidder intends to obtain a subcontractor to perform the work at a
282 later date, the bidder shall provide documentation with the subcontractor list describing:

283 ~~[(A)]~~ (i) the bidder's efforts to obtain a bid of a qualified subcontractor at a reasonable
284 cost; and

285 ~~[(B)]~~ (ii) why the bidder was unable to obtain a qualified subcontractor bid.

286 ~~[(i)]~~ (f) If the bidder who intends to obtain a subcontractor to perform the work at a
287 later date is awarded a contract, the director shall supervise the bidder's efforts to obtain a
288 qualified subcontractor bid.

289 ~~[(iii)]~~ (g) The director may not adjust the amount of the contract awarded in order to
290 reflect the actual amount of the subcontractor's bid.

291 (5) The division may not disclose any subcontractor bid amounts obtained under this
292 section until the division has awarded the project to a contractor.

293 (6) (a) The director shall, in consultation with the State Building Board, prepare draft
294 rules establishing a process for resolving disputes involved with contracts under the division's
295 procurement authority.

296 ~~[(b) The draft rules shall be presented to the Government Operations Interim
297 Committee for review, comment, and recommendations before August 31, 2004.]~~

298 ~~[(e)]~~ (b) The director shall consider, and the rules may include:

299 (i) requirements regarding preliminary resolution efforts between the parties directly
300 involved with the dispute;

301 (ii) requirements for the filing of claims, including notification, time frames, and
302 documentation;

303 (iii) identification of the types of costs eligible for allocation and a method for
304 allocating costs among the parties to the dispute;

305 (iv) required time periods, not to exceed 60 days, for the resolution of the claim;

306 (v) provision for an independent hearing officer, panel, or arbitrator to extend the time

307 period for resolution of the claim by not to exceed 60 additional days for good cause;
308 (vi) provision for the extension of required time periods if the claimant agrees;
309 (vii) requirements that decisions be issued in writing;
310 (viii) provisions for administrative appeals of the decision;
311 (ix) provisions for the timely payment of claims after resolution of the dispute,
312 including any appeals;
313 (x) a requirement that the final determination resulting from the dispute resolution
314 process provided for in the rules is a final agency action subject to judicial review as provided
315 in Sections 63G-4-401 and 63G-4-402;
316 (xi) a requirement that a claim or dispute that does not include a monetary claim
317 against the division or its agents is not limited to the dispute resolution process provided for in
318 this Subsection (6);
319 (xii) requirements for claims and disputes to be eligible for this dispute resolution
320 process;
321 (xiii) the use of an independent hearing officer, panel, arbitration, or mediation; and
322 (xiv) the circumstances under which a subcontractor may file a claim directly with the
323 division.
324 [~~(d)~~] (c) Persons pursuing claims under the process required by this Subsection (6):
325 (i) are bound by the decision reached under this process unless the decision is properly
326 appealed; and
327 (ii) may not pursue claims or disputes under the dispute resolution process established
328 in Sections 63G-6-805 through 63G-6-814.
329 (7) In addition to all other reasons allowed by law or rule, the director may reject all
330 bids if none of the bidders whose bid is within the budget of the project submit a subcontractor
331 list that meets the requirements of this section.
332 (8) Any violation of this section, or any fraudulent misrepresentation by a contractor,
333 subcontractor, or supplier, may be grounds for:
334 (a) the contractor, subcontractor, or supplier to be suspended or debarred by the
335 director; or
336 (b) the contractor or subcontractor to be disciplined by the Division of Professional and
337 Occupational Licensing.

338 Section 4. Section **63G-6-501** is amended to read:

339 **63G-6-501. Alternative methods of construction contracting management.**

340 (1) (a) Rules shall provide as many alternative methods of construction contracting
341 management as determined to be feasible.

342 (b) These rules shall:

343 (i) grant to the chief procurement officer or the head of the purchasing agency
344 responsible for carrying out the construction project the discretion to select the appropriate
345 method of construction contracting management for a particular project; and

346 (ii) require the procurement officer to execute and include in the contract file a written
347 statement setting forth the facts which led to the selection of a particular method of
348 construction contracting management for each project.

349 (c) Before choosing a construction contracting management method, the chief
350 procurement officer or the head of the purchasing agency responsible for carrying out the
351 construction project shall consider the following factors:

352 (i) when the project must be ready to be occupied;

353 (ii) the type of project;

354 (iii) the extent to which the requirements of the procuring agencies and the ways in
355 which they are to be met are known;

356 (iv) the location of the project;

357 (v) the size, scope, complexity, and economics of the project;

358 (vi) the source of funding and any resulting constraints necessitated by the funding
359 source;

360 (vii) the availability, qualification, and experience of state personnel to be assigned to
361 the project and how much time the state personnel can devote to the project; and

362 (viii) the availability, qualifications, and experience of outside consultants and
363 contractors to complete the project under the various methods being considered.

364 (2) (a) Rules adopted by state public procurement units and local public procurement
365 units to implement this section may authorize the use of a construction manager/general
366 contractor as one method of construction contracting management.

367 (b) ~~[Those]~~ Except as provided in Subsection (2)(c), the rules described in Subsection
368 (2)(a) shall require that:

369 (i) the construction manager/general contractor shall be selected using one of the
370 source selection methods provided for in Part 4, Source Selections and Contract Formation,
371 and Section 63G-6-502; and

372 (ii) when entering into any subcontract that was not specifically included in the
373 construction manager/general contractor's cost proposal submitted under the requirements of
374 Subsection (2)(b)(i), the construction manager/general contractor shall procure that
375 subcontractor by using one of the source selection methods provided for in Part 4, Source
376 Selections and Contract Formation, in the same manner as if the subcontract work was
377 procured directly by the state.

378 (c) The rules described in Subsection (2)(a) shall require that the request for proposals
379 process, described in Section 63G-6-408, be used for projects described in Section 53A-20-101
380 or 63A-5-207.5, if the state public procurement unit or local public procurement unit contracts
381 with a construction manager/general contractor for the project.

382 (3) Procurement rules adopted by the State Building Board under Subsection (1) for
383 state building construction projects may authorize the use of a design-build provider as one
384 method of construction contracting management.

Legislative Review Note
as of 12-8-11 10:34 AM

Office of Legislative Research and General Counsel