

### **R33. Government Operations, Purchasing and General Services.**

#### **R33-1. Utah Procurement Rules, General Procurement Provisions.**

##### **R33-1-1. Definitions.**

- (1) Terms used in the procurement rules are defined in Section 63G-6a-103.
- (2) In addition:
  - (a) "Bias" means:
    - (i) a predisposition or a preconceived opinion that prevents an individual from impartially performing any duty or responsibility in Title 63G, Chapter 6a, Utah Procurement Code, or other applicable law or rule; or
    - (ii) a prejudice in favor of or against a thing, individual, or group that results in an action or treatment that a reasonable person would consider to be unfair or have the appearance of being unfair.
  - (b) "Bid Bond" is an insurance agreement, accompanied by a monetary commitment, by which a third party accepts liability and guarantees that the bidder will not withdraw the bid. The bidder will furnish bonds in the required amount and if the contract is awarded to the bonded bidder, the bidder will accept the contract as bid, or else the surety will pay a specific amount.
  - (c) "Bid Rigging" means an agreement among potential competitors to manipulate the competitive bidding process, for example, by agreeing not to bid, to bid a specific price, to rotate bidding, or to give kickbacks.
  - (d) "Bid Security" means the deposit of cash, certified check, cashier's check, bank draft, money order, or bid bond submitted with a bid and serving to guarantee to the owner that the bidder, if awarded the contract, will execute such contract in accordance with the bidding requirements and the contract documents.
  - (e) "Brand Name or Equal Specification" means a specification which uses a brand name specification to describe the standard of quality, performance, and other characteristics being solicited, and which invites the submission of equivalent products.
  - (f) "Brand Name Specification" means a specification identifying one or more products by manufacturer name, product name, unique product identification number, product description, SKU or catalogue number.
  - (g) "Collusion" means when two or more persons act together to achieve a fraudulent or unlawful act. Collusion inhibits free and open competition in violation of law.
  - (h) "Cost Analysis" means the evaluation of cost data for the purpose of arriving at estimates of costs to be incurred, prices to be paid, costs to be reimbursed, or costs actually incurred.
  - (i) "Cost Data" means factual information concerning the cost of labor, material, overhead, and other cost elements expected to be incurred or that have been actually incurred by the contractor in performing the contract.
  - (j) "Cronyism" is an anticompetitive practice that may violate federal and state antitrust and procurement laws. Cronyism in government contracting is a form of favoritism where contracts are awarded on the basis of friendships, associations or political connections instead of fair and open competition.
  - (k) "Evaluation Criteria" means the objective or subjective criteria that will be used to evaluate a vendor's solicitation response
  - (l) "Mandatory Requirement" means a condition set out in the specifications or statement of work that must be met without exception.
  - (m) "Minor Irregularity" is a variation from the solicitation that does not affect the price of the bid, offer, or contract or does not give a bidder or offeror an advantage or benefit not shared by other bidders or offerors, or does not adversely impact the interests of the procurement unit.
  - (n) "New Technology" means any invention, discovery, improvement, or innovation, that was not available to the acquiring agency on the effective date of the contract, whether or not patentable, including:
    - (i) new processes, emerging technology, machines, and improvements to, or new applications of, existing processes, machines, manufactures and software;
    - (ii) new computer programs, and improvements to, or new applications of, existing computer programs, whether or not copyrightable; and;
    - (iii) any new process, machine, including software, and improvements to, or new applications of, existing processes, machines, manufactures and software.
  - (o) "Objective Criteria" means the solicitation criteria that will be evaluated and scored based solely on the measurable and verifiable facts, evidence, and documentation provided in each vendor's solicitation response.
  - (p) "Participating Addendum" means an agreement issued in conjunction with a cooperative contract that authorizes a public entity to use the Cooperative Contract.
  - (q) "Payment Bond" is a bond that guarantees payment for labor and materials expended on the contract.
  - (r) "Person" means:
    - (i) an individual;
    - (ii) an association;
    - (iii) an institution;
    - (iv) a corporation;
    - (v) a company;
    - (vi) a trust;
    - (vii) a limited liability company;
    - (viii) a partnership;
    - (ix) a political subdivision;
    - (x) a government office, department, division, bureau, or other body of government; and
    - (xi) any other organization or entity.

- (s) "Price Analysis" means the evaluation of price data without analysis of the separate cost components and profit.
- (t) "Price Data" means factual information concerning prices for procurement items.
- (u) "Reasonable Person Standard" means an objective test to determine if a reasonably prudent person who exercises an average degree of care, skill, and judgment would be justified in drawing the same conclusions under the same circumstances or having knowledge of the same facts.
- (v) "Subjective Criteria" means the solicitation criteria that will be evaluated and scored based on the personal judgement, interpretations, and opinions of the evaluators after reviewing and analyzing the information provided in each vendor's solicitation response.
- (w) "Surety bond" or "Performance Bond" means a promise to pay the obligee or owner a certain amount if the principal or contractor fails to meet some obligation, such as fulfilling the terms of a contract.
- (x) "Steering a Contract to a Favored Vendor" is defined as a person involved in any phase of the procurement process who acts with bias or prejudice in violation of the law to favor one vendor over another vendor(s) in awarding a government contract. Steering a contract to a favored vendor includes:
  - (i) taking part in collusion or manipulation of the procurement process;
  - (ii) accepting any form of illegal gratuity, bribe or kickback from a vendor in exchange for a contract award;
  - (iii) awarding a contract to a vendor without engaging in a standard procurement process without proper justification;
  - (iv) involvement in a bid rigging scheme;
  - (v) writing specifications that are overly restrictive, beyond the reasonable needs of the procurement unit, or that gives an unfair advantage to a particular vendor without proper justification;
  - (vi) intentionally dividing a purchase to avoid engaging in a standard competitive procurement process as set forth in Section 63G-6a-506(8);
  - (vii) leaking solicitation or other information to a particular vendor that is prejudicial to other vendors;
  - (viii) improperly avoiding engaging in a standard procurement process in order to extend the duration of a vendor's existing contract through means of a contract extension; or
  - (ix) participating in the procurement process while having a financial conflict of interest as set forth in Section R33-24-105.
- (y) "Technology" means any type of technology defined in Subsection 63F-1-102(8).

#### **R33-1-2. Applicability of Rules.**

- (1) Title R33 shall apply to:
  - (a) a procurement unit for which the Utah State Procurement Policy Board is identified in Section 63G-6a-103 as the applicable rulemaking authority, except to the extent the procurement unit has adopted its own administrative rules as authorized under Section 63G-6a-103(3); and
  - (b) a procurement unit with independent procurement authority or a procurement unit for which the Utah State Procurement Policy Board is not identified in Section 63G-6a-103 as the applicable rulemaking authority, and the procurement unit has adopted Title R33 or a portion of Title R33 by rule, ordinance, policy, or other authorized means.

#### **R33-1-2.5. Use of Similar Laws and Rules to Establish Precedent or Extrapolate Legal Intent.**

- (1) When making a determination and a specific law or rule pertaining to the issue does not exist, the procurement official may refer to other applicable laws that are similar in nature to the issue to establish a precedent or extrapolation of legal intent to assist in making a determination based on the reasonable person standard in Section R33-1-1.

#### **R33-1-3. Determinations by Procurement Official.**

- (1) Unless specifically stated otherwise, determinations under Title 63G, Chapter 6a and Title R33 shall be made by the procurement official.
- (2) A determination by the procurement official shall be made:
  - (a) in accordance with the provisions set forth in Sections 63G-6a-106 and 63G-6a-303 and other rules and laws if applicable;or
  - (b) by applying the reasonable person standard to determine:
    - (i) if the actions of a person involved in the procurement process would cause a reasonable person to conclude that the person has acted in violation of Title 63G, Chapter 6a, or Title R33;
    - (ii) if the circumstances surrounding a procurement would cause a reasonable person to conclude that a violation of Title 63G, Chapter 6a, or Title R33 has occurred; or
    - (iii) if the evidence presented would cause a reasonable person to conclude that certain facts associated with a procurement are true.

#### **R33-1-4. Competitive Procurement Required for Expenditure of Public Funds or Use of Public Property or Other Public Assets to Acquire a Procurement Item Unless Exception is Authorized.**

- (1) Unless the procurement official issues a written exception in accordance with Title 63G, Chapter 6a, and applicable rules documenting why a competitive procurement process is not required and why it is in the best interest of the procurement unit to award a contract without engaging in a standard procurement process, a procurement unit shall conduct a standard procurement process whenever:
  - (a) public funds are expended or used to acquire a procurement item; or

(b) a procurement unit's property, name, influence, assets, resources, programs, or other things of value are used as consideration in the formation of a contract for a procurement item.

**R33-1-12. Mandatory Minimum Requirements in a Solicitation.**

(1) Mandatory minimum requirements may be used in a solicitation to assist the conducting procurement unit in identifying the most qualified vendors responding to a solicitation and to limit the number of vendors eligible to move forward to subsequent stages in the solicitation or evaluation process.

**R33-1-13. Pre-Solicitation Conferences and Site Visits.**

(1) A pre-solicitation conference and site visit may be held to explain the procurement requirements in accordance with the following:

(a) Persons submitting a solicitation response must attend pre-solicitation conferences and site visits, except as authorized in writing by the procurement official.

(b) Pre-solicitation conferences or site visits may be attended in person or via any of the following electronic means:

(i) teleconference;

(ii) webinar; or

(iii) other electronic media approved by the procurement official.

(c) Pre-solicitation conferences and site visits must be attended by an authorized representative of the vendor submitting a response and as may be further specified in the procurement documents.

(d) If the pre-solicitation conference or site visit is mandatory, the solicitation must state that failure to attend shall result in the disqualification of any vendor that does not have an authorized representative present for the entire duration of the pre-solicitation conference or site visit.

(e) An audio or video recording of a pre-solicitation conference and site visit may be made at the discretion of the procurement unit.

(f) Listening to or viewing an audio or video recording of a mandatory pre-solicitation conference or site visit may not be substituted for attendance, unless the procurement official grants an exception to the mandatory requirement in writing.

(2)(a) If a pre-solicitation conference or site visit is held, the procurement unit shall maintain:

(i) an attendance log including the name of each attendee, the entity the attendee is representing, and the attendee's contact information;

(ii) minutes of the pre-solicitation conference or site visit; and

(iii) a copy of any document distributed by the procurement unit to the attendees.

(b) After the pre-solicitation conference or site visit, the procurement unit shall publish an addendum to the solicitation that includes:

(i) the attendance log;

(ii) minutes of the pre-bid conference or site visit;

(iii) a copy of any document distributed to attendees; and

(iv) any verbal modification made to any solicitation document during the pre-solicitation conference or site visit.

**R33-1-14. Addenda to Solicitation.**

(1) Prior to the deadline for receipt of a solicitation response, a procurement unit may issue addenda modifying any aspect of the solicitation.

(a) Addenda shall be distributed within a reasonable time to allow a person to consider the addenda in preparing a response to the solicitation.

(b) After the due date and time for submitting a response, at the discretion of the procurement official, addenda to the solicitation may be limited to vendors who submitted a solicitation response, provided the addenda does not make a change to the solicitation that, in the opinion of the procurement official, likely would have impacted the number of persons responding to the solicitation.

**R33-1-15. Rejection of a Late Response -- Delivery and Time Requirements.**

(1) Except as provided in Subsection (4), a procurement unit may not accept a response after the deadline for receipt of solicitation responses.

(2) When submitting a response electronically, vendors must allow sufficient time to complete the online forms and finish uploading all documents before the closing time posted in the electronic system. Solicitation responses still in the process of being uploaded at the posted closing time will not be accepted.

(3) When submitting a solicitation response by physical delivery, which includes U.S. Mail, courier service, hand-delivery, or other physical means the vendor is solely responsible for meeting the deadline. Any delay caused by a delivery service or other physical means will not be considered an acceptable reason for a response being late.

(4) Responses received by physical delivery will be date and time stamped by the procurement unit.

(5) If an error on the part of the procurement unit or an employee of a procurement unit results in a response not being received by the established due date and time, the response shall be accepted as being on time.

**R33-1-16. Voluntary Withdrawal of a Response.**

(1) A vendor may voluntarily withdraw a response at any time before a contract is awarded with respect to the solicitation for which the response was submitted provided the vendor is not engaged in any type of bid rigging, collusion or other anti-competitive practice made unlawful under other applicable law.

**R33-1-17. Errors Discovered After the Award of Contract.**

(1) An error discovered after the award of a contract may only be corrected if, after consultation with the procurement official and the applicable legal counsel, it is determined that correction of the error does not violate the requirements of Title 63G, Chapter 6a, or these Title R33.

(2) Any correction made under this subsection must be supported by a written determination signed by the procurement official.

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