

## HB0398S02 compared with HB0398S01

~~deleted text~~ shows text that was in HB0398S01 but was deleted in HB0398S02.

Inserted text shows text that was not in HB0398S01 but was inserted into HB0398S02.

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**Representative Gage Froerer** proposes the following substitute bill:

### PROCUREMENT CODE AMENDMENTS

2017 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Gage Froerer**

Senate Sponsor: \_\_\_\_\_

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#### LONG TITLE

##### General Description:

This bill modifies provisions of the Utah Procurement Code.

##### Highlighted Provisions:

This bill:

- ▶ modifies the stated purposes of the Utah Procurement Code;
- ▶ enacts and modifies definitions applicable to the Utah Procurement Code;
- ▶ modifies a provision relating to public notice;
- ▶ provides that it is the responsibility of a person seeking information provided by a public notice to seek out, find, and respond to the public notice;
- ▶ modifies minimum experience requirements for the chief procurement officer;
- ▶ modifies language relating to the bidding process and request for proposals process;
- ▶ clarifies the use of multiple award contracts in the bidding process and request for

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proposals process;

- ▶ clarifies provisions involving the terms "responsible" and "responsive";
- ▶ modifies language relating to the situations where the use of a request for proposals process is appropriate;
- ▶ repeals and reenacts a provision relating to best and final offers;
- ▶ modifies a provision relating to a determination concerning a contract extension;
- ▶ modifies a provision relating to a determination of nonresponsibility;
- ▶ eliminates an appeal to the procurement appeals panel for a debarment or suspension and modifies the process of obtaining judicial review of a suspension or debarment;
- ▶ modifies provisions relating to protests and appeals of protest decisions;
- ▶ makes it unlawful for a person to divide a single procurement in order to avoid the use of a standard procurement process and for a person to take certain action against a public officer or employee involved in the procurement process;
- ▶ exempts taxed interlocal entities and their directors, officers, and employees from provisions relating to unlawful conduct and penalties;
- ▶ modifies language relating to the consequence of failing to report unlawful conduct; and
- ▶ makes technical changes.

### **Money Appropriated in this Bill:**

None

### **Other Special Clauses:**

This bill provides a coordination clause.

### **Utah Code Sections Affected:**

AMENDS:

**63G-6a-102**, as last amended by Laws of Utah 2014, Chapter 196

**63G-6a-103**, as last amended by Laws of Utah 2016, Chapters 176, 237, 355 and last amended by Coordination Clause, Laws of Utah 2016, Chapter 355

**63G-6a-112**, as renumbered and amended by Laws of Utah 2016, Chapter 355

**63G-6a-116**, as enacted by Laws of Utah 2016, Chapter 355 and last amended by Coordination Clause, Laws of Utah 2016, Chapter 355

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**63G-6a-302**, as last amended by Laws of Utah 2013, Chapter 445  
**63G-6a-410**, as enacted by Laws of Utah 2016, Chapter 355  
**63G-6a-506**, as last amended by Laws of Utah 2016, Chapters 237, 348 and  
renumbered and amended by Laws of Utah 2016, Chapter 355  
**63G-6a-507**, as enacted by Laws of Utah 2016, Chapter 355  
**63G-6a-602**, as last amended by Laws of Utah 2013, Chapter 445  
**63G-6a-603**, as last amended by Laws of Utah 2016, Chapter 355  
**63G-6a-606**, as last amended by Laws of Utah 2016, Chapter 355  
**63G-6a-607**, as last amended by Laws of Utah 2014, Chapter 196  
**63G-6a-608**, as last amended by Laws of Utah 2013, Chapter 445  
**63G-6a-612**, as last amended by Laws of Utah 2014, Chapter 196  
**63G-6a-702**, as last amended by Laws of Utah 2014, Chapter 196  
**63G-6a-703**, as last amended by Laws of Utah 2016, Chapter 355  
**63G-6a-707**, as last amended by Laws of Utah 2016, Chapters 237 and 355  
**63G-6a-709**, as last amended by Laws of Utah 2016, Chapter 355  
**63G-6a-802.7**, as enacted by Laws of Utah 2016, Chapter 355  
**63G-6a-903**, as last amended by Laws of Utah 2013, Chapter 445  
**63G-6a-904**, as last amended by Laws of Utah 2015, Chapter 258  
**63G-6a-1002**, as last amended by Laws of Utah 2013, Chapter 445  
**63G-6a-1003**, as last amended by Laws of Utah 2013, Chapter 445  
**63G-6a-1204.5**, as renumbered and amended by Laws of Utah 2013, Chapter 445  
**63G-6a-1402**, as last amended by Laws of Utah 2014, Chapter 196  
**63G-6a-1403**, as renumbered and amended by Laws of Utah 2012, Chapter 347  
**63G-6a-1601.5**, as enacted by Laws of Utah 2016, Chapter 355  
**63G-6a-1602**, as last amended by Laws of Utah 2016, Chapter 355  
**63G-6a-1603**, as last amended by Laws of Utah 2016, Chapter 355  
**63G-6a-1702**, as last amended by Laws of Utah 2016, Chapter 355  
**63G-6a-1703**, as last amended by Laws of Utah 2016, Chapter 355  
**63G-6a-1802**, as last amended by Laws of Utah 2015, Chapter 218  
**63G-6a-2403**, as enacted by Laws of Utah 2014, Chapter 196  
**63G-6a-2407**, as last amended by Laws of Utah 2016, Chapter 355

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**63G-10-403**, as last amended by Laws of Utah 2016, Chapter 355

ENACTS:

**63G-6a-1701.5**, Utah Code Annotated 1953

**63G-6a-2404.3**, Utah Code Annotated 1953

**63G-6a-2404.7**, Utah Code Annotated 1953

REPEALS AND REENACTS:

**63G-6a-707.5**, as last amended by Laws of Utah 2016, Chapter 355

REPEALS:

**63G-6a-1604**, as enacted by Laws of Utah 2012, Chapter 347 and last amended by  
Coordination Clause, Laws of Utah 2012, Chapter 347

**63G-6a-1706**, as last amended by Laws of Utah 2014, Chapter 196

**Utah Code Sections Affected by Coordination Clause:**

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

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

Section 1. Section **63G-6a-102** is amended to read:

**63G-6a-102. Purpose of chapter.**

The underlying purposes and policies of this chapter are:

~~[(1) to simplify, clarify, and modernize the law governing procurement in the state;]~~

(1) to ensure transparency in the public procurement process;

(2) to ensure the fair and equitable treatment of all persons who [deal with the]  
participate in the public procurement [system] process;

(3) to provide increased economy in state procurement activities; and

(4) to foster effective broad-based competition within the free enterprise system.

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

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

As used in this chapter:

~~[(1) "Administrative law judge" means the same as that term is defined in Section  
67-19e-102.;~~

~~[(2) "Administrative law judge service" means service provided by an administrative  
law judge.]~~

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~~(3)~~ (1) "Applicable rulemaking authority" means:

- (a) for a legislative procurement unit, the Legislative Management Committee;
- (b) for a judicial procurement unit, the Judicial Council;
- (c) (i) only to the extent of the procurement authority expressly granted to the

procurement unit by statute:

(A) for the building board or the Division of Facilities Construction and Management, created in Section 63A-5-201, the building board;

(B) for the Office of the Attorney General, the attorney general; and

(C) for the Department of Transportation created in Section 72-1-201, the executive director of the Department of Transportation; and

(ii) for each other executive branch procurement unit, the board;

(d) for a local government procurement unit:

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

(ii) an individual or body designated by the legislative body of the local government procurement unit;

(e) for a school district or a public school, the board, except to the extent of a school district's own nonadministrative rules that do not conflict with the provisions of this chapter;

(f) for a state institution of higher education, the State Board of Regents;

(g) for a public transit district, the chief executive of the public transit district;

(h) for a local district other than a public transit district or for a special service district:

(i) before January 1, 2015, the board of trustees of the local district or the governing body of the special service district; or

(ii) on or after January 1, 2015, the board, except to the extent that the board of trustees of the local district or the governing body of the special service district makes its own rules:

(A) with respect to a subject addressed by board rules; or

(B) that are in addition to board rules; ~~or~~

(i) for an applied technology college within the Utah College of Applied Technology, the Utah College of Applied Technology board of trustees; or

~~(j)~~ (j) for any other procurement unit, the board.

~~(4)~~ (2) "Approved vendor" means a vendor who has been approved through the approved vendor list process.

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~~[(5)]~~ (3) "Approved vendor list" means a list of approved vendors established under Section 63G-6a-507.

~~[(6)]~~ (4) "Approved vendor list process" means the procurement process described in Section 63G-6a-507.

~~{~~ ~~(5)~~ "Bias" means:

~~——~~ (a) a predisposition or a preconceived opinion that prevents an individual from impartially evaluating facts; or

~~——~~ (b) a prejudice in favor of or against a thing, individual, or group that usually results in treatment generally considered to be unfair.

~~‡~~ ~~[(7)]~~ ~~(~~6~~5)~~ "Bidder" means a person who submits a bid or price quote in response to an invitation for bids.

~~[(8)]~~ ~~(~~7~~6)~~ "Bidding process" means the procurement process described in Part 6, Bidding.

~~[(9)]~~ ~~(~~8~~7)~~ "Board" means the Utah State Procurement Policy Board, created in Section 63G-6a-202.

~~[(10)]~~ ~~(~~9~~8)~~ "Building board" means the State Building Board, created in Section 63A-5-101.

~~[(11)]~~ ~~(~~10~~9)~~ "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.

~~[(12)]~~ ~~(~~11~~10)~~ "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.

~~[(13)]~~ ~~(~~12~~11)~~ "Chief procurement officer" means the chief procurement officer appointed under Subsection 63G-6a-302(1).

~~[(14)]~~ ~~(~~13~~12)~~ "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:

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- (i) preparing any solicitation document;
- (ii) appointing an evaluation committee;
- (iii) conducting the evaluation process, except as provided in Subsection 63G-6a-707(6)(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) contract administration.

[(15)] ~~(14)~~ 13 "Conservation district" means the same as that term is defined in Section 17D-3-102.

[(16)] ~~(15)~~ 14 "Construction":

(a) means services, including work, and supplies for a project for the construction, renovation, alteration, improvement, or repair of a public facility on real property; and

(b) does not include services and supplies for the routine, day-to-day operation, repair, or maintenance of an existing public facility.

[(17)] ~~(16)~~ 15 "Construction manager/general contractor":

(a) means a contractor who enters into a contract:

(i) for the management of a construction project; and

(ii) that allows the contractor to subcontract for additional labor and materials that are not included in the contractor's cost proposal submitted at the time of the procurement of the contractor's services; and

(b) 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.

~~(17)~~ 16 "Construction subcontractor":

(a) means a person under contract with a contractor or another subcontractor to provide services or labor for ~~construction~~ the design or construction of a construction project;

(b) includes a general contractor or specialty contractor licensed or exempt from licensing under Title 58, Chapter 55, Utah Construction Trades Licensing Act; and

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

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~~[(18)]~~ [(17)] "Contract" means an agreement for a procurement.

~~[(19)]~~ [(18)] "Contract administration" means all functions, duties, and responsibilities associated with managing, overseeing, and carrying out a contract between a procurement unit and a contractor, including:

- (a) implementing the contract;
- (b) ensuring compliance with the contract terms and conditions by the conducting procurement unit and the contractor;
- (c) executing change orders;
- (d) processing contract amendments;
- (e) resolving, to the extent practicable, contract disputes;
- (f) curing contract errors and deficiencies;
- (g) terminating a contract;
- (h) measuring or evaluating completed work and contractor performance;
- (i) computing payments under the contract; and
- (j) closing out a contract.

~~[(20)]~~ [(19)] "Contractor" means a person who is awarded a contract with a procurement unit.

~~[(21)]~~ [(20)] "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.

~~[(22)]~~ [(21)] "Cooperative purchasing organization" means an organization, association, or alliance of purchasers established to combine purchasing power in order to obtain the best value for the purchasers by engaging in procurements in accordance with Section 63G-6a-2105.

~~[(23)]~~ [(22)] "Cost-plus-a-percentage-of-cost contract" means a contract under which the contractor is paid a percentage of the total actual expenses or costs in addition to the contractor's actual expenses or costs.

~~[(24)]~~ [(23)] "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.

~~[(25)]~~ [(24)] "Days" means calendar days, unless expressly provided otherwise.



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~~[(26)]~~ [(25)] "Definite quantity contract" means a fixed price contract that provides for a specified amount of supplies over a specified period, with deliveries scheduled according to a specified schedule.

~~[(27)]~~ [(26)] "Design-build" means the procurement of design professional services and construction by the use of a single contract.

~~[(28)]~~ [(27)] "Design professional" means:

- (a) an individual licensed as an architect under Title 58, Chapter 3a, Architects Licensing Act; or
- (b) an individual licensed as a professional engineer or professional land surveyor under Title 58, Chapter 22, Professional Engineers and Professional Land Surveyors Licensing Act.

~~[(29)]~~ [(28)] "Design professional procurement process" means the procurement process described in Part 15, Design Professional Services.

~~[(30)]~~ [(29)] "Design professional 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.

~~[(31)]~~ [(30)] "Director" means the director of the division.

~~[(32)]~~ [(31)] "Division" means the Division of Purchasing and General Services, created in Section 63A-2-101.

~~[(33)]~~ [(32)] "Educational procurement unit" means:

- (a) a school district;
- (b) a public school, including a local school board and a charter school;
- (c) the Utah Schools for the Deaf and Blind;
- (d) the Utah Education and Telehealth Network; ~~[or]~~
- (e) an institution of higher education of the state~~[-];~~ or
- (f) an applied technology college within the Utah College of Applied Technology.

~~[(34)]~~ [(33)] "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;

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(b) is 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.

~~[(35)]~~ (34) "Executive branch procurement unit" means a department, division, office, bureau, agency, or other organization within the state executive branch.

~~[(36)]~~ (35) "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.

~~[(37)]~~ (36) "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.

~~[(38)]~~ (37) "Grant" means an expenditure of public funds or other assistance, or an agreement to expend public funds or other assistance, for a public purpose authorized by law, without acquiring a procurement item in exchange.

~~[(39)]~~ (38) "Head of a procurement unit" means:

(a) for a legislative procurement unit, any person designated by rule made by the applicable rulemaking authority;

(b) for an executive branch procurement unit:

(i) the director of the division; or

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

(c) for a judicial procurement unit:

(i) the Judicial Council; or

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

(d) for a local government procurement unit:

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- (i) the legislative body of the local government procurement unit; or
- (ii) any other person designated by the local government procurement unit;
- (e) for a local district other than a public transit district, the board of trustees of the local district or a designee of the board of trustees;
- (f) for a special service district, the governing body of the special service district or a designee of the governing body;
- (g) for a local building authority, the board of directors of the local building authority or a designee of the board of directors;
- (h) for a conservation district, the board of supervisors of the conservation district or a designee of the board of supervisors;
- (i) for a public corporation, the board of directors of the public corporation or a designee of the board of directors;
- (j) for a school district or any school or entity within a school district, the board of the school district, or the board's designee;
- (k) for a charter school, the individual or body with executive authority over the charter school, or the individual's or body's designee;
- (l) for an institution of higher education of the state, the president of the institution of higher education, or the president's designee; ~~[or]~~
- (m) for an applied technology college within the Utah College of Applied Technology, the president of the applied technology college or the president's designee; or
- ~~[(m)]~~ (n) for a public transit district, the board of trustees or a designee of the board of trustees.

~~[(40)]~~ (39) "Immaterial error":

- (a) means an irregularity or abnormality that is:
  - (i) a matter of form that does not affect substance; or
  - (ii) an inconsequential variation from a requirement of a solicitation that has no, little, or a trivial effect on the procurement process and that is not prejudicial to other vendors; and
- (b) includes:
  - (i) a missing signature, missing acknowledgment of an addendum, or missing copy of a professional license, bond, or insurance certificate;
  - (ii) a typographical error;

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(iii) an error resulting from an inaccuracy or omission in the solicitation; and  
(iv) any other error that the chief procurement officer or the head of a procurement unit with independent procurement authority reasonably considers to be immaterial.

~~[(41)]~~ (40) "Indefinite quantity contract" means a fixed price contract that:

(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.

~~[(42)]~~ (41) "Independent procurement authority" means authority granted to a procurement unit under Subsection 63G-6a-106(4)(a).

~~[(43)]~~ (42) "Invitation for bids":

(a) means a document used to solicit:

(i) bids to provide a procurement item to a procurement unit; or

(ii) quotes for a price of a procurement item to be provided to a procurement unit; and

(b) includes all documents attached to or incorporated by reference in a document described in Subsection ~~[(43)]~~ (42)(a).

~~[(44)]~~ (43) "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 and approves the terms and conditions of a contract.

~~[(45)]~~ (44) "Judicial procurement unit" means:

(a) the Utah Supreme Court;

(b) the Utah Court of Appeals;

(c) the Judicial Council;

(d) a state judicial district; or

(e) an office, committee, subcommittee, or other organization within the state judicial branch.

~~[(46)]~~ (45) "Labor hour contract" is a contract under which:

(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.

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~~[(47)]~~ [(46)] "Legislative procurement unit" means:

- (a) the Legislature;
- (b) the Senate;
- (c) the House of Representatives;
- (d) a staff office of the Legislature, the Senate, or the House of Representatives; or
- (e) ~~[an office,]~~ a committee, subcommittee, commission, or other organization:
  - (i) within the state legislative branch[-]; or
  - (ii) (A) that is created by statute to advise or make recommendations to the Legislature;
  - (B) the membership of which includes legislators; and
  - (C) for which the Office of Legislative Research and General Counsel provides staff support.

~~[(48)]~~ [(47)] "Local building authority" means the same as that term is defined in Section 17D-2-102.

~~[(49)]~~ [(48)] "Local district" means the same as that term is defined in Section 17B-1-102.

~~[(50)]~~ [(49)] "Local government procurement unit" means:

- (a) a county or municipality, and each office or agency of the county or municipality, unless the county or municipality adopts its own procurement code by ordinance;
- (b) a county or municipality that has adopted this entire chapter by ordinance, and each office or agency of that county or municipality; or
- (c) a county or municipality that has adopted a portion of this chapter by ordinance, to the extent that a term in the ordinance is used in the adopted portion of this chapter, and each office or agency of that county or municipality.

~~[(51)]~~ [(50)] "Multiple award contracts" means the award of a contract for an indefinite quantity of a procurement item to more than one ~~[bidder or offeror]~~ person.

~~[(52)]~~ [(51)] "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.

~~[(53)]~~ [(52)] "Municipality" means a city, town, or metro township.

~~[(54)]~~ [(53)] "Nonadopting local government procurement unit" means:

- (a) a county or municipality that has not adopted Part 16, Protests, Part 17,

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Procurement Appeals Board, Part 18, Appeals to Court and Court Proceedings, and Part 19, General Provisions Related to Protest or Appeal; and

(b) each office or agency of a county or municipality described in Subsection (54)(a).

~~[(55)]~~ (54) "Offeror" means a person who submits a proposal in response to a request for proposals.

~~[(56) "Person" means the same as that term is defined in Section 68-3-12.5, excluding a political subdivision and a government office, department, division, bureau, or other body of government.]~~

~~[(57)]~~ ~~(56)~~ 55 "Preferred bidder" means a bidder that is entitled to receive a reciprocal preference under the requirements of this chapter.

~~[(58)]~~ ~~(57)~~ 56 "Procure" means to acquire a procurement item through a procurement.

~~[(59)]~~ ~~(58)~~ 57 "Procurement":

(a) means a procurement unit's acquisition of a procurement item through an expenditure of public funds, or an agreement to expend public funds;

(b) includes all functions that pertain to the acquisition of a procurement item, including:

(i) preparing and issuing a solicitation; and

(ii) (A) conducting a standard procurement process; or

(B) conducting a procurement process that is an exception to a standard procurement process under Part 8, Exceptions to Procurement Requirements; and

(c) does not include a grant.

~~[(60)]~~ ~~(59)~~ 58 "Procurement item" means a supply, a service, or construction.

~~[(61)]~~ ~~(60)~~ 59 "Procurement officer" means:

(a) for 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) for the division or a procurement unit without independent procurement authority, the chief procurement officer.

~~[(62)]~~ ~~(61)~~ 60 "Procurement unit":

(a) means:

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- (i) a legislative procurement unit;
  - (ii) an executive branch procurement unit;
  - (iii) a judicial procurement unit;
  - (iv) an educational procurement unit;
  - (v) a local government procurement unit;
  - (vi) a local district;
  - (vii) a special service district;
  - (viii) a local building authority;
  - (ix) a conservation district;
  - (x) a public corporation; or
  - (xi) a public transit district; and
- (b) does not include a political subdivision created under Title 11, Chapter 13,

Interlocal Cooperation Act.

[(63)] ~~(62)~~61 "Professional service" means labor, effort, or work that requires an elevated degree of specialized knowledge and discretion, including labor, effort, or work in the field of:

- (a) accounting;
- (b) architecture;
- (c) construction design and management;
- (d) engineering;
- (e) financial services;
- (f) information technology;
- (g) the law;
- (h) medicine;
- (i) psychiatry; or
- (j) underwriting.

[(64)] ~~(63)~~62 "Protest officer" means:

- (a) for 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's designee who is an employee of the procurement unit; or

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

(b) for a procurement unit without independent procurement authority, the chief procurement officer or the chief procurement officer's designee who is an employee of the division.

~~(65)~~ ~~(64;63)~~ "Public corporation" means the same as that term is defined in Section 63E-1-102.

~~(66)~~ ~~(65;64)~~ "Public entity" means any government entity of the state or political subdivision of the state, including:

(a) a procurement unit;

(b) a municipality or county, regardless of whether the municipality or county has adopted this chapter or any part of this chapter; and

(c) any other government entity located in the state that expends public funds.

~~(67)~~ ~~(66;65)~~ "Public facility" means a building, structure, infrastructure, improvement, or other facility of a public entity.

~~(68)~~ ~~(67;66)~~ "Public funds" means money, regardless of its source, including from the federal government, that is owned or held by a procurement unit.

~~(69)~~ ~~(68;67)~~ "Public transit district" means a public transit district organized under Title 17B, Chapter 2a, Part 8, Public Transit District Act.

~~(70)~~ ~~(69;68)~~ "Qualified vendor" means a vendor who:

(a) is responsible; and

(b) submits a responsive statement of qualifications under Section 63G-6a-410 that meets the minimum mandatory requirements, evaluation criteria, and any applicable score thresholds set forth in the request for statement of qualifications.

~~(71)~~ ~~(70;69)~~ "Real property" means land and any building, fixture, improvement, appurtenance, structure, or other development that is permanently affixed to land.

~~(72)~~ ~~(71;70)~~ "Request for information" means a nonbinding process through which a procurement unit requests information relating to a procurement item.

~~(73)~~ ~~(72;71)~~ "Request for proposals" means a document used to solicit proposals to provide a procurement item to a procurement unit, including all other documents that are attached to that document or incorporated in that document by reference.

~~(74)~~ ~~(73;72)~~ "Request for proposals process" means the procurement process



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described in Part 7, Request for Proposals.

~~(75)~~ ~~(74;73)~~ "Request for statement of qualifications" means a document used to solicit information about the qualifications of a person interested in responding to a potential procurement, including all other documents attached to that document or incorporated in that document by reference.

~~(76)~~ ~~(75;74)~~ "Requirements contract" means a contract:

(a) under which 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.

~~(77)~~ ~~(76;75)~~ "Responsible" means being capable, in all respects, of:

(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.

~~(78)~~ ~~(77;76)~~ "Responsive" means conforming in all material respects to the requirements of a solicitation.

~~(79)~~ ~~(78;77)~~ "Sealed" means manually or electronically secured to prevent disclosure.

~~(80)~~ ~~(79;78)~~ "Service":

(a) means labor, effort, or work to produce a result that is beneficial to a procurement unit;

(b) includes a professional service; and

(c) does not include labor, effort, or work provided under an employment agreement or a collective bargaining agreement.

~~(81)~~ ~~(80;79)~~ "Small purchase process" means the procurement process described in Section 63G-6a-506.

~~(82)~~ ~~(81;80)~~ "Sole source contract" means a contract resulting from a sole source procurement.

~~(83)~~ ~~(82;81)~~ "Sole source procurement" means a procurement without competition pursuant to a determination under Subsection 63G-6a-802(1)(a) that there is only one source

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for the procurement item.

[(84)] ~~(83)~~82 "Solicitation" means an invitation for bids, request for proposals, request for statement of qualifications, or request for information.

[(85)] ~~(84)~~83 "Solicitation response" means:

- (a) a bid submitted in response to an invitation for bids;
- (b) a proposal submitted in response to a request for proposals; or
- (c) a statement of qualifications submitted in response to a request for statement of qualifications.

[(86)] ~~(85)~~84 "Special service district" means the same as that term is defined in Section 17D-1-102.

[(87)] ~~(86)~~85 "Specification" means any description of the physical or functional characteristics or of the 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.

[(88)] ~~(87)~~86 "Standard procurement process" means:

- (a) the bidding process;
- (b) the request for proposals process;
- (c) the approved vendor list process;
- (d) the small purchase process; or
- (e) the design professional procurement process.

[(89)] ~~(88)~~87 "State cooperative contract" means a contract awarded by the division for and in behalf of all public entities.

[(90)] ~~(89)~~88 "Statement of qualifications" means a written statement submitted to a procurement unit in response to a request for statement of qualifications.

[(91)] ~~(90)~~89 "Subcontractor":

~~[(a) means a person under contract with a contractor or another subcontractor to provide services or labor for design or construction;]~~

~~[(b) includes a trade contractor or specialty contractor; and]~~

~~[(c) does not include a supplier who provides only materials, equipment, or supplies to~~

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~~a contractor or subcontractor.]~~

(a) means a person under contract to perform part of a contractual obligation under the control of the contractor, whether the person's contract is with the contractor directly or with another person who is under contract to perform part of a contractual obligation under the control of the contractor; and

(b) includes a supplier, distributor, or other vendor that furnishes supplies or services to a contractor.

~~(92)~~ ~~(91;90)~~ "Supply" means a good, material, technology, piece of equipment, or any other item of personal property.

~~(93)~~ ~~(92;91)~~ "Tie bid" means that the lowest responsive bids of responsible bidders are identical in price.

~~(94)~~ ~~(93;92)~~ "Time and materials contract" means a contract under which 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.

~~(95)~~ ~~(94;93)~~ "Transitional costs":

- (a) means the costs of changing:
  - (i) from an existing provider of a procurement item to another provider of that procurement item; or
  - (ii) from an existing type of procurement item to another type;
- (b) includes:
  - (i) training costs;
  - (ii) conversion costs;
  - (iii) compatibility costs;
  - (iv) costs associated with system downtime;
  - (v) disruption of service costs;
  - (vi) staff time necessary to implement the change;
  - (vii) installation costs; and
  - (viii) ancillary software, hardware, equipment, or construction costs; and

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(c) does not include:

- (i) the costs of preparing for or engaging in a procurement process; or
- (ii) contract negotiation or drafting costs.

~~[(96)]~~ ~~(~~95~~;94)~~ "Trial use contract" means a contract for a procurement item that the procurement unit acquires for a trial use or testing to determine whether the procurement item will benefit the procurement unit.

~~[(97)]~~ ~~(~~96~~;95)~~ "Vendor":

(a) means a person who is seeking to enter into a contract with a procurement unit to provide a procurement item; and

(b) includes:

- (i) a bidder;
- (ii) an offeror;
- (iii) an approved vendor; and
- (iv) a design professional.

Section 3. Section **63G-6a-112** is amended to read:

### **63G-6a-112. Required public notice.**

(1) The division or a procurement unit with independent procurement authority that issues a solicitation required to be published in accordance with this section, shall provide public notice that includes:

~~[(a) the name of the conducting procurement unit;]~~

~~[(b)]~~ (a) the name of the procurement unit acquiring the procurement item;

~~[(c)]~~ (b) information on how to contact the issuing procurement unit;

~~[(d)]~~ (c) the date of the opening and closing of the solicitation;

~~[(e)]~~ (d) information on how to obtain a copy of the procurement documents;

~~[(f)]~~ (e) a general description of the procurement items that will be obtained through the standard procurement process or procurement under Section 63G-6a-802; and

~~[(g)]~~ (f) for a notice of a procurement under Section 63G-6a-802:

(i) contact information and other information relating to contesting or obtaining additional information relating to the procurement; and

(ii) the earliest date that the procurement unit may make the procurement.

(2) Except as provided in Subsection (4), the issuing procurement unit shall publish the

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notice described in Subsection (1):

(a) at least seven days before the day of the deadline for submission of a bid or other response; and

(b) (i) in a newspaper of general circulation in the state;

(ii) in a newspaper of local circulation in the area:

(A) directly impacted by the procurement; or

(B) over which the procurement unit has jurisdiction;

(iii) on the main website for the issuing procurement unit or the procurement unit acquiring the procurement item; or

(iv) on a state website that is owned, managed by, or provided under contract with, the division for posting a public procurement notice.

(3) Except as provided in Subsection (4), for a procurement under Section 63G-6a-802 for which notice is required to be published in accordance with this section, the issuing procurement unit shall publish the notice described in Subsection (1):

(a) at least seven days before the acquisition of the procurement item; and

(b) (i) in a newspaper of general circulation in the state;

(ii) in a newspaper of local circulation in the area:

(A) directly impacted by the procurement; or

(B) over which the procurement unit has jurisdiction;

(iii) on the main website for the procurement unit acquiring the procurement item; or  
(iv) on a state website that is owned by, managed by, or provided under contract with, the division for posting a procurement notice.

(4) An issuing procurement unit may reduce the seven-day period described in Subsection (2) or (3), if the procurement officer or the procurement officer's designee signs a written statement that:

(a) states that a shorter time is needed; and

(b) determines that competition from multiple sources may be obtained within the shorter period of time.

(5) (a) An issuing procurement unit shall make a copy of the solicitation documents available for public inspection at the main office of the issuing procurement unit or on the website described in Subsection (2)(b) until the award of the contract or the cancellation of the

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procurement.

(b) A procurement unit issuing a procurement under Section 63G-6a-802 shall make a copy of information related to the procurement available for public inspection at the main office of the procurement unit or on the website described in Subsection (3)(b) until the award of the contract or the cancellation of the procurement.

(c) A procurement unit shall maintain all records in accordance with Part 20, Records.

(6) A procurement unit that issues a request for statement of qualifications as part of an approved vendor list process that results in the establishment of an open-ended vendor list, as defined in Section 63G-6a-507, shall keep the request for statement of qualifications posted on a website described in Subsection (2)(b)(iii) or (iv) during the entire period of the open-ended vendor list.

(7) (a) It is the responsibility of a person seeking information provided by a public notice under this section to seek out, find, and respond to a public notice issued by a procurement unit.

(b) As a courtesy and in order to promote competition, a procurement unit may provide, but is not required to provide, individual notice.

Section 4. Section **63G-6a-116** is amended to read:

### **63G-6a-116. Procurement of administrative law judge service.**

(1) As used in this section:

(a) "Administrative law judge" means the same as that term is defined in Section 67-19e-102.

(b) "Administrative law judge service" means service provided by an administrative law judge.

~~(1)~~ (2) A procurement unit shall use a standard procurement process under this chapter for the procurement of administrative law judge service.

(3) For a procurement of administrative law judge service, an evaluation committee shall consist of:

(a) the head of the conducting procurement unit, or the head's designee;

(b) the head of an executive branch procurement unit other than the conducting procurement unit, appointed by the executive director of the Department of Human Resource Management, or the head's designee; and

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(c) the executive director of the Department of Human Resource Management, or the executive director's designee.

[(2)] (4) Within 30 days after the day on which a conducting procurement unit awards a contract for administrative law judge service, the conducting procurement unit shall give written notice to the Department of Human Resource Management that states:

(a) that the conducting procurement unit awarded a contract for administrative law judge service;

(b) the name of the conducting procurement unit; and

(c) the expected term of the contract.

(5) A procurement of administrative law judge service using a small purchase process is subject to rules made pursuant to Subsection 63G-6a-506(2)(c).

Section 5. Section **63G-6a-302** is amended to read:

### **63G-6a-302. Chief procurement officer -- Appointment -- Qualifications --**

#### **Authority.**

(1) The executive director of the Department of Administrative Services, with the consent of the governor, shall appoint the chief procurement officer after considering recommendations from the board.

(2) The chief procurement officer shall:

(a) have a minimum of eight years' experience;

(i) (A) in the large-scale procurement of supplies [and], services, or [services and] construction[-]; or

(B) negotiating contract terms and conditions; and

(ii) at least five years of which shall have been in public or comparable private procurement within 12 years preceding the date of appointment; and

(b) be a person with demonstrated executive and organizational ability.

(3) The chief procurement officer appointed under Subsection (1) is also the director of the Division of Purchasing and General Services.

(4) The chief procurement officer has authority over a procurement by a procurement unit, except:

(a) a procurement unit with independent procurement authority; or

(b) as otherwise expressly provided in this chapter.

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Section 6. Section **63G-6a-410** is amended to read:

### **63G-6a-410. Request for statement of qualifications -- Process.**

(1) (a) A procurement unit may use the process described in this section:

(i) as one of the stages of a multiple-stage:

(A) bidding process;

(B) request for proposals process; or

(C) design professional procurement process; and

(ii) to identify qualified vendors to participate in other stages of the multiple-stage procurement process.

(b) A procurement unit shall use the process described in this section as part of the approved vendor list process, if the procurement unit intends to establish an approved vendor list.

(2) A procurement unit may not:

(a) award a contract based solely on the process described in this section; or

(b) solicit costs, pricing, or rates or negotiate fees through the process described in this section.

(3) The process of identifying qualified vendors in a multiple-stage procurement process or of establishing an approved vendor list under Section 63G-6a-507 is initiated by a procurement unit issuing a request for statement of qualifications.

(4) A request for statement of qualifications in a multiple-stage procurement process shall include:

(a) a statement indicating that participation in other stages of the multiple-stage procurement process will be limited to qualified vendors;

(b) the minimum mandatory requirements, evaluation criteria, and applicable score thresholds that will be used to identify qualified vendors, including, as applicable:

(i) experience and work history;

(ii) management and staff requirements or standards;

(iii) licenses, certifications, and other qualifications;

(iv) performance ratings or references;

(v) financial stability; and

(vi) other information pertaining to vendor qualifications that the chief procurement



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officer or the head of a procurement unit with independent procurement authority considers relevant or important; and

(c) the deadline by which a vendor is required to submit a statement of qualifications.

(5) A request for statement of qualifications in an approved vendor list process under Section 63G-6a-507 shall include:

(a) a general description of, as applicable:

(i) the procurement item that the procurement unit seeks to acquire;

(ii) the type of project or scope or category of work that will be the subject of a procurement by the procurement unit;

(iii) the procurement process the procurement unit will use to acquire the procurement item; and

(iv) the type of vendor the procurement unit seeks to provide the procurement item;

(b) the minimum mandatory requirements, evaluation criteria, and applicable score thresholds that vendors are required to meet to be included on the approved vendor list;

(c) a statement indicating that the approved vendor list will include only responsible vendors that:

(i) submit a responsive statement of qualifications; and

(ii) meet the minimum mandatory requirements, evaluation criteria, and applicable score thresholds described in the request for statement of qualifications;

(d) a statement indicating that only vendors on the approved vendor list will be able to participate in the procurements identified in the request for statement of qualifications;

(e) a statement indicating whether the procurement unit will use a performance rating system for evaluating the performance of vendors on the approved vendor list, including whether a vendor on the approved vendor list may be disqualified and removed from the list;

(f) (i) a statement indicating whether the procurement unit uses a closed-ended approved vendor list, as defined in Section 63G-6a-507, or an open-ended approved vendor list, as defined in Section 63G-6a-507; and

(ii) (A) if the procurement unit uses a closed-ended approved vendor list, the deadline by which a vendor is required to submit a statement of qualifications and a specified period of time after which the approved vendor list will expire; or

(B) if the procurement unit uses an open-ended approved vendor list, the deadline by

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which a vendor is required to submit a statement of qualifications to be considered for the initial approved vendor list, a schedule indicating when a vendor not on the initial approved vendor list may submit a statement of qualifications to be considered to be added to the approved vendor list, and the specified period of time after which a vendor is required to submit a new statement of qualifications for evaluation before the vendor's status as an approved vendor on the approved vendor list may be renewed; and

(g) a description of any other criteria or requirements specific to the procurement item or scope of work that is the subject of the procurement.

(6) A procurement unit issuing a request for statement of qualifications shall publish the request as provided in Section 63G-6a-112.

(7) After the deadline for submitting a statement of qualifications, the chief procurement officer or the head of a procurement unit with independent procurement authority may allow a vendor to correct an immaterial error in a statement of qualifications, as provided in Section 63G-6a-114.

(8) (a) A conducting procurement unit may reject a statement of qualifications if the conducting procurement unit determines that:

(i) the vendor who submitted the statement of qualifications:

(A) is not responsible;

(B) is in violation of a provision of this chapter;

(C) has engaged in unethical conduct; or

(D) receives a performance rating below the satisfactory performance threshold specified in the request for statement of qualifications;

(ii) there has been a change in the vendor's circumstances after the vendor submits a statement of qualifications that, if the change had been known at the time the statement of qualifications was evaluated, would have caused the statement of qualifications not to have received a qualifying score; or

(iii) the statement of qualifications:

(A) is not responsive; or

(B) does not meet the mandatory minimum requirements, evaluation criteria, or applicable score thresholds stated in the request for statement of qualifications.

(b) A procurement unit that rejects a statement of qualifications under Subsection

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(8)(a) shall:

- (i) make a written finding, stating the reasons for the rejection; and
- (ii) provide a copy of the written finding to the vendor that submitted the rejected

statement of qualifications.

(9) (a) (i) After the issuance of a request for statement of qualifications, the conducting procurement unit shall appoint an evaluation committee consisting of [~~membership as provided in Subsection (9)(a)(ii) or (iii), as applicable.~~ (ii) An evaluation committee for a procurement of administrative law judge service shall consist of: (A) the head of the conducting procurement unit, or the head's designee; (B) the head of an executive branch procurement unit other than the conducting procurement unit, appointed by the executive director of the Department of Human Resource Management, or the head's designee; and (C) the executive director of the Department of Human Resource Management, or the executive director's designee. (iii) An evaluation committee for each other procurement shall consist of] at least three individuals with at least a general familiarity with or basic understanding of:

(A) the technical requirements relating to the type of procurement item that is the subject of the request for statement of qualifications; or

(B) the need that the procurement item is intended to address.

~~[(iv)]~~ (ii) The conducting procurement unit shall ensure that each member of [~~the~~] an evaluation committee [~~under Subsection (9)(a)(iii)]~~ and each individual participating in the evaluation committee process:

(A) does not have a conflict of interest with any vendor that submits a statement of qualifications;

(B) can fairly evaluate each statement of qualifications;

(C) does not contact or communicate with a vendor concerning the evaluation process or procurement outside the official evaluation committee process; and

(D) conducts or participates in the evaluation in a manner that ensures a fair and competitive process and avoids the appearance of impropriety.

(b) A conducting procurement unit may authorize an evaluation committee to receive assistance:

(i) from an expert or consultant who:

(A) is not a member of the evaluation committee; and

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- (B) does not participate in the evaluation scoring; and
- (ii) to better understand a technical issue involved in the procurement.
- (c) An evaluation committee appointed under this Subsection (9):
  - (i) shall evaluate and score statements of qualifications submitted in response to a request for statement of qualifications using the minimum mandatory requirements, evaluation criteria, and applicable score thresholds set forth in the request for statement of qualifications;
  - (ii) may not evaluate or score a statement of qualifications using criteria not included in the request for statement of qualifications; and
  - (iii) may, with the approval of the head of the conducting procurement unit, enter into discussions or conduct interviews with or attend presentations by vendors, for the purpose of clarifying information contained in statements of qualifications.
- (d) In a discussion, interview, or presentation under Subsection (9)(c)(iii), a vendor:
  - (i) may only explain, illustrate, or interpret the contents of the vendor's original statement of qualifications; and
  - (ii) may not:
    - (A) address criteria or specifications not contained in the vendor's original statement of qualifications;
    - (B) correct a deficiency, inaccuracy, or mistake in a statement of qualifications that is not an immaterial error;
    - (C) correct an incomplete submission of documents that the request for statement of qualifications required to be submitted with the statement of qualifications;
    - (D) correct a failure to submit a timely statement of qualifications;
    - (E) substitute or alter a required form or other document specified in the statement of qualifications;
    - (F) remedy a cause for a vendor being considered to be not responsible or a statement of qualifications not responsive; or
    - (G) correct a defect or inadequacy resulting in a determination that a vendor does not meet the mandatory minimum requirements, evaluation criteria, or applicable score thresholds established in the statement of qualifications.
- (e) After the evaluation committee completes its evaluation and scoring of the statements of qualifications, the evaluation committee shall submit the statements of

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qualifications and evaluation scores to the head of the procurement unit for review and final determination of:

(i) qualified vendors, if the request for statement of qualifications process is used as one of the stages of a multiple-stage process; or

(ii) vendors to be included on an approved vendor list, if the request for statement of qualifications process is used as part of the approved vendor list process.

(f) The issuing procurement unit shall review the evaluation committee's scores and correct any errors, scoring inconsistencies, and reported noncompliance with this chapter.

(g) (i) The deliberations of an evaluation committee under this Subsection (9) may be held in private.

(ii) If the evaluation committee is a public body, as defined in Section 52-4-103, the evaluation committee shall comply with Section 52-4-205 in closing a meeting for its deliberations.

(10) A procurement unit may at any time request a vendor to clarify information contained in a statement of qualifications, as provided in Section 63G-6a-115.

(11) A vendor may voluntarily withdraw a statement of qualifications at any time before a contract is awarded with respect to which the statement of qualifications was submitted.

(12) If only one vendor meets the minimum qualifications, evaluation criteria, and applicable score thresholds set forth in the request for statement of qualifications that the procurement unit is using as part of an approved vendor list process, the conducting procurement unit:

(a) shall cancel the request for statement of qualifications; and

(b) may not establish an approved vendor list based on the canceled request for statement of qualifications or on statements of qualifications submitted in response to the request for statement of qualifications.

(13) If a conducting procurement unit cancels a request for statement of qualifications, the conducting procurement unit shall make available for public inspection a written justification for the cancellation.

(14) After receiving and reviewing the statements of qualifications and evaluation scores submitted by the evaluation committee [~~under Subsection (9)(d)~~], the head of the

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procurement unit using the request for statement of qualifications process under this section as one of the stages of a multiple-stage procurement process shall identify those vendors meeting the minimum mandatory requirements, evaluation criteria, and applicable score thresholds as qualified vendors who are allowed to participate in the remaining stages of the multiple-stage procurement process.

(15) The applicable rulemaking authority may make rules pertaining to the request for statement of qualifications and the process described in this section.

Section 7. Section **63G-6a-506** is amended to read:

### **63G-6a-506. Small purchases.**

(1) As used in this section:

(a) "Annual cumulative threshold" means the maximum total annual amount, established by the applicable rulemaking authority under Subsection (2), that a procurement unit may expend to obtain procurement items from the same source under this section.

(b) "Individual procurement threshold" means the maximum amount, established by the applicable rulemaking authority under Subsection (2), for which a procurement unit may purchase a procurement item under this section.

(c) "Single procurement aggregate threshold" means the maximum total amount, established by the applicable rulemaking authority under Subsection (2), that a procurement unit may expend to obtain multiple procurement items from one source at one time under this section.

(2) (a) The applicable rulemaking authority may make rules governing small purchases of any procurement item, including construction, job order contracting, design professional services, other professional services, information technology, and goods.

(b) Rules under Subsection (2)(a) may include provisions:

(i) establishing expenditure thresholds, including:

(A) an annual cumulative threshold;

(B) an individual procurement threshold; and

(C) a single procurement aggregate threshold;

(ii) establishing procurement requirements relating to the thresholds described in Subsection (2)(b)(i); and

(iii) providing for the use of electronic, telephone, or written quotes.

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(c) If a procurement unit obtains administrative law judge service through a small purchase standard procurement process, rules made under Subsection (2)(a) shall provide that the process for the procurement of administrative law judge service include an evaluation committee described in Subsection [~~63G-6a-707(3)(a)~~ 63G-6a-116(3)].

(3) Expenditures made under this section by a procurement unit may not exceed a threshold established by the applicable rulemaking authority, unless the chief procurement officer or the head of a procurement unit with independent procurement authority gives written authorization to exceed the threshold that includes the reasons for exceeding the threshold.

(4) Except as provided in Subsection (5), an executive branch procurement unit may not obtain a procurement item through a small purchase standard procurement process if the procurement item may be obtained through a state cooperative contract or a contract awarded by the chief procurement officer under Subsection 63G-6a-2105(1).

(5) Subsection (4) does not apply if:

(a) the procurement item is obtained for an unanticipated, urgent, or emergency condition, including:

- (i) an item needed to avoid stopping a public construction project;
- (ii) an immediate repair to a facility or equipment; or
- (iii) another emergency condition; or

(b) the chief procurement officer or the head of a procurement unit that is an executive branch procurement unit with independent procurement authority:

(i) determines in writing that it is in the best interest of the procurement unit to obtain an individual procurement item outside of the state contract, comparing:

(A) the contract terms and conditions applicable to the procurement item under the state contract with the contract terms and conditions applicable to the procurement item if the procurement item is obtained outside of the state contract;

(B) the maintenance and service applicable to the procurement item under the state contract with the maintenance and service applicable to the procurement item if the procurement item is obtained outside of the state contract;

(C) the warranties applicable to the procurement item under the state contract with the warranties applicable to the procurement item if the procurement item is obtained outside of the state contract;

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(D) the quality of the procurement item under the state contract with the quality of the procurement item if the procurement item is obtained outside of the state contract; and

(E) the cost of the procurement item under the state contract with the cost of the procurement item if the procurement item is obtained outside of the state contract;

(ii) for a procurement item that, if defective in its manufacture, installation, or performance, may result in serious physical injury, death, or substantial property damage, determines in writing that the terms and conditions, relating to liability for injury, death, or property damage, available from the source other than the contractor who holds the state contract, are similar to, or better than, the terms and conditions available under the state contract; and

(iii) grants an exception, in writing, to the requirement described in Subsection (4).

(6) Except as otherwise expressly provided in this section, a procurement unit:

(a) may not use the small purchase standard procurement process described in this section for ongoing, continuous, and regularly scheduled procurements that exceed the annual cumulative threshold; and

(b) shall make its ongoing, continuous, and regularly scheduled procurements that exceed the annual cumulative threshold through a contract awarded through another standard procurement process described in this chapter or an applicable exception to another standard procurement process, described in Part 8, Exceptions to Procurement Requirements.

(7) This section does not prohibit regularly scheduled payments for a procurement item obtained under another provision of this chapter.

~~[(8)(a) It is unlawful for a person to intentionally or knowingly divide a procurement into smaller procurements with the intent to make a procurement:]~~

~~[(i) qualify as a small purchase, if, before dividing the procurement, it would not have qualified as a small purchase; or]~~

~~[(ii) meet a threshold established by rule made by the applicable rulemaking authority, if, before dividing the procurement, it would not have met the threshold:]~~

~~[(b) A person who engages in the conduct made unlawful under Subsection (8)(a) is guilty of:]~~

~~[(i) a second degree felony, if the value of the procurement before being divided is \$1,000,000 or more;]~~



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~~[(ii) a third degree felony, if the value of the procurement before being divided is \$250,000 or more but less than \$1,000,000;]~~

~~[(iii) a class A misdemeanor, if the value of the procurement before being divided is \$100,000 or more but less than \$250,000; or]~~

~~[(iv) a class B misdemeanor, if the value of the procurement before being divided is less than \$100,000.]~~

~~[(9) A division of a procurement that is prohibited under Subsection (8) includes doing any of the following with the intent or knowledge described in Subsection (8):]~~

~~[(a) making two or more separate purchases;]~~

~~[(b) dividing an invoice or purchase order into two or more invoices or purchase orders; or]~~

~~[(c) making smaller purchases over a period of time.]~~

(8) (a) It is unlawful for a person knowingly to divide a single procurement into multiple smaller procurements, including by dividing an invoice or purchase order into multiple invoices or purchase orders, if:

(i) the single procurement would not have qualified as a small purchase under this section;

(ii) one or more of the multiple smaller procurements qualify as a small purchase under this section; and

(iii) the division is done with the intent to:

(A) avoid having to use a standard procurement process, other than the small purchase process, that the person would otherwise be required to use for the single procurement; or

(B) make one or more of the multiple smaller procurements fall below a small purchase expenditure threshold established by rule under Subsection (2)(b) that the single procurement would not have fallen below without the division.

(b) A violation of Subsection (8)(a) is subject to penalties as provided in Subsection 63G-6a-2404.3(2).

~~[(10)]~~ ~~(18)~~9 The Division of Finance within the Department of Administrative Services may conduct an audit of an executive branch procurement unit to verify compliance with the requirements of this section.

~~[(11)]~~ ~~(19)~~10 An executive branch procurement unit may not make a small purchase

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after January 1, 2014, unless the chief procurement officer certifies that the person responsible for procurements in the procurement unit has satisfactorily completed training on this section and the rules made under this section.

Section 8. Section **63G-6a-507** is amended to read:

### **63G-6a-507. Approved vendor list procurement process.**

(1) As used in this section:

(a) "Closed-ended approved vendor list" means an approved vendor list that is subject to:

(i) a short period of time, specified by the procurement unit, during which vendors may be added to the list; and

(ii) a specified period of time after which the list will expire.

(b) "Open-ended approved vendor list" means an approved vendor list that is subject to:

(i) an indeterminate period of time during which vendors may be added to the list;

(ii) the addition of vendors to the list throughout the term of the list; and

(iii) a specified period of time after which a vendor on the list is required to submit the vendor's qualifications for evaluation before the vendor may be renewed as an approved vendor.

(2) A procurement unit may not establish an approved vendor list unless the procurement unit has first completed the statement of qualifications process described in Section 63G-6a-410.

(3) (a) A procurement unit may establish an approved vendor list for:

(i) a specific, fully defined procurement item; or

(ii) a future procurement item that is not specifically and fully defined, if the request for statement of qualifications contains a general description of:

(A) the procurement item; and

(B) the type of vendor that the procurement unit seeks to provide the procurement item.

(b) A procurement unit may not award a contract to a vendor on an approved vendor list for a procurement item that is outside the scope of the general description of the procurement item contained in the request for statement of qualifications.

(4) After receiving the statements of qualifications and evaluation scores submitted by

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the evaluation committee under Subsection 63G-6a-410(9)~~(d)~~(e), the head of the conducting procurement unit using the request for statement of qualifications process under Section 63G-6a-410 as part of an approved vendor list process shall:

(a) include on an approved vendor list those vendors meeting the minimum mandatory requirements, evaluation criteria, and applicable score thresholds; and

(b) reject any vendor not meeting the minimum mandatory requirements, evaluation criteria, and applicable score thresholds as ineligible for inclusion on the approved vendor list.

(5) (a) A procurement unit shall include approved vendors on a closed-ended approved vendor list or an open-ended approved vendor list.

(b) (i) A closed-ended approved vendor list shall expire no later than 18 months after the publication of the closed-ended approved vendor list.

(ii) A procurement unit shall require a vendor on an open-ended approved vendor list, in order to remain on the approved vendor list, to submit an updated statement of qualifications for evaluation no later than 18 months after the vendor was added to the list as an approved vendor.

(6) A procurement unit may:

(a) (i) using a bidding process, request for proposals process, small purchase process, or design professional procurement process, award a contract to a vendor on an approved vendor list for any procurement item or type of procurement item specified by the procurement unit in the request for statement of qualifications, including procurement items that the procurement unit intends to acquire in a series of future procurements described in the request for statement of qualifications; and

(ii) limit participation in a bidding process, request for proposals process, small purchase process, or design professional procurement process to vendors on an approved vendor list; or

(b) award a contract to a vendor on an approved vendor list at a price established as provided in Section 63G-6a-113.

(7) After establishing an approved vendor list as provided in this section, the conducting procurement unit shall, before using the approved vendor list, submit the approved vendor list to the issuing procurement unit for publication by the issuing procurement unit.

(8) A conducting procurement unit administering an open-ended approved vendor list

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shall:

(a) require a vendor seeking inclusion on the approved vendor list to submit a statement of qualifications that complies with all requirements applicable at the time of the initial request for statement of qualifications;

(b) if modifying the requirements for inclusion on the approved vendor list, apply any new or additional requirement to all vendors equally, whether a vendor is seeking inclusion on the approved vendor list for the first time or is already included on the approved vendor list; and

(c) keep the request for statement of qualifications posted on a website as required under Subsection 63G-6a-112(6).

(9) The applicable rulemaking authority shall make rules pertaining to an approved vendor list process, including:

(a) procedures to ensure that all vendors on an approved vendor list have a fair and equitable opportunity to compete for a contract for a procurement item; and

(b) requirements for using an approved vendor list with the small purchase process.

Section 9. Section **63G-6a-602** is amended to read:

### **63G-6a-602. Contracts awarded by bidding.**

(1) [~~Except as otherwise provided in this chapter, the~~] The division or a procurement unit with independent procurement authority [~~shall~~] may award a contract for a procurement item by the bidding process, in accordance with the rules of the applicable rulemaking authority.

(2) The bidding standard procurement process is appropriate to use when cost is the major factor in determining the award of a procurement.

Section 10. Section **63G-6a-603** is amended to read:

### **63G-6a-603. Invitation for bids -- Requirements -- Publication.**

(1) The bidding standard procurement process begins when the issuing procurement unit issues an invitation for bids.

(2) An invitation for bids shall:

(a) state the period of time during which bids will be accepted;

(b) describe the manner in which a bid shall be submitted;

(c) state the place where a bid shall be submitted; and

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(d) include, or incorporate by reference:

(i) to the extent practicable, a full description of the procurement items sought and the full scope of work;

(ii) the objective criteria that will be used to evaluate the bids; and

(iii) the required contractual terms and conditions.

(3) An issuing procurement unit shall publish an invitation for bids in accordance with the requirements of Section 63G-6a-112.

Section 11. Section **63G-6a-606** is amended to read:

### **63G-6a-606. Evaluation of bids -- Award -- Cancellation -- Rejecting a bid.**

(1) A procurement unit that conducts a procurement using a bidding [~~standard procurement~~] process shall evaluate each bid using the objective criteria described in the invitation for bids, which may include:

(a) experience;

(b) performance ratings;

(c) inspection;

(d) testing;

(e) quality;

(f) workmanship;

(g) time and manner of delivery;

(h) references;

(i) financial stability;

(j) cost;

(k) suitability for a particular purpose;

(l) the contractor's work site safety program, including any requirement that the contractor imposes on subcontractors for a work site safety program; or

(m) other objective criteria specified in the invitation for bids.

(2) Criteria not described in the invitation for bids may not be used to evaluate a bid.

(3) The conducting procurement unit shall:

(a) subject to the provisions of Section 63G-6a-1204.5 for multiple award contracts, award the contract as soon as practicable to:

(i) the responsible bidder who submits the lowest responsive bid that meets the

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objective criteria described in the invitation for bids; or

(ii) if, in accordance with Subsection (4), the procurement officer or the head of the conducting procurement unit rejects a bid described in Subsection (3)(a)(i), the responsible bidder who submits the next lowest responsive bid that meets the objective criteria described in the invitation for bids; or

(b) cancel the invitation for bids without awarding a contract.

(4) In accordance with Subsection (5), the procurement officer or the head of the conducting procurement unit may reject a bid for:

(a) a violation of this chapter by the bidder who submitted the bid;

(b) a violation of a requirement of the invitation for bids;

(c) unlawful or unethical conduct by the bidder who submitted the bid; or

(d) a change in a bidder's circumstance that, had the change been known at the time the bid was submitted, would have caused the bid to be rejected.

(5) A procurement officer or head of a conducting procurement unit who rejects a bid under Subsection (4) shall:

(a) make a written finding, stating the reasons for the rejection; and

(b) provide a copy of the written finding to the bidder who submitted the rejected bid.

(6) If a conducting procurement unit cancels an invitation for bids without awarding a contract, the conducting procurement unit shall make available for public inspection a written justification for the cancellation.

Section 12. Section **63G-6a-607** is amended to read:

### **63G-6a-607. Action if all bids exceed available funds -- Exemption.**

(1) Except as provided in Subsection (2) or (3), if the fiscal officer for the conducting procurement unit certifies that all accepted bids exceed available funds and that the lowest responsive ~~[and] bid from~~ a responsible bidder does not exceed the available funds by more than 5%, the procurement officer may negotiate an adjustment of the bid price and bid requirements with the responsible bidder who submitted the lowest responsive ~~[and responsible bidder] bid~~ in order to bring the bid within the amount of available funds.

(2) A procurement officer may not adjust the bid requirements under Subsection (1) if there is a substantial likelihood that, had the adjustment been included in the invitation for bids, a person that did not submit a bid would have submitted a responsive~~[, responsible,]~~ and

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competitive bid.

(3) The Division of Facilities Construction and Management is exempt from the requirements of this section if:

(a) the building board adopts rules governing procedures when all accepted bids exceed available funds; and

(b) the Division of Facilities Construction and Management complies with the rules described in Subsection (3)(a).

Section 13. Section **63G-6a-608** is amended to read:

### **63G-6a-608. Tie bids -- Resolution -- Copies provided to attorney general.**

(1) A procurement officer shall resolve a tie bid in accordance with a method established by rule made by the applicable rulemaking authority. The method may include awarding the tie bid:

(a) to the tie bidder who:

(i) is a provider of state products, if no other tie bidder is a [responsive] provider of state products;

(ii) is closest to the point of delivery;

(iii) received the previous award; or

(iv) will provide the earliest delivery date;

(b) by drawing lots; or

(c) by any other reasonable method of resolving a tie bid.

(2) The method chosen by the procurement officer to resolve a tie bid shall be at the sole discretion of the procurement officer, subject to the rules established under Subsection (1).

(3) A procurement unit in the state executive branch shall provide a copy of the procurement to the attorney general if an award of a contract to a tie bidder exceeds \$100,000 in expenditures.

Section 14. Section **63G-6a-612** is amended to read:

### **63G-6a-612. Conduct of reverse auction.**

(1) A procurement unit conducting a reverse auction:

(a) may conduct the reverse auction at a physical location or by electronic means;

(b) shall permit all prequalified bidders to participate in the reverse auction;

(c) may not permit a bidder to participate in the reverse auction if the bidder did not

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prequalify to participate in the reverse auction;

- (d) may not accept a bid after the time for submission of a bid has expired;
- (e) shall update the bids on a real time basis; and
- (f) shall conduct the reverse auction in a manner that permits each bidder to:
  - (i) bid against each other; and
  - (ii) lower the bidder's price below the lowest bid before the reverse auction closes.

(2) At the end of the reverse auction, the conducting procurement unit shall:

- (a) award the contract as soon as practicable to the ~~[lowest responsive and]~~ responsible

bidder who:

(i) meets the objective criteria described in the invitation for bids; ~~[or]~~ and

(ii) submitted the lowest responsive bid; or

(b) cancel the reverse auction without awarding a contract.

(3) After the reverse auction is finished, the conducting procurement unit shall make publicly available:

(a) (i) the amount of the final bid submitted by each bidder during the reverse auction;

and

(ii) the identity of the bidder that submitted each final bid; and

(b) if practicable:

(i) the amount of each bid submitted during the reverse auction; and

(ii) the identity of the bidder that submitted each bid.

Section 15. 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 the procurement officer determines, in writing, that the request for proposals standard procurement process will provide the best value to the procurement unit.]~~

(1) The division or a procurement unit with independent procurement authority may award a contract for a procurement item by the request for proposals process, in accordance with the rules of the applicable rulemaking authority.

(2) (a) The request for proposals ~~[standard procurement]~~ process is appropriate for a procurement unit to use ~~[for]~~ in selecting the proposal that provides the best value or is the most advantageous to the procurement unit, including when:



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~~[(a) the procurement of professional services;]~~

~~[(b) a design-build procurement;]~~

(i) the procurement involves a contract whose terms and conditions are to be negotiated in order to achieve the result that is the most advantageous to the procurement unit;

~~[(c) when]~~ (ii) 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]~~ (iii) factors, apart from or in addition to cost, are highly significant in making the selection that is most advantageous to the procurement unit.

(b) The types of procurements for which it is appropriate to use the request for proposals process include:

(i) a procurement of professional services; and

(ii) a procurement of design-build or construction manager/general contractor services.

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

Section 16. Section **63G-6a-703** is amended to read:

### **63G-6a-703. Request for proposals -- Requirements -- Publication of request.**

(1) The request for proposals standard procurement process begins when the division or a procurement unit with independent procurement authority issues a request for proposals.

(2) A request for proposals shall:

(a) state the period of time during which a proposal will be accepted;

(b) describe the manner in which a proposal shall be submitted;

(c) state the place where a proposal shall be submitted;

(d) include, or incorporate by reference:

(i) to the extent practicable, a full description of the procurement items sought and the full scope of work;

(ii) a description of the subjective and objective criteria that will be used to evaluate the proposal; and

(iii) the standard contractual terms and conditions required by the authorized purchasing entity;

(e) state the relative weight that will be given to each score for the criteria described in Subsection (2)(d)(ii), including cost;

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(f) state the formula that will be used to determine the score awarded for the cost of each proposal;

(g) if the request for proposals will be conducted in multiple stages, as described in Section 63G-6a-710, include a description of the stages and the criteria and scoring that will be used to screen offerors at each stage; and

(h) state that best and final offers may be allowed, as provided in Section 63G-6a-707.5, from responsible offerors who submit responsive proposals that meet minimum qualifications, evaluation criteria, or applicable score thresholds identified in the request for proposals.

(3) The division or a procurement unit with independent procurement authority shall publish a request for proposals in accordance with the requirements of Section 63G-6a-112.

Section 17. Section **63G-6a-707** is amended to read:

### **63G-6a-707. Evaluation of proposals -- Evaluation committee.**

(1) To determine which proposal provides the best value to the procurement unit, the evaluation committee shall evaluate each responsible offeror's responsive [~~and responsible~~] proposal that has not been disqualified from consideration under the provisions of this chapter, using the criteria described in the request for proposals, which may include:

- (a) experience;
- (b) performance ratings;
- (c) inspection;
- (d) testing;
- (e) quality;
- (f) workmanship;
- (g) time, manner, or schedule of delivery;
- (h) references;
- (i) financial solvency;
- (j) suitability for a particular purpose;
- (k) management plans;
- (l) the presence and quality of a work site safety program, including any requirement that the offeror imposes on subcontractors for a work site safety program;
- (m) cost; or

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(n) other subjective or objective criteria specified in the request for proposals.

(2) Criteria not described in the request for proposals may not be used to evaluate a proposal.

~~[(3) (a) For a procurement of administrative law judge service, an evaluation committee shall consist of:]~~

~~[(i) the head of the conducting procurement unit, or the head's designee;]~~

~~[(ii) the head of an executive branch procurement unit other than the conducting procurement unit, appointed by the executive director of the Department of Human Resource Management, or the head's designee; and]~~

~~[(iii) the executive director of the Department of Human Resource Management, or the executive director's designee.]~~

~~[(b) For every other procurement requiring an evaluation by an evaluation committee, the]~~

(3) The conducting procurement unit shall:

~~[(i)]~~ (a) appoint an evaluation committee consisting of at least three individuals with at least a general familiarity with or basic understanding of:

~~[(A)]~~ (i) the technical requirements relating to the type of procurement item that is the subject of the procurement; or

~~[(B)]~~ (ii) the need that the procurement item is intended to address; and

~~[(ii)]~~ (b) ensure that the evaluation committee and each individual participating in the evaluation committee process:

~~[(A)]~~ (i) does not have a conflict of interest with any of the offerors;

~~[(B)]~~ (ii) can fairly evaluate each proposal;

~~[(C)]~~ (iii) does not contact or communicate with an offeror concerning the procurement outside the official evaluation committee process; and

~~[(D)]~~ (iv) conducts or participates in the evaluation in a manner that ensures a fair and competitive process and avoids the appearance of impropriety.

(4) A conducting procurement unit may authorize an evaluation committee to receive assistance:

(a) from an expert or consultant who:

(i) is not a member of the evaluation committee; and

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(ii) does not participate in the evaluation scoring; and

(b) to better understand a technical issue involved in the procurement.

(5) (a) An evaluation committee may, with the approval of the head of the conducting procurement unit, enter into discussions or conduct interviews with, or attend presentations by, the offerors, for the purpose of clarifying information contained in proposals.

(b) In a discussion, interview, or presentation under Subsection (5)(a), an offeror:

(i) may only explain, illustrate, or interpret the contents of the offeror's original proposal; and

(ii) may not:

(A) address criteria or specifications not contained in the offeror's original proposal;

(B) correct a deficiency, inaccuracy, or mistake in a proposal that is not an immaterial error;

(C) correct an incomplete submission of documents that the solicitation required to be submitted with the proposal;

(D) correct a failure to submit a timely proposal;

(E) substitute or alter a required form or other document specified in the solicitation;

(F) remedy a cause for an offeror being considered to be not responsible or a proposal not responsive; or

(G) correct a defect or inadequacy resulting in a determination that an offeror does not meet the mandatory minimum requirements, evaluation criteria, or applicable score thresholds established in the solicitation.

(6) (a) Except as provided in Subsection (7)(b) relating to access to management fee information, and except as provided in Subsection (9), each member of the evaluation committee is prohibited from knowing, or having access to, any information relating to the cost, or the scoring of the cost, of a proposal until after the evaluation committee submits its final recommended scores on all other criteria to the issuing procurement unit.

(b) The issuing procurement unit shall:

(i) if applicable, assign an individual who is not a member of the evaluation committee to calculate scores for cost based on the applicable scoring formula, weighting, and other scoring procedures contained in the request for proposals;

(ii) review the evaluation committee's scores and correct any errors, scoring

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inconsistencies, and reported noncompliance with this chapter;

(iii) add the scores calculated for cost, if applicable, to the evaluation committee's final recommended scores on criteria other than cost to derive the total combined score for each responsive [~~and responsible~~] proposal from a responsible offeror; and

(iv) provide to the evaluation committee the total combined score calculated for each responsive [~~and responsible~~] proposal from a responsible offeror, including any applicable cost formula, weighting, and scoring procedures used to calculate the total combined scores.

(c) The evaluation committee may not:

(i) change its final recommended scores described in Subsection (6)(a) after the evaluation committee has submitted those scores to the issuing procurement unit; or

(ii) change cost scores calculated by the issuing procurement unit.

(7) (a) As used in this Subsection (7), "management fee" includes only the following fees of the construction manager/general contractor:

(i) preconstruction phase services;

(ii) monthly supervision fees for the construction phase; and

(iii) overhead and profit for the construction phase.

(b) When selecting a construction manager/general contractor for a construction project, the evaluation committee:

(i) may score a construction manager/general contractor based upon criteria contained in the solicitation, including qualifications, performance ratings, references, management plan, certifications, and other project specific criteria described in the solicitation;

(ii) may, as described in the solicitation, weight and score the management fee as a fixed rate or as a fixed percentage of the estimated contract value;

(iii) may, at any time after the opening of the responses to the request for proposals, have access to, and consider, the management fee proposed by the offerors; and

(iv) except as provided in Subsection (9), may not know or have access to any other information relating to the cost of construction submitted by the offerors, until after the evaluation committee submits its final recommended scores on all other criteria to the issuing procurement unit.

(8) (a) The deliberations of an evaluation committee may be held in private.

(b) If the evaluation committee is a public body, as defined in Section 52-4-103, the

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evaluation committee shall comply with Section 52-4-205 in closing a meeting for its deliberations.

(9) An issuing procurement unit is not required to comply with Subsection (6) or (7)(b)(iv), as applicable, if the head of the issuing procurement unit or a person designated by rule made by the applicable rulemaking authority:

(a) signs a written statement:

(i) indicating that, due to the nature of the proposal or other circumstances, it is in the best interest of the procurement unit to waive compliance with Subsection (6) or (7)(b)(iv), as the case may be; and

(ii) describing the nature of the proposal and the other circumstances relied upon to waive compliance with Subsection (6) or (7)(b)(iv); and

(b) makes the written statement available to the public, upon request.

Section 18. Section **63G-6a-707.5** is repealed and reenacted to read:

**63G-6a-707.5. Best and final offers.**

(1) The best and final offer process described in this section:

(a) may be used only in a request for proposals process, whether the request for proposals process is used independently or after the establishment of an approved vendor list through the approved vendor list process; and

(b) may not be used in any other standard procurement process, whether the other standard procurement process is used independently or after the establishment of an approved vendor list through the approved vendor list process.

(2) Subject to Subsection (3), a conducting procurement unit may request best and final offers from responsible offerors:

(a) only with the approval of the chief procurement officer or the head of the issuing procurement unit; and

(b) if:

(i) no single proposal adequately addresses all the specifications stated in the request for proposals;

(ii) all proposals are unclear or deficient in one or more respects;

(iii) all cost proposals exceed the identified budget or the procurement unit's available funding; or

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(iv) two or more proposals receive an identical evaluation score that is the highest score~~;~~ or~~;~~

~~{ (v) there exist other circumstances that the applicable rulemaking authority has determined in rule justify the conducting procurement unit requesting best and final offers.~~

~~{ (3) A conducting procurement unit may request a best and final offer from, and a best and final offer may be submitted to the conducting procurement unit by, only a responsible offeror that has submitted a responsive proposal that meets the minimum mandatory criteria stated in the request for proposals required to be considered in the stage of the procurement process at which best and final offers are being requested.~~

(4) The best and final offer process may not be used to change:

(a) a determination that an offeror is not responsible to a determination that the offeror is responsible; or

(b) a determination that a proposal is not responsive to a determination that the proposal is responsive.

(5) (a) This Subsection (5) applies if a request for best and final offers is issued because all cost proposals exceed the identified budget or the procurement unit's available funding.

(b) (i) The conducting procurement unit may, in the request for best and final offers:

(A) specify the scope of work reductions the procurement unit is making in order to generate proposals that are within the identified budget or the procurement unit's available funding; or

(B) invite offerors submitting best and final offers to specify the scope of work reductions being made so that the reduced cost proposal is within the identified budget or the procurement unit's available funding.

(ii) The conducting procurement unit is not required to accept a scope of work reduction that an offeror has specified in the offeror's best and final offer.

(c) A best and final offer submitted with a reduced cost proposal shall include an itemized list identifying specific reductions in the offeror's proposed scope of work that correspond to the offeror's reduced cost proposal.

(d) A reduction in the scope of work may not:

(i) eliminate a component identified in the request for proposals as a minimum

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mandatory requirement; or

(ii) alter the nature of the original request for proposals to the extent that a request for proposals for the reduced scope of work would have likely attracted a significantly different set of offerors submitting proposals in response to the request for proposals.

(6) If a request for best and final offers is issued because two or more proposals received an identical evaluation score that is the highest score:

(a) the request may be issued only to offerors who submitted a proposal receiving the highest score; and

(b) an offeror submitting a best and final offer may revise:

(i) the technical aspects of the offeror's proposal;

(ii) the offeror's cost proposal, as provided in Subsection (5); or

(iii) both the technical aspects of the offeror's proposal and, as provided in Subsection (5), the offeror's cost proposal.

(7) In a request for best and final offers, the conducting procurement unit shall:

(a) clearly specify:

(i) the issues that the procurement unit requests the offerors to address in their best and final offers; and

(ii) how best and final offers will be evaluated and scored in accordance with Section 63G-6a-707;

(b) establish a deadline for an offeror to submit a best and final offer; and

(c) if applicable, establish a schedule and procedure for conducting discussions with offerors concerning the best and final offers.

(8) In conducting a best and final offer process under this section, a conducting procurement unit shall:

(a) maintain confidential the information the procurement unit receives from an offeror, including any cost information, until a contract has been awarded or the request for proposals canceled;

(b) ensure that each offeror receives fair and equal treatment; and

(c) safeguard the integrity of the scope of the original request for proposals, except as specifically provided otherwise in this section.

(9) In a best and final offer, an offeror:



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(a) may address only the issues described in the request for best and final offers; and  
(b) may not correct a material error or deficiency in the offeror's proposal or address any issue not described in the request for best and final offers.

(10) If an offeror fails to submit a best and final offer, the conducting procurement unit shall treat the offeror's original proposal as the offeror's best and final offer.

(11) After the deadline for submitting best and final offers has passed, the evaluation committee shall evaluate the best and final offers submitted using the criteria described in the request for proposals.

(12) An offeror may not make and a conducting procurement unit may not consider a best and final offer that the conducting procurement unit has not requested under this section.

(13) To implement the best and final offer process described in this section, an applicable rulemaking authority may make rules consistent with this section and the other provisions of this chapter.

Section 19. Section **63G-6a-709** is amended to read:

### **63G-6a-709. Award of contract -- Cancellation -- Rejection of proposal.**

(1) After the completion of the evaluation and scoring of proposals and the justification statement, including any required cost-benefit analysis, the evaluation committee shall submit the proposals, evaluation scores, and justification statement to the head of the procurement unit or designee for review and final determination of a contract award or an award of multiple contracts as provided in Section 63G-6a-1204.5.

(2) After reviewing the proposals, evaluation scores, and justification statement, including any required cost-benefit analysis, the head of the issuing procurement unit shall:

(a) (i) award the contract as soon as practicable to the responsible offeror with the responsive proposal receiving the highest total score; or

(ii) (A) if the head of the issuing procurement unit [~~disqualifies an offeror~~] rejects a proposal under Subsection (3) of an offeror who would otherwise have been awarded a contract, award the contract to the responsible offeror with the responsive proposal receiving the next highest total score; and

(B) if the head of the issuing procurement unit [~~disqualifies an offeror~~] rejects a proposal under Subsection (3) of an offeror who would otherwise have been awarded a contract under Subsection (2)(a)(ii)(A), repeat the process described in Subsection (2)(a)(ii)(A) as many

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times as necessary until a contract is awarded to a responsible offeror [~~who is not disqualified~~]  
whose proposal is not rejected; or

(b) cancel the request for proposals without awarding a contract.

(3) The head of an issuing procurement unit may reject a proposal if:

(a) the offeror who submitted the proposal:

(i) is not responsible;

(ii) is in violation of a provision of this chapter;

(iii) has engaged in unethical conduct; or

(iv) fails to sign a contract within:

(A) 90 days after the contract award, if no time is specified in the solicitation; or

(B) a time authorized in writing by the head of the issuing procurement unit;

(b) there is a change in the offeror's circumstances that, if the change had been known at the time the offeror's proposal was evaluated, would have caused the proposal not to have received the highest score; or

(c) the proposal:

(i) is not responsive; or

(ii) does not meet the mandatory minimum requirements, evaluation criteria, or applicable score thresholds stated in the solicitation.

(4) A head of an issuing procurement unit who rejects a proposal under Subsection (3) shall:

(a) make a written finding, stating the reasons for the rejection; and

(b) provide a copy of the written finding to the offeror whose proposal is rejected.

(5) If an issuing procurement unit cancels a request for proposals without awarding a contract, the issuing procurement unit shall make available for public inspection a written justification for the cancellation.

Section 20. Section **63G-6a-802.7** is amended to read:

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

The chief procurement officer or the head of a procurement unit with independent procurement authority may extend an existing contract without engaging in a standard procurement process:

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- (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 chief procurement officer or head of a procurement unit with independent procurement authority 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.

Section 21. Section **63G-6a-903** is amended to read:

### **63G-6a-903. Determination of nonresponsibility.**

- (1) A determination of nonresponsibility of a [~~bidder or offeror~~] person made by an issuing procurement unit shall be made in writing, in accordance with the rules of the

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applicable rulemaking authority.

(2) ~~[The]~~ A person's unreasonable failure ~~[of a bidder or offeror]~~ to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to the ~~[bidder or offeror]~~ person.

(3) Subject to Title 63G, Chapter 2, Government Records Access and Management Act, information furnished by a ~~[bidder or offeror]~~ person pursuant to this section may not be disclosed outside of a procurement unit without the person's prior written consent ~~[by the bidder or offeror]~~.

Section 22. Section **63G-6a-904** is amended to read:

### **63G-6a-904. Debarment or suspension from consideration for award of contracts -- Process -- Causes for debarment -- Appeal.**

(1) (a) Subject to Subsection (1)(b), the chief procurement officer or the head of a procurement unit with independent procurement authority may:

(i) debar a person for cause from consideration for award of contracts for a period not to exceed three years; or

(ii) suspend a person from consideration for award of contracts if there is ~~[probable]~~ cause to believe that the person has engaged in any activity that might lead to debarment.

(b) Before debarring or suspending a person under Subsection (1)(a), the chief procurement officer or head of a procurement unit with independent procurement authority shall:

(i) consult with:

(A) the procurement unit involved in the matter for which debarment or suspension is sought; and

(B) the attorney general, if the procurement unit is in the state executive branch, or the procurement unit's attorney, if the procurement unit is not in the state executive branch;

(ii) give the person at least 10 days' prior written notice of:

(A) the reasons for which debarment or suspension is being considered; and

(B) the hearing under Subsection (1)(b)(iii); and

(iii) hold ~~[a]~~ an informal hearing in accordance with Subsection (1)(c).

(c) (i) At ~~[a]~~ an informal hearing under Subsection (1)(b)(iii), the chief procurement officer or head of a procurement unit with independent procurement authority may:

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(A) subpoena witnesses and compel their attendance at the hearing;

(B) subpoena documents for production at the hearing;

(C) obtain additional factual information; and

(D) obtain testimony from experts, the person who is the subject of the proposed debarment or suspension, representatives of the procurement unit, or others to assist the chief procurement officer or head of a procurement unit with independent procurement authority to make a decision on the proposed debarment or suspension.

(ii) The Rules of Evidence do not apply to [a] an informal hearing under Subsection (1)(b)(iii).

(iii) The chief procurement officer or head of a procurement unit with independent procurement authority shall:

(A) record a hearing under Subsection (1)(b)(iii); and

(B) preserve all records and other evidence relied upon in reaching a decision until the decision becomes final[;].

~~[(C) for an appeal of a debarment or suspension by a procurement unit other than a legislative procurement unit, a judicial procurement unit, a local government procurement unit, or a public transit district, submit to the procurement policy board chair a copy of the written decision and all records and other evidence relied upon in reaching the decision, within seven days after receiving a notice that an appeal of a debarment or suspension has been filed under Section 63G-6a-1702 or after receiving a request from the procurement policy board chair; and]~~

~~[(D) for an appeal of a debarment or suspension by a legislative procurement unit, a judicial procurement unit, a local government procurement unit, or a public transit district, submit to the Utah Court of Appeals a copy of the written decision and all records and other evidence relied upon in reaching the decision, within seven days after receiving a notice that an appeal of a debarment or suspension has been filed under Section 63G-6a-1802.]~~

(iv) The holding of [a] an informal hearing under Subsection (1)(b)(iii) or the issuing of a decision under Subsection (1)(c)(v) does not affect a person's right to later question or challenge the jurisdiction of the chief procurement officer or head of a procurement unit with independent procurement authority to hold a hearing or issue a decision.

(v) The chief procurement officer or head of a procurement unit with independent

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procurement authority shall:

(A) promptly issue a written decision regarding a proposed debarment or suspension, unless the matter is settled by mutual agreement; and

(B) mail, email, or otherwise immediately furnish a copy of the decision to the person who is the subject of the decision.

(vi) A written decision under Subsection (1)(c)(v) shall:

(A) state the reasons for the debarment or suspension, if debarment or suspension is ordered; and

(B) inform the person who is debarred or suspended of the right to judicial [~~or administrative~~] review as provided in this chapter[~~; and~~].

~~[(C) indicate the amount of the security deposit or bond required under Section 63G-6a-1703 and how that amount was calculated.]~~

~~[(vii) (A) A decision of debarment or suspension issued by a procurement unit other than a legislative procurement unit, a judicial procurement unit, a local government procurement unit, or a public transit district is final and conclusive unless the person who is debarred or suspended files an appeal of the decision under Section 63G-6a-1702.]~~

~~[(B) (vii) A decision of debarment or suspension [issued by a legislative procurement unit, a judicial procurement unit, a local government procurement unit, or a public transit district] is final and conclusive unless [the person who is debarred or suspended files an appeal of] the decision is overturned by a court under [Section 63G-6a-1802] Subsection (4).~~

(2) A suspension under this section may not be for a period exceeding three months, unless an indictment has been issued for an offense which would be a cause for debarment under Subsection (3), in which case the suspension shall, at the request of the attorney general, if the procurement unit is in the state executive branch, or the procurement unit's attorney, if the procurement unit is not in the state executive branch, remain in effect until after the trial of the suspended person.

(3) The causes for debarment include the following:

(a) conviction of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract or in the performance of a public or private contract or subcontract;

(b) conviction under state or federal statutes of embezzlement, theft, forgery, bribery,

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falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a contractor for the procurement unit;

- (c) conviction under state or federal antitrust statutes;
- (d) failure without good cause to perform in accordance with the terms of the contract;
- (e) a violation of this chapter; or
- (f) any other cause that the chief procurement officer or the head of a procurement unit

with independent procurement authority determines to be so serious and compelling as to affect responsibility as a contractor for the procurement unit, including debarment by another governmental entity.

(4) (a) A person who is debarred or suspended under this section may ~~[appeal]~~ seek judicial review of the debarment or suspension[:] by filing a petition for judicial review in district court.

~~[(a) as provided in Section 63G-6a-1702, if the debarment or suspension is by a procurement unit other than a legislative procurement unit, a judicial procurement unit, a local government procurement unit, or a public transit district; or (b) as provided in Section 63G-6a-1802, if the debarment or suspension is by a legislative procurement unit, a judicial procurement unit, a local government procurement unit, or a public transit district.]~~

(b) A petition under Subsection (4)(a):

(i) is a complaint governed by the Utah Rules of Civil Procedure;

(ii) shall name the procurement unit as respondent;

(iii) shall be accompanied by a copy of the written decision as to which judicial review is sought; and

(iv) is barred unless filed in district court within 30 days after the date of the issuance of the written decision of suspension or debarment under Subsection (1)(c)(v).

(c) A district court's review of a petition under Subsection (4)(a) shall be de novo.

(d) A district court shall, without a jury, determine all questions of fact and law, including any constitutional issue, presented in the pleadings.

(5) A procurement unit may consider a cause for debarment under Subsection (3) as the basis for determining that a person responding to a solicitation is not responsible:

- (a) independent of any effort or proceeding under this section to debar or suspend the

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person; and

(b) even if the procurement unit does not choose to seek debarment or suspension.

(6) An applicable rulemaking authority may make rules pertaining to the suspension and debarment process under this section, including rules governing an informal hearing under Subsection (1)(b)(iii).

Section 23. Section **63G-6a-1002** is amended to read:

### **63G-6a-1002. Reciprocal preference for providers of state products.**

(1) (a) An issuing procurement unit shall, for all procurements, give a reciprocal preference to those bidders offering procurement items that are produced, manufactured, mined, grown, or performed in Utah over those bidders offering procurement items that are produced, manufactured, mined, grown, or performed in any state that gives or requires a preference to procurement items that are produced, manufactured, mined, grown, or performed in that state.

(b) The amount of reciprocal preference shall be equal to the amount of the preference applied by the other state for that particular procurement item.

(c) In order to receive a reciprocal preference under this section, the bidder shall certify on the bid that the procurement items offered are produced, manufactured, mined, grown, or performed in Utah.

(d) The reciprocal preference is waived if the certification described in Subsection (1)(c) does not appear on the bid.

(2) (a) If the responsible bidder submitting the lowest responsive [~~and responsible~~] bid offers procurement items that are produced, manufactured, mined, grown, or performed in a state that gives or requires a preference, and if another responsible bidder has submitted a responsive [~~and responsible~~] bid offering procurement items that are produced, manufactured, mined, grown, or performed in Utah, and with the benefit of the reciprocal preference, the bid of the other bidder is equal to or less than the original lowest bid, the issuing procurement unit shall:

(i) give notice to the bidder offering procurement items that are produced, manufactured, mined, grown, or performed in Utah that the bidder qualifies as a preferred bidder; and

(ii) make the purchase from the preferred bidder if the bidder agrees, in writing, to



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meet the low bid within 72 hours after notification that the bidder is a preferred bidder.

(b) The issuing procurement unit shall include the exact price submitted by the lowest bidder in the notice the issuing procurement unit submits to the preferred bidder.

(c) The issuing procurement unit may not enter into a contract with any other bidder for the purchase until 72 hours have elapsed after notification to the preferred bidder.

(3) (a) If there is more than one preferred bidder, the issuing procurement unit shall award the contract to the willing preferred bidder who was the lowest preferred bidder originally.

(b) If there were two or more equally low preferred bidders, the issuing procurement unit shall comply with the rules of the applicable rulemaking authority to determine which bidder should be awarded the contract.

(4) The provisions of this section do not apply if application of this section might jeopardize the receipt of federal funds.

Section 24. Section **63G-6a-1003** is amended to read:

### **63G-6a-1003. Preference for resident contractors.**

(1) As used in this section, "resident contractor" means a person, partnership, corporation, or other business entity that:

(a) either has its principal place of business in Utah or that employs workers who are residents of this state when available; and

(b) was transacting business on the date when bids for the public contract were first solicited.

(2) (a) When awarding contracts for construction, an issuing procurement unit shall grant a resident contractor a reciprocal preference over a nonresident contractor from any state that gives or requires a preference to contractors from that state.

(b) The amount of the reciprocal preference shall be equal to the amount of the preference applied by the state of the nonresident contractor.

(3) (a) In order to receive the reciprocal preference under this section, the bidder shall certify on the bid that the bidder qualifies as a resident contractor.

(b) The reciprocal preference is waived if the certification described in Subsection (2)(a) does not appear on the bid.

(4) (a) If the responsible contractor submitting the lowest responsive [~~and responsible~~]

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bid is not a resident contractor whose principal place of business is in a state that gives or requires a preference to contractors from that state, and if a resident responsible contractor has also submitted a responsive [~~and responsible~~] bid, and, with the benefit of the reciprocal preference, the resident contractor's bid is equal to or less than the original lowest bid, the issuing procurement unit shall:

(i) give notice to the resident contractor that the resident contractor qualifies as a preferred resident contractor; and

(ii) issue the contract to the resident contractor if the resident contractor agrees, in writing, to meet the low bid within 72 hours after notification that the resident contractor is a preferred resident contractor.

(b) The issuing procurement unit shall include the exact price submitted by the lowest bidder in the notice that the issuing procurement unit submits to the preferred resident contractor.

(c) The issuing procurement unit may not enter into a contract with any other bidder for the construction until 72 hours have elapsed after notification to the preferred resident contractor.

(5) (a) If there is more than one preferred resident contractor, the issuing procurement unit shall award the contract to the willing preferred resident contractor who was the lowest preferred resident contractor originally.

(b) If there were two or more equally low preferred resident contractors, the issuing procurement unit shall comply with the rules of the applicable rulemaking authority to determine which bidder should be awarded the contract.

(6) The provisions of this section do not apply if application of this section might jeopardize the receipt of federal funds.

Section 25. Section **63G-6a-1204.5** is amended to read:

### **63G-6a-1204.5. Multiple award contracts.**

(1) (a) [~~The~~] Through a standard procurement process, the division or a procurement unit with independent procurement authority may enter into multiple award contracts with [~~bidders or offerors~~] multiple persons.

(b) The applicable rulemaking authority may make rules, consistent with this section, regulating the use of multiple award contracts.

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(2) Multiple award contracts may be in a procurement unit's best interest if award to two or more bidders or offerors for similar procurement items is needed or desired for adequate delivery, service, availability, or product compatibility.

(3) A procurement unit that enters into multiple award contracts under this section shall:

(a) exercise care to protect and promote competition among bidders or offerors when seeking to enter into multiple award contracts;

(b) name all eligible users of the multiple award contracts in the invitation for bids or request for proposals; and

(c) if the procurement unit anticipates entering into multiple award contracts before issuing the invitation for bids or request for proposals, state in the invitation for bids or request for proposals that the procurement unit may enter into multiple award contracts at the end of the procurement process.

(4) A procurement unit that enters into multiple award contracts under this section shall:

(a) obtain, under the multiple award contracts, all of its normal, recurring requirements for the procurement items that are the subject of the contracts until the contracts terminate; and

(b) reserve the right to obtain the procurement items described in Subsection (4)(a) separately from the contracts if:

(i) there is a need to obtain a quantity of the procurement items that exceeds the amount specified in the contracts; or

(ii) the procurement officer makes a written finding that the procurement items available under the contract will not effectively or efficiently meet a nonrecurring special need of a procurement unit.

(5) An applicable rulemaking authority may make rules to further regulate a procurement under this section.

Section 26. Section **63G-6a-1402** is amended to read:

### **63G-6a-1402. Procurement of design-build transportation project contracts.**

(1) As used in this section:

(a) "Design-build transportation project contract" means the procurement of both the design and construction of a transportation project in a single contract with a company or

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combination of companies capable of providing the necessary engineering services and construction.

(b) "Transportation agency" means:

(i) the Department of Transportation;

(ii) a county of the first or second class, as defined in Section 17-50-501;

(iii) a municipality of the first class, as defined in Section 10-2-301;

(iv) a public transit district that has more than 200,000 people residing within its boundaries; and

(v) a public airport authority.

(2) Except as provided in Subsection (3), a transportation agency may award a design-build transportation project contract for any transportation project that has an estimated cost of at least \$50,000,000 by following the requirements of this section.

(3) (a) The Department of Transportation:

(i) may award a design-build transportation project contract for any transportation project by following the requirements of this section; and

(ii) shall make rules, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, establishing requirements for the procurement of its design-build transportation project contracts in addition to those required by this section.

(b) A public transit district that has more than 200,000 people residing within its boundaries:

(i) may award a design-build transportation project contract for any transportation project by following the requirements of this section; and

(ii) shall pass ordinances or a resolution establishing requirements for the procurement of its design-build transportation project contracts in addition to those required by this section.

(c) A design-build transportation project contract authorized under this Subsection (3) is not subject to the estimated cost threshold described in Subsection (2).

(d) A design-build transportation project contract may include provision by the contractor of operations, maintenance, or financing.

(4) (a) Before entering into a design-build transportation project contract, a transportation agency may issue a request for qualifications to prequalify potential contractors.

(b) Public notice of the request for qualifications shall be given in accordance with

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board rules.

(c) A transportation agency shall require, as part of the qualifications specified in the request for qualifications, that potential contractors at least demonstrate their:

- (i) construction experience;
- (ii) design experience;
- (iii) financial, manpower, and equipment resources available for the project; and
- (iv) experience in other design-build transportation projects with attributes similar to

the project being procured.

(d) The request for qualifications shall identify the number of eligible competing proposers that the transportation agency will select to submit a proposal, which may not be less than two.

(5) The transportation agency shall:

- (a) evaluate the responses received from the request for qualifications;
- (b) select from their number those qualified to submit proposals; and
- (c) invite those respondents to submit proposals based upon the transportation agency's

request for proposals.

(6) If the transportation agency fails to receive at least two qualified eligible competing proposals, the transportation agency shall readvertise the project.

(7) The transportation agency shall issue a request for proposals to those qualified respondents that:

(a) includes a scope of work statement constituting an information for proposal that may include:

- (i) preliminary design concepts;
- (ii) design criteria, needs, and objectives;
- (iii) warranty and quality control requirements;
- (iv) applicable standards;
- (v) environmental documents;
- (vi) constraints;
- (vii) time expectations or limitations;
- (viii) incentives or disincentives; and
- (ix) other special considerations;

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(b) requires submitters to provide:

- (i) a sealed cost proposal;
- (ii) a critical path matrix schedule, including cash flow requirements;
- (iii) proposal security; and
- (iv) other items required by the department for the project; and

(c) may include award of a stipulated fee to be paid to offerors who submit unsuccessful proposals.

(8) The transportation agency shall:

(a) evaluate the submissions received in response to the request for proposals from the prequalified offerors;

(b) comply with rules relating to discussion of proposals, best and final offers, and evaluations of the proposals submitted; and

(c) after considering price and other identified factors, award the contract to the [~~responsive and~~] responsible offeror whose responsive proposal is most advantageous to the transportation agency or the state.

Section 27. Section **63G-6a-1403** is amended to read:

### **63G-6a-1403. Procurement of tollway development agreements.**

(1) As used in this section, "tollway development agreement" is as defined in Section 72-6-202.

(2) The Department of Transportation and the Transportation Commission:

(a) may solicit a tollway development agreement proposal by following the requirements of this section;

(b) may award a solicited tollway development agreement contract for any tollway project by following the requirements of this section; and

(c) shall make rules, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, establishing requirements for the procurement of tollway development agreement proposals in addition to those required by this section.

(3) (a) Before entering into a tollway development agreement, the Department of Transportation may issue a request for qualifications to prequalify potential contractors.

(b) Public notice of the request for qualifications shall be given in accordance with board rules.

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(c) The Department of Transportation shall require, as part of the qualifications specified in the request for qualifications, that potential contractors at least provide:

- (i) a demonstration of their experience with other transportation concession projects with attributes similar to the project being procured;
- (ii) a financial statement of the firm or consortium of firms making the proposal;
- (iii) a conceptual project development plan and financing plan;
- (iv) the legal structure of the firm or consortium of firms making the proposal;
- (v) the organizational structure for the project; and
- (vi) a statement describing why the firm or consortium of firms is best qualified for the project.

(d) The request for qualifications shall identify the number of eligible competing offerors that the Department of Transportation will select to submit a proposal.

(4) The Department of Transportation shall:

- (a) evaluate the responses received from the request for qualifications;
- (b) select from their number those qualified to submit proposals; and
- (c) invite those respondents to submit proposals based upon the Department of Transportation's request for proposals.

(5) The Department of Transportation shall issue a request for proposals to those qualified respondents that may require, as appropriate for the procurement:

- (a) a description of the proposed project or projects;
- (b) a financial plan for the project, including:
  - (i) the anticipated financial commitment of all parties;
  - (ii) equity, debt, and other financing mechanisms;
  - (iii) an analysis of the projected return, rate of return, or both; and
  - (iv) the monetary benefit and other value to a government entity;
- (c) assumptions about user fees or toll rates;
- (d) a project development and management plan, including:
  - (i) the contracting structure;
  - (ii) the plan for quality management;
  - (iii) the proposed toll enforcement plan; and
  - (iv) the plan for safety management; and

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(e) that the proposal to comply with the minimum guidelines for tollway development agreement proposals under Section 72-6-204.

(6) The Department of Transportation and the Transportation Commission:

(a) shall evaluate the submissions received in response to the request for proposals from the prequalified offerors;

(b) shall comply with rules relating to discussion of proposals, best and final offers, and evaluations of the proposals submitted; and

(c) may, after considering price and other identified factors and complying with the requirements of Section 72-6-206, award the contract to the [~~responsive and~~] responsible offeror whose responsive proposal is most advantageous to the state.

Section 28. Section **63G-6a-1601.5** is amended to read:

### **63G-6a-1601.5. Definitions.**

As used in this part:

(1) "Constructive knowledge":

(a) means knowledge or information that a protestor would have if the protestor had exercised reasonable care or diligence, regardless of whether the protestor actually has the knowledge or information; and

(b) includes knowledge of:

(i) applicable provisions of this chapter and other law and administrative rule;

(ii) instructions, criteria, deadlines, and requirements contained in the solicitation or in other documents made available to persons interested in the solicitation or provided in a mandatory pre-solicitation meeting;

(iii) relevant facts and evidence supporting the protest or leading the protestor to contend that the protestor has been aggrieved in connection with a procurement;

(iv) communications or actions, pertaining to the procurement, of all persons within the protestor's organization or under the supervision of the protestor; and

(v) any other applicable information discoverable by the exercise of reasonable care or diligence.

(2) "Hearing" means a proceeding in which evidence, which may include oral testimony, or argument relevant to a protest is presented to a protest officer in connection with the protest officer's determination of an issue of fact or law or both.



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(3) "Protest appeal record" means:

(a) a copy of the protest officer's written decision;

(b) all documentation and other evidence the protest officer relied upon in reaching the protest officer's decision;

(c) the recording of the hearing, if the protest officer held a hearing;

(d) a copy of the protestor's written protest; and

(e) all documentation and other evidence submitted by the protestor supporting the protest or the protestor's claim of standing.

~~(2)~~ (4) "Protestor" means a person who files a protest under this part.

~~(3)~~ (5) "Standing" means to have suffered an injury or harm or to be about to suffer imminent injury or harm, if:

(a) the cause of the injury or harm is:

(i) an infringement of the protestor's own right and not the right of another person who is not a party to the procurement;

(ii) reasonably connected to the procurement unit's conduct; and

(iii) the sole reason the protestor is not considered, or is no longer considered, for an award of a contract under the procurement that is the subject of the protest;

(b) a decision on the protest in favor of the protestor:

(i) is likely to redress the injury or harm; and

(ii) would give the protestor a reasonable likelihood of being awarded a contract; and

(c) the protestor has the legal authority to file the protest on behalf of the actual or prospective bidder or offeror or prospective contractor involved in the procurement that is the subject of the protest.

Section 29. Section **63G-6a-1602** is amended to read:

**63G-6a-1602. Protest -- Time for filing -- Basis of protest -- Authority to resolve protest.**

(1) A protest may be filed with the protest officer by a person who:

(a) has standing; and

(b) is aggrieved in connection with a procurement or an award of a contract.

(2) A protest may not be filed after:

(a) (i) (A) the opening of bids, for a protest relating to a procurement under a bidding

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process; or

(B) the deadline for submitting responses to the solicitation, for a protest relating to another standard procurement process; or

(ii) the closing of the procurement stage that is the subject of the protest:

(A) if the protest relates to a multiple-stage procurement; and

(B) notwithstanding Subsections (2)(a)(i)(A) and (B); or

(b) the day that is seven days after the day on which the person knows or first has constructive knowledge of the facts giving rise to the protest, if:

(i) the protestor did not know and did not have constructive knowledge of the facts giving rise to the protest before:

(A) the opening of bids, for a protest relating to a procurement under a bidding process;

(B) the deadline for submitting responses to the solicitation, for a protest relating to another standard procurement process; or

(C) the closing of the procurement stage that is the subject of the protest, if the protest relates to a multiple-stage procurement; or

(ii) the protest relates to a procurement process not described in Subsection (2)(a).

(3) A deadline under Subsection (2) for filing a protest may not be modified.

~~(3)~~ (4) (a) A protestor shall include in a protest:

(i) the protestor's mailing address and email address; and

(ii) a concise statement of the facts and evidence:

(A) leading the protestor to claim that the protestor has been aggrieved in connection with a procurement and providing the grounds for the protestor's protest; and

(B) supporting the protestor's claim of standing.

(b) A protest may not be considered unless it contains facts and evidence that, if true, would establish:

(i) a violation of this chapter or other applicable law or rule;

(ii) the procurement unit's failure to follow a provision of a solicitation;

(iii) an error made by an evaluation committee or conducting procurement unit;

(iv) a bias exercised by an evaluation committee or an individual committee member, excluding a bias that is a preference arising during the evaluation process because of how well a solicitation response meets criteria in the solicitation;

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- (v) a failure to correctly apply or calculate a scoring criterion; or
- (vi) that specifications in a solicitation are unduly restrictive or unduly anticompetitive.

~~[(4)]~~ (5) A protest may not be based on:

(a) the rejection of a solicitation response due to a protestor's failure to attend or participate in a mandatory conference, meeting, or site visit held before the deadline for submitting a solicitation response; ~~[or]~~

(b) a vague or unsubstantiated allegation~~[-];~~ or

(c) a person's claim that:

(i) a procurement unit that complied with Section 63G-6a-112 did not provide individual notice of a solicitation to the person; or

(ii) the person received late notice of a solicitation for which notice was provided in accordance with Section 63G-6a-112.

~~[(5)]~~ (6) A protest may not include a request for:

(a) an explanation of the rationale or scoring of evaluation committee members;

(b) the disclosure of a protected record or protected information in addition to the information provided under the disclosure provisions of this chapter; or

(c) other information, documents, or explanations not explicitly provided for in this chapter.

~~[(6)]~~ (7) A person who fails to file a protest within the time prescribed in Subsection (2) may not:

(a) protest to the protest officer a solicitation or award of a contract; or

(b) file an action or appeal challenging a solicitation or award of a contract before an appeals panel, a court, or any other forum.

~~[(7)]~~ (8) Subject to the applicable requirements of Section 63G-10-403, a protest officer or the head of a procurement unit may enter into a settlement agreement to resolve a protest.

Section 30. Section **63G-6a-1603** is amended to read:

**63G-6a-1603. Protest officer responsibilities and authority -- Proceedings on protest -- Effect of decision.**

(1) After a protest is filed, the protest officer shall determine whether the protest is timely filed and complies fully with the requirements of Section 63G-6a-1602.

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(2) If the protest officer determines that the protest is not timely filed or that the protest does not fully comply with Section 63G-6a-1602, the protest officer shall dismiss the protest without holding a hearing.

(3) If the protest officer determines that the protest is timely filed and complies fully with Section 63G-6a-1602, the protest officer shall:

(a) dismiss the protest without holding a hearing if the protest officer determines that the protest alleges facts that, if true, do not provide an adequate basis for the protest;

(b) uphold the protest without holding a hearing if the protest officer determines that the undisputed facts of the protest indicate that the protest should be upheld; or

(c) hold a hearing on the protest if there is a genuine issue of material fact or law that needs to be resolved in order to determine whether the protest should be upheld.

(4) (a) If a hearing is held on a protest, the protest officer may:

(i) subpoena witnesses and compel their attendance at the protest hearing;

(ii) subpoena documents for production at the protest hearing;

(iii) obtain additional factual information; and

(iv) obtain testimony from experts, the person filing the protest, representatives of the procurement unit, or others to assist the protest officer to make a decision on the protest.

(b) The Rules of Evidence do not apply to a protest hearing.

(c) The applicable rulemaking authority shall make rules relating to intervention in a protest, including designating:

(i) who may intervene; and

(ii) the time and manner of intervention.

(d) A protest officer shall:

(i) record each hearing held on a protest under this section;

(ii) regardless of whether a hearing on a protest is held under this section, preserve all records and other evidence relied upon in reaching the protest officer's written decision until the decision, and any appeal of the decision, becomes final; and

~~[(iii) submit to the procurement policy board chair a copy of the protest officer's written decision and all records and other evidence relied upon in reaching the decision, within seven days after receiving:]~~

~~[(A) notice that an appeal of the protest officer's decision has been filed under Section~~

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~~63G-6a-1702; or]~~

~~[(B) a request from the chair of the procurement policy board.]~~

(iii) if the protestor appeals the protest officer's decision, submit the protest appeal record to the procurement policy board chair within seven days after receiving:

(A) notice that an appeal of the protest officer's decision has been filed under Section 63G-6a-1702; or

(B) a request for the protest appeal record from the chair of the procurement policy board.

(e) A protest officer's holding a hearing, considering a protest, or issuing a written decision under this section does not affect a person's right to later question or challenge the protest officer's jurisdiction to hold the hearing, consider the protest, or issue the decision.

(5) (a) The deliberations of a protest officer may be held in private.

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

(6) (a) A protest officer~~[, or the protest officer's designee,]~~ shall promptly issue a written decision regarding any protest, unless the protest is settled by mutual agreement.

(b) The decision shall:

(i) state the reasons for the action taken;

(ii) inform the protestor of the right to judicial or administrative review as provided in this chapter; and

(iii) indicate the amount of the security deposit or bond required under Section 63G-6a-1703.

(c) A person who issues a decision under Subsection (6)(a) shall mail, email, or otherwise immediately furnish a copy of the decision to the protestor.

(7) A decision described in this section is effective until stayed or reversed on appeal, except to the extent provided in Section 63G-6a-1903.

(8) (a) A decision described in Subsection (6)(a) that is issued in relation to a procurement unit other than a legislative procurement unit, a judicial procurement unit, a nonadopting local government procurement unit, or a public transit district is final and conclusive unless the protestor files an appeal under Section 63G-6a-1702.

(b) A decision described in Subsection (6)(a) that is issued in relation to a legislative

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procurement unit, a judicial procurement unit, a nonadopting local government procurement unit, or a public transit district is final and conclusive unless the protestor files an appeal under Section 63G-6a-1802.

(9) If the protest officer does not issue the written decision regarding a protest within 30 calendar days after the day on which the protest was filed with the protest officer, or within a longer period as may be agreed upon by the parties, the protestor may proceed as if an adverse decision had been received.

(10) A determination under this section by the protest officer regarding an issue of fact may not be overturned on appeal unless the decision is arbitrary and capricious or clearly erroneous.

(11) An individual is not precluded from acting, and may not be disqualified or required to be recused from acting, as a protest officer because the individual also acted in another capacity during the procurement process, as required or allowed in this chapter.

Section 31. Section **63G-6a-1701.5** is enacted to read:

### **63G-6a-1701.5. Definitions.**

As used in this part:

(1) "Appointing officer" means:

(a) the chair of the board; or

(b) a designee of the chair who is not employed by the procurement unit responsible for the solicitation, contract award, or other action that is the subject of the protestor's protest.

(2) "Protest appeal record" means the same as that term is defined in Section 63G-6a-1601.5.

(3) "Protestor" means the same as that term is defined in Section 63G-6a-1601.5.

Section 32. Section **63G-6a-1702** is amended to read:

### **63G-6a-1702. Appeal to Utah State Procurement Policy Board -- Appointment of 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 nonadopting local government procurement unit; or

(d) a public transit district.

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(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)]~~ protestor may appeal ~~[the protest decision]~~ to the board a protest decision of a procurement unit that is subject to this part 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 provided by the party under Subsection 63G-6a-1602~~[(3)]~~[(4)]; or

(ii) the day on which the 30-day period described in Subsection 63G-6a-1603(9) 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)]~~ (b) 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]~~.

(c) The deadline for appealing a protest decision may not be modified.

(3) A person may not base an appeal of a protest under this section on:

(a) a ground not specified in the person's protest under Section 63G-6a-1602[-]; or

(b) new or additional evidence not considered by the protest officer.

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

~~[(a)]~~ (i) a decision on the protest has been issued; or

~~[(b)]~~ (ii) a decision is not issued and the 30-day period described in Subsection 63G-6a-1603(9), 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 procurement unit responsible for the solicitation, contract award, or other action complained of:]~~

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~~[(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:]~~

~~(b) A procurement unit may not appeal a protest decision or other determination made by the procurement unit's protest officer.~~

~~(5) (a) Within seven days after the chair of the board receives a written notice of an appeal under this section, the chair shall submit a written request to the protest officer for the protest appeal record.~~

~~(b) Within seven days after the chair receives the protest appeal record from the protest officer, the appointing officer shall, in consultation with the attorney general's office:~~

~~(i) review the appeal to determine whether the appeal complies with the requirements of Subsections (2), (3), and (4) and Section 63G-6a-1703; and~~

~~(ii) (A) dismiss any claim asserted in the appeal, or dismiss the appeal, without holding a hearing if the appointing officer determines that the claim or appeal, respectively, fails to comply with any of the requirements listed in Subsection (5)(b)(i); or~~

~~(B) appoint a procurement appeals panel to conduct an administrative review of any claim in the appeal that has not been dismissed under Subsection (5)(b)(ii)(A), if the appointing officer determines that one or more claims asserted in the appeal comply with the requirements listed in Subsection (5)(b)(i).~~

~~(c) A procurement appeals panel appointed under Subsection (5)(a) shall consist of an odd number of at least three individuals, each of whom is:~~

~~[(A)] (i) a member of the board; or~~

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

~~[(ii)] (d) The appointing officer shall appoint one of the members of the procurement appeals panel to [be the chair] serve as the coordinator of the panel[;].~~

~~[(b)] (e) The appointing officer 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[;].~~



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~~[(e)]~~ (f) The appointing officer 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]~~ that is the subject of the protestor's protest.

~~[(d)]~~ (g) The appointing officer shall, at the time the procurement appeals panel is appointed, provide appeals panel members with ~~ff~~ 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]~~ notice of appeal filed under Subsection (2) and the protest decision record.

(6) (a) A procurement appeals panel described in Subsection (5) ~~[shall]:~~

~~[(a) consist of an odd number of members;]~~

~~[(b)]~~ (i) shall conduct an ~~[informal proceeding on]~~ administrative review of the appeal within ~~[60]~~ 30 days after the day on which the procurement appeals panel is appointed~~[-]~~, or before a later date that all parties agree upon, unless the appeal is dismissed under Subsection (8)(a); and

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

~~[(ii) subject to Subsection (8);]~~

(ii) (A) may, as part of the administrative review and at the sole discretion of the procurement appeals panel, conduct an informal hearing, if the procurement appeals panel considers a hearing to be necessary; and

~~[(e)]~~ (B) if the procurement appeals panel conducts an informal hearing, shall, at least seven days before the [proceeding] hearing, mail, email, or hand-deliver a written notice of the [proceeding] hearing to the parties to the appeal[-and].

(b) A procurement appeals panel may, during an informal hearing, ask questions and receive responses regarding the appeal and the protest appeal record to assist the procurement appeals panel to understand the basis of the appeal and information contained in the protest appeal record, but may not otherwise take any additional evidence or consider any additional ground for the appeal.

(7) A procurement appeals panel shall consider and decide the appeal based solely on:

(a) the notice of appeal and the protest appeal record; and

(b) responses received during an informal hearing, if an informal hearing is held and to the extent allowed under Subsection (6)(b).

(8) A procurement appeals panel:

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(a) may dismiss an appeal if the appeal does not comply with the requirements of this chapter; and

(b) shall uphold the protest decision unless the protest decision is arbitrary and capricious or clearly erroneous.

~~[(d)]~~ (9) The procurement appeals panel shall, within seven days after the day on which the [proceeding ends] procurement appeals panel concludes the administrative review:

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

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

~~[(7)]~~ (10) (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)]~~ (11) A procurement appeals panel may continue [a procurement appeals proceeding] an administrative review under this section beyond the [60-day] 30-day period described in Subsection (6)~~[(b)]~~[(a)(i)] 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)]~~ (12) 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

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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)]

(12)(a).

[(11)] (13) 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.

[(12)] (14) The Rules of Evidence do not apply to [~~an appeals proceeding~~] a hearing held by a procurement appeals panel.

(15) Part 20, Records, applies to the records involved in the process described in this section, including the decision issued by a procurement appeals panel.

Section 33. Section **63G-6a-1703** is amended to read:

**63G-6a-1703. Requirement to pay a security deposit or post a bond -- Exceptions -- Amount -- Forfeiture of security deposit or bond.**

(1) A person who files a notice of appeal under Section 63G-6a-1702 shall, before the expiration of the time provided under Subsection 63G-6a-1702(2) for filing a notice of appeal, pay a security deposit or post a bond with the office of the protest officer.

(2) The amount of a security deposit or bond required under Subsection (1) is:

(a) for an appeal relating to an invitation for bids or request for proposals and except as provided in Subsection (2)(b)(ii):

- (i) \$20,000, if the total contract value is under \$500,000;
- (ii) \$25,000, if the total contract value is \$500,000 or more but less than \$1,000,000;
- (iii) \$50,000, if the total contract value is \$1,000,000 or more but less than \$2,000,000;
- (iv) \$95,000, if the total contract value is \$2,000,000 or more but less than \$4,000,000;
- (v) \$180,000, if the total contract value is \$4,000,000 or more but less than \$8,000,000;
- (vi) \$320,000, if the total contract value is \$8,000,000 or more but less than

\$16,000,000;

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- (vii) \$600,000, if the total contract value is \$16,000,000 or more but less than \$32,000,000;
  - (viii) \$1,100,000, if the total contract value is \$32,000,000 or more but less than \$64,000,000;
  - (ix) \$1,900,000, if the total contract value is \$64,000,000 or more but less than \$128,000,000;
  - (x) \$3,500,000, if the total contract value is \$128,000,000 or more but less than \$256,000,000;
  - (xi) \$6,400,000, if the total contract value is \$256,000,000 or more but less than \$512,000,000; and
  - (xii) \$10,200,000, if the total contract value is \$512,000,000 or more; or
- (b) \$20,000, for an appeal:
- (i) relating to any type of procurement process other than an invitation for bids or request for proposals;
  - (ii) relating to an invitation for bids or request for proposals, if the estimated total contract value cannot be determined; or
  - (iii) of a debarment or suspension.
- (3) (a) For an appeal relating to an invitation for bids, the estimated total contract value shall be based on:
- (i) the lowest [~~responsible and~~] responsive bid amount for the entire term of the contract, excluding any renewal period, if the bid opening has occurred;
  - (ii) the total budget for the procurement item for the entire term of the contract, excluding any renewal period, if bids are based on unit or rate pricing; or
  - (iii) if the contract is being rebid, the historical usage and amount spent on the contract over the life of the contract.
- (b) For an appeal relating to a request for proposals, the estimated total contract value shall be based on:
- (i) the lowest cost proposed in a response to a request for proposals, considering the entire term of the contract, excluding any renewal period, if the opening of proposals has occurred;
  - (ii) the total budget for the procurement item over the entire term of the contract,

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excluding any renewal period, if opened cost proposals are based on unit or rate pricing; or

(iii) if the contract is being reissued, the historical usage and amount spent on the contract over the life of the contract that is being reissued.

(4) The protest officer shall:

(a) retain the security deposit or bond until the protest and any appeal of the protest decision is final;

(b) as it relates to a security deposit:

(i) deposit the security deposit into an interest-bearing account; and

(ii) after any appeal of the protest decision becomes final, return the security deposit and the interest it accrues to the person who paid the security deposit, unless the security deposit is forfeited to the general fund of the procurement unit under Subsection (5); and

(c) as it relates to a bond:

(i) retain the bond until the protest and any appeal of the protest decision becomes final; and

(ii) after the protest and any appeal of the protest decision becomes final, return the bond to the person who posted the bond, unless the bond is forfeited to the general fund of the procurement unit under Subsection (5).

(5) A security deposit that is paid, or a bond that is posted, under this section shall forfeit to the general fund of the procurement unit if:

(a) the person who paid the security deposit or posted the bond fails to ultimately prevail on appeal; and

(b) the procurement appeals panel finds that the protest or appeal is frivolous or that its primary purpose is to harass or cause a delay.

Section 34. Section **63G-6a-1802** is amended to read:

### **63G-6a-1802. Appeal to Utah Court of Appeals.**

(1) (a) As provided in this part:

(i) a person may appeal a dismissal of an appeal by the board chair under Subsection [~~63G-6a-1706(1)~~] 63G-6a-1702(5)(b)(ii)(A);

(ii) a person who receives an adverse decision by a procurement appeals panel may appeal that decision;

(iii) subject to Subsection (2), a procurement unit, other than a legislative procurement

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unit, a judicial procurement unit, a nonadopting local government procurement unit, or a public transit district, may appeal an adverse decision by a procurement appeals panel; and

(iv) a person who receives an adverse decision in a protest relating to a legislative procurement unit, a judicial procurement unit, a nonadopting local government procurement unit, or a public transit district may appeal that decision~~[; and]~~.

~~[(v) a person who is debarred or suspended under Section 63G-6a-904 by a legislative procurement unit, a judicial procurement unit, a nonadopting local government procurement unit, or a public transit district may appeal the debarment or suspension.]~~

(b) A person seeking to appeal a dismissal~~;~~ or decision~~;~~ ~~or debarment or suspension~~ under Subsection (1)(a) shall file a notice of appeal with the Utah Court of Appeals within seven days after the dismissal~~;~~ or decision~~;~~ ~~or debarment or suspension~~.

(2) A procurement unit may not appeal the decision of a procurement appeals panel, unless the appeal is:

(a) recommended by the protest officer involved; and

(b) except for a procurement unit that is not represented by the attorney general's office, approved by the attorney general.

(3) A person appealing a dismissal, decision, or protest~~;~~ ~~debarment, or suspension~~ under this section may not base the appeal on a ground not specified in the proceeding from which the appeal is taken.

(4) The Utah Court of Appeals:

(a) shall consider the appeal as an appellate court;

(b) may not hear the matter as a trial de novo; and

(c) may not overturn a finding, dismissal, or decision~~;~~ ~~or debarment or suspension~~;

unless the finding, dismissal, or decision, ~~or debarment or suspension~~ is arbitrary and capricious or clearly erroneous.

(5) The Utah Court of Appeals is encouraged to:

(a) give an appeal made under this section priority; and

(b) consider the appeal and render a decision in an expeditious manner.

Section 35. Section **63G-6a-2403** is amended to read:

### **63G-6a-2403. Applicability.**

(1) This part applies to each public entity.

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(2) A procurement professional is subject to this part at all times during:

- (a) the procurement process; and
- (b) the administration of a contract or grant.

(3) A contract administration professional is subject to this part at all times during the period the contract administration professional is:

- (a) under contract with a procurement unit; and
- (b) involved in:
  - (i) the procurement process; or
  - (ii) the administration of a contract or grant.

(4) This part does not apply to:

- (a) an individual described in Subsection 63G-6a-2402(9)(b); ~~or~~
- (b) any individual other than a procurement professional or contract administration professional~~[-]; or~~

(c) a taxed interlocal entity, as defined in Section 11-13-602, or a director, officer, or employee of a taxed interlocal entity.

(5) The other subsections of this section do not affect the applicability or effect of any other ethics, bribery, or other law.

Section 36. Section **63G-6a-2404.3** is enacted to read:

**63G-6a-2404.3. Dividing a procurement to avoid using a standard procurement process.**

(1) It is unlawful for a person knowingly to divide a single procurement into multiple smaller procurements if dividing the single procurement:

(a) is done with the intent to avoid the use of a standard procurement process that would have otherwise been required if the procurement had not been divided;

(b) constitutes unlawful conduct under Subsection 63G-6a-506(8); or

~~(b)~~(c) is otherwise prohibited by this chapter.

(2) A violation of Subsection (1) is:

(a) a second degree felony, if the value of the procurement before being divided is \$1,000,000 or more;

(b) a third degree felony, if the value of the procurement before being divided is \$250,000 or more but less than \$1,000,000;

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(c) a class A misdemeanor, if the value of the procurement before being divided is \$100,000 or more but less than \$250,000; or

(d) a class B misdemeanor, if the value of the procurement before being divided is less than \$100,000.

Section 37. Section **63G-6a-2404.7** is enacted to read:

**63G-6a-2404.7. Improper action against a public officer or employee involved in the procurement process.**

~~{~~ (1) As used in this section, "requisite intent" means the intent to:

~~\_\_\_\_\_~~ (a) prevent a public officer or employee from performing a duty or responsibility that the officer or employee has under this chapter;

~~\_\_\_\_\_~~ (b) influence a public officer or employee to award a contract under this chapter to the person or take other action under this chapter in favor of the person; or

~~\_\_\_\_\_~~ (c) retaliate against a public officer or employee for:

~~\_\_\_\_\_~~ (i) not awarding a contract under this chapter to the person;

~~\_\_\_\_\_~~ (ii) issuing a decision or taking an action under this chapter that is adverse to the person; or

~~\_\_\_\_\_~~ (iii) performing a duty or responsibility the officer or employee has under this chapter.

~~‡~~ (~~{2}~~1) (a) It is unlawful for a person knowingly to threaten to make a false allegation against a public officer or employee, or knowingly to threaten to take a menacing or intimidating action against a public officer or employee ~~{ with the requisite intent.~~

~~‡~~ , with the intent to:

(i) prevent the officer or employee from performing a duty or responsibility that the officer or employee has under this chapter;

(ii) influence the officer or employee to award a contract under this chapter to the person or take other action under this chapter in favor of the person; or

(iii) retaliate against the officer or employee for:

(A) not awarding a contract under this chapter to the person;

(B) issuing a decision or taking an action under this chapter that is adverse to the person; or

(C) performing a duty or responsibility the officer or employee has under this chapter.

(b) A violation of Subsection (1)(a) is a class A misdemeanor.



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(2) (a) It is unlawful for a person knowingly to make a false allegation against a public officer or employee, or knowingly to take a menacing or intimidating action against a public officer or employee, with the intent to:

(i) prevent the officer or employee from performing a duty or responsibility that the officer or employee has under this chapter;

(ii) influence the officer or employee to award a contract under this chapter to the person or take other action under this chapter in favor of the person; or

(iii) retaliate against the officer or employee for:

(A) not awarding a contract under this chapter to the person;

(B) issuing a decision or taking an action under this chapter that is adverse to the person; or

(C) performing a duty or responsibility the officer or employee has under this chapter.

(b) A violation of Subsection (2)(a) is a third degree felony.

~~{ (3) (a) It is unlawful for a person knowingly to make a false allegation or to take a menacing or intimidating action against a public officer or employee with the requisite intent.~~

~~(b) A violation of Subsection (3)(a) is a second degree felony.~~

‡ Section 38. Section **63G-6a-2407** is amended to read:

### **63G-6a-2407. Duty to report unlawful conduct.**

(1) As used in this section, "unlawful conduct" means:

(a) conduct made unlawful under this part; or

(b) conduct, including bid rigging, improperly steering a contract to a favored vendor, exercising undue influence on an individual involved in the procurement process, or participating in collusion or other anticompetitive practices, made unlawful under other applicable law.

(2) (a) A procurement professional with actual knowledge that a person has engaged in unlawful conduct shall report the person's unlawful conduct to:

(i) the state auditor; or

(ii) the attorney general or other appropriate prosecuting attorney.

(b) An individual not subject to the requirement of Subsection (2)(a) who has actual knowledge that a person has engaged in unlawful conduct may report the person's unlawful conduct to:

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- (i) the state auditor; or
- (ii) the attorney general or other appropriate prosecuting attorney.
- (3) A procurement professional who fails to comply with the requirement of

Subsection (2)(a) is subject to any applicable disciplinary action [~~or civil penalty identified in Subsection 63G-6a-2404(5)~~].

Section 39. Section **63G-10-403** is amended to read:

**63G-10-403. Department of Transportation bid or request for proposals protest settlement agreement approval and review.**

(1) As used in this section:

(a) "Department" means the Department of Transportation created in Section 72-1-201.

(b) "Settlement agreement" includes stipulations, consent decrees, settlement agreements, or other legally binding documents or representations resolving a dispute between the department and another party when the department is required to pay money or required to take legally binding action.

(2) The department shall obtain the approval of the Transportation Commission or the governor or review by the Legislative Management Committee of a settlement agreement that involves a bid or request for proposal protest in accordance with this section.

(3) A settlement agreement that is being settled by the department as part of a bid or request for proposal protest, in accordance with Subsection 63G-6a-1602[~~(7)~~](8), that might cost government entities more than \$100,000 to implement shall be presented to the Transportation Commission for approval or rejection.

(4) A settlement agreement that is being settled by the department as part of a bid or request for proposal protest, in accordance with Subsection 63G-6a-1602[~~(7)~~](8), that might cost government entities more than \$500,000 to implement shall be presented:

- (a) to the Transportation Commission for approval or rejection; and
- (b) to the governor for approval or rejection.

(5) (a) A settlement agreement that is being settled by the department as part of a bid or request for proposal protest, in accordance with Subsection 63G-6a-1602[~~(7)~~](8), that might cost government entities more than \$1,000,000 to implement shall be presented:

- (i) to the Transportation Commission for approval or rejection;
- (ii) to the governor for approval or rejection; and

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(iii) if the settlement agreement is approved by the Transportation Commission and the governor, to the Legislative Management Committee.

(b) The Legislative Management Committee may recommend approval or rejection of the settlement agreement.

(6) (a) The department may not enter into a settlement agreement that resolves a bid or request for proposal protest, in accordance with Subsection 63G-6a-1602[~~(7)~~](8), that might cost government entities more than \$100,000 to implement until the Transportation Commission has approved the agreement.

(b) The department may not enter into a settlement agreement that resolves a bid or request for proposal protest, in accordance with Subsection 63G-6a-1602[~~(7)~~](8), that might cost government entities more than \$500,000 to implement until the Transportation Commission and the governor have approved the agreement.

(c) The department may not enter into a settlement agreement that resolves a bid or request for proposal protest, in accordance with Subsection 63G-6a-1602[~~(7)~~](8), that might cost government entities more than \$1,000,000 to implement until:

- (i) the Transportation Commission has approved the agreement;
- (ii) the governor has approved the agreement; and
- (iii) the Legislative Management Committee has reviewed the agreement.

### Section 40. **Repealer.**

This bill repeals:

Section **63G-6a-1604, Dismissal of protest not filed in accordance with requirements.**

Section **63G-6a-1706, Dismissal of an appeal not filed in compliance with requirements.**

### Section 41. **Coordinating H.B. 398 with S.B. 204 -- Technical amendments.**

If this H.B. 398 and S.B. 204, Public-Private Partnerships, both pass and become law, it is the intent of the Legislature that the Office of Legislative Research and General Counsel in preparing the Utah Code database for publication, merge the amendments in Subsection 63G-6a-702(2) to read:

"(2) (a) The request for proposals [~~standard procurement~~] process is appropriate for a procurement unit to use [~~for~~] in selecting the proposal that provides the best value or is the

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most advantageous to the procurement unit, including when:

~~[(a) the procurement of professional services;]~~

~~[(b) a design-build procurement;]~~

(i) the procurement involves a contract whose terms and conditions are to be negotiated in order to achieve the result that is the most advantageous to the procurement unit;

~~[(c) when]~~ (ii) 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]~~ (iii) factors, apart from or in addition to cost, are highly significant in making the selection that is most advantageous to the procurement unit[-]; or

(iv) the procurement unit anticipates entering into a public-private partnership.

(b) The types of procurements for which it is appropriate to use the request for proposals process include:

(i) a procurement of professional services; and

(ii) a procurement of design-build or construction manager/general contractor services."