

1                   **SCHOOL CONSTRUCTION AMENDMENTS**

2                   2014 GENERAL SESSION

3                   STATE OF UTAH

4                   **Chief Sponsor: Scott K. Jenkins**

5                   House Sponsor: Gage Froerer

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7                   **LONG TITLE**

8                   **Committee Note:**

9                   The Government Operations Interim Committee recommended this bill.

10                  **General Description:**

11                  This bill amends certain provisions related to the procurement process for public school  
12 construction.

13                  **Highlighted Provisions:**

14                  This bill:

- 15                  ▶ defines terms;
- 16                  ▶ requires a local education agency to follow the Utah Procurement Code when  
17 constructing a public school or public school facility;
- 18                  ▶ requires a local education agency to follow certain retention requirements if the  
19 local education agency chooses to withhold a portion of the contract price until the  
20 project is completed;

- 21                  ▶ amends certain procurement code definitions related to public schools; and
- 22                  ▶ makes technical changes.

23                  **Money Appropriated in this Bill:**

24                  None

25                  **Other Special Clauses:**

26                  None

27                  **Utah Code Sections Affected:**



28 AMENDS:

29       **53A-20-101**, as last amended by Laws of Utah 2012, Chapters 86 and 347

30       **63G-6a-103**, as last amended by Laws of Utah 2013, Chapter 445

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

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

34       **53A-20-101. Construction and alteration of public schools and other public**  
35 **school facilities.**

36       (1) As used in this section[~~the word "sealed" does not preclude acceptance of~~  
37 ~~electronically sealed and submitted bids or proposals in addition to bids or proposals manually~~  
38 ~~sealed and submitted~~]:

39           (a) "Construction" has the same meaning as defined in Section **63G-6a-103**.

40           (b) "Local education agency" or "LEA" means a school district, charter school, or the  
41 Utah Schools for the Deaf and the Blind.

42           (2) Except as provided in Subsection (4), the design, construction, and maintenance  
43 projects for a public school or other public school facility shall follow all procurement, source  
44 selection, construction, public notice, and contracting procedures provided in Title 63G,  
45 Chapter 6a, Utah Procurement Code.

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

49       [(b) ~~The board shall have the advertisement published in a newspaper having general~~  
50 ~~circulation throughout the state and in appropriate construction trade publications that offer~~  
51 ~~free listings.]~~

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

54       [(d) ~~The advertisement shall:~~]

55           [(i) ~~require sealed proposals for the building project in accordance with plans and~~  
56 ~~specifications furnished by the local school board;~~]

57           [(ii) ~~state where and when the proposals will be opened and shall reserve the right of~~  
58 ~~the board to reject any and all proposals; and]~~

59 [((iii) require a certified check or bid bond of not less than 5% of the bid to accompany  
60 the bid.]

61 [(3)(a) The board shall meet at the time and place specified in the advertisement and  
62 publicly open and read all received proposals.]

63 [(b) If satisfactory bids are received, the board shall award the contract to the lowest  
64 responsible bidder.]

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

66 [(d) The board shall again advertise in the manner provided in this section.]

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

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

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

74 [(5) A local school board shall require payment and performance bonds of the  
75 successful bidder as required in Section 63G-6a-1103.]

76 [(6)] (3) (a) [A local school board] An LEA may require in the proposed contract that  
77 up to 5% of the contract price be withheld in retention until the project is completed and  
78 accepted by the [board] LEA.

79 (b) All money held in retention by an LEA shall be retained in accordance with the  
80 requirements of Section 13-8-5.

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

83 [(c) This money shall be paid upon completion of the project and acceptance by the  
84 board.]

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

87 [(b) The board may use its resources if no satisfactory bids are received under this  
88 section.]

89 [(8) If the local school board determines in accordance with Section 63G-6a-1302 to

90 ~~use a construction manager/general contractor as its method of construction contracting  
91 management on projects where the total estimated accumulative cost exceeds \$80,000, it shall  
92 select the construction manager/general contractor in accordance with the requirements of Title  
93 63G, Chapter 6a, Utah Procurement Code.]~~

94 ~~[(9) A local school board member may not have a direct or indirect financial interest in  
95 the construction project contract.]~~

96 (4) (a) An LEA may self-perform work on a construction project up to \$100,000.

97 (b) A construction project over \$100,000 shall be procured in accordance with the  
98 requirements of Title 63G, Chapter 6a, Utah Procurement Code.

99 Section 2. Section **63G-6a-103** is amended to read:

100 **63G-6a-103. Definitions.**

101 As used in this chapter:

102 (1) "Architect-engineer services" means:

103 (a) professional services within the scope of the practice of architecture as defined in  
104 Section [58-3a-102](#); or

105 (b) professional engineering as defined in Section [58-22-102](#).

106 (2) "Bidder" means a person who responds to an invitation for bids.

107 (3) "Change directive" means a written order signed by the procurement officer that  
108 directs the contractor to suspend work or make changes, as authorized by contract, without the  
109 consent of the contractor.

110 (4) "Change order" means a written alteration in specifications, delivery point, rate of  
111 delivery, period of performance, price, quantity, or other provisions of a contract, upon mutual  
112 agreement of the parties to the contract.

113 (5) "Chief procurement officer" means the chief procurement officer appointed under  
114 Subsection [63G-6a-302](#)(1).

115 (6) (a) "Construction" means the process of building, renovating, altering, improving,  
116 or repairing a public building or public work.

117 (b) "Construction" does not include the routine operation, routine repair, or routine  
118 maintenance of an existing structure, building, or real property.

119 (7) (a) "Construction manager/general contractor" means a contractor who enters into a  
120 contract for the management of a construction project when the contract allows the contractor

121 to subcontract for additional labor and materials that are not included in the contractor's cost  
122 proposal submitted at the time of the procurement of the contractor's services.

123 (b) "Construction manager/general contractor" does not include a contractor whose  
124 only subcontract work not included in the contractor's cost proposal submitted as part of the  
125 procurement of the contractor's services is to meet subcontracted portions of change orders  
126 approved within the scope of the project.

127 (8) "Contract" means an agreement for the procurement or disposal of a procurement  
128 item.

129 (9) "Contractor" means a person who is awarded a contract with a procurement unit.

130 (10) "Cooperative procurement" means procurement conducted by, or on behalf of,  
131 more than one procurement unit, or by a procurement unit and an external procurement unit.

132 (11) "Cost-plus-a-percentage-of-cost contract" means a contract where the contractor is  
133 paid a percentage over and above the contractor's actual expenses or costs.

134 (12) "Cost-reimbursement contract" means a contract under which a contractor is  
135 reimbursed for costs which are allowed and allocated in accordance with the contract terms and  
136 the provisions of this chapter, and a fee, if any.

137 (13) "Days" means calendar days, unless expressly provided otherwise.

138 (14) "Definite quantity contract" means a fixed price contract that provides for the  
139 supply of a specified amount of goods over a specified period, with deliveries scheduled  
140 according to a specified schedule.

141 (15) "Design-build" means the procurement of architect-engineer services and  
142 construction by the use of a single contract with the design-build provider.

143 (16) "Director" means the director of the division.

144 (17) "Established catalogue price" means the price included in a catalogue, price list,  
145 schedule, or other form that:

146 (a) is regularly maintained by a manufacturer or contractor;

147 (b) is either published or otherwise available for inspection by customers; and

148 (c) states prices at which sales are currently or were last made to a significant number  
149 of any category of buyers or buyers constituting the general buying public for the supplies or  
150 services involved.

151 (18) "Fixed price contract" means a contract that provides a price, for each

152 procurement item obtained under the contract, that is not subject to adjustment except to the  
153 extent that:

154 (a) the contract provides, under circumstances specified in the contract, for an  
155 adjustment in price that is not based on cost to the contractor; or

156 (b) an adjustment is required by law.

157 (19) "Fixed price contract with price adjustment" means a fixed price contract that  
158 provides for an upward or downward revision of price, precisely described in the contract, that:

159 (a) is based on the consumer price index or another commercially acceptable index,  
160 source, or formula; and

161 (b) is not based on a percentage of the cost to the contractor.

162 (20) (a) "Grant" means furnishing, by a public entity or by any other public or private  
163 source, financial or other assistance to a person to support a program authorized by law.

164 (b) "Grant" does not include:

165 (i) an award whose primary purpose is to procure an end product or procurement item;  
166 or

167 (ii) a contract that is awarded as a result of a procurement or a procurement process.

168 (21) "Head of a procurement unit" means:

169 (a) as it relates to a legislative procurement unit, any person designated by rule made  
170 by the applicable rulemaking authority;

171 (b) as it relates to an executive branch procurement unit:

172 (i) the director of a division; or

173 (ii) any other person designated by the board, by rule;

174 (c) as it relates to a judicial procurement unit:

175 (i) the Judicial Council; or

176 (ii) any other person designated by the Judicial Council, by rule;

177 (d) as it relates to a local government procurement unit:

178 (i) the legislative body of the local government procurement unit; or

179 (ii) any other person designated by the local government procurement unit;

180 (e) as it relates to a local district, the board of trustees of the local district or a designee  
181 of the board of trustees;

182 (f) as it relates to a special service district, the governing body of the special service

183 district or a designee of the governing body;

184 (g) as it relates to a local building authority, the board of directors of the local building  
185 authority or a designee of the board of directors;

186 (h) as it relates to a conservation district, the board of supervisors of the conservation  
187 district or a designee of the board of supervisors;

188 (i) as it relates to a public corporation, the board of directors of the public corporation  
189 or a designee of the board of directors;

190 (j) as it relates to a school district or any school or entity within a school district, the  
191 local school board of the school district, or the local school board's designee;

192 (k) as it relates to a charter school, the individual or body charter school governing  
193 board with executive authority over the charter school, or the individual's or body's charter  
194 school governing board's designee;

195 (l) as it relates to an institution of higher education of the state, the president of the  
196 institution of higher education, or the president's designee; or

197 (m) as it relates to a public transit district, the board of trustees or a designee of the  
198 board of trustees.

199 (22) "Indefinite quantity contract" means a fixed price contract that:

200 (a) is for an indefinite amount of procurement items to be supplied as ordered by a  
201 procurement unit; and

202 (b) (i) does not require a minimum purchase amount; or

203 (ii) provides a maximum purchase limit.

204 (23) "Independent procurement authority" means authority granted to a procurement  
205 unit, under Subsection 63G-6a-108(2), to engage in a procurement without oversight or control  
206 of the division.

207 (24) "Invitation for bids" includes all documents, including documents that are attached  
208 or incorporated by reference, used for soliciting bids to provide a procurement item to a  
209 procurement unit.

210 (25) "Issuing procurement unit" means:

211 (a) the division, if the division issues the invitation for bids or the request for  
212 proposals; or

213 (b) the procurement unit, with independent procurement authority, that issues the

214 invitation for bids or the request for proposals.

215 (26) "Labor hour contract" is a contract where:

216 (a) the supplies and materials are not provided by, or through, the contractor; and

217 (b) the contractor is paid a fixed rate that includes the cost of labor, overhead, and

218 profit for a specified number of labor hours or days.

219 (27) "Multiple award contracts" means the award of a contract for an indefinite

220 quantity of a procurement item to more than one bidder or offeror.

221 (28) "Multiyear contract" means a contract that extends beyond a one-year period,  
222 including a contract that permits renewal of the contract, without competition, beyond the first  
223 year of the contract.

224 (29) "Municipality" means a city or a town.

225 (30) "Offeror" means a person who responds to a request for proposals.

226 (31) "Preferred bidder" means a bidder that is entitled to receive a reciprocal preference  
227 under the requirements of this chapter.

228 (32) (a) "Procure" or "procurement" means buying, purchasing, renting, leasing, leasing  
229 with an option to purchase, or otherwise acquiring a procurement item.

230 (b) "Procure" or "procurement" includes all functions that pertain to the obtaining of a  
231 procurement item, including:

232 (i) the description of requirements;

233 (ii) the selection process;

234 (iii) solicitation of sources;

235 (iv) the preparation for soliciting a procurement item;

236 (v) the award of a contract; and

237 (vi) all phases of contract administration.

238 (33) "Procurement item" means a supply, a service, construction, or technology.

239 (34) "Procurement officer" means:

240 (a) as it relates to a procurement unit with independent procurement authority:

241 (i) the head of the procurement unit;

242 (ii) a designee of the head of the procurement unit; or

243 (iii) a person designated by rule made by the applicable rulemaking authority; or

244 (b) as it relates to the division or a procurement unit without independent procurement

245 authority, the chief procurement officer.

246 (35) "Professional service" means a service that requires a high degree of specialized  
247 knowledge and discretion in the performance of the service, including:

- 248 (a) legal services;
- 249 (b) consultation services;
- 250 (c) architectural services;
- 251 (d) engineering;
- 252 (e) design;
- 253 (f) underwriting;
- 254 (g) bond counsel;
- 255 (h) financial advice;
- 256 (i) construction management;
- 257 (j) medical services;
- 258 (k) psychiatric services; or
- 259 (l) counseling services.

260 (36) "Protest officer" means:

261 (a) as it relates to the division or a procurement unit with independent procurement  
262 authority:

- 263 (i) the head of the procurement unit;
  - 264 (ii) a designee of the head of the procurement unit; or
  - 265 (iii) a person designated by rule made by the applicable rulemaking authority; or
- 266 (b) as it relates to a procurement unit without independent procurement authority, the  
267 chief procurement officer or the chief procurement officer's designee.

268 (37) "Request for information" means a nonbinding process where a procurement unit  
269 requests information relating to a procurement item.

270 (38) "Request for proposals" includes all documents, including documents that are  
271 attached or incorporated by reference, used for soliciting proposals to provide a procurement  
272 item to a procurement unit.

273 (39) "Requirements contract" means a contract:

274 (a) where a contractor agrees to provide a procurement unit's entire requirements for  
275 certain procurement items at prices specified in the contract during the contract period; and

- 276                   (b) that:
- 277                   (i) does not require a minimum purchase amount; or
- 278                   (ii) provides a maximum purchase limit.
- 279                   (40) "Responsible" means that a bidder or offeror:
- 280                   (a) is capable, in all respects, to fully perform the contract requirements solicited in an
- 281 invitation for bids or a request for proposals; and
- 282                   (b) has the integrity and reliability to ensure good faith performance.
- 283                   (41) "Responsive" means that a bidder or offeror submits a response to an invitation for
- 284 bids or a request for proposals that conforms in all material respects to the invitation for bids or
- 285 request for proposals.
- 286                   (42) "Sealed" means manually or electronically sealed and submitted bids or proposals.
- 287                   (43) (a) "Services" means the furnishing of labor, time, or effort by a contractor, not
- 288 involving the delivery of a specific end product other than a report that is incidental to the
- 289 required performance.
- 290                   (b) "Services" does not include an employment agreement or a collective bargaining
- 291 agreement.
- 292                   (44) "Specification" means any description of the physical or functional characteristics,
- 293 or nature of a procurement item included in an invitation for bids or a request for proposals, or
- 294 otherwise specified or agreed to by a procurement unit, including a description of:
- 295                   (a) a requirement for inspecting or testing a procurement item; or
- 296                   (b) preparing a procurement item for delivery.
- 297                   (45) "Standard procurement process" means one of the following methods of obtaining
- 298 a procurement item:
- 299                   (a) bidding, as described in Part 6, Bidding;
- 300                   (b) request for proposals, as described in Part 7, Request for Proposals; or
- 301                   (c) small purchases, in accordance with the requirements established under Section
- 302 **63G-6a-408**.
- 303                   (46) "State cooperative contract" means a contract awarded by the division.
- 304                   (47) (a) "Subcontractor" means a person under contract with a contractor or another
- 305 subcontractor to provide services or labor for design or construction.
- 306                   (b) "Subcontractor" includes a trade contractor or specialty contractor.

307           (c) "Subcontractor" does not include a supplier who provides only materials,  
308 equipment, or supplies to a contractor or subcontractor.

309           (48) "Supplies" means all property, including equipment, materials, and printing.

310           (49) "Tie bid" means that the lowest responsive and responsible bids are identical in  
311 price.

312           (50) "Time and materials contract" means a contract where the contractor is paid:

313           (a) the actual cost of direct labor at specified hourly rates;

314           (b) the actual cost of materials and equipment usage; and

315           (c) an additional amount, expressly described in the contract, to cover overhead and  
316 profit, that is not based on a percentage of the cost to the contractor.

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**Legislative Review Note****as of 10-16-13 2:35 PM****Office of Legislative Research and General Counsel**