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June 6, 1986

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Re: Building and Construction Activities of County and
Public Officials

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Blake:

You have asked a number of questions concerning what building and construction activities the county and public officers and employees may engage in on behalf of the various county officers, agencies and districts. The following paragraph from the dissent in Oregon Short Line R.R. v. Berg, 52 Idaho 499, 514, 16 P.2d 373 (1932), sets the broad underlying principles which control the counties and other public agencies in this regard:

It is to be noted that the Idaho Constitution contains no provision requiring that taxes be levied for a public purpose, or anything of similar import. That, however, is necessarily implied, as the very foundation of the power to tax is the presence of a public purpose to be subserved by the expenditure for which the taxes are raised. (1 Cooley on Taxation, 4th ed., p. 381, sec. 174.) As concerns municipal taxes, in addition to being delegated for public purposes only, they can only be delegated for corporate purposes. That is to say, a municipality can only levy taxes which subserve a municipal, public purpose. (6 McQuillin on Municipal Corporations, 2d ed., p. 292, sec. 2532.)

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A number of Idaho cases have dealt at length with this subject. Among them are Village of Moyie Springs, Idaho v. Aurora Manufacturing Company, 82 Idaho 337, 346, 353 P.2d 767 (1960); Hansen v. Kootenai County Board of County Commissioners, 93 Idaho 655, 660, 471 P.2d 42 (1970); Boise Redevelopment Agency v. Yick Kong Corporation, 94 Idaho 876, 878, 499 P.2d 575 (1972); and Board of County Commissioners of Twin Falls County v. Idaho Health Facilities Authority, 96 Idaho 498, 501, 531 P.2d 588 (1974).

In summary, any construction or building to be done should be for a public purpose related to the public agency involved.

Chapter 10, title 31, Idaho Code, gives the county power to erect public buildings as necessary. Chapter 17, title 50, Idaho Code, gives generalized power to build and construct many things through local improvement districts. Title 40, chapters 6, 9, and 13, Idaho Code, give power to construct highways and bridges. Article VIII, section 3, Idaho Constitution, and chapter 19, title 31, Idaho Code, limit county use and availability of funds to the funds on hand in any year or else require election, bonding and provision for repayment. When the public purpose doctrine and the above statutes are considered together, they delineate the answers to your first and second questions. Counties have only such powers as are expressly or impliedly conferred on them by statutes, Prather v. Board of County Commissioners, 22 Idaho 598, 127 P. 175 (1912).

In answer to your third question, generally, all anticipated expenditure for construction by the county must be listed in the county's annual budget, but internal changes may be made within the road and bridge fund by the county commissioners. Idaho Code § 31-1606 provides that:

The estimates of expenditures as classified in each of the two (2) general classes, "Salaries and wages" and "Other expenses," required in section 31-1602, as finally fixed and adopted as the county budget by said board of county commissioners, shall constitute the appropriations for the county for the ensuing fiscal year. Each and every county official or employee shall be limited in making expenditures or the incurring of liabilities to the respective amounts of such appropriations. Provided, in the case of road and bridge appropriations, other than "salaries and wages," any lawful transfer deemed necessary may be made by resolution formally adopted by the board of county commissioners at a regular or special meeting thereof, which action must be

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entered upon the minutes of said board; provide, further, that no salary may be increased during the ensuing year after the final budget is adopted, without resolution of the board of county commissioners, which resolution shall be entered upon their minutes.

As we understand your fourth question, you ask whether Bonneville County departments can contract with other public entities such that those entities would construct or maintain public works for the county (or vice-versa).

As to roads, specifically, Idaho Code § 40-604 states that:

Commissioners shall:

(5) Have authority to make agreements with any incorporated city, other county, a highway district, the state, or the United States, its agencies, departments, bureaus, boards, or any government owned corporation for the construction, reconstruction, or maintenance of the county's highway system by those entities or for the construction, reconstruction, or maintenance of the highway systems of those entities by the county's highway organization. The county shall compensate or be compensated for the fair cost of the work except as otherwise specifically provided in this title.

Thus, at least as to highways, the answer to your fourth question is yes.

There is no clear authority as to other public works, however, Idaho Code § 31-1001 states that county commissioners "must cause to be erected" necessary public buildings. The section does not say whom they may "cause" to do this, however. Under Idaho Code § 67-2332, public agencies may contract with other public agencies "to perform any governmental service, activity, or undertaking which each public agency entering into the contract is authorized by law to perform, including, but not limited to joint contracting for services, supplies and capital equipment." (Idaho Code §§ 67-2326 to 67-2333 set forth various limitations of such agreements.)

The problem with reliance upon Idaho Code § 67-2332 is that it seemed, from its wording and context, to refer to "joint" agreements, in which two or more public entities together contract with a private party, which is not what you ask about. On the

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other hand, the policy behind Idaho Code § 67-2332 is to allow cooperation among public agencies. Idaho Code § 67-2326. Thus, perhaps, the section should be liberally construed.

Your next question asks whether there is a dollar limit on public works contracts between public entities. We have not found such a limitation. Thus, the value of a project is only limited by the size of the budget.

As to your sixth question, cities, county officers, county departments, and highway districts are all required to conform to bidding laws. Counties and cities are required to advertise and take bids for any projects over \$5,000 or for purchase of equipment over \$10,000. Idaho Code §§ 31-4003 and 50-341. Idaho Code § 40-906 and other provisions of chapter 9, title 40, Idaho Code, require bidding in all contracts for road or bridge work over \$5,000 or for equipment over \$10,000.

In answer to your seventh question, the Idaho bidding laws provide that the public entity must advertise for bids in all situations above the monetary limits, but may find that it can do the work more cheaply itself and may then reject all bids and carry out the work not using a contractor. The bidding procedure must be followed before the public entity has the ability to go ahead on its own. Under Idaho Code § 40-913 as to highway construction, the bidding procedure must be carried out twice before doing it without contract.

In answer to question eight, the provisions of Idaho Code § 67-2309 appear to be quite plain. That section reads as follows:

All officers of the state of Idaho, the separate counties, cities, towns, villages or school districts within the state of Idaho, all boards or trustees thereof or other persons required by the statutes of the state of Idaho to advertise for bids on contracts for the construction, repair or improvement of public works, public buildings, public places or other work, shall make written plans and specifications of such work to be performed or materials furnished, and such plans and specifications shall be available for all interested and prospective bidders therefor, providing that such bidders may be required to make a reasonable deposit upon obtaining a copy of such plans and specifications; all plans and specifications for said contracts or materials shall state, among other things pertinent to the work to be performed or

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materials furnished, the number, size, kind and quality of materials and service required for such contract, and such plans and specifications shall not specify or provide the use of any articles of a specific brand or mark, or any patented apparatus or appliances when other materials are available for such purpose and when such requirements would prevent competitive bidding on the part of dealers or contractors in other articles or materials of equivalent value, utility or merit. (Emphasis added.)

The statute states that bidders may be required to make a deposit. Bid specifications must set out such requirements. If the county is a bidder, it would have to comply with the bid specifications, just as any other bidders would have to. Also of interest in regard to this question is Idaho Code § 54-1218. It requires that the plans mandated by § 67-2309 must be drawn by a licensed engineer.

In regard to your next question, public agencies are exempt from the public works contractors license law under Idaho Code § 54-1903.

In answer to your tenth question, private contractors must be licensed under the public works contractors license law for any public works of a value over \$1,000. However, again, public entities are exempt from the operation of this law.

The answer to your next question, whether performance bonds are required, is generally dependent upon the situation. If a public entity is doing its own job, after it has advertised for bids and rejected them, the answer would be, no. If a public agency has successfully bid on another public agency's project, such a performance bond could be required by the bid specifications. In this regard see Idaho Code §§ 40-904 and 31-4006.

In answer to your next question, generally it is good practice for public agencies to require performance bonds; although this may not be required by law in every case.

In answer to your thirteenth and fourteenth questions, single projects should not be split. Any public officer who does so to avoid bidding laws is subject to fine under the terms of Idaho Code § 59-1026. Within the terms of the previous answers, there is no particular dollar value of public works construction that a county may or may not do itself. If the construction is over

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\$5,000, the county must first seek bids, reject them, and then determine to do the work itself.

As to your fifteenth question, there seems to be no limit to the dollar value of construction that a county can do for itself. However, as discussed above, if a project has a value of over \$5,000, bidding procedures must be followed.

In answer to your last two questions, whenever public officers have engaged in practices which are outside of or contrary to state law, as spelled out herein and as set forth in the Idaho Code, they may be subject to civil and/or criminal penalties. Their failure to follow state law may also cause the public entity, and the individual officers themselves, to be subject to actions for damages and other penalties provided for by law. See chapter 41, title 19, Idaho Code, which provides for removal of officers from office, and the sections concerning omission and neglect of duty, Idaho Code §§ 18-315, 18-316, and 31-855.

Sincerely,

Robie G. Russell
Deputy Attorney General
Chief, Local Government Division

Sincerely,

Warren Felton
Deputy Attorney General
Local Government Division

WF/cjm