

## **Procurement: Contracts and Contract Limitations**

### **Definitions—**

In this policy, the following definitions apply:

- “Architect-engineer services” means either (a) professional services within the scope of the practice of architecture as defined in Utah Code Section 58-3a-102, or (b) professional engineering as defined in Utah Code Section 58-22-102.
- “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.
- “Construction” means the process of building, renovating, altering, improving, or repairing a public building or public work. It does not include the routine operation, routine repair, or routine maintenance of an existing structure, building, or real property.
- “Construction manager/general contractor” means a contractor who enters into a contract for the management of a construction project when the contract allows the contractor to subcontract for additional labor and materials that are not included in the contractor’s cost proposal submitted at the time of the procurement of the contractor’s services. It 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.
- “Cost-plus-a-percentage-of-cost contract” means a contract where the contractor is paid a percentage over and above the contractor’s actual expenses or costs.
- “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 the procurement policies and Utah Procurement Code, and a fee, if any.
- “Definite quantity contract” means a fixed price contract that provides for the supply of a specified amount of goods over a specified period, with deliveries scheduled according to a specified schedule.
- “Design-build” means the procurement of architect-engineer services and construction by the use of a single contract with the design-build provider.

- “Established catalogue price” means the price included in a catalogue, price list, schedule, or other form that: (a) is regularly maintained by a manufacturer or contractor; (b) is either published or otherwise available for inspection by customers; and (c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.
- “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 either (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.
- “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.
- “Indefinite quantity contract” means a fixed price contract that both (a) is for an indefinite amount of procurement items to be supplied as ordered by the District; and (b) either does not require a minimum purchase amount or provides a maximum purchase limit.
- “Labor hour contract” is a contract where the supplies and materials are not provided by, or through, the contractor and 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.
- “Multiple award contracts” means the award of a contract for an indefinite quantity of a procurement item to more than one bidder or offeror.
- “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.
- “Requirements contract” means a contract: (a) where a contractor agrees to provide the District’s entire requirements for certain procurement items at prices specified in the contract during the contract period; and (b) that either does not require a minimum purchase amount or provides a maximum purchase limit.

*Utah Code § 63G-6a-103 (2013)*

## **Permissible and Impermissible Types of Contracts—**

Except as otherwise provided in this policy, and subject to any rules made by the Procurement Policy Board, the District may use any type of contract that will promote its best interests. However, before the District uses any type of contract other than a firm fixed price contract, the Procurement Officer must first make a written determination that:

1. the proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated;
2. the proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles; and
3. the use of a specified type of contract, other than a firm fixed price contract, is in the best interest of the District, taking into consideration the following criteria:
  - a. the type and complexity of the procurement item;
  - b. the difficulty of estimating performance costs at the time the contract is entered into, due to factors that may include:
    - i. the difficulty of determining definitive specifications;
    - ii. the difficulty of determining the risks, to the contractor, that are inherent in the nature of the work to be performed; or
    - iii. the difficulty to clearly determine other factors necessary to enter into an accurate firm fixed price contract;
  - c. the administrative costs to the District and the contractor;
  - d. the degree to which the District is required to provide technical coordination during performance of the contract;
  - e. the impact that the choice of contract type may have upon the level of competition for award of the contract;
  - f. the stability of material prices, commodity prices, and wage rates in the applicable market;
  - g. the impact of the contract type on the level of urgency related to obtaining the procurement item;
  - h. the impact of any applicable governmental regulation relating to the contract; and
  - i. other criteria that the Procurement Officer determines may relate to determining the contract type that is in the best interest of the District.

Subject to this policy and any rules made by the Procurement Policy Board, the District may use the following types of contracts:

1. a fixed price contract;
2. a fixed price contract with price adjustment;
3. a time and materials contract;

4. a labor hour contract;
5. a definite quantity contract;
6. an indefinite quantity contract;
7. a requirements contract; or
8. a contract that includes one of the following construction delivery methods:
  - a. design-build;
  - b. design-bid-build; or
  - c. construction manager/general contractor.

Except as it applies to a change order, the District may not enter into a cost-plus-percentage-of-cost contract, unless:

1. use of a cost-plus-percentage-of-cost contract is approved by the Procurement Officer;
2. it is standard practice in the industry to obtain the procurement item through that type of contract; and
3. the percentage and the method of calculating costs in the contract are in accordance with industry standards.

The District may not enter into a cost-reimbursement contract, unless the Procurement Officer makes a written determination that: (1) either (a) a cost-reimbursement contract is likely to cost less than any other type of permitted contract; or (b) it is impracticable to obtain the procurement item under any other type of permitted contract; and (2) the proposed contractor's accounting system will both (a) timely develop the cost data in the form necessary for the District to timely and accurately make payments under the contract; and (b) allocate costs in accordance with generally accepted accounting principles.

*Utah Code § 63G-6a-1205 (2013)*

#### *Determining allowable incurred costs under a cost-based contract*

Except as provided below, a person who seeks to be, or is, a party in a cost-based contract with the District shall submit cost or pricing data relating to determining the cost or pricing amount and shall certify that, to the best of the contractor's knowledge and belief, the cost or pricing data submitted is accurate and complete as of the date specified by the District. The Procurement Officer shall ensure that the specified date is before (a) the pricing of any contract awarded by a standard procurement process or pursuant to a sole source procurement, if the total contract price is expected to exceed an amount established by rule of the Procurement Policy Board made by the applicable rulemaking authority; or (b) the pricing of any change order that is expected to exceed an amount established by rule of the Procurement Policy Board.

A contract or change order that requires a cost or pricing data certification shall include a provision that the price to the District, including profit or fee, shall be adjusted to exclude any significant sums by which the District finds that the price was increased because the contractor provided cost or pricing data that was inaccurate, incomplete, or not current as of the date specified by the Procurement Officer.

A cost-reimbursement contract does not have to meet the cost or pricing data requirements above if:

1. the contract price is based on adequate price competition;
2. the contract price is based on established catalogue prices or market prices;
3. the contract price is set by law or rule; or
4. the procurement states, in writing that in accordance with Procurement Policy Board rules the requirements may be waived and sets forth the reasons for that waiver.

The Procurement Officer may, at reasonable times and places, but only to the extent that the books and records relate to the applicable cost or pricing data, audit the books and records of either a person who has submitted cost or pricing data pursuant to this section; or a contractor or subcontractor under a contract or subcontract other than a firm fixed price contract. Unless a shorter time is provided for by contract, persons who submit cost or pricing data shall maintain the books and records relating to cost or pricing data for three years after the day on which the fiscal year in which final payment is made under the contract ends, contractors shall maintain such records until three years after the day on which the fiscal year in which final payment under the prime contract ends; and subcontractors shall maintain such records for three years after the day on which the fiscal year in which final payment is made under the subcontract ends.

*Utah Code § 63G-6a-1206 (2013)*

#### *Installment payments and contract prepayments*

The District may enter into a contract which provides for installment payments, including interest charges, over a period of time, if the Procurement Officer makes a written finding that:

1. the use of installment payments is in District's interest;
2. installment payments are not used as a method of avoiding budgetary constraints;
3. the District has obtained all budgetary approvals and other approvals required for making the installment payments;

4. all aspects of the installment payments required in the contract are in accordance with the requirements of law; and
5. for a contract awarded through an invitation for bids or a request for proposals, the invitation for bids or request for proposals indicates that installment payments are required or permitted.

The District may not pay for a procurement item before the procurement item is received by the District unless the Procurement Officer makes a written finding that it is necessary or beneficial for the District to pay for the procurement item before the procurement item is received. Such circumstances include (a) when it is customary in the industry to prepay for the procurement item, (b) if the District will receive an identifiable benefit by prepaying, including reduced costs, additional procurement items, early delivery, better service, or better contract terms; or (c) such other circumstances as may be permitted by Procurement Policy Board rule.

A prepaid expenditure shall be supported by documentation indicating:

1. the amount of the prepayment;
2. the prepayment schedule;
3. the procurement items to which each prepayment relates;
4. the remedies for a contractor's noncompliance with requirements relating to the provision of the procurement items; and
5. all other terms and conditions relating to the payments and the procurement items.

The Procurement Officer or his or her designee may require a performance bond, of up to 100% of the prepayment amount, from the person to whom the prepayments are made.

*Utah Code § 63G-6a-1208 (2013)*

### *Leases of personal property*

As used in this policy, "lease" means for the District to lease or lease-purchase a procurement item from a person. (This does not apply to the lease of real property.) The District may only lease a procurement item if each of the following requirements is met:

1. the Procurement Officer determines that it is in the best interest of the District to lease the procurement item, after he or she investigates and considers the costs and benefits of alternative means of obtaining the procurement item;
2. all conditions for renewal and cost are included in the lease;
3. the lease is awarded through a standard procurement process or a valid exception described in Policy CBF;

4. for a standard procurement process, the invitation for bids, request for proposals, or request for quotes states that the District is seeking, or willing to consider, a lease (or a lease purchase);
  5. the lease is not used to avoid competition; and
  6. the lease complies with all other applicable provisions of law or rule.
- Utah Code § 63G-6a-1209 (2013)*

### *Multiyear contracts*

The District may enter into a multiyear contract if the Procurement Officer determines, in his or her discretion, that doing so is in the District's best interest and the other requirements of this section are satisfied. The Procurement Officer shall consider whether the multiyear contract will:

- result in significant savings to the District, including (a) reduction of the administrative burden in procuring, negotiating, or administering contracts, (b) continuity in operations of the District, or (c) the ability to obtain a volume or term discount;
- encourage participation by a person who might not otherwise be willing or able to compete for a shorter term contract; or
- provide an incentive for a bidder or offeror to improve productivity through capital investment or better technology.

The invitation for bids or request for proposals must (a) state the term of the contract, including all possible renewals of the contract, (b) state the conditions for renewal of the contract, and (c) includes the pertinent funding and renewal condition provision applicable to the contract.

Except as stated below with regard to contracts with federal funding and regardless of anything in an invitation for bids, request for proposals, or a contract, no multiyear contract may continue or be renewed for any year after the first year of the multiyear contract if adequate funds are not appropriated or otherwise available to continue or renew the contract.

A multiyear contract that is funded solely by federal funds may be continued or renewed for any year after the first year of the multiyear contract if:

1. adequate funds to continue or renew the contract have not been, but are expected to be appropriated by, and received from, the federal government;
2. continuation or renewal of the contract before the money is appropriated or received is permitted by the federal government; and
3. the contract states that it may be cancelled, without penalty, if the anticipated federal funds are not appropriated or received.

A multiyear contract that is funded in part by federal funds may be continued or renewed for any year after the first year of the multiyear contract if:

1. the portion of the contract that is to be funded by District funds are appropriated;
2. adequate federal funds to continue or renew the contract have not been, but are expected to be, appropriated by, and received from, the federal government;
3. continuation or renewal of the contract before the federal money is appropriated or received is permitted by the federal government; and
4. the contract states that it may be cancelled, without penalty, if the anticipated federal funds are not appropriated or received.

The District may not continue or renew a multiyear contract after the end of the multiyear contract term or the renewal periods described in the contract, unless the District engages in a new standard procurement process or complies with a valid exception to standard procurement.

A multiyear contract, including any renewal periods, may not exceed a period of five years, unless the Procurement Officer makes a written determination that the longer period is necessary in order to obtain the procurement item, or that a longer period is customary for industry standards, or that a longer period is in the best interest of the District. This written determination must be included in the file relating to the procurement. However, this limitation does not apply to a contract for the design or construction of a facility, a road, or a contract for the financing of equipment.

*Utah Code § 63G-6a-1204 (2013)*

#### *Multiple award contracts*

Subject to any rules made by the Procurement Policy Board, the District may enter into multiple award contracts with bidders or offerors. Multiple award contracts may be in the District'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.

In entering into or seeking to enter into multiple award contracts, the District shall exercise care to protect and promote competition among bidders or offerors and shall name all eligible users of the multiple award contracts in the invitation for bids or request for proposals. If the District anticipates entering into multiple award contracts before issuing the invitation for bids or request for proposals, the invitation



or request shall state that the District may enter into multiple award contracts at the end of the procurement process.

Once the District has entered into multiple award contracts, it shall obtain under those contracts all of its normal, recurring requirements for the procurement items that are the subject of the contracts until the contracts terminate. However, the District shall in the contracts reserve the right to obtain the procurement items separately from the contracts if either (a) there is a need to obtain a quantity of the procurement items that exceeds the amount specified in the contracts, or (b) 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 the District.

*Utah Code § 63G-6a-1204.5 (2013)*

### **Contract Clauses—**

#### *Required contract clauses*

Subject to any rules made by the Procurement Policy Board, construction contracts entered into by the District shall include provisions regarding:

1. the unilateral right of the Procurement Officer to order in writing changes in the work within the scope of the contract and changes in the time of performance of the contract that do not alter the scope of the contract work;
2. variations occurring between estimated quantities of work in a contract and actual quantities;
3. suspension of work ordered by the procurement officer;
4. appropriate remedies and covering at a minimum (a) liquidated damages as appropriate, (b) specified excuses for delay or nonperformance, (c) termination of the contract for default, and (d) termination of the contract in whole or in part for the convenience of the District; and
5. site conditions differing from those indicated in the construction contract, or ordinarily encountered, except that differing site conditions clauses required by the rules need not be included in a construction contract when the contract is negotiated, the contractor provides the site or design, or the parties have otherwise agreed with respect to the risk of differing site conditions. However, where the contract is for construction of a school building, the contract shall contain a clause addressing the rights of the parties when, after the contract is executed, site conditions are discovered that the contractor did not and

could not reasonably have known existed at execution and those conditions materially impact the costs of construction.

Price adjustments under the required clauses above shall be computed in one or more of the following ways:

- by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
- by unit prices specified in the contract or subsequently agreed upon;
- by the costs attributable to the events or situations under the clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;
- in any other manner as the contracting parties may mutually agree; or
- in the absence of agreement by the parties, by a unilateral determination by the Procurement Officer of the costs attributable to the events or situations under the clauses with adjustment of profit or fee, all as computed by the procurement officer in accordance with applicable rules and subject to the contractor's right to appeal.

A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the section above regarding determining allowable incurred costs. Subject to any rules made by the Procurement Policy Board, the Board of Education or the Procurement Officer may modify the clauses for inclusion in any particular contract provided that such variations are supported by a written determination describing the circumstances justifying the variations and notice of any material variation is included in the invitation for bids or request for proposals.

*Utah Code § 53A-20-109 (2012); § 63G-6a-1202 (2013)*

#### *Permissible clauses*

The District may include any of the required clauses above in contracts for procurement items other than construction. In addition, the District may include in any of its contracts terms that provide for (a) incentives, including bonuses, (b) payment of damages, including liquidated damages, and (c) penalties.

*Utah Code § 63G-6a-1202 (2013); § 63G-6a-1210 (2013)*

#### *Prohibited contract clauses for design professionals*

A "design professional" includes architects, landscaped architects, professional engineers, and professional land surveyors who are licensed by the state under one of the following chapters of Title 58 of the Utah Code: Chapter 3a, Chapter 53, or Chapter 22.

A contract entered into by the District in a procurement may not require that a design professional indemnify another from liability claims that arise out of the design professional's services, unless the liability claim arises from the design professional's negligent act, wrongful act, error or omission, or other liability imposed by law. This limitation may not be waived by contract. However, a design professional may be required to indemnify a person for whom the design professional has direct or indirect control or responsibility.

*Utah Code § 63G-6a-1203 (2013)*