

## **Procurement: *Exceptions to Standard Procurement Processes***

### **Exceptions to Standard Procurement Processes—**

Any procurement by the District must either be done through one of the standard procurement processes or under a valid exception to those standard processes. The standard procurement processes are (1) bidding, as described in Policies CBB and CBC; (2) requests for proposals, as described in Policy CBD; and (3) small purchases, as described in Policy CBE. The exceptions to the standard procurement processes are sole source procurement, transitional costs/best interest procurement, specified circumstances procurement, trial use contracts, contract extension, emergency procurement, community rehabilitation program procurement, and prison industry goods procurement. The requirements relating to each exception are set forth in this policy.

[Utah Code § 63G-6a-103\(82\), \(87\) \(2018\)](#)

[Utah Code § 63G-6a-802 \(2016\)](#)

[Utah Code § 63G-6a-803 \(2016\)](#)

[Utah Code § 63G-6a-804 \(2013\)](#)

[Utah Code § 63G-6a-805 \(2016\)](#)

[Utah Admin. Rules R33-8-101 \(June 21, 2017\)](#)

### **Notice of Intent to Award Without Standard Procurement Process—**

Before the District may award a contract under the sole source, transitional costs/best interest, or specified circumstances procurement processes (rather than one of the standard procurement processes), a “Notice of Intent to Award a Contract Without Engaging in a Standard Procurement Process” must be approved by the Procurement Officer or the Board of Education. The District may use the form prepared by the Procurement Policy Board or may use its own form, but the notice must be in writing and include, at a minimum, the following information:

- (1) A description of the procurement item (including, when applicable, the proposed scope of work);
- (2) The total value of the procurement item (including, when applicable, the actual or estimated full lifecycle cost of maintenance and service agreements);
- (3) The duration of the proposed contract;
- (4) The signature of an authorized official of the District; and
- (5) Research by the District establishing the necessary elements for the alternative method to be used, as follows:
  - a. For sole source procurement, showing that there are no other competing vendors or sources for the procurement item in accordance with the requirements set out below;

- b. For transitional costs/best interest procurement, showing that transitional costs are a significant consideration in selecting the procurement item and the results of a cost benefit analysis documenting that transitional costs are unreasonable or cost-prohibitive and that awarding the contract without engaging in a standard procurement process is in the best interest of the District, in accordance with the requirements set out below; and
- c. For specified circumstances procurement, the other circumstances which make awarding a contract through a standard procurement process impractical and not in the best interest of the District, in accordance with the requirements set out below.

After approval of the notice by the Procurement Officer or Board of Education, before a contract may be awarded the District must also publish the notice. This publication must be in accordance with Policy CBA and must also state the earliest date the District may obtain the item and provide contact information and other information relating to contesting, or obtaining additional information in relation to, the procurement.

Publication of the notice is not required for procurements which are \$50,000 or less or which are for the following procurement items:

- (1) Public utility services
- (2) Conference and convention facilities with unique or specialized amenities, abilities, location, or services
- (3) Conference fees, including materials
- (4) Speakers or trainers with unique or proprietary presentations or training materials
- (5) Hosting of dignitaries (in-state, out-of-state, or international)
- (6) International, national, or local promotion of the state or a public entity
- (7) An award when the Legislature identifies the intended recipient of a contract
- (8) 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
- (9) Catering services at government functions where the event requires a caterer with unique and specialized qualifications, skills, and abilities
- (10) Other circumstances as determined in writing by the Procurement Officer or the Board of Education

Even though publication of the notice is not required by statute or regulation, the Procurement Officer or Board of Education may require the notice to be

published if deemed necessary to uphold the fair and equitable treatment of all persons who deal with the procurement system.

The District shall also make a copy of information related to the non-standard procurement available for public inspection at the main District office or on the website of the District or of the Division of Purchasing and General Services until award of the contract or the cancellation of the procurement.

[Utah Code § 63G-6a-112 \(2017\)](#)

[Utah Code § 63G-6a-802\(3\) \(2016\)](#)

[Utah Admin. Rules R33-8-101d \(June 21, 2017\)](#)

[Utah Admin. Rules R33-8-101e \(June 21, 2017\)](#)

## **Contesting a Non-Standard Procurement Process—**

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 Policy CBA by submitting the following information in writing to the Procurement Officer or Board of Education: (a) the name of the contesting person and (b) a detailed explanation of the challenge. Depending on the type of non-standard process, the detailed explanation of the challenge would include documentation that there are other competing sources for the procurement item, or that transitional costs are not significant, unreasonable, or cost-prohibitive, or that conducting a standard procurement process is in the best interest of the conducting procurement unit.

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

If a challenge is upheld, the District shall either cancel the procurement or shall conduct a standard procurement process for the procurement item being considered. If a challenge is not upheld, the District may proceed with awarding a contract without engaging in a standard procurement process.

By contesting or challenging a notice of intent to use a non-standard process, a vendor does not waive the right to file a protest under the procurement code or District policies.

[Utah Admin. Rules R33-8-101f \(June 21, 2017\)](#)

## **Negotiation for Best Terms**

When the District procures under the sole source, transitional costs/best interest, or specified circumstances procurement processes (rather than one of the standard procurement processes), the Procurement Officer or Board of Education shall negotiate with the contractor to ensure that the terms of the contract, including price and delivery, are in the best interest of the District.

[Utah Code § 63G-6a-802\(4\) \(2016\)](#)

**Sole Source Procurement—***Required Conditions for Sole Source Procurement*

The District may award a contract for a procurement item without engaging in a standard procurement process if the Board of Education or the district Procurement Officer makes a written determination that there is only one source for the procurement item. Circumstances in which a sole source procurement 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. An urgent or unexpected circumstance or requirement for a procurement item does not justify a sole source procurement.

[Utah Code § 63G-6a-103\(81\) \(2018\)](#)

[Utah Code § 63G-6a-802\(1\)\(a\) \(2016\)](#)

[Utah Admin. Rules R33-8-101a \(June 21, 2017\)](#)

*Process for Sole Source Procurement*

Prior to awarding a contract in a sole source procurement, the District must follow the procedure outlined above for the “Notice of Intent to Award a Contract Without Engaging in a Standard Procurement Process.” In addition, the Procurement Officer or Board of Education shall, whenever practicable, conduct a price analysis in accordance with [Utah Admin. Rules R33-12-603](#).

[Utah Admin. Rules R33-8-101a \(June 21, 2017\)](#)

**Transitional Costs / Cost-Benefit Analysis Procurement—**

The District may award a contract for a procurement item without engaging in a standard procurement process if the Board of Education or the Procurement Officer makes a written determination that transitional costs are a significant consideration in selecting a procurement item and the results of a cost-benefit analysis demonstrate that transitional costs are unreasonable or cost-prohibitive and that awarding a contract without engaging in a standard procurement process is in the best interest of the District.

[Utah Code § 63G-6a-802\(1\)\(b\) \(2016\)](#)

[Utah Admin. Rules R33-8-101\(1\)\(b\) \(June 21, 2017\)](#)

*Definitions*

“Transitional costs” mean the costs of changing from an existing provider of, or type of, a procurement item to another provider of, or type of, procurement item, including training costs, conversion costs, compatibility costs, costs associated with

system downtime, disruption of service costs, staff time necessary to implement the change, installation costs, and ancillary software, hardware, equipment, or construction costs. “Transitional costs” do not include (1) the costs of preparing for or engaging in a procurement process, or (2) contract negotiation or contract drafting costs, or (3) costs associated with a trial use or testing of a procurement item under a trial use contract.

[Utah Code § 63G-6a-103\(94\) \(2018\)](#)

“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 performance, specifications, scope of work, and provider qualifications, certifications, and licensing.

[Utah Admin. Rules R33-8-101b\(1\)\(a\) \(June 21, 2017\)](#)

“Competing provider” means another provider other than the existing provider under contract that provides a competing type of procurement item.

[Utah Admin. Rules R33-8-101b\(1\)\(b\) \(June 21, 2017\)](#)

“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 (a) 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 (b) provides a compelling justification for not conducting a competitive standard procurement process.

[Utah Admin. Rules R33-8-101b\(1\)\(c\) \(June 21, 2017\)](#)

### *Cost-benefit analysis*

Before awarding a contract under the transitional costs/cost-benefit procurement process, the District shall complete a written cost-benefit analysis with regard to the procurement to determine whether the procurement is permitted. The cost-benefit analysis shall be considered by the Procurement Officer or Board of Education before approving the procurement. This cost-benefit analysis should not be overly time-consuming to complete, nor should it involve hiring costly consultants or engaging in costly financial analysis.

[Utah Admin. Rules R33-8-101b\(5\), \(6\) \(June 21, 2017\)](#)

The cost-benefit analysis must consider the following transitional costs: (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.

[Utah Admin. Rules R33-8-101b\(2\) \(June 21, 2017\)](#)

The cost-benefit analysis may consider the following transitional costs: (a) any costs identified in the definition of “transitional costs” set forth above, (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(s) 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 District from a competing provider(s) for a competing type of procurement item, and (e) other transitional costs determined to be applicable by the Procurement Officer or Board of Education.

[Utah Admin. Rules R33-8-101b\(3\) \(June 21, 2017\)](#)

The cost-benefit analysis may NOT consider the following costs: (a) costs excluded from the definition of “transitional costs” above, (b) data provided by the existing provider for the purpose of establishing either the market value of the existing type of procurement item or 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 Officer or Board of Education.

[Utah Admin. Rules R33-8-101b\(4\) \(June 21, 2017\)](#)

## **Specified Other Circumstances Procurement—**

The District may award a contract for a procurement item without engaging in a standard procurement process if the Board of Education or the Procurement Officer makes a written determination that awarding a contract through a standard procurement process is impractical and not in the best interest of the District.

[Utah Code § 63G-6a-802\(1\)\(c\) \(2016\)](#)

[Utah Admin. Rules R33-8-101\(1\)\(c\) \(June 21, 2017\)](#)

In considering whether the use of a standard procurement process is impractical and not in the best interest of the District, the Procurement Officer or Board of Education may consider the following circumstances:

- (1) awarding the contract 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;
- (2) the procurement item is public utility services and only one public utility service of the type is available in an area;

- (3) the procurement item is one where compatibility is the overriding consideration; or
- (4) the procurement item is a used item that presents a unique, specialized, or time-limited buying opportunity.

[Utah Admin. Rules R33-8-101c \(June 21, 2017\)](#)

Prior to awarding a contract under this process, the District must follow the procedure outlined above for the “Notice of Intent to Award a Contract Without Engaging in a Standard Procurement Process.”

[Utah Admin. Rules R33-8-101d \(June 21, 2017\)](#)

### **Trial Use Contracts—**

A “trial use contract” is a contract between the District and a vendor for a procurement item that the District acquires for trial use or testing to determine whether it will benefit the District.

[Utah Code § 63G-6a-103\(95\) \(2018\)](#)

The District may award a trial use contract without engaging in a standard procurement process if the contract is (1) awarded for a procurement item that is not already available to the District under an existing contract, (2) restricted to the procurement of a procurement item in the minimum quantity and for the minimum period of time necessary to test the procurement item, (3) the only trial use contract for the District for the same procurement item; and (4) not used to circumvent the purposes and policies of the Procurement Code.

[Utah Code § 63G-6a-802.3\(1\) \(2016\)](#)

The period of trial use or testing of a procurement item under a trial use contract may not exceed 18 months, unless the Procurement Officer provides a written exception documenting the reason for a longer period.

[Utah Code § 63G-6a-802.3\(2\) \(2016\)](#)

A trial use contract shall:

- state that the contract is strictly for the purpose of the trial use or testing of a procurement item;
- state that the contract terminates upon completion of the trial use or testing period;
- state that the District is not obligated to purchase or enter into a contract for the procurement item, regardless of the trial use or testing result;
- state that any purchase of the procurement item beyond the terms of the trial use contract will be made in accordance with the Procurement Code; and
- include, as applicable:
  - test schedules;

- deadlines and a termination date;
- measures that will be used to evaluate the performance of the procurement item;
- any fees and associated expenses or an explanation of the circumstances warranting a waiver of those fees and expenses;
- the obligations of the District and vendor;
- provisions regarding the ownership of the procurement item during and after the trial use or testing period;
- an explanation of the grounds upon which the contract may be terminated;
- a provision relating to any required bond or security deposit; and
- other requirements unique to the procurement item for trial use or testing.

[Utah Code § 63G-6a-802.3\(3\) \(2016\)](#)

The District is not required to publish notice of a trial use contract.

[Utah Code § 63G-6a-802.3\(4\) \(2016\)](#)

### **Contract Extension—**

The Board of Education or Procurement Officer may extend an existing contract without engaging in a standard procurement process as stated in this section.

A contract extension does not involve a standard procurement process. Because one of the purposes and policies of the Procurement Code 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, and 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 should only be used after thorough analysis and proper justification.

[Utah Admin. Rules R33-8-110\(1\) \(June 21, 2017\)](#)

#### *Avoidance of contract extensions*

In fulfillment of its contract administration duties, the District 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 District determines there is a continuing need for the procurement item, the District unit shall whenever practicable initiate a standard procurement process no later than 90 days prior to the contract expiration date of an existing contract and no later than 45 days prior to the contract expiration date, publish, if applicable, a solicitation for the procurement item. However, if the District determines that a procurement will be complex or involve a change in industry standards or new specifications requiring negotiations, the District shall initiate a



standard procurement process no later than 180 days prior to the contract expiration date and no later than 45 days prior to the contract expiration date, publish, if applicable, a solicitation for the procurement item.

[Utah Admin. Rules R33-8-110\(2\) \(June 21, 2017\)](#)

### *Circumstances which do not justify contract extension*

Contract extension is not justified if there has been an intentional delay in conducting a standard procurement process to award a contract to replace an expiring contract, or if there has been an intentional delay in executing a contract to replace an expiring contract. An improper avoidance of use of a standard procurement process in order to extend the duration of an existing contract with a vendor may be considered steering a contract to a favored provider, which is unlawful conduct.

[Utah Admin. Rules R33-8-110\(3\), \(4\) \(June 21, 2017\)](#)

### *Process for contract extension*

An existing contract may be extended for a period not to exceed 120 days if:

- an extension is necessary to either
  - avoid a lapse in a critical governmental service, or
  - to mitigate a circumstance that is likely to have a negative impact on public health, safety, welfare, or property, and
- the District is engaged in a standard procurement process for an item that is the subject of the contract being extended, and
  - the standard procurement process is delayed due to unintentional error, or
  - a change in industry standards requires one or more significant changes to specifications for the procurement item, or
  - the extension is necessary to either
    - prevent the loss of federal funds, or
    - mitigate the effects of a delay of a state or federal appropriation, or
    - to enable the District 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
    - to enable the District to continue to receive a procurement item during a period of time during which negotiations with a vendor under a new contract for the item are being conducted;

An existing contract may be extended for the period of a protest, appeal, or court action if such protest, appeal, or court action is the reason for delaying the award of a new contract.

An existing contract may be extended for a period exceeding 120 days if, after consulting with the attorney general or the District's attorney, the Board or the chief procurement officer determines in writing that the 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.

[Utah Code § 63G-6a-802.7 \(2017\)](#)

## **Emergency Procurement—**

Notwithstanding any other District policy regarding procurement, the Board of Education or the Procurement Officer may authorize an emergency procurement without using a standard procurement process if the procurement is necessary to mitigate circumstances that create harm or risk of harm to public health, safety, welfare, or property. Circumstances that may create harm or risk of harm to public health, welfare, safety, or property include:

- (1) damage to a facility or infrastructure resulting from flood, fire, earthquake, storm, or explosion;
- (2) failure or imminent failure of a public building, equipment, road, bridge or utility;
- (3) terrorist activity;
- (4) epidemics;
- (5) civil unrest;
- (6) events that impair the ability of a public entity to function or perform required services;
- (7) situations that may cause harm or injury to life or property; or
- (8) other conditions as determined in writing by the Procurement Officer or Board of Education or its designee.

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

The District shall ensure that the procurement is made with as much competition as reasonably practicable (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 (including the District) to function or perform required services.

After the emergency condition has been alleviated, the District shall prepare a written determination documenting the basis for the emergency and the selection of the procurement item. This determination shall be kept in the contract file.

[Utah Code § 63G-6a-803 \(2016\)](#)  
[Utah Admin. Rules R33-8-401 \(June 21, 2017\)](#)

### **Procurement from Community Rehabilitation Programs—**

The Utah Purchasing from Persons with Disabilities Advisory Board establishes a preferred procurement contract list of goods and services available for purchase from community rehabilitation programs, developing, maintaining, and approving a preferred procurement contract list of goods and services. Unless the fiscal year threshold has been reached as stated below, the District shall purchase goods and services using this preferred procurement contract list if:

- the good or service offered for sale by a community rehabilitation program reasonably conforms to the needs and specifications of the District;
- the community rehabilitation program can supply the good or service within a reasonable time; and
- the price of the good or service is reasonably competitive with the cost of procuring the good or service from another source.

Procurement from this preferred procurement contract list may be done without using a standard procurement process.

The requirement that the District purchase available goods from this preferred procurement contract list does not apply during a particular fiscal year if the Division of Purchasing and General Services determines that the total amount of procurement contracts with community rehabilitation programs has reached \$5 million for that fiscal year.

[Utah Code § 63G-6a-805\(4\), \(7\), \(9\) \(2016\)](#)

### **Purchase of Prison Industry Goods—**

The District may purchase goods and services from the Utah Correctional Industries Division without following a standard procurement process. The director of Utah Correctional Industries publishes a catalog of goods and services which includes a description and price of each item offered for sale. In determining whether to procure a goods or services from the Correctional Industries Division, the Procurement Officer shall consider whether such procurement is in the best interests of the District, including for example (a) whether the good or service meets the reasonable requirements of the District, (b) when the good or service can be supplied by the division, and (c) whether the cost of the good or service, including basic price, transportation costs, and other expenses of acquisition, is competitive with the cost of procuring the item from another source.

[Utah Code § 63G-6a-804 \(2013\)](#)