

1                                   **CHANGES TO DIVISION OF FACILITIES**  
2                                   **AND CONSTRUCTION MANAGEMENT**  
3                                   **CONTRACT PROCEDURES AND**  
4                                   **REQUIREMENTS**

5                                   2004 GENERAL SESSION

6                                   STATE OF UTAH

7                                   **Sponsor: Wayne A. Harper**

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8  
9   **LONG TITLE**

10   **General Description:**

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

14   **Highlighted Provisions:**

15           This bill:

- 16           ▶ requires DFCM to formally adopt rules establishing a process for resolving claims
- 17   made by contractors and subcontractors;
- 18           ▶ defines certain elements of that process that the rule must include;
- 19           ▶ requires DFCM to submit the draft rules to the Government Operations Interim
- 20   Committee for its review and comment;
- 21           ▶ establishes certain contract provisions that DFCM must include in contracts with
- 22   general contractors; and
- 23           ▶ makes technical corrections.

24   **Monies Appropriated in this Bill:**

25           None

26   **Other Special Clauses:**

27           None



28 **Utah Code Sections Affected:**

29 AMENDS:

30 **63A-5-205**, as last amended by Chapter 365, Laws of Utah 1999

31 **63A-5-208**, as last amended by Chapter 91, Laws of Utah 2000



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

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

35 **63A-5-205. Contracting powers of director -- Retainage.**

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

38 [~~(1)~~] (2) In accordance with Title 63, Chapter 56, Utah Procurement Code, the director  
39 may:

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

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

44 [~~(2)~~] (3) The judgment of the director as to the responsibility and qualifications of a  
45 bidder is conclusive, except in case of fraud or bad faith.

46 (4) Each contract entered into by the director with a contractor to perform capital  
47 developments or capital improvements shall include a provision that:

48 (a) requires the contractor to:

49 (i) comply with standard business practices in the contractor's management of the  
50 project and relationship with subcontractors;

51 (ii) comply with applicable rules governing subcontractors;

52 (iii) comply with building codes and inspection requirements; and

53 (iv) pay the subcontractor for work performed by the subcontractor in accordance with  
54 the contract between the contractor and subcontractor, even if the contractor has a dispute with  
55 the state over an element of the work for which the subcontractor is not responsible; and

56 (b) requires the division to make all payments to the contractor for completed work in  
57 accordance with the contract and to pay the interest specified in the contract on any payments  
58 that are late.

59            [~~(3)~~] (5) If any payment on a contract with a private contractor to do work for the  
60 division or the State Building Board is retained or withheld, it shall be retained or withheld and  
61 released as provided in Section 13-8-5.

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

63            **63A-5-208. Definitions -- Certain public construction bids to list subcontractors --**  
64 **Changing subcontractors -- Bidders as subcontractors -- Dispute resolution process --**  
65 **Penalties.**

66            (1) As used in this section:

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

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

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

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

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

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

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

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

85            (ii) On projects where the contractor's total bid is less than \$500,000, subcontractors  
86 whose bid is less than \$20,000 need not be listed.

87            (iii) On projects where the contractor's total bid is \$500,000 or more, subcontractors  
88 whose bid is less than \$35,000 need not be listed.

89            (b) (i) The bidders shall submit this list within 24 hours after the bid opening time, not

90 including Saturdays, Sundays, and state holidays.

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

93 (c) The bidders shall verify that all subcontractors listed as part of their bids are  
94 licensed as required by state law.

95 (d) Twenty-four hours after the bid opening, the contractor may change his  
96 subcontractors only after:

97 (i) receiving permission from the director; and

98 (ii) establishing that:

99 (A) the change is in the best interest of the state; and

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

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

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

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

109 (ii) the bidder intends to obtain a subcontractor to perform the work at a later date

110 because the bidder was unable to:

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

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

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

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

118 (B) qualifications for performing the work.

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

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

124 (A) require the bidder to use a subcontractor for the portion of the work in question and  
125 obtain the subcontractor bid under the supervision of the director; or

126 (B) reject the bidder's bid.

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

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

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

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

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

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

139 ~~[(6) (a) The director may establish a Contractor Performance Review Committee to:]~~

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

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

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

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

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

- 152           (c) The director shall ensure that the rules include:  
153           (i) requirements regarding preliminary resolution efforts between the parties directly  
154 involved with the dispute;  
155           (ii) requirements for the filing of claims, including notification, timeframes, and  
156 documentation;  
157           (iii) identification of the types of costs eligible for allocation and a method for  
158 allocating costs among the parties to the dispute;  
159           (iv) required time periods, not to exceed 60 days, for the resolution of the claim;  
160           (v) provision for an independent hearing officer, panel, or arbitrator to extend the time  
161 period for resolution of the claim by not to exceed 60 additional days for good cause;  
162           (vi) provision for the extension of required time periods if the claimant agrees;  
163           (vii) requirements that decisions be issued in writing;  
164           (viii) provisions for administrative appeals of the decision;  
165           (ix) provisions for the timely payment of claims after resolution of the dispute,  
166 including any appeals;  
167           (x) a requirement that the final determination resulting from the dispute resolution  
168 process provided for in the rules is a final agency action subject to judicial review as provided  
169 in Sections 63-46b-14 and 63-46b-15; and  
170           (xi) a requirement that a claim or dispute that does not include a monetary claim  
171 against the division or its agents is not limited to the dispute resolution process provided for in  
172 this Subsection (6).  
173           (d) These rules may include:  
174           (i) requirements for claims and disputes to be eligible for this dispute resolution  
175 process; and  
176           (ii) the use of an independent hearing officer, panel, arbitration, or mediation.  
177           (e) Persons pursuing claims under the process required by this Subsection (6):  
178           (i) are bound by the decision reached under this process unless the decision is properly  
179 appealed; and  
180           (ii) may not pursue claims or disputes under the dispute resolution process established  
181 in Sections 63-56-49 through 63-56-58.  
182           (7) In addition to all other reasons allowed by law or rule, the director may reject all

183 bids if none of the bidders whose bid is within the budget of the project submit a subcontractor  
184 list that meets the requirements of this section.

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

187 (a) the contractor, subcontractor, or supplier to be suspended or debarred by [a  
188 ~~Contractor Performance Review Committee~~ the director; or

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

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**Legislative Review Note**

as of 1-19-04 11:34 AM

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

**Office of Legislative Research and General Counsel**

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**Fiscal Note****Bill Number HB0217****Changes to Division of Facilities and Construction Management  
Contract Procedures and Requirements***23-Jan-04**3:10 PM*

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**State Impact**

No fiscal impact.

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**Individual and Business Impact**No fiscal impact.

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**Office of the Legislative Fiscal Analyst**