

**DIVISION OF FACILITIES CONSTRUCTION
AND MANAGEMENT BIDDING PROCESS**

1998 GENERAL SESSION

STATE OF UTAH

Sponsor: Raymond W. Short

AN ACT RELATING TO PUBLIC CONSTRUCTION CONTRACTS; MODIFYING SUBCONTRACTOR LIST REQUIREMENTS; CLARIFYING APPLICATION OF SUBCONTRACTOR REQUIREMENTS; AUTHORIZING THE DIRECTOR TO ESTABLISH A CONTRACTOR PERFORMANCE REVIEW COMMITTEE AND DEFINING ITS RESPONSIBILITIES AND DUTIES; CLARIFYING THE DIRECTOR'S POWER IN CERTAIN BIDDING SITUATIONS; IDENTIFYING PENALTIES; AND PROVIDING AN EFFECTIVE DATE.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

63A-5-205, as renumbered and amended by Chapter 212, Laws of Utah 1993

63A-5-208, as renumbered and amended by Chapters 212 and 270, Laws of Utah 1993

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **63A-5-205** is amended to read:

63A-5-205. Contracting powers of director -- Retainage escrow.

(1) In accordance with Title 63, Chapter 56, Utah Procurement Code, the director may:

(a) [may] enter into contracts for any work or professional services which the division or the State Building Board may do or have done; and

(b) [may,] as a condition of any contract for architectural or engineering services, prohibit the architect or engineer from retaining a sales or agent engineer for the necessary design work[;].

~~[(c) shall let to the lowest responsible and qualified bidder any contract, except those for professional services.]~~

(2) The judgment of the director as to the responsibility and qualifications of a bidder is conclusive, except in case of fraud or bad faith.

(3) (a) If any payment on a contract with a private contractor to do work for the division

or the State Building Board is retained or withheld, it shall be placed in an interest bearing account and the interest shall accrue for the benefit of the contractor and subcontractors to be paid after the project is completed and accepted by the director.

(b) The contractor shall ensure that any interest accrued on the retainage is distributed by the contractor to subcontractors on a pro rata basis.

Section 2. Section **63A-5-208** is amended to read:

63A-5-208. Definitions -- Certain public construction bids to list subcontractors -- Changing subcontractors -- Bidders as subcontractors -- Contractor Performance Review Committee -- Penalties.

(1) As used in this section:

(a) "First-tier subcontractor" means a subcontractor who contracts directly with the prime contractor.

(b) "Subcontractor" means any person or entity under contract with a contractor or another subcontractor to provide services or labor for the construction, installation, or repair of an improvement to real property.

(c) "Subcontractor" includes a trade contractor or specialty contractor.

(d) "Subcontractor" does not include suppliers who provide only materials, equipment, or supplies to a contractor or subcontractor.

(2) The director shall apply the provisions of this section to achieve fair and competitive bidding and to discourage bid-shopping by contractors.

[(1)] (3) (a) (i) (A) On each public construction project, the director shall require the apparent lowest three bidders to submit a list of their first-tier subcontractors indicating each subcontractor's name [and], bid amount, and other information required by rule.

(B) Other bidders who are not one of the apparent lowest three bidders may also submit a list of their first-tier subcontractors containing the information required by this Subsection (3).

(C) The director may not consider any bid submitted by a bidder if the bidder fails to submit a subcontractor list meeting the requirements of this section.

(ii) On projects where the contractor's total bid is less than [\$250,000] \$500,000,

subcontractors whose bid is less than ~~[\$5,000]~~ \$10,000 need not be listed.

(iii) On projects where the contractor's total bid is ~~[\$250,000]~~ \$500,000 or more, subcontractors whose bid is less than \$25,000 need not be listed.

(b) (i) The bidders shall submit this list within 24 hours after the bid opening time, not including Saturdays, Sundays, and state holidays.

(ii) This list does not limit the director's right to authorize a change in the listing of any subcontractor.

(c) ~~[(i)]~~ The ~~[apparent low contractors]~~ bidders shall verify that all subcontractors listed as part of their bids are licensed as required by state law.

~~[(ii) If the director finds that any subcontractors are not licensed as required by state law, he may require the contractor to provide a substitute at no increased cost to the project.]~~

(d) ~~[24]~~ Twenty-four hours after the bid opening, the contractor may change his subcontractors only after:

(i) receiving permission from the director; and

(ii) establishing that:

(A) the change is in the best interest of the state; ~~[or]~~ and

~~[(B) there is a sufficient reason for the change, including, error in bid figures, financial irresponsibility, inability of a subcontractor to perform, or other good reason.]~~

(B) the contractor establishes reasons for the change that meet the standards established by the State Building Board.

(e) If the director approves any changes in subcontractors that result in a net lower contract price for subcontracted work, the total of the prime contract may be reduced to reflect the changes.

~~[(2) (a) A bidder may not list himself as a subcontractor unless the bidder:]~~

~~[(i) intends to perform the work; and]~~

~~[(ii) is currently licensed to perform the portion of the work for which the bidder listed himself as a subcontractor.]~~

~~[(b) (i) The director may, by written request, require that a bidder who lists himself as a subcontractor provide the director with information indicating the bidder's:]~~

~~[(A) previous experience in the type of work to be performed; and]~~

~~[(B) qualifications for performing the work.]~~

~~[(ii) The bidder must respond in writing within five business days of receiving the director's written request.]~~

~~[(c) If the bidder's submitted information causes the director to reasonably believe that self-performance of the portion of the work by the bidder is likely to yield a substandard finished product, the director shall:]~~

~~[(i) require the bidder to use a subcontractor for the portion of the work in question; or]~~

~~[(ii) reject the bidder's bid.]~~

(4) (a) A bidder may list himself as a subcontractor when the bidder is currently licensed to perform the portion of the work for which the bidder lists himself as a subcontractor and:

(i) the bidder intends to perform the work of a subcontractor himself; or

(ii) the bidder intends to obtain a subcontractor to perform the work at a later date because the bidder was unable to:

(A) obtain a bid from a qualified subcontractor; or

(B) obtain a bid from a qualified subcontractor at a cost that the bidder considers to be reasonable.

(b) (i) When the bidder intends to perform the work of a subcontractor himself, the director may, by written request, require that the bidder provide the director with information indicating the bidder's:

(A) previous experience in the type of work to be performed; and

(B) qualifications for performing the work.

(ii) The bidder must respond in writing within five business days of receiving the director's written request.

(iii) If the bidder's submitted information causes the director to reasonably believe that self-performance of the portion of the work by the bidder is likely to yield a substandard finished product, the director shall:

(A) require the bidder to use a subcontractor for the portion of the work in question and

obtain the subcontractor bid under the supervision of the director; or

(B) reject the bidder's bid.

(c) (i) When the bidder intends to obtain a subcontractor to perform the work at a later date, the bidder shall provide documentation with the subcontractor list describing:

(A) the bidder's efforts to obtain a bid of a qualified subcontractor at a reasonable cost; and

(B) why the bidder was unable to obtain a qualified subcontractor bid.

(ii) If the bidder who intends to obtain a subcontractor to perform the work at a later date is awarded a contract, the director shall supervise the bidder's efforts to obtain a qualified subcontractor bid.

(iii) The director may not adjust the amount of the contract awarded in order to reflect the actual amount of the subcontractor's bid.

[(3)] (5) The division may not disclose any subcontractor [bids] bid amounts obtained under this section until the division has awarded the project to a contractor.

(6) (a) The director may establish a Contractor Performance Review Committee to:

(i) adjudicate complaints about contractor, subcontractor, and supplier performance by following the procedures and requirements of Section 63-56-48; and

(ii) when appropriate, impose suspensions or debarments from bidding on state building contracts on contractors, subcontractors, and suppliers for cause.

(b) In conducting hearings and making decisions under this Subsection (6), the Contractor Performance Review Committee is acting as the chief procurement officer or the head of purchasing agency for purposes of Section 63-56-48.

(7) In addition to all other reasons allowed by law or rule, the director may reject all bids if none of the bidders whose bid is within the budget of the project submit a subcontractor list that meets the requirements of this section.

(8) Any violation of this section, or any fraudulent misrepresentation by a contractor, subcontractor, or supplier, may be grounds for:

(a) the contractor, subcontractor, or supplier to be suspended or debarred by a Contractor Performance Review Committee; or

(b) the contractor or subcontractor to be disciplined by the Division of Professional and Occupational Licensing.

Section 3. **Effective date.**

This act takes effect on July 1, 1998.