

R33. Government Operations, Purchasing and General Services.

R33-8. Exceptions to Standard Procurement Process.

R33-8-101. Award of Contract Without Engaging in a Standard Procurement Process.

(1) Under the provisions set forth in Section 63G-6a-802, the procurement official may award a contract without engaging in a standard procurement process under the following circumstances:

- (a) There is only one source for the procurement item;
- (b) Transitional costs are a significant consideration in selecting a procurement item and the results of a cost-benefit analysis document that transitional costs are unreasonable or cost-prohibitive and awarding a contract without engaging in a standard procurement process is in the best interest of the procurement unit; or
- (c) Other circumstances described by the applicable rulemaking authority that make awarding a contract through a standard procurement process impractical and not in the best interest of the procurement unit.

R33-8-101a. Sole Source Contract Awards.

(1) The underlying purposes and policies of Title 63G, Chapter 61, Utah Procurement Code, are to ensure the fair and equitable treatment of each person who deals with the procurement system and to foster effective broad-based competition within the free enterprise system. The most effective way to achieve this is by conducting a standard procurement process whenever public funds are expended for a procurement item. Sole source contract awards do not involve a standard procurement process and should only be used when justified after reasonable research has been conducted by the procurement unit to determine if there are other available sources and an analysis has been conducted to determine if a sole source award is cost justified.

(2) Circumstances for which a sole source contract award may be justified include procurements for:

- (a) a procurement item for which there is no comparable product or service, such as a one-of-a-kind item available from only one vendor;
- (b) a component or replacement part for which there is no commercially available substitute, and which can be obtained only directly from the manufacturer; or
- (c) an exclusive maintenance, service, or warranty agreement.

(3) Prior to awarding a sole source contract, the procurement official shall, whenever practicable, conduct a price analysis in accordance with Section R33-12-603.

(4) An urgent or unexpected circumstance or requirement for a procurement item does not justify the award of a contract without engaging in a standard procurement process.

R33-8-101b. Transitional Costs -- Cost-Benefit Analysis.

(1) For the purpose of this section, the following definitions shall apply:

(a) "Competing type of procurement item" means a type of procurement item that is the same, equivalent, or superior to the existing type of procurement item currently under contract in all material aspects including:

- (i) performance;
- (ii) specifications;
- (iii) scope of work; and
- (iv) provider qualifications, certifications, and licensing.

(b) "Competing provider" means another provider other than the existing provider under contract that provides a competing type of procurement item.

(c) "Significant", "unreasonable or cost-prohibitive" transitional costs are defined as costs associated with changing from an existing provider of a procurement item to another provider of that procurement item or from an existing type of procurement item to another type that:

- (i) constitute a measurably large amount that would likely have an influence or effect on the award of a contract if a competitive procurement were to be conducted for the procurement item being considered; and
- (ii) provides a compelling justification for not conducting a competitive standard procurement process.

(2) Transitional costs that must be considered in a cost-benefit analysis include:

(a) costs that are directly associated with changing from an existing provider of a procurement item to a competing provider of that procurement item or from an existing type of procurement item to a competing type of procurement item; and

(b) a full lifecycle cost analysis of the existing type of procurement item and competing type of procurement items in order to determine which procurement item is more cost-effective.

(3) Transitional costs that may be considered in a cost-benefit analysis include:

(a) costs identified in Section 63G-6a-103;

(b) costs offered by a competing provider(s) for a competing type of procurement item in a competitive bid or RFP process conducted within the last 12 months;

(c) costs offered by a competing provider for a competing type of procurement item in a competitive bid or RFP process conducted prior to the most recent 12 months, updated using an applicable price index;

(d) written cost estimates obtained by the procurement unit from a competing provider for a competing type of procurement item; and

(e) other transitional costs determined to be applicable by the procurement official

(4) Transitional costs or other information that may not be considered in a cost-benefit analysis include:

(a) costs prohibited in Subsection 63G-6a-103;

- (b) data provided by the existing provider for the purpose of establishing:
 - (i) the market value of the existing type of procurement item; or
 - (ii) a competing provider's price for a competing type of procurement item;
 - (c) costs associated with any other procurement item other than the existing type of procurement item or a competing type of procurement item;
 - (d) non-monetary factors, such as the provider's performance, agency preference, and other data or information not specific to the transitional costs associated with the existing type of procurement item or a competing type of procurement item;
 - (e) factors other than the monetary transitional costs directly associated with changing from an existing provider of a procurement item to a competing provider of that procurement item or from an existing type of procurement item to a competing type of procurement item; and
 - (f) other transitional costs or other information deemed inappropriate by the procurement official
- (5) The conducting procurement unit shall complete a written cost-benefit analysis and submit it to the issuing procurement unit for approval.
- (6) The cost-benefit analysis should not be overly time-consuming to complete or involve hiring costly consultants or financial analysts.

R33-8-101c. Other Circumstances That May Make Awarding a Contract Through a Standard Procurement Process Impractical.

- (1) In accordance with Section 63G-6a-802(1)(c), the procurement official may consider, as applicable, the following circumstances when making a determination as to whether awarding a contract through a standard procurement process is impractical and not in the best interest of the procurement unit:
- (a) a contract award to a specific supplier, service provider, or contractor is a condition of a donation or grant that will fund the full cost of the supply, service, or construction item;
 - (b) public utility services, when only one public utility service is available in an area;
 - (c) an item where compatibility is the overriding consideration; or
 - (d) a used procurement item that presents a unique, specialized, or time-limited buying opportunity.

R33-8-101d. Notice of Intent to Award a Contract Without Engaging in a Standard Procurement Process.

- (1)(a) The division shall make available a form titled: "Notice of Intent to Award a Contract without Engaging in a Standard Procurement Process" that requires the procurement unit to provide, at a minimum, the following information:
- (i) a description of the procurement item, including, when applicable, the proposed scope of work;
 - (ii) the total dollar value of the procurement item, including, when applicable, the actual or estimated full lifecycle cost of maintenance and service agreements;
 - (iii) the duration of the proposed contract;
 - (iv) the signature of an authorized official of the procurement unit; and
 - (v) research completed by the procurement unit documenting that:
 - (A) there are no other competing vendors or sources for the procurement item in accordance with the provisions set forth in Section R33-8-101a;
 - (B) transitional costs are a significant consideration in selecting a procurement item and the results of a cost benefit analysis documenting that transitional costs are unreasonable or cost-prohibitive and awarding a contract without engaging in a standard procurement process is in the best interest of the procurement unit in accordance with the provisions set forth in Section R33-8-101b; or
 - (C) Other circumstances that make awarding a contract through a standard procurement process impractical and not in the best interest of the procurement unit in accordance with the provisions set forth in Section R33-8-101c.
- (b) A procurement unit with independent procurement authority may use the division's notice of intent to award a contract without engaging in a standard procurement process form or develop its own form to provide notice of intent to award a contract without engaging in a standard procurement process that contains, at a minimum, the same basic information in Subsection (1)(a).
- (c) The conducting procurement unit shall submit in writing a completed notice of intent to award a contract without engaging in a standard procurement process form to the chief procurement official, or head of a procurement unit with independent procurement authority for approval to award a contract without engaging in a standard procurement process.

R33-8-101e. Public Notice -- Waiver of Public Notice.

- (1) Except as provided in Subsection (2), publication of a notice of intent to award a contract without engaging in a standard procurement process shall be published in accordance with Section 63G-6a-112 if the cost of the procurement being considered under this rule exceeds \$50,000.
- (2)(a) When making a determination under Sections R33-8-101a, R33-8-101b, or R33-8-101c, the procurement official may waive the requirement to publish the "Notice of intent to award a contract without engaging in a standard procurement process" for the following procurements:
- (i) procurements of \$50,000 or less;
 - (ii) public utility services;
 - (iii) conference and convention facilities with unique or specialized amenities, abilities, location, or services;
 - (iv) conference fees, including materials;
 - (v) speakers or trainers with unique or proprietary presentations or training materials;

- (vi) hosting of in-state, out-of-state, and international dignitaries;
 - (vii) international, national, or local promotion of the state or a public entity;
 - (viii) an award when the Legislature identifies the intended recipient of a contract;
 - (ix) an award to a specific supplier, service provider, or contractor if the award is a condition of a donation or grant that will fund the full cost of the supply, service, or construction item;
 - (x) catering services at government functions where the event requires a caterer with unique and specialized qualifications, skills, and abilities; or
 - (xi) other circumstances as determined in writing by the procurement official.
- (b) The procurement official may require publication of a notice of intent to award a contract without engaging in a standard procurement process for any procurement identified in Subsection (2)(a) if deemed necessary to uphold the fair and equitable treatment of all persons who deal with the procurement system.

R33-8-101f. Contesting a Notice of Intent to Award a Contract Without Engaging in a Standard Procurement Process.

(1) A person may contest the notice of intent to award a contract without engaging in a standard procurement process prior to the closing of the public notice period set forth in Section 63G-6a-112 by submitting the following information in writing to the procurement official:

- (a) the name of the contesting person; and
- (b) a detailed explanation of the challenge, including documentation that:
 - (i) there are other competing sources for the procurement item;
 - (ii) transitional costs are not significant, unreasonable, or cost-prohibitive; or
 - (iii) a standard procurement process is in the best interest of the conducting procurement unit.

(2) Upon receipt of a challenge contesting an award of a contract without engaging in a standard procurement process, the procurement official shall conduct an investigation to determine the validity of the challenge and make a written determination either supporting or denying the challenge.

(a) If a challenge is upheld, the procurement unit shall conduct a standard procurement process for the procurement item being considered or cancel the procurement;

(b) If a challenge is not upheld, the procurement unit may proceed with awarding a contract without engaging in a standard procurement process.

(3) A vendor's right to file a protest under Title 63G, Chapter 6a; Part 16, Protests, is not waived by a vendor's actions to contest or challenge a procurement unit's notice of intent to award a contract without engaging in a standard procurement process under Section R33-8-101f.

R33-8-102. Reserved.

Reserved.

R33-8-110. Extension of a Contract Without Engaging in a Standard Procurement Process.

(1) One of the underlying purposes and policies of Title 63G, Chapter 6a is to ensure the fair and equitable treatment of all persons who deal with the procurement system and to foster effective broad-based competition within the free enterprise system. The most effective way to achieve this is by conducting a standard procurement process whenever public funds are expended for a procurement item. A contract extension does not involve a standard procurement process and should only be used after thorough analysis and proper justification.

(2) Pursuant to Section 63G-6a-103, "contract administration" is a duty of the procurement unit and includes all functions, duties, and responsibilities associated with closing out a contract. In fulfillment of these duties, the procurement unit shall maintain a process or system for tracking contract expiration dates in order to determine well in advance of a contract expiration date if there is a continuing need for the procurement item. If the procurement unit determines there is a continuing need for the procurement item, the procurement unit shall whenever practicable:

(a)(i) initiate a standard procurement process no later than 90 days prior to the contract expiration date of an existing contract; and

(ii) no later than 45 days prior to the contract expiration date, publish, if applicable, a solicitation for the procurement item; or

(b)(i) if the procurement unit determines that a procurement will be complex or involve a change in industry standards or new specifications requiring negotiations, no later than 180 days prior to the contract expiration date, initiate a standard procurement process; and

(ii) no later than 45 days prior to the contract expiration date, publish, if applicable, a solicitation for the procurement item.

(3) The following do not justify an extension of a contract under Section 63G-6a-802.7:

(a) a procurement unit's intentional delay in conducting a standard procurement process to award a contract to replace an expiring contract; and

(b) a procurement unit or vendor's intentional delay in executing a contract to replace an expiring contract.

(4) 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, may be classified as steering a contract to a favored vendor which is reportable as unlawful conduct under Section 63G-6a-2407.

R33-8-201. Trial Use or Testing of a Procurement Item, Including New Technology.

(1) The trial use or testing of a procurement item, including new technology, shall be conducted as set forth in Section 63G-6a-802.3, Utah Procurement Code.

R33-8-301. Reserved.

Reserved.

R33-8-401. Emergency Procurement.

(1) Emergency procurements shall be conducted in accordance with the requirements set forth in Section 63G-6a-803, and this rule.

(2) An emergency procurement is a procurement procedure where the procurement unit is authorized to obtain a procurement item without using a standard competitive procurement process.

(3) An emergency procurement may only be used when circumstances create harm or risk of harm to public health, welfare, safety, or property.

(a) Circumstances that may create harm or risk to health, welfare, safety, or property include:

(i) damage to a facility or infrastructure resulting from flood, fire, earthquake, storm, or explosion;

(ii) failure or eminent failure of a public building, equipment, road, bridge or utility;

(iii) terrorist activity;

(iv) epidemics;

(v) civil unrest;

(vi) events that impair the ability of a public entity to function or perform required services;

(vii) situations that may cause harm or injury to life or property; or

(viii) other conditions as determined in writing by the procurement official, or as applicable, the head of a procurement unit with independent procurement authority.

(4) Emergency procurements are limited to those procurement items necessary to mitigate the emergency.

(5) While a standard procurement process is not required under an emergency procurement, when practicable, procurement units should seek to obtain as much competition as possible through use of phone quotes, internet quotes, limited invitations to bid, or other selection methods while avoiding harm, or risk of harm, to the public health, safety, welfare, property, or impairing the ability of a public entity to function or perform required services.

(6) The procurement unit shall make a written determination documenting the basis for the emergency and the selection of the procurement item. A record of the determination and selection shall be kept in the contract file. The documentation may be made after the emergency condition has been alleviated.

R33-8-501. Declaration of "Official State of Emergency".

(1) Upon a declaration of an "Official State of Emergency" by the authorized state official, the procurement official shall implement the division's Continuity of Operations Plan. When activated, the division shall follow the procedures outlined in the plan and take appropriate actions as directed by the procurement unit responsible for authorizing emergency acquisitions of procurement items.

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