

**CHANGES TO DIVISION OF FACILITIES
AND CONSTRUCTION MANAGEMENT
CONTRACT PROCEDURES AND
REQUIREMENTS**

2004 GENERAL SESSION

STATE OF UTAH

Sponsor: Wayne A. Harper

LONG TITLE

General Description:

This bill makes substantial changes to the Division of Facilities Construction and Management (DFCM) contracting procedures and requirements for construction contracts.

Highlighted Provisions:

This bill:

- ▶ requires DFCM to prepare draft rules establishing a process for resolving claims made by contractors and subcontractors;
- ▶ suggests certain elements of that process that the rule may include;
- ▶ requires DFCM to submit the draft rules to the Government Operations Interim Committee for its review and comment; and
- ▶ makes technical corrections.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

63A-5-205, as last amended by Chapter 365, Laws of Utah 1999

63A-5-208, as last amended by Chapter 91, Laws of Utah 2000

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.

(1) As used in this section, "capital developments" and "capital improvements" have the same meaning as provided in Section 63A-5-104.

~~[(+)]~~ (2) In accordance with Title 63, Chapter 56, Utah Procurement Code, the director may:

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

(b) 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.

~~[(2)]~~ (3) The judgment of the director as to the responsibility and qualifications of a bidder is conclusive, except in case of fraud or bad faith.

(4) The division shall make all payments to the contractor for completed work in accordance with the contract and pay the interest specified in the contract on any payments that are late.

~~[(3)]~~ (5) 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 retained or withheld and released as provided in Section 13-8-5.

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 -- Dispute resolution process -- 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.

(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, 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 \$500,000, subcontractors whose bid is less than \$20,000 need not be listed.

(iii) On projects where the contractor's total bid is \$500,000 or more, subcontractors whose bid is less than \$35,000 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) The bidders shall verify that all subcontractors listed as part of their bids are licensed as required by state law.

(d) 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; and
(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.

(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.

(5) The division may not disclose any subcontractor 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.]~~

(6) (a) The director shall, in consultation with the State Building Board, prepare draft rules establishing a process for resolving disputes involved with contracts under the division's procurement authority.

(b) The draft rules shall be presented to the Government Operations Interim Committee for review, comment, and recommendations before August 31, 2004.

(c) The director shall consider, and the rules may include:

(i) requirements regarding preliminary resolution efforts between the parties directly involved with the dispute;

(ii) requirements for the filing of claims, including notification, timeframes, and

documentation;

(iii) identification of the types of costs eligible for allocation and a method for allocating costs among the parties to the dispute;

(iv) required time periods, not to exceed 60 days, for the resolution of the claim;

(v) provision for an independent hearing officer, panel, or arbitrator to extend the time period for resolution of the claim by not to exceed 60 additional days for good cause;

(vi) provision for the extension of required time periods if the claimant agrees;

(vii) requirements that decisions be issued in writing;

(viii) provisions for administrative appeals of the decision;

(ix) provisions for the timely payment of claims after resolution of the dispute, including any appeals;

(x) a requirement that the final determination resulting from the dispute resolution process provided for in the rules is a final agency action subject to judicial review as provided in Sections 63-46b-14 and 63-46b-15;

(xi) a requirement that a claim or dispute that does not include a monetary claim against the division or its agents is not limited to the dispute resolution process provided for in this Subsection (6);

(xii) requirements for claims and disputes to be eligible for this dispute resolution process;

(xiii) the use of an independent hearing officer, panel, arbitration, or mediation; and

(xiv) the circumstances under which a subcontractor may file a claim directly with the division.

(d) Persons pursuing claims under the process required by this Subsection (6):

(i) are bound by the decision reached under this process unless the decision is properly appealed; and

(ii) may not pursue claims or disputes under the dispute resolution process established in Sections 63-56-49 through 63-56-58.

(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~~] the director; or

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