

R33. Government Operations, Division of Purchasing and General Services.

R33-12. Terms and Conditions, Contracts, Change Orders and Costs.

R33-12-101. Required Contract Clauses.

(1) Public entities shall comply with Section 63G-6a-1202 considering clauses for contracts. Executive branch procurement units shall also comply with the requirements of Section 63G-6a-110(6). All definitions in the Utah Procurement Code shall apply to this Rule unless otherwise specified in this Rule. This administrative rule provides additional requirements and procedures and must be used in conjunction with the Procurement Code.

R33-12-201. Establishment of Terms and Conditions.

(1) Executive branch procurement units without independent procurement authority shall be required to use the standard terms and conditions adopted by the division for each particular procurement, unless exceptions or additions are granted by the procurement official after consultation with the Attorney General's Office. Public entities, other than executive branch procurement units, may enact similar requirements. Terms and conditions may be established for:

- (a) a category of procurement items;
- (b) a specific procurement item;
- (c) general use in procurements;
- (d) the special needs of a procurement unit; or
- (e) the requirements of federal funding.

(2) In addition to the required standard terms and conditions, executive branch procurement units without independent procurement authority may submit their own additional special terms and conditions subject to the following:

- (a) the chief procurement officer may reject terms and conditions submitted by a conducting procurement unit if:
 - (i) the terms and conditions are unduly restrictive;
 - (ii) will unreasonably increase the cost of the procurement item; or
 - (iii) places the state at increased risk.

(b) the procurement official may require the conducting procurement unit's Assistant Attorney General to approve any additional special terms and conditions.

R33-12-301. Awarding a Multiple Award Contract.

(1) A multiple award contract is a procurement process where two or more bidders or offerors are awarded a contract under a single solicitation. Purchases are made through an order placed with a vendor on a multiple award contract pursuant to the procedures established in Section R33-12-301b.

(2) As authorized under Section 63G-6a-1204.5, the division or a procurement unit with independent procurement authority may enter into multiple award contracts.

(3) A multiple award contract may be awarded under a single solicitation when two or more bidders or offerors for similar procurement items are needed for:

(a) coverage on a statewide, regional, combined statewide and regional basis, agency specific requirement, or other criteria specified in the solicitation such as:

- (i) delivery;
- (ii) service;
- (iii) product availability; or
- (iv) compatibility with existing equipment or infrastructure.

(4) In addition to the requirements set forth in Sections 63G-6a-603 and 63G-6a-703, when it is anticipated that a procurement will result in multiple contract awards, the solicitation shall include a statement that:

- (a) indicates that contracts may be awarded to more than one bidder or offeror;
- (b) specifies whether contracts will be awarded on a statewide, regional, combined statewide and regional basis, or agency specific requirement; and

(c) describes specific methodology or a formula that will be used to determine the number of contract awards.

(5) A multiple award contract in an invitation for bids shall be conducted and awarded in accordance with Title 63G, Chapter 6a, Part 6 to the lowest responsive and responsible bidder who meet the objective criteria described in the invitation for bids and may be awarded to provide adequate regional, statewide, or combined regional and statewide coverage, agency specific requirement, or delivery, or product availability using the following methods:

(a) lowest bids for procurement items solicited provided the solicitation indicates that multiple contracts will be awarded to the lowest bidders for procurement items being solicited as determined by the following methods:

(i) bids within a specified percentage, not to exceed five percent, of the lowest responsive and responsible bid, unless otherwise approved in writing by the procurement official;

(ii) responsive and responsible bidders will be awarded a contract, provided the contract specifically directs that orders must be placed first with low bidder unless the lowest bidder cannot provide the needed procurement item, then with the second lowest bidder unless the second lowest bidder cannot provide the needed procurement item, then with the third lowest bidder unless the third lowest bidder cannot provide the needed procurement item, and so on in order from the lowest responsive and responsible bidder to the highest responsive and responsible bidder; or

(iii) other methodology described in the solicitation to award contracts;

(b) lowest bid by category provided:

- (i) the solicitation indicates that a contract will be awarded based on the lowest bid per category; and
- (ii) only one bidder may be awarded a contract per category;
- (c) lowest bid by line item provided:
 - (i) the solicitation indicates that a contract will be awarded based on the lowest bid per line item, task or service; and
 - (ii) only one bidder may be awarded a contract per line item, task or service; or
 - (d) other specific objective methodology described in the solicitation, such as Section R33-12-302 for primary and secondary contracts, approved by the procurement official.

(6) Multiple award contracts in a request for proposals shall be conducted and awarded in accordance with Title 63G, Chapter 6a, Part 7 and may be awarded on a statewide, regional, combination statewide and regional basis, agency specific requirement, or other criteria set forth in the solicitation and in accordance with point thresholds and other methodology set forth in the RFP describing how multiple award contracts will be awarded with enough specificity as to avoid the appearance of any favoritism affecting the decision of whether to award a multiple contract and who should receive a multiple award contract.

R33-12-301a. Multiple Award Contracts for Unidentified Procurement Items.

- (1) An unidentified procurement item is defined as a procurement item that at the time the solicitation is issued:
 - (a) Has not been specifically identified but will be identified at some time in the future, such as an approved vendor list or approved consultant list;
 - (b) Does not have a clearly defined project or procurement specific scope of work; and
 - (c) Does not have a clearly defined project or procurement specific budget.
- (2) Unidentified procurement items may be procured under the approved vendor list thresholds established by the applicable rule making authority or Section R33-4-102.
- (3) An RFP, request for statements of qualifications, or multi stage solicitation issued for a multiple award contract for unidentified procurement item(s) must specify the methodology that the procurement unit will use to determine which vendor under the multiple award contract will be selected.
 - (a) The methodology must include a procedure to document that the procurement unit is obtaining best value, including an analysis of cost and other evaluation criteria outlined in the solicitation.
 - (b) The methodology must also ensure the fair and equitable treatment of each multiple award contract vendor, including using methods to select a vendor such as:
 - (i) a rotation system, organized alphabetically, numerically, or randomly;
 - (ii) assigning a potential vendor or contractor to a specified geographical area;
 - (iii) classifying each potential vendor or contractor based on the potential vendor's or contractor's field or area of expertise; or
 - (iv) obtaining quotes or bids from two or more vendors or contractors.

R33-12-301b. Ordering From A Multiple Award Contract.

- (1)(a) When buying a procurement item from a multiple award contract solicited through an invitation for bids, a procurement unit shall:
 - (i) obtain a minimum of two quotes for the procurement item if the contract was awarded based on the method described in R33-12-301(5)(a)(i) and place the order for the procurement item with the vendor or contractor with the lowest quoted price;
 - (ii) place the order for the procurement item with the lowest bidder on contract unless the lowest bidder cannot provide the needed procurement item, then the order may be placed with the second lowest bidder unless the second lowest bidder cannot provide the needed procurement item and on, in order, from lowest bidder to highest bidder as described in R33-12-301(5)(a)(ii);
 - (iii) place the order in accordance with instructions contained in the contract for the procurement item if the contract was awarded based on the method described in R33-12-301(5)(a)(iii);
 - (iv) place the order for the procurement item if the contract was awarded based on the method described in R33-12-301(5)(b);
 or
 - (v) place the order for the procurement item if the contract was awarded based on the method described in R33-12-301(5)(c);
- (b) The requirement to obtain two or more quotes in section (1)(a)(i) is waived when there is only one bidder award for the particular procurement item or only one bidder is awarded per geographical area.
- (2) When buying a procurement item from a multiple award contract solicited through an RFP, a procurement unit may place orders with any vendor or contractor under contract based on which procurement item best meets the needs of the procurement unit. Contracts awarded through the RFP process are awarded based on best value as determined by cost and non-price criteria specified in the RFP. As a result, all vendors, contractors and procurement items under contract issued through an RFP have been determined to provide best value to procurement units buying from these contracts.
- (3) A procurement unit may not use a multiple award contract to steer purchases to a favored vendor or use any other means or methods that do not result in fair consideration being given to all vendors that have been awarded a contract under a multiple award.

R33-12-302. Primary and Secondary Contracts.

- (1) Designations of multiple award contracts as primary and secondary may be made provided a statement to that effect is contained in the solicitation documents.
- (2) When the procurement official determines that the need for procurement items will exceed the capacity of any single primary contractor, secondary contracts may be awarded to additional contractors.

(3) Purchases under primary and secondary contracts shall be made initially to the primary contractor offering the lowest contract price until the primary contractor's capacity has been reached or the items are not available from the primary contractor, then to secondary contractors in progressive order from lowest price or availability to the next lowest price or availability.

R33-12-303. Intent to Use.

(1) If a multiple award is anticipated prior to issuing a solicitation, the method of award shall be stated in the solicitation.

R33-12-401. Contracts and Change Orders -- Contract Types.

(1) A procurement unit may use contract types to the extent authorized under Section 63G-6a-1205.

R33-12-402. Prepayments.

(1) Prepayments are subject to the restrictions contained in Section 63G-6a-1208.

R33-12-403. Leases of Personal Property.

(1) Leases of personal property are subject to the following:

(a) Leases shall be conducted in accordance with Division of Finance rules and Section 63G-6a-1209.

(b) A lease may be entered into provided the procurement unit complies with Section 63G-6a-1209 and:

(i) it is in the best interest of the procurement unit;

(ii) all conditions for renewal and costs of termination are set forth in the lease; and

(iii) the lease is not used to avoid a competitive procurement.

(c) Lease contracts shall be conducted with as much competition as practicable.

(d) Executive Branch Procurement Unit Leases with Purchase Option. A purchase option in a lease may be exercised if the lease containing the purchase option was awarded under an authorized procurement process. Before exercising this option, the procurement unit shall:

(i) investigate alternative means of procuring comparable procurement items; and

(ii) compare estimated costs and benefits associated with the alternative means and the exercise of the option, for example, the benefit of buying new state of the art data processing equipment compared to the estimated, initial savings associated with exercise of a purchase option.

R33-12-404. Multi-Year Contracts.

(1) Procurement units may issue multi-year contracts for any solicitation process in accordance with Section 63G-6a-1204.

R33-12-405. Installment Payments.

(1) Procurement units may make installment payments in accordance with Section 63G-6a-1208.

R33-12-501. Change Orders.

(1) In addition to the requirements in Section 63G-6a-1207, for executive branch procurement units without independent procurement authority, the certifications required under Subsections 63G-6a-1207(1) and 63G-6a-1207(2) must be submitted in writing by the procurement unit to the procurement official prior to the commencement of any work to be performed under a contract change order unless:

(a) the procurement unit has authority Subsection 63G-6a-304(1) and Section R33-3-101 to authorize contract change orders up to the amount delegated; or

(b) The change order is:

(i) requisite to avert an emergency; or

(ii) required as an emergency.

(2) For purposes of Subsection (1)(b) "emergency" is described in Subsection R33-8-401(3) and is subject to Section 63G-6a-803.

(3) Any contract change order authorized by a procurement unit under Subsection R33-12-501(1)(c) shall, as soon as practicable, be submitted to the procurement official and included in the division's contract file.

R33-12-502. Contract Modifications for New Technology and Technological Upgrades.

(1) A contract for a procurement item may be modified to include new technology or technological upgrades associated with the procurement item, provided:

(a) The solicitation contains a statement indicating that:

(i) the awarded contract may be modified to incorporate new technology or technological upgrades associated with the procurement item being solicited, including new or upgraded:

(A) systems;

(B) apparatuses;

(C) modules;

(D) components; and

(E) other supplementary items;

- (ii) a maintenance or service agreement associated with the procurement item under contract may be modified to include any new technology or technological upgrades; and
- (iii) Any contract modification incorporating new technology or technological upgrades is specific to the procurement item being solicited and substantially within the scope of the original procurement or contract.
- (b) Any contract modification incorporating new technology or technological upgrades is agreed upon by all parties and is executed using the process set forth in the contract for other contract modifications.
- (c) Prior to executing a contract modification incorporating new technology or technological upgrades, executive branch procurement units shall obtain the approval of the Executive Director of the Department of Technology Services.
- (d) A contract modification for new technology or technology upgrades may not extend the term of the contract except as provided in the Utah Procurement Code.

R33-12-601. Requirements for Cost or Pricing Data.

- (1) For contracts that expressly allow price adjustments, cost or pricing data shall be required in support of a proposal leading to the adjustment of any contract pricing.
- (2) Cost or pricing data exceptions:
 - (a) need not be submitted when the terms of the contract state established market indices, catalog prices or other benchmarks are used as the basis for contract price adjustments or when prices are set by law or rule;
 - (b) if a contractor submits a price adjustment higher than established market indices, catalog prices or other benchmarks established in the contract, the procurement official may request additional cost or pricing data; or
 - (c) the procurement official may waive the requirement for cost or pricing data provided a written determination is made supporting the reasons for the waiver. A copy of the determination shall be kept in the contract file.

R33-12-602. Defective Cost or Pricing Data.

- (1) If defective cost or pricing data was used to adjust a contract price, the vendor and the procurement unit may enter into discussions to negotiate a settlement.
- (2) If a settlement cannot be negotiated, either party may seek relief through the courts.

R33-12-603. Price Analysis.

- (1) Price analysis may be used to determine if a price is reasonable and competitive, such as when:
 - (a) there are a limited number of vendors, bidders or offerors;
 - (b) awarding a sole source or other contract without engaging in a standard procurement process; or
 - (c) identifying price that are significantly lower or higher than other vendors, bidders, or offerors.
- (2) Price analysis involves a comparison of prices for the same or similar procurement items, including quality, warranties, service agreements, delivery, contractual provisions, terms and conditions, and so on.
- (3) Examples of a price analysis include:
 - (a) prices submitted by other prospective bidders or offerors;
 - (b) price quotations;
 - (c) previous contract prices;
 - (d) comparisons to the existing contracts of other public entities; and,
 - (e) prices published in catalogs or price lists.

R33-12-604. Cost Analysis.

- (1) Cost analysis includes the verification of cost data. Cost analysis may be used to evaluate:
 - (a) specific elements of costs;
 - (b) total cost of ownership and life-cycle cost;
 - (c) supplemental cost schedules;
 - (d) market basket cost of similar items;
 - (e) the necessity for certain costs;
 - (f) the reasonableness of allowances for contingencies;
 - (g) the basis used for allocation of indirect costs; and,
 - (h) the reasonableness of the total cost or price.

R33-12-605. Right to Audit.

- (1) As used in this rule:
 - (a) "Authorized representative" includes:
 - (i) a purchasing procurement unit;
 - (ii) an internal auditor or other employee of the procurement unit;
 - (iii) an audit firm, consultant or examiner under contract with the procurement unit;
 - (iv) the State Auditor;
 - (v) the Legislative Auditor General; or
 - (vi) federal auditors.

(b) "Books and records" mean written or electronic information pertaining to the applicable contract between the procurement unit and the contractor including:

- (i) accounting information, financial statements, files, invoices, reports, and statements;
- (ii) pricing data;
- (iii) usage reports;
- (iv) transaction histories;
- (v) delivery logs;
- (vi) contracts, contract amendments, and other legal documents; and
- (vii) performance evaluations.

(2) Any contract between a contractor and a procurement unit that involves the expenditure of public funds may include or incorporate by reference a right to audit clause that may contain the following provisions:

(a) a statement indicating that the procurement unit or its authorized representative has the right to audit the books and records of a contractor or any subcontractor under any contract or subcontract to the extent that the books and records relate to the performance of the contract or subcontract;

(b) notification procedures for initiating an audit and reporting audit findings;

(c) dispute resolution procedures, including, to the extent practicable, negotiation, settlement, and final resolution of audit findings;

(d) a statement requiring the contractor and its subcontractors to:

(i) maintain books and records relating to a contract for six years after the day on which the contractor receives the final payment under the contract, or until audits initiated under this section within the six-year period have been completed, whichever is later;

(ii) establish and maintain an accounting and record-keeping system that enables the procurement unit or its authorized representative to readily have access to the contractor's books and records in both written and electronic format;

(iii) upon request, provide to the procurement unit or its authorized representative an electronic copy of the contractor's books and records within thirty days of the request;

(iv) allow the procurement unit or its authorized representative to interview the contractor's employees, agents, subcontractors, partners, resellers, and any other person who might reasonably have information related to the contractor's performance of the contract.

(v) correct errors and repay overcharges to the contracting procurement unit within thirty days of receiving written notice of the errors or overcharges documented in an audit finding;

(A) payments relating to overcharges or other audit findings involving state cooperative contracts shall be repaid to the Utah Division of Purchasing; and

(vi) if contract errors or overcharges are in dispute, correct errors and repay overcharges within thirty days of receipt of a notice of decision issued by the procurement official after a hearing has been conducted to attempt to resolve the dispute, or a court order;

(e) a statement indicating that:

(i) the procurement unit or its authorized representative have the right to audit the contract at any time during or after the term of the contract between the contractor and the procurement unit; including the right to examine, make copies of, or extract data from any record required to be maintained by the contractor; and

(ii) an audit or other request shall:

(A) be limited to records or other information related to or pertaining to the applicable contract;

(B) include access to records necessary to properly account for the contractor's performance under the contract and the payments made by the procurement unit to the contractor; and

(C) be carried out at a reasonable time and place;

(f) a notice that if a contractor fails to maintain or provide records in accordance with the provisions of the contract, the procurement unit may:

(i) deem the contractor to be in breach of its contract with the procurement unit;

(ii) enter into negotiations with the contractor to initiate a corrective action plan to bring the contractor into compliance; or

(iii) cancel the contract;

(g) a notice that the procurement unit may initiate debarment or suspension proceedings against a contractor under Section 63G-6a-904, or pursue other legal action, for any of the following:

(i) failure to respond to an audit;

(ii) failure to correct errors or repay overcharges;

(iii) an illegal act or fraud documented in an audit; or

(iv) other reasons as determined by the procurement official.

R33-12-607. Applicable Credits.

(1) Applicable credits are receipts or price reductions which offset or reduce expenditures allocable to contracts as direct or indirect costs. Examples include purchase discounts, rebates, allowance, recoveries or indemnification for losses, sale of scrap and surplus equipment and materials, adjustments for overpayments or erroneous charges, and income from employee recreational or incidental services and food sales.

R33-12-608. Use of Federal Cost Principles.

(1) In dealing with contractors operating according to federal cost principles, the procurement official may use the federal cost principles, including the determination of allowable, allocable, and reasonable costs, as guidance in contract negotiations.

(2) In contracts not awarded under a program which is funded by federal assistance funds, the procurement official may explicitly incorporate federal cost principles into a solicitation and thus into any contract awarded pursuant to that solicitation. The procurement official and the contractor by mutual agreement may incorporate federal cost principles into a contract during negotiation or after award.

(3) In contracts awarded under a program which is financed in whole or in part by federal assistance funds, requirements set forth in the assistance document including specified federal cost principles, must be satisfied. To the extent that the cost principles specified in the grant document conflict with the cost principles issued pursuant to Section 63G-6a-1206, the cost principles specified in the grant shall control.

R33-12-609. Authority to Deviate from Cost Principles.

(1) If a procurement unit desires to deviate from the cost principles set forth in this rule, a written determination shall be made by the procurement official specifying the reasons for the deviation and the written determination shall be made part of the contract file.

R33-12-701. Inspections.

(1) Circumstances under which the procurement unit may perform inspections include inspections of the contractor's manufacturing/production facility or place of business, or any location where the work is performed:

- (a) whether the definition of "responsible", has been met or is capable of being met; and
- (b) if the contract is being performed in accordance with its terms.

R33-12-702. Access to Contractor's Manufacturing/Production Facilities.

(1) The procurement unit may enter a contractor's or subcontractor's manufacturing/production facility or place of business to:

- (a) inspect procurement items for acceptance by the procurement unit pursuant to the terms of a contract;
- (b) audit cost or pricing data or audit the books and records of any contractor or subcontractor pursuant to Section R33-12-605; and
- (c) investigate in connection with an action to debar or suspend a person from consideration for award of contracts.

R33-12-703. Inspection of Supplies and Services.

(1) Contracts may provide that the procurement unit or procurement official may inspect procurement items at the contractor's or subcontractor's facility and perform tests to determine whether the procurement items conform to solicitation and contract requirements.

R33-12-704. Conduct of Inspections.

(1) Inspections or tests shall be performed so as not to unduly delay the work of the contractor or subcontractor. No inspector may change any provision of the specifications or the contract without written authorization of the procurement official. The presence or absence of an inspector or an inspection, shall not relieve the contractor or subcontractor from any requirements of the contract.

(2) When an inspection is made, the contractor or subcontractor shall provide without charge all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing.

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