

HB0291S02 compared with HB0291S01

~~{deleted text}~~ shows text that was in HB0291S01 but was deleted in HB0291S02.

inserted text shows text that was not in HB0291S01 but was inserted into HB0291S02.

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Representative Keven J. Stratton proposes the following substitute bill:

PROCUREMENT CHANGES

2015 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Keven J. Stratton

Senate Sponsor: _____

LONG TITLE

General Description:

This bill modifies the Utah Procurement Code.

Highlighted Provisions:

This bill:

- ▶ deletes a definition of grant and enacts new definitions for a competitive grant and a ~~{direct award}~~noncompetitive grant;
- ▶ provides that the procurement code does not apply to direct ~~{award}~~noncompetitive grants;
- ▶ specifies application of the procurement code to competitive grants;
- ▶ modifies a provision relating to exemptions from the procurement code; and
- ▶ enacts provisions relating to the procurement process applicable to competitive grants.

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Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

63G-6a-103, as last amended by Laws of Utah 2014, Chapter 196

63G-6a-105, as last amended by Laws of Utah 2013, Chapter 445

63G-6a-107, as last amended by Laws of Utah 2014, Chapters 180, 196, and 313

63G-6a-109, as enacted by Laws of Utah 2014, Chapter 196

63G-6a-702, as last amended by Laws of Utah 2014, Chapter 196

63G-6a-1702, as last amended by Laws of Utah 2014, Chapter 196

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

Section 1. Section **63G-6a-103** is amended to read:

63G-6a-103. Definitions.

As used in this chapter:

(1) "Architect-engineer services" means:

(a) professional services within the scope of the practice of architecture as defined in

Section 58-3a-102;

(b) professional engineering as defined in Section 58-22-102; or

(c) master planning and programming services.

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

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

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

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

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(6) "Competitive grant" means an award ~~of funds, whether originating from a federal, state, or local government entity or private entity~~:

(a) by an executive branch procurement unit;

(b) ~~with respect to which~~ of funds that the executive branch procurement unit receives from:

(i) a federal, state, or local government entity; or

(ii) a private entity;

(c) to a person in the selection of whom the executive branch procurement unit has discretion ~~to determine to whom the funds are to be awarded~~; and

~~(c) d~~ ~~to a person~~ in exchange for a procurement item.

~~(6)~~ (7) "Conducting procurement unit" means a procurement unit that conducts all aspects of a procurement:

(a) except:

(i) reviewing a solicitation to verify that it is in proper form; and

(ii) causing the publication of a notice of a solicitation; and

(b) including:

(i) preparing any solicitation document;

(ii) appointing an evaluation committee;

(iii) conducting the evaluation process, except as provided in Subsection 63G-6a-707(5)(b) relating to scores calculated for costs of proposals;

(iv) selecting and recommending the person to be awarded a contract;

(v) negotiating the terms and conditions of a contract, subject to the issuing procurement unit's approval; and

(vi) administering a contract.

~~(7)~~ (8) (a) "Construction" means the process of building, renovating, altering, improving, or repairing a public building or public work.

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

~~(8)~~ (9) (a) "Construction manager/general contractor" means a contractor who enters into a contract for the management of a construction project when the contract allows the contractor to subcontract for additional labor and materials that are not included in the

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contractor's cost proposal submitted at the time of the procurement of the contractor's services.

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

~~[(9)]~~ (10) "Contract" means an agreement for the procurement or disposal of a procurement item.

~~[(10)]~~ (11) "Contractor" means a person who is awarded a contract with a procurement unit.

~~[(11)]~~ (12) "Cooperative procurement" means procurement conducted by, or on behalf of:

- (a) more than one procurement unit; or
- (b) a procurement unit and a cooperative purchasing organization.

~~[(12)]~~ (13) "Cost-plus-a-percentage-of-cost contract" means a contract where the contractor is paid a percentage over and above the contractor's actual expenses or costs.

~~[(13)]~~ (14) "Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs which are allowed and allocated in accordance with the contract terms and the provisions of this chapter, and a fee, if any.

~~[(14)]~~ (15) "Days" means calendar days, unless expressly provided otherwise.

~~[(15)]~~ (16) "Definite quantity contract" means a fixed price contract that provides for the supply of a specified amount of goods over a specified period, with deliveries scheduled according to a specified schedule.

~~[(16)]~~ (17) "Design-build" means the procurement of architect-engineer services and construction by the use of a single contract with the design-build provider.

~~{ — (18) "Direct award grant" means an award of funds, whether originating from a federal, state, or local government entity or private entity:~~

~~— (a) by an executive branch procurement unit;~~

~~— (b) with respect to which the executive branch procurement unit does not have discretion to determine to whom the funds are to be awarded because of requirements imposed by:~~

~~— (i) the federal, state, or local government entity or private entity from which the funds~~

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~~originate; or~~

~~— (ii) the circumstances of the executive branch procurement unit's receipt of the funds; and~~

~~— (c) to a person without the person providing value in return to the executive branch procurement unit.~~

‡ [(17)] ~~(19)~~ (18) "Director" means the director of the division.

[(18)] ~~(20)~~ (19) "Established catalogue price" means the price included in a catalogue, price list, schedule, or other form that:

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

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

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

[(19)] ~~(21)~~ (20) "Fixed price contract" means a contract that provides a price, for each procurement item obtained under the contract, that is not subject to adjustment except to the extent that:

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

(b) an adjustment is required by law.

[(20)] ~~(22)~~ (21) "Fixed price contract with price adjustment" means a fixed price contract that provides for an upward or downward revision of price, precisely described in the contract, that:

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

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

~~[(21)(a) "Grant" means furnishing, by a public entity or by any other public or private source, financial or other assistance to a person to support a program authorized by law.]~~

~~[(b) "Grant" does not include:]~~

~~[(i) an award whose primary purpose is to procure an end product or procurement item; or]~~

~~[(ii) a contract that is awarded as a result of a procurement or a procurement process.]~~

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~~(11)~~(22)~~(11)~~~~(23)~~ "Head of a procurement unit" means:

- (a) as it relates to a legislative procurement unit, any person designated by rule made by the applicable rulemaking authority;
- (b) as it relates to an executive branch procurement unit:
 - (i) the director of a division; or
 - (ii) any other person designated by the board, by rule;
- (c) as it relates to a judicial procurement unit:
 - (i) the Judicial Council; or
 - (ii) any other person designated by the Judicial Council, by rule;
- (d) as it relates to a local government procurement unit:
 - (i) the legislative body of the local government procurement unit; or
 - (ii) any other person designated by the local government procurement unit;
- (e) as it relates to a local district, the board of trustees of the local district or a designee of the board of trustees;
- (f) as it relates to a special service district, the governing body of the special service district or a designee of the governing body;
- (g) as it relates to a local building authority, the board of directors of the local building authority or a designee of the board of directors;
- (h) as it relates to a conservation district, the board of supervisors of the conservation district or a designee of the board of supervisors;
- (i) as it relates to a public corporation, the board of directors of the public corporation or a designee of the board of directors;
- (j) as it relates to a school district or any school or entity within a school district, the board of the school district, or the board's designee;
- (k) as it relates to a charter school, the individual or body with executive authority over the charter school, or the individual's or body's designee;
- (l) as it relates to an institution of higher education of the state, the president of the institution of higher education, or the president's designee; or
- (m) as it relates to a public transit district, the board of trustees or a designee of the board of trustees.

~~(11)~~(23)~~(11)~~~~(24)~~ "Indefinite quantity contract" means a fixed price contract that:

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

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

(ii) provides a maximum purchase limit.

~~ff(24)~~~~ff(25)~~ "Independent procurement authority" means authority granted to a procurement unit under Subsection 63G-6a-106(4)(a).

~~ff(25)~~~~ff(26)~~ "Invitation for bids" includes all documents, including documents that are attached or incorporated by reference, used for soliciting bids to provide a procurement item to a procurement unit.

~~ff(26)~~~~ff(27)~~ "Issuing procurement unit" means a procurement unit that:

(a) reviews a solicitation to verify that it is in proper form;

(b) causes the notice of a solicitation to be published; and

(c) negotiates the terms and conditions of a contract.

~~ff(27)~~~~ff(28)~~ "Labor hour contract" is a contract where:

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

(b) the contractor is paid a fixed rate that includes the cost of labor, overhead, and profit for a specified number of labor hours or days.

~~ff(28)~~~~ff(29)~~ "Multiple award contracts" means the award of a contract for an indefinite quantity of a procurement item to more than one bidder or offeror.

~~ff(29)~~~~ff(30)~~ "Multiyear contract" means a contract that extends beyond a one-year period, including a contract that permits renewal of the contract, without competition, beyond the first year of the contract.

~~ff(30)~~~~ff(31)~~ "Municipality" means a city or a town.

(31) "Noncompetitive grant" means an award:

(a) by an executive branch procurement unit;

(b) of funds that the executive branch procurement unit receives from:

(i) a federal, state, or local government entity; or

(ii) a private entity; and

(c) (i) to a person in the selection of whom the executive branch procurement unit does not have discretion because of requirements imposed by:

(A) the federal, state, or local government entity or private entity from which the funds

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originate; or

(B) the circumstances of the executive branch procurement unit's receipt of the funds;

or

(ii) that is not for the purpose of procuring a procurement item.

~~(31)~~ (32) "Offeror" means a person who responds to a request for proposals.

~~(32)~~ (33) "Preferred bidder" means a bidder that is entitled to receive a reciprocal preference under the requirements of this chapter.

~~(33)~~ (34) (a) "Procure" or "procurement" means buying, purchasing, renting, leasing, leasing with an option to purchase, or otherwise acquiring a procurement item, including through a competitive grant.

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

- (i) the description of requirements;
- (ii) the selection process;
- (iii) solicitation of sources;
- (iv) the preparation for soliciting a procurement item; and
- (v) the award of a contract.

~~(34)~~ (35) "Procurement item" means a supply, a service, construction, or technology.

~~(35)~~ (36) "Procurement officer" means:

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

- (i) the head of the procurement unit;
- (ii) a designee of the head of the procurement unit; or
- (iii) a person designated by rule made by the applicable rulemaking authority; or

(b) as it relates to the division or a procurement unit without independent procurement authority, the chief procurement officer.

~~(36)~~ (37) "Professional service" means a service that requires a high degree of specialized knowledge and discretion in the performance of the service, including:

- (a) legal services;
- (b) consultation services;
- (c) architectural services;
- (d) engineering;

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- (e) design;
- (f) underwriting;
- (g) bond counsel;
- (h) financial advice;
- (i) construction management;
- (j) medical services;
- (k) psychiatric services; or
- (l) counseling services.

~~[(37)]~~ (38) "Protest officer" means:

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

- (i) the head of the procurement unit;
- (ii) a designee of the head of the procurement unit; or
- (iii) a person designated by rule made by the applicable rulemaking authority; or

(b) as it relates to a procurement unit without independent procurement authority, the chief procurement officer or the chief procurement officer's designee.

~~[(38)]~~ (39) "Request for information" means a nonbinding process where a procurement unit requests information relating to a procurement item.

~~[(39)]~~ (40) "Request for proposals" includes all documents, including documents that are attached or incorporated by reference, used for soliciting proposals to provide a procurement item to a procurement unit.

~~[(40)]~~ (41) "Request for statement of qualifications" means all documents used to solicit information about the qualifications of the person interested in responding to a potential procurement, including documents attached or incorporated by reference.

~~[(41)]~~ (42) "Requirements contract" means a contract:

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

(b) that:

- (i) does not require a minimum purchase amount; or
- (ii) provides a maximum purchase limit.

~~[(42)]~~ (43) "Responsible" means being capable, in all respects, of:

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(a) meeting all the requirements of a solicitation; and

(b) fully performing all the requirements of the contract resulting from the solicitation, including being financially solvent with sufficient financial resources to perform the contract.

~~[(43)]~~ (44) "Responsive" means conforming in all material respects to the invitation for bids or request for proposals.

~~[(44)]~~ (45) "Sealed" means manually or electronically sealed and submitted bids or proposals.

~~[(45)]~~ (46) (a) "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than a report that is incidental to the required performance.

(b) "Services" does not include an employment agreement or a collective bargaining agreement.

~~[(46)]~~ (47) "Sole source contract" means a contract resulting from a sole source procurement.

~~[(47)]~~ (48) "Sole source procurement" means a procurement without competition pursuant to a determination under Subsection 63G-6a-802(2)(a) that there is only one source for the procurement item.

~~[(48)]~~ (49) "Solicitation" means an invitation for bids, request for proposals, notice of a sole source procurement, request for statement of qualifications, request for information, or any document used to obtain bids, proposals, pricing, qualifications, or information for the purpose of entering into a procurement contract.

~~[(49)]~~ (50) "Specification" means any description of the physical or functional characteristics, or nature of a procurement item included in an invitation for bids or a request for proposals, or otherwise specified or agreed to by a procurement unit, including a description of:

(a) a requirement for inspecting or testing a procurement item; or

(b) preparing a procurement item for delivery.

~~[(50)]~~ (51) "Standard procurement process" means one of the following methods of obtaining a procurement item:

(a) bidding, as described in Part 6, Bidding;

(b) request for proposals, as described in Part 7, Request for Proposals; or

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(c) small purchases, in accordance with the requirements established under Section 63G-6a-408.

~~[(51)]~~ (52) "State cooperative contract" means a contract awarded by the division for and in behalf of all public entities.

~~[(52)]~~ (53) "Statement of qualifications" means a written statement submitted to a procurement unit in response to a request for statement of qualifications.

~~[(53)]~~ (54) (a) "Subcontractor" means a person under contract with a contractor or another subcontractor to provide services or labor for design or construction.

(b) "Subcontractor" includes a trade contractor or specialty contractor.

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

~~[(54)]~~ (55) "Supplies" means all property, including equipment, materials, and printing.

~~[(55)]~~ (56) "Tie bid" means that the lowest responsive and responsible bids are identical in price.

~~[(56)]~~ (57) "Time and materials contract" means a contract where the contractor is paid:

- (a) the actual cost of direct labor at specified hourly rates;
- (b) the actual cost of materials and equipment usage; and
- (c) an additional amount, expressly described in the contract, to cover overhead and profit, that is not based on a percentage of the cost to the contractor.

Section 2. Section **63G-6a-105** is amended to read:

63G-6a-105. Application of chapter.

(1) The provisions of this chapter that are enacted on May 1, 2013, apply only to a procurement advertised, or begun on or after May 1, 2013, unless the parties agree to have the provisions apply with respect to a procurement that was advertised or begun before May 1, 2013, but is not completed before May 1, 2013.

(2) (a) Except as provided in Section 63G-6a-107, this chapter shall apply to every expenditure of public funds irrespective of the source of the funds, including federal assistance, by any procurement unit, under any contract.

(b) The provisions of this chapter do not apply to a public entity that is not a procurement unit.

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(3) Except as provided in Subsection 17B-1-108(3) relating to local districts, the following procurement units shall adopt ordinances or resolutions relating to the procurement of architect-engineer services not inconsistent with the provisions of Part 15,

Architect-Engineer Services:

- (a) an educational procurement unit;
- (b) a conservation district;
- (c) a local building authority;
- (d) a local district;
- (e) a public corporation; or
- (f) a special service district.

(4) Any section of this chapter, or its implementing regulations, may be adopted by:

- (a) a county;
- (b) a municipality; or
- (c) the Utah Housing Corporation.

(5) Rules adopted under this chapter shall be consistent with the provisions of this chapter.

(6) An applicable rulemaking authority or a procurement unit may not adopt rules, policies, or regulations that are inconsistent with this chapter.

(7) Unless otherwise provided by statute, this chapter does not apply to procurement of real property.

(8) (a) Except as provided in Subsection (8)(a), this chapter applies to a competitive grant.

(b) The following provisions do not apply to a competitive grant:

(i) Subsections 63G-6a-707(5), (6), and (8);

(ii) Subsections 63G-6a-708(1)(a)(iii) and (iv);

(iii) Subsections 63G-6a-708(2)~~, (3), (4), (5), and~~ through (6); and

(iv) Section 63G-6a-711.

(9) An executive branch procurement unit shall administer a noncompetitive grant in accordance with the requirements imposed by the federal, state, or local government entity or private entity providing the funding for the noncompetitive grant.

Section 3. Section **63G-6a-107** is amended to read:

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63G-6a-107. Exemptions from chapter -- Compliance with federal law.

(1) Except for Part 24, Unlawful Conduct and Penalties, the provisions of this chapter do not apply to:

(a) funds administered under the Percent-for-Art Program of the Utah Percent-for-Art Act;

~~[(b) grants awarded by the state or contracts between the state and any of the following:]~~

~~[(i) an educational procurement unit;]~~

~~[(ii) a conservation district;]~~

~~[(iii) a local building authority;]~~

~~[(iv) a local district;]~~

~~[(v) a public corporation;]~~

~~[(vi) a special service district;]~~

~~[(vii) a public transit district; or]~~

~~[(viii) two or more of the entities described in Subsections (1)(b)(i) through (vii); acting under legislation that authorizes intergovernmental cooperation;]~~

(b) a ~~direct award~~ noncompetitive grant;

(c) a contract between procurement units;

~~[(c)]~~ (d) medical supplies or medical equipment, including service agreements for medical equipment, obtained through a purchasing consortium by the Utah State Hospital, the Utah State Developmental Center, the University of Utah Hospital, or any other hospital owned by the state or a political subdivision of the state, if:

(i) the consortium uses a competitive procurement process; and

(ii) the chief administrative officer of the hospital makes a written finding that the prices for purchasing medical supplies and medical equipment through the consortium are competitive with market prices;

~~[(d)]~~ (e) the purchase of firefighting supplies or equipment by the Division of Forestry, Fire, and State Lands, created in Section 65A-1-4, through the federal General Services Administration or the National Fire Cache system;

~~[(e)]~~ (f) goods purchased for resale to the public; or

~~[(f)]~~ (g) the Division of Parks and Recreation, during a fiscal emergency, as defined by

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Subsection 79-4-1102(1), if the division is acting under the authority described in Sections 79-4-1101 through 79-4-1103.

(2) This chapter does not prevent a procurement unit from complying with the terms and conditions of any grant, gift, or bequest that is otherwise consistent with law.

(3) This chapter does not apply to any action taken by a majority of both houses of the Legislature.

(4) Notwithstanding any conflicting provision of this chapter, ~~if~~ if a procurement involves the expenditure of federal or state assistance, federal contract funds, local matching funds, or federal financial participation funds, the procurement unit shall comply with mandatory applicable federal or state law and regulations not reflected in this chapter.

(5) This chapter does not supersede the requirements for retention or withholding of construction proceeds and release of construction proceeds as provided in Section 13-8-5.

Section 4. Section **63G-6a-109** is amended to read:

63G-6a-109. Issuing procurement unit and conducting procurement unit.

(1) ~~[With]~~ (a) Except as provided in Subsection (1)(b), with respect to a procurement by an executive branch procurement unit:

~~[(a)]~~ (i) the division is the issuing procurement unit; and

~~[(b)]~~ (ii) the executive branch procurement unit is the conducting procurement unit and is responsible to ensure that the procurement is conducted in compliance with this chapter.

(b) An executive branch procurement unit ~~{pursuing}~~ administering a competitive grant is both the issuing procurement unit and the conducting procurement unit.

(2) With respect to a procurement by any other procurement unit, the procurement unit is both the issuing procurement unit and the conducting procurement unit.

Section 5. Section **63G-6a-702** is amended to read:

63G-6a-702. Contracts awarded by request for proposals.

(1) A request for proposals standard procurement process may be used instead of bidding if:

(a) the procurement officer determines, in writing, that the request for proposals standard procurement process will provide the best value to the procurement unit[-]; or

(b) the procurement is a competitive grant.

(2) The request for proposals standard procurement process is appropriate to use for:

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- (a) the procurement of professional services;
- (b) a design-build procurement;
- (c) when cost is not the most important factor to be considered in making the selection that is most advantageous to the procurement unit; or
- (d) when factors, in addition to cost, are highly significant in making the selection that is most advantageous to the procurement unit.

(3) The procurement of architect-engineer services is governed by Part 15, Architect-Engineer Services.

(4) (a) An executive branch agency may ~~denominate~~ title its solicitation for a competitive grant as a request for grant applications rather than a request for proposals.

(b) A request for grant applications shall include:

(i) a description of the nature of the grant project, including the scope of the work to be performed or service to be provided;

(ii) an identification of the funding source and the total amount of available funds;

(iii) a statement indicating whether a single award or multiple awards are expected to be made;

(iv) a statement indicating whether collaboration or partnering between persons or community partnerships will be allowed;

(v) any requirements mandated by the federal, state, or local government authorizing the grant;

(vi) the criteria that will be used to evaluate applicants for the award and the relative importance of each criterion;

(vii) the date by which applications for the grant are required to be submitted and the anticipated date when awards will be made public;

(viii) whether the grant award will be for multiple years; and

(ix) any other information unique to the grant.

(c) An executive branch procurement unit may, before the date applications for the grant award are required to be submitted, conduct a conference with potential grant applicants to explain grant application requirements.

Section 6. Section **63G-6a-1702** is amended to read:

63G-6a-1702. Appeal to Utah State Procurement Policy Board -- Appointment of

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procurement appeals panel -- Proceedings.

(1) This part applies to all procurement units other than:

- (a) a legislative procurement unit;
- (b) a judicial procurement unit;
- (c) a local government procurement unit; or
- (d) a public transit district.

(2) (a) Subject to Section 63G-6a-1703, a party to a protest involving a procurement unit other than a procurement unit listed in Subsection (1)(a), (b), (c), or (d) may appeal the protest decision to the board by filing a written notice of appeal with the chair of the board within seven days after:

(i) the day on which the written decision described in Section 63G-6a-1603 is:

(A) personally served on the party or the party's representative; or

(B) emailed or mailed to the address or email address of record provided by the party under Subsection 63G-6a-1602~~[(3)]~~(2); or

(ii) the day on which the 30-day period described in Subsection 63G-6a-1603(7) ends, if a written decision is not issued before the end of the 30-day period.

(b) A person appealing a debarment or suspension of a procurement unit other than a procurement unit listed in Subsection (1)(a), (b), (c), or (d) shall file a written notice of appeal with the chair of the board no later than seven days after the debarment or suspension.

(c) A notice of appeal under Subsection (2)(a) or (b) shall:

(i) include the address of record and email address of record of the party filing the notice of appeal; and

(ii) be accompanied by a copy of any written protest decision or debarment or suspension order.

(3) A person may not base an appeal of a protest under this section on a ground not specified in the person's protest under Section 63G-6a-1602.

(4) A person may not appeal from a protest described in Section 63G-6a-1602, unless:

(a) a decision on the protest has been issued; or

(b) a decision is not issued and the 30-day period described in Subsection 63G-6a-1603(7), or a longer period agreed to by the parties, has passed.

(5) The chair of the board or a designee of the chair who is not employed by the

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procurement unit responsible for the solicitation, contract award, or other action complained of:

(a) shall, within seven days after the day on which the chair receives a timely written notice of appeal under Subsection (2), and if all the requirements of Subsection (2) and Section 63G-6a-1703 have been met, appoint:

(i) a procurement appeals panel to hear and decide the appeal, consisting of at least three individuals, each of whom is:

(A) a member of the board; or

(B) a designee of a member appointed under Subsection [~~(4)~~] (5)(a)(i)(A), if the designee is approved by the chair; and

(ii) one of the members of the procurement appeals panel to be the chair of the panel;

(b) may:

(i) appoint the same procurement appeals panel to hear more than one appeal; or

(ii) appoint a separate procurement appeals panel for each appeal;

(c) may not appoint a person to a procurement appeals panel if the person is employed by the procurement unit responsible for the solicitation, contract award, or other action complained of; and

(d) shall, at the time the procurement appeals panel is appointed, provide appeals panel members with a copy of the protest officer's written decision and all other records and other evidence that the protest officer relied on in reaching the decision.

(6) A procurement appeals panel described in Subsection (5) shall:

(a) consist of an odd number of members;

(b) conduct an informal proceeding on the appeal within 60 days after the day on which the procurement appeals panel is appointed:

(i) unless all parties stipulate to a later date; and

(ii) subject to Subsection (8);

(c) at least seven days before the proceeding, mail, email, or hand-deliver a written notice of the proceeding to the parties to the appeal; and

(d) within seven days after the day on which the proceeding ends:

(i) issue a written decision on the appeal; and

(ii) mail, email, or hand-deliver the written decision on the appeal to the parties to the appeal and to the protest officer.

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(7) (a) The deliberations of a procurement appeals panel may be held in private.

(b) If the procurement appeals panel is a public body, as defined in Section 52-4-103, the procurement appeals panel shall comply with Section 52-4-205 in closing a meeting for its deliberations.

(8) A procurement appeals panel may continue a procurement appeals proceeding beyond the 60-day period described in Subsection (6)(b) if the procurement appeals panel determines that the continuance is in the interests of justice.

(9) A procurement appeals panel:

(a) shall, subject to Subsection (9)(c), consider the appeal based solely on:

(i) the protest decision;

(ii) the record considered by the person who issued the protest decision; and

(iii) if a protest hearing was held, the record of the protest hearing;

(b) may not take additional evidence;

(c) notwithstanding Subsection (9)(b), may, during an informal hearing, ask questions and receive responses regarding the appeal, the protest decision, or the record in order to assist the panel to understand the appeal, the protest decision, and the record; and

(d) shall uphold the decision of the protest officer, unless the decision is arbitrary and capricious or clearly erroneous.

(10) If a procurement appeals panel determines that the decision of the protest officer is arbitrary and capricious or clearly erroneous, the procurement appeals panel:

(a) shall remand the matter to the protest officer, to cure the problem or render a new decision;

(b) may recommend action that the protest officer should take; and

(c) may not order that:

(i) a contract be awarded to a certain person;

(ii) a contract or solicitation be cancelled; or

(iii) any other action be taken other than the action described in Subsection (10)(a).

(11) The board shall make rules relating to the conduct of an appeals proceeding, including rules that provide for:

(a) expedited proceedings; and

(b) electronic participation in the proceedings by panel members and participants.

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(12) The Rules of Evidence do not apply to an appeals proceeding.