

If you are a procurement officer, contract administrator, involved in procurements or disbursements of public funds or grants, you are encouraged to read these provisions carefully and seek legal counsel for your questions.

Part 23. Unlawful Conduct and Penalties

63G-6a-2301. Title.

This part is known as "Unlawful Conduct and Penalties."

63G-6a-2302. Duty to report factual information to attorney general.

If a procurement unit has reason to believe that a person has engaged in a violation of Section 63G-6a-2304.5, collusion, or other anticompetitive practices relating to a procurement or a potential procurement, the procurement unit shall transmit a notice of the relevant facts to the attorney general.

63G-6a-2304.5. Gratuities -- Kickbacks -- Unlawful use of position or influence.

(1) As used in this section:

(a) "Contract administrator" means a person who administers a current contract, on behalf of a public entity, including:

- (i) making payments relating to the contract;
- (ii) ensuring compliance with the contract;
- (iii) auditing a contractor in relation to the contract; or
- (iv) enforcing the contract.

(b) "Contribution" means:

(i) a voluntary gift or donation to a public entity for the public entity's use, and not for a particular person employed by a public entity, including:

- (A) a philanthropic donation;
- (B) services;
- (C) money; or
- (D) other items of value;

(ii) admission to a seminar, vendor fair, charitable event, fundraising event, or similar event that relates to the function of the public entity;

(iii) purchase of a booth at an event sponsored by the public entity or a group of which the public entity is a member; or

(iv) sponsorship of an event that is organized by the public entity.

(c) "Gratuity" means anything of value, including:

- (i) money;
- (ii) a loan at an interest rate below the market rate or with terms that are more advantageous to the person receiving the loan than terms offered generally on the market;
- (iii) an award;
- (iv) employment;
- (v) admission to an event;
- (vi) a meal;
- (vii) lodging;
- (viii) travel; or
- (ix) entertainment for which a charge is normally made.

(d) "Family member" means a parent, stepparent, spouse, sibling, stepsibling, child, stepchild, grandparent, great-grandparent, grandchild, or great-grandchild.

(e) (i) "Hospitality gift" means a promotional or hospitality item, including, a pen, pencil, stationery, toy, pin, trinket, snack, nonalcoholic beverage, or appetizer.

- (ii) "Hospitality gift" does not include money, a meal, a ticket, admittance to an event, entertainment for which a charge is normally made, travel, or lodging.
- (f) "Interested person" means a person who is interested in any way in the sale of a procurement item or insurance to a public entity.

(g) "Kickback" means a gratuity given in exchange for favorable treatment in a pending procurement or the administration of a contract.

(h) "Pending procurement" means a procurement at any stage, including:

- (i) preparing to engage in a standard procurement process, including preparing documents that will be used in the standard procurement process;
- (ii) engaging in a standard procurement process;
- (iii) evaluating, or making a recommendation regarding, a quote, a bid, or a response; and
- (iv) awarding a contract or otherwise making a decision to obtain a procurement item from a particular person.

(i) "Procurement participant" means a person involved in:

- (i) administering, conducting, or making decisions regarding a standard procurement process;
- (ii) making a recommendation regarding award of a contract or regarding a decision to obtain a procurement item for a particular person;
- (iii) evaluating a quote, a bid, or a response; or
- (iv) awarding a contract or otherwise making a decision to obtain a procurement item from a particular person.

[Note – for people that as part of their job duties, are involved in procurements, contract administration (and grants, etc.), this would apply all the time. For people that are only sporadically involved, such as a Director of an Agency/Institution or evaluation committee member, this would only apply to the time they were aware of the particular procurement through the time of find award. For those sporadically involved in contract administration (approving change orders, modifications, etc.) this apply apply through the contract administration process. An evaluation committee may still be required to disclose conflicts of interests and may be removed from the evaluation committee. Legal advice on this is highly recommended.]

(2) Nothing in this section exempts a person subject to the provisions of Title 67, Chapter 16, Utah Public Officers' and Employees Ethics Act, from complying with the provisions of the Utah Public Officers' and Employees Ethics Act.

(3) (a) Except as provided in Subsection (6) or (7), it is unlawful for an interested person to give, offer, or promise to give a gratuity to:

- (i) a procurement participant; or
- (ii) an individual who the person knows is a family member of a procurement participant.

(b) Except as provided in Subsection (6) or (7), it is unlawful for a procurement participant to ask, receive, offer to receive, accept, or ask for a promise to receive a gratuity from an interested person.

(c) Except as provided in Subsection (6) or (7), it is unlawful for a contractor to give a gratuity to:

- (i) a contract administrator of the contractor's contract; or
- (ii) an individual who the contractor knows is a family member of a contract administrator of the contractor's contract.

(d) Except as provided in Subsection (6) or (7), it is unlawful for a person who is a contract administrator of a contract to ask, receive, offer to receive, accept, or ask for a promise to receive, for the contract administrator or a family member of the contract administrator, a gratuity from the contractor for that contract.

(4) (a) It is unlawful for a person to give, offer, or promise to give a kickback to a procurement participant or to another person for the benefit of a procurement participant.

(b) It is unlawful for a procurement participant to ask, receive, offer to receive, accept, or ask for a promise to receive a kickback for the procurement participant or for another person.

(c) It is unlawful for a person to give a kickback to a contract administrator, or to

another person for the benefit of a contract administrator.

(d) It is unlawful for a contract administrator to ask, receive, offer to receive, accept, or ask for a promise to receive a kickback for the contract administrator or for another person.

(5) It is unlawful for a procurement participant to use the procurement participant's position or influence to obtain a personal benefit for the procurement participant, or for a family member of the procurement participant, from an interested person.

(6) A person is not guilty of a violation of Subsection (3) for giving, offering, promising to give, receiving, or accepting a hospitality gift if, as it relates to a procurement participant or a contract administrator:

(a) the total value of all hospitality gifts given, offered, or promised to, or received or accepted by, the procurement participant or contract administrator in relation to a particular procurement or contract is less than \$10; and

(b) the total value of all hospitality gifts given, offered, or promised to, or received or accepted by, the procurement participant or contract administrator from any one person, vendor, bidder, responder, or contractor in a calendar year is less than \$50.

(7) (a) A person is not guilty of a violation of this section for giving, offering, or promising a contribution to a public entity, unless the contribution is given, offered, or promised with the intent to induce a person to make a procurement decision, or to take action in relation to the administration of a contract, in reciprocation for the contribution.

(b) A person is not guilty of a violation of this section for receiving or accepting a contribution on behalf of a public entity, unless the person accepts or receives the contribution in exchange for making a procurement decision, or for taking action in relation to the administration of a contract, in reciprocation for the contribution.

(c) A person is not guilty of a violation of this section if the person gives, offers, or makes a pledge, in the form of a contribution to an organization to which a procurement participant or contract administrator belongs, unless the contribution is given, offered, or pledged with the intent to induce a person to make a procurement decision, or to take action in relation to the administration of a contract, in reciprocation for the contribution.

(8) A person who violates this section is guilty of:

(a) a felony of the second degree if the total value of the gratuity or kickback is \$1,000 or more;

(b) a felony of the third degree if the total value of the gratuity or kickback is \$250 or more, but less than \$1,000;

(c) a class A misdemeanor if the total value of the gratuity or kickback is \$100 or more, but less than \$250; or

(d) a class B misdemeanor if the total value of the gratuity or kickback is less than \$100.

63G-6a-2305. Penalties for artificially dividing a purchase.

A person who violates Subsection 63G-6a-408 [~~(4) or (5)~~](8) or (9) is guilty of:

(1) a felony of the second degree if the total value of the divided procurements is \$1,000,000 or more;

(2) a felony of the third degree if the total value of the divided procurements is \$250,000 or more, but less than \$1,000,000;

(3) a class A misdemeanor if the total value of the divided procurements is \$100,000 or more, but less than \$250,000; or

(4) a class B misdemeanor if the total value of the divided procurements is less than \$100,000.

63G-6a-2306. Penalties.

(1) Except as provided in Subsection (2), in addition to any penalty contained in any other provision of law, a public officer or public employee who intentionally violates a provision of Section 63G-6a-2304.5, or Section 63G-6a-2305 shall be dismissed from employment or removed from office.

(2) An elected official who intentionally violates a provision of Section 63G-6a-2304.5, or Section 63G-6a-2305 may only be removed from office in accordance with the requirements of law

relating to removal of the elected official from office.

(3) Except as provided in Subsection (4), a public officer or public employee who intentionally violates a provision of this chapter is subject to disciplinary action, up to and including dismissal from employment or dismissal from office.

(4) An elected official who intentionally violates a provision of this chapter may only be disciplined or removed from office in accordance with the requirements of law relating to discipline of the elected official or removal of the elected official from office.

63G-6a-2307. Contract awarded in relation to criminal conduct void. If a person who is awarded a contract intentionally violates a provision of Section 63G-6a-2304.5 in relation to the contract, the contract is void and unenforceable. (note: This may have unintended consequences – perhaps it should be voidable at the discretion of the public entity – especially if the project is almost complete.)

63G-6a-2308. Exemption.

(1) This part does not apply to:

- (a) a county, a municipality, a local district, a special service district, a conservation district, or a political subdivision created under Title 11, Chapter 13, Interlocal Cooperation Act; or
- (b) as it relates to a procurement by, or a contract with, a person described in Subsection (1)(a):
 - (i) a procurement participant, interested person, or contract administrator of a person described in Subsection (1)(a); or
 - (ii) a family member of a person described in Subsection (1)(b)(i).

(2) A person described in Subsection (1) is, as it is applicable to the person, required to comply with:

- (a) Title 67, Chapter 16, Utah Public Officers' and Employees' Ethics Act;
- (b) Section 76-8-105 ; and
- (c) all other applicable provisions of law.

67-16-5.3 (Effective 05/01/13). Requiring donation, payment, or service to government agency in exchange for approval -- When prohibited.

(1) Except as provided in Subsection (3), it is an offense for a public officer, public employee, or legislator to demand from any person as a condition of granting any application or request for a permit, approval, or other authorization, that the person donate personal property, money, or services to any agency.

(2) (a) Subsection (1) does not apply to any donation of property, funds, or services to an agency that is:

- (i) expressly required by statute, ordinance, or agency rule;
- (ii) mutually agreed to between the applicant and the entity issuing the permit, approval, or other authorization;
- (iii) made voluntarily by the applicant; or
- (iv) a condition of a consent decree, settlement agreement, or other binding instrument entered into to resolve, in whole or in part, an actual or threatened agency enforcement action.

(b) If a person donates property, funds, or services to an agency, the agency shall, as part of the permit or

other written authorization:

- (i) identify that a donation has been made;
- (ii) describe the donation;
- (iii) certify, in writing, that the donation was voluntary; and
- (iv) place that information in its files.

(3) This section does not apply to a public officer, public employee, or legislator who engages in conduct that constitutes a violation of this section to the extent that the public officer, public

employee, or legislator is chargeable, for the same conduct, under Section 63G-6a-2304.5 or Section 76-8-105 .

67-16-5.6. Offering donation, payment, or service to government agency in exchange for approval -- When prohibited.

(1) Except as provided in Subsection (3), it is an offense for any person to donate or offer to donate personal property, money, or services to any agency on the condition that the agency or any other agency approve any application or request for a permit, approval, or other authorization.

(2) (a) Subsection (1) does not apply to any donation of property, funds, or services to an agency that is:

- (i) otherwise expressly required by statute, ordinance, or agency rule;
- (ii) mutually agreed to between the applicant and the entity issuing the permit, approval, or other authorization;
- (iii) a condition of a consent decree, settlement agreement, or other binding instrument entered into to resolve, in whole or in part, an actual or threatened agency enforcement

action;

or

- (iv) made without condition.

(b) The person making the donation of property, funds, or services shall include with the donation a signed written statement certifying that the donation is made without condition.

(c) The agency receiving the donation shall place the signed written statement in its files.

(3) This section does not apply to a person who engages in conduct that constitutes a violation of this section to the extent that the person is chargeable, for the same conduct, under Section 63G-6a-2304.5 or Section 76-8-105 .

63G-6a-107. Exemptions from chapter -- Compliance with federal law.

(1) Except for Part 23, Unlawful Conduct and Penalties, the provisions of this chapter are not applicable to:

(a) funds administered under the Percent-for-Art Program of the Utah Percent-for-Art Act;

(b) grants awarded by the state or contracts between the state and any of the following:

- (i) an educational procurement unit;
- (ii) a conservation district;
- (iii) a local building authority;
- (iv) a local district;
- (v) a public corporation;
- (vi) a special service district;
- (vii) a public transit district; or
- (viii) two or more of the entities described in Subsections (1)(b)(i) through (vii), acting under legislation that authorizes intergovernmental cooperation;

(c) medical supplies or medical equipment, including service agreements for medical equipment, obtained through a purchasing consortium by the Utah State Hospital, the Utah State Developmental Center, the University of Utah Hospital, or any other hospital owned by the state or a political subdivision of the state, if:

- (i) the consortium uses a competitive procurement process; and
- (ii) the chief administrative officer of the hospital makes a written finding that the prices for purchasing medical supplies and medical equipment through the consortium are competitive with market prices;

(d) goods purchased for resale; or

- (e) any action taken by a majority of both houses of the Legislature.
- (2) (a) Notwithstanding Subsection (1), the provisions of Part 23, Unlawful Conduct and Penalties, are not applicable to an entity described in Subsection (1)(b)(ii), (iii), (iv), (vi), (vii), or (viii).
- (b) This chapter does not prevent a procurement unit from complying with the terms and conditions of any grant, gift, or bequest that is otherwise consistent with law.
- (3) Notwithstanding any conflicting provision of this chapter, when a procurement involves the expenditure of federal assistance, federal contract funds, local matching funds, or federal financial participation funds, the procurement unit shall comply with mandatory applicable federal law and regulations not reflected in this chapter.
- (4) This chapter does not supersede the requirements for retention or withholding of construction proceeds and release of construction proceeds as provided in Section 13-8-5 .

[Note: Just because an entity or transaction is in the exempt list, does not mean that Part 23, Unlawful Conduct and Penalties does not apply. People involved with grants, consortiums, etc. need to get legal advice on this.]

Section 120. Effective date.

If approved by two-thirds of all members elected to each house, this bill takes effect on May 1, 2013.

63G-6a-204. Applicability of rules and regulations of Utah State Procurement Policy Board and State Building Board -- Report to interim committee.

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- (5) Notwithstanding Subsection 63G-3-301 (13)(b), an applicable rulemaking authority is, on or before May 13, 2014, required to initiate rulemaking proceedings for rules required to be made under this chapter.