

# Optional Contract Types

“Fixed price contract”:

A contract that provides a price for each procurement item obtained under the contract.

# Subtypes

- ▶ Definite quantity contract—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
- ▶ Fixed price contract with price adjustment—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.

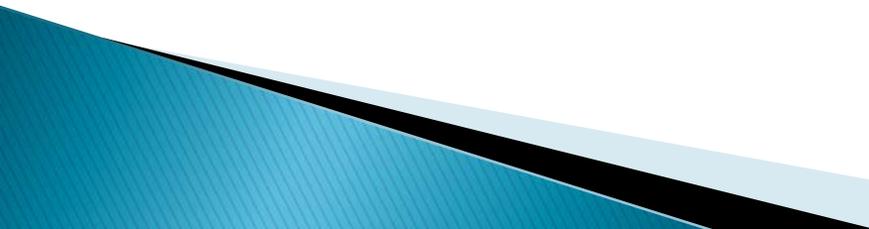
# Subtypes

- ▶ Indefinite quantity contract—a fixed price contract that:
    - (a) is for an indefinite amount of procurement items to be supplied as ordered by a procurement unit; and
    - (b)(i) does not require a minimum purchase amount; or (ii) provides a maximum purchase limit.
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# Firm Fixed Price Contracts

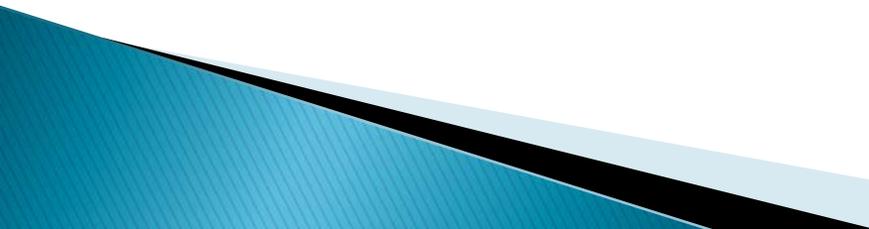
- ▶ Firm fixed price contracts must be used unless the procurement officer makes a written determination that the use of a specified type of contract is in the best interest of the procurement unit, taking into consideration the following criteria:

# Fixed Price Contract Exceptions

1. The type and complexity of the procurement item;
  2. The difficulty of estimating performance costs at the time the contract is entered into—the factors may include:
    - (a) the difficulty of determining definitive specifications;
    - (b) the difficulty of determining the risks, to the contractor, that are inherent in the nature of the work to be performed; or
    - (c) the difficulty to clearly determine other factors necessary to enter into an accurate firm fixed price contract.
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# Firm Fixed Price Contract

## Exceptions cont.

3. The administrative costs to the procurement unit and the contractor;
  4. The degree to which the procurement unit is required to provide technical coordination during performance of the contract;
  5. The impact that the choice of contract type may have upon the level of competition for the award of the contract;
  6. The stability of material prices, commodity prices, and wage rates in the applicable market;
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# Firm Fixed Price Contract

## Exceptions cont.

7. The impact of the contract type on the level of urgency related to obtaining the procurement item;
  8. The impact of any applicable governmental regulation relating to the contract; and
  9. Other criteria relating to the contract type that is deemed by the procurement officer to be in the best interest of the procurement unit.
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# Other Contract Types

- ▶ Cost Plus a Percentage of Cost Contract—a contract where the contractor is paid a percentage over and above the contractor's actual expenses or costs.

Prohibited, except for change orders, unless:

- (a) use of a cost-plus contract is approved by the procurement officer;
- (b) is standard practice in the industry; and
- (c) the percentage and the method of calculating costs in the contract are in accordance with industry standards.



- ▶ **Cost Reimbursement Contract**—a contract under which a contractor is reimbursed for costs which are allowed and allocated in accordance with the contract terms and the requirements of the Procurement Code.

Prohibited unless the procurement officer makes a written determination that:

(a) a cost reimbursement contract is likely to cost less than any other permitted contract type; or it is impracticable to obtain the procurement item under any other type of permitted contract; and

(b) the proposed contractor's accounting system will timely develop the cost data in a form sufficient for the needs of the procurement unit; and will allocate costs in accordance with generally accepted accounting principles

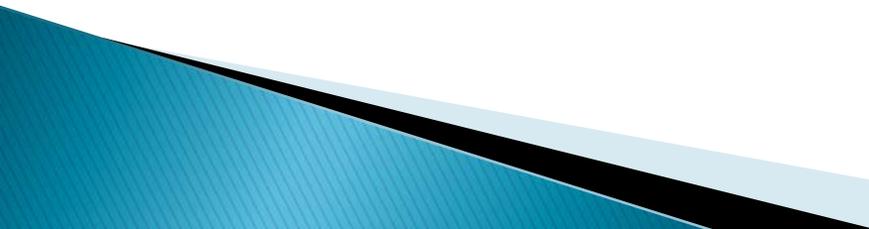
# Leases

- ▶ Not applicable to real property
  - ▶ Standard procurement processes, or a recognized exception, must be followed.
  - ▶ The procurement officer must determine that a lease is in the best interest of the procurement unit; must investigate alternative means of acquisition, including costs and benefits, and all conditions for renewal and cost in the lease.
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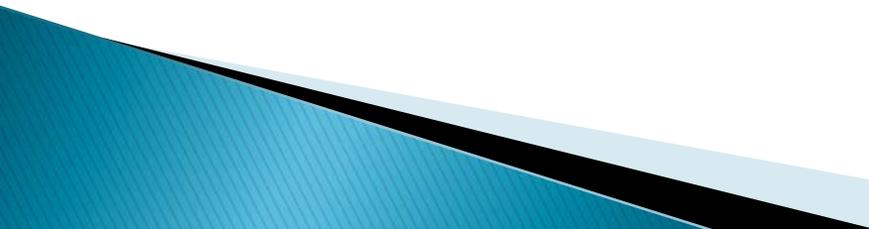
# Leases cont.

- ▶ The invitation for bids, request for proposals or request for quotes must state that the procurement unit is seeking or will consider a lease or a lease/purchase.
  - ▶ Cannot be used to avoid competition.
  - ▶ The lease must comply with all other applicable laws and rules.
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# Requirements Contract

- ▶ May be a fixed price contract
  - ▶ Is a contract: (a) where a contractor agrees to provide a procurement unit's entire requirements for certain procurement items at prices specified in the contract during the contract period; and  
(b) that: does not require a minimum purchase amount; or provides a maximum purchase limit.
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# Time and Materials Contract

- ▶ A contract where the contractor is paid:
    - (a) the actual cost of direct labor at specified hourly rates;
    - (b) the actual costs of materials and equipment usage; and
    - (c) an additional amount expressly described in the contract, to cover overhead and profit, that is not based on a percentage of the cost to the contractor.
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# Labor Hour Contract

- ▶ A contract where:
    - (a) The supplies and materials are not provided by, or through, the contractor; and
    - (b) 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.
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# Multiple Award Contract

- ▶ The award of a contract for an indefinite quantity of a procurement item to more than one bidder or offeror.
  - ▶ Rules must be promulgated
  - ▶ May be in a procurement unit's best interest if two or more vendors are needed or desired for similar procurement items to accomplish adequate delivery, service, availability, or product compatibility
  - ▶ State in the invitation for bids or request for proposals that the procurement unit may enter into multiple award contracts at the end of the procurement process
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# Multiyear Contract

- ▶ 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
- ▶ May be used if the procurement officer determines it to be in the best interest of the procurement unit
- ▶ The invitation for bids or request for proposals must state the term of the contract, including all possible renewals
- ▶ The procurement officer must consider whether a multiyear contract will result in significant savings to the procurement unit; encourage participation by a vendor who might not otherwise compete for a shorter term contract; or provide an incentive for a bidder or offeror to improve productivity through capital investment or better technology

# Multiyear Contract cont.

- ▶ May not continue or be renewed for any year after the first if adequate funds are not appropriated or otherwise available
- ▶ The contract may not be continued or renewed after a maximum five year term unless the procurement unit goes through a new standard procurement process or complies with an exception to using a standard procurement process
- ▶ **EXCEPTION—unless:**
  - (a) the procurement officer determines in writing that a longer period is necessary in order to obtain the procurement item; a longer period is customary for industry standards; or a longer period is in the best interest of the procurement unit; and
  - (b) that written determination is included in the file related to the procurement

# Construction Management Alternatives

- ▶ Rules should be adopted to guide utilization
- ▶ Construction Manager/General Contractor

A contractor who enters into a contract to manage a construction project for a procurement unit

- The contractor must be selected using a standard procurement process
- The contractor will subcontract for additional labor and materials not included in the contractor's cost proposal
- The contractor must use a standard procurement process in selecting all subcontractors (bid, RFP or small purchase)

# Construction Management Alternatives cont.

- ▶ Design Build—the procurement of architect–engineer services and construction using a single contract with the design build provider
  - Turnkey
  - Site may be included
  - Restricted by Title 11, Chapter 39 of the Utah Code
    - o May be used for a public works project that costs \$1,000,000 or more
    - o “Public works project” involves the construction of a park or recreational facility or a pipeline, culvert, damn, canal, or other system for water, sewage, storm water or flood control; but does not include most public buildings or structures, which are defined as “building improvements”
    - o May change in 2014

# Construction Management Alternatives cont.

- ▶ Transportation Contracts
- ▶ Design–build transportation contract—the procurement of both the design and construction of a transportation project in a single contract with a company or combination of companies capable of providing the necessary engineering services and construction
  - May be used by a public transit district serving more than 200,000 residents

# Protests and Appeals

- ▶ At the District:
  - An aggrieved bidder, offeror or contractor may protest to the protest officer or a designee
  - Strict time limitations are applicable
    - Before bid opening or the closing date for proposals
    - Otherwise, within 7 days of when the protester knows or should have known
  - After a protest is timely filed, the protest officer will consider the protest and may hold a hearing on the protest
  - Rules regarding conducting a hearing (optional) and records of the hearing are described

# Protests and Appeals (cont.)

- Absent a contrary agreement by the parties, the lack of a written decision by the protest officer within 30 days is considered an adverse decision – a denial
- May be able to proceed with the procurement while an appeal is pending based upon “a written determination [after consulting the attorney] that award of the contract without delay is necessary to protect substantial interests of” the District
- ▶ **Before the Procurement Appeals Panel**
  - Appeal to the Utah State Procurement Policy Board
    - Within 7 days

# Protests and Appeals (cont.)

- The Board chair, within seven days, will appoint a procurement appeals panel (at least three members) to hear and decide the appeal.
  - Each a member of the Board or a designee of a Board member.
- The panel will consider the appeal based solely on the protest decision, the record considered by the protest officer, and the record of the protest hearing (if one was held).
- The panel will not to take additional evidence and shall uphold the decision of the protest officer, unless the decision is arbitrary and capricious or clearly erroneous.

# Protests and Appeals (cont.)

## ▶ Appeal to Court:

- A person (including the district) receiving an adverse decision may appeal a decision of a procurement appeals panel to the Utah Court of Appeals
  - Within seven days after the decision is issued
- The Court of Appeals will consider the appeal as an appellate court, not as a trial de novo.
- The Court of Appeals may not overturn a finding or decision of a protest officer or procurement appeals panel unless the finding or decision is arbitrary and capricious or clearly erroneous.

# Protests and Appeals (cont.)

- Administrative remedies must be exhausted before pursuing appeals.
- Relief when the award of a contract is finally determined to violate the law:
  - If the party awarded the contract did not act fraudulently or in bad faith:
    - Contract may be ratified and affirmed if in the best interest of the procurement unit; or
    - Contract may be terminated
    - Contractor will be compensated for actual expenses reasonably incurred before termination plus a reasonable profit

# Protests and Appeals (cont.)

- If the party awarded the contract acted fraudulently or in bad faith:
  - The contract may be declared null and void; or
  - It may be ratified and affirmed if in best interest of the procuring unit
- No consequential damages may be awarded (lost profits, loss of business opportunities, or damage to reputation)
- Determination of illegality before the award of the contract
  - The procurement or proposed award must be canceled or revised to comply with the law

# Pre-qualification of potential vendors

- ▶ May pre-qualify potential bidders (for competitive bids), or offerors (for proposals), or contractors, (including architects or engineers)
  - An invitation for bids or request for proposals may be limited to the prequalified potential vendors
- ▶ To prequalify, an invitation for a request for qualifications must be issued.
  - The prequalification list may remain in effect no longer than 18 months.

# Pre-qualification of potential vendors (cont.)

- ▶ Prequalification cannot “back door” into a sole source procurement. – use objective, reasonable criteria
  - If only one name remains, abandon the effort or start over
- ▶ Provide each potential vendor who did not make the cut a written justification statement
- ▶ The list of prequalified potential vendors must be made available to the public within 30 days

# Approved Vendor List

- ▶ A procurement unit may compile a list of approved vendors from which procurement items may be obtained-- similar to the prequalification process.
  - ▶ The “world” must be invited to respond
  - ▶ Responding vendors meeting the minimum criteria are published as the approved list.
    - A procurement unit may select vendors from the list in an unbiased manner, using a rotation system organized alphabetically, numerically or randomly, or based on geography or on the vendor’s particular expertise.
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# Approved Vendor List (cont.)

- ▶ Use with construction contracts – limited to construction projects costing less than an amount specified by the applicable rule making authority.