



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

JIM JONES  
ATTORNEY GENERAL

TELEPHONE  
(208) 334-2400

ATTORNEY GENERAL OPINION NO. 89-2

TO: G. Anne Barker, Administrator  
Division of Public Works  
Idaho Department of Administration  
502 North 4th Street  
Boise, Idaho 83720  
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. With regard to public works projects, what is the limit for project size beyond which the project must be advertised and competitively bid? Are there any exceptions?
2. With regard to public works projects, can \$5,000 worth of material be purchased and installed by in-house maintenance personnel?
3. Is there a distinction to be made between a "public works" project and a "maintenance" project? If so, what should be the guidelines for making this distinction and how are the two types of projects affected by Idaho Code with respect to size of the project, advertising and competitive bidding? (For example: A \$7,000 pump may fail. The purchase is made through the division of purchasing. The pump is installed by an in-house maintenance staff. Does "maintenance" include changes to the structure or fixtures that require adherence to the Uniform Building Code?)
4. Under miscellaneous maintenance projects, the past practice of the division of public works was to pay the labor costs associated with the employees of state agencies doing public works projects. Can the permanent building fund be used to pay the salaries of state employees?

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5. Finally, would you clarify for me the exception for using inmate labor to do public works projects?

CONCLUSIONS:

1. Except as to certain exempt entities such as the University of Idaho, jurisdiction of projects which cost more than \$5,000 resides in the department of administration, division of public works. The procedure for calling of bids set forth in Idaho Code § 67-5718 must be used as to all contracts let unless an emergency is declared as provided in Idaho Code § 67-5711B.

2. When the cost of a project including materials exceeds \$5,000, the department of administration, division of public works, may choose to use in-house maintenance personnel on the project.

3. The statutes do not define jurisdiction of the department of administration, division of public works, in terms of maintenance versus non-maintenance projects. Rather, department of administration jurisdiction depends upon whether the project involves construction, alteration, equipping and furnishing, or repair of buildings or improvements of public works. Installation of a \$7,000 pump in a state building would involve equipping the building and the department would have jurisdiction.

4. The permanent building fund advisory council may pay other agencies for services pursuant to interaccount agreements. Agencies utilizing state operating or dedicated accounts could expend the funds for salaries to the extent permitted by their appropriations. Payments from the permanent building fund to trust accounts or agency asset accounts could be expended in the same manner as other receipts to those accounts.

5. Inmate labor may be used in public works projects only when the work is performed in accordance with Idaho Code § 67-5713.

ANALYSIS:

The scope of our review is limited to those projects that come within the purview of the department of administration, division of public works. Idaho Code § 67-5711. We have not reviewed "public works" projects under the control of other state agencies, such as the University of Idaho, etc., or other political

subdivisions having authority to perform "public works" construction as defined by Idaho Code § 54-1901.

1. Department Of Administration Jurisdiction And Bidding Requirements Apply To Projects Which Cost More Than \$5,000.

Idaho Code § 67-5711 is the principal statute defining the dollar amount of projects supervised by the department of administration. It provides in pertinent part:

The director of the department of administration, or his designee, of the state of Idaho, is authorized and empowered, subject to the approval of the permanent building fund council, to provide or secure all plans and specifications for, to let all contracts for, and to have charge of and supervision of the construction, alteration, equipping and furnishing and repair of any and all buildings, improvements of public works of the state of Idaho, the cost of which construction, alteration, equipping and furnishing or repair exceeds the sum of five thousand dollars (\$5,000) provided, that the director or his designee, and permanent building fund council shall, in the letting of contracts under this section, comply with the procedure for the calling of bids provided in section 67-5718, Idaho Code.

Thus, if the cost of construction, alteration, equipping and furnishing or repair of public buildings or improvements of public works exceeds \$5,000, the department of administration has jurisdiction over the project. Subject to the approval of the permanent building fund council, the department of administration is empowered to provide or secure all plans and specifications for, to let all contracts for, and to have charge of and supervision of such projects.

In letting contracts the department of administration must follow the procedure for the calling of bids provided in Idaho Code § 67-5718. The statute is mandatory in this regard, providing in pertinent part that "the director . . . shall, in the letting of contracts under this section, comply with the procedures for the calling of bids provided in section 67-5718, Idaho Code; . . ." Idaho Code §§ 67-5711.

Idaho Code § 67-5718 sets forth the procedure used by the department of administration, division of purchasing, when purchasing goods and services for state agencies. Accordingly, the same procedure for the calling of bids must be used by the department of administration, division of public works, when letting any contract for a public works project under its jurisdiction.

The only exception provided from the bidding procedures of Idaho Code § 67-5718 is the exception for emergency contracting provided in Idaho Code § 67-5711B. That section permits the use of emergency public works contracts "when there exists a threat to public health, welfare, or safety under emergency conditions." The section provides for a declaration of emergency under the following conditions:

The administrator [of the division of public works] may declare an emergency when one (1) or more of the following conditions exist: an imminent life-threatening environment; or an imminent threat to property; or an imminent loss of significant state resources.

In summary, when total project costs exceed \$5,000, the department of administration, division of public works, has jurisdiction over the project. The procedure for calling for bids of Idaho Code § 67-5718 must be used by the department unless an emergency is declared as provided in Idaho Code § 67-5711B.

2. The Department Of Administration May Permit Use Of In-house Personnel On Projects.

For projects over \$5,000 subject to department of administration jurisdiction, we have been asked if in-house personnel may be used to perform part or all of the labor involved in such projects. The portion of Idaho Code § 67-5711 relating to contracting includes the following language:

The director. . . is authorized and empowered. . . to let all contracts for and have charge of and supervision of the construction. . . . [The director] shall, in the letting of contracts under this section, comply with the procedure for the calling of bids provided in section 67-5718, Idaho Code;. . .

Thus, if a project is within the jurisdiction of the department of administration, the department has charge of and supervision of the construction. The department is empowered to let all contracts which are entered into in connection with the project, and is required to follow statutory bid procedures when contracting. The language does not require that all work be done pursuant to contract. Rather, it grants contracting jurisdiction to the department of administration and requires the department to follow bid procedures when contracting. Consequently, the statute does not prohibit the department of administration from using in-house personnel in performance of some or all of the labor on a public works project.

This conclusion is reinforced by the fact that the procedure of Idaho Code § 67-5718 for calling for bids exempts from its provisions the use of regularly employed personnel. That section sets forth the general procedures for the purchase of goods, services, parts, supplies and equipment. "Services" is defined in Idaho Code § 67-5716(5) as:

Personal services, in excess of personnel regularly employed for whatever duration and/or covered by personnel system standards, for which bidding is not prohibited or made impractical by statute, rules and regulations or generally accepted ethical practices.

Thus, the general bidding procedure of Idaho Code § 67-5718 is not violated by the use of regularly employed personnel. Rather, the section excludes regularly employed personnel from its requirements. In short, neither the language of Idaho Code § 67-5711 nor the bidding procedure of Idaho Code § 67-5718 implies any restriction on the use of in-house personnel on projects controlled by the department of administration.

Since the department of administration has "charge of and supervision of" such projects, any state personnel used would be required to follow all directions of the department in connection with the project. As to any portion of the project contracted out, the department of administration would, as mentioned earlier, be subject to the statutory requirement that the department "shall, in the letting of contracts under this section, comply with the procedure for the calling of bids provided in section 67-5718, Idaho Code."

If an agency desires to use its own in-house personnel on a project a question can arise as to proper measurement of project cost. Project cost will determine whether the department of

administration or the particular agency has jurisdiction over the project. As discussed above, the department of administration only has administrative jurisdiction if "the cost of . . . construction, alteration, equipping and furnishing or repair exceeds the sum of five thousand dollars." If all work on a project is contracted out, it can be readily determined whether the five thousand dollar amount is exceeded. However, if an agency desires to use its own in-house personnel to perform part of a contract, the statutes do not specify how the five thousand dollar amount is to be calculated.

We recommend the following method of calculation as a practical approach consistent with the statutory scheme. The time required by in-house personnel should be estimated as accurately as possible. The time required should be multiplied by the wage rates of the employees involved including fringe benefits. If estimated as accurately as possible, this should provide a reasonable method of estimating the cost to an agency of using its own personnel. Other out-of-pocket costs to an agency should also be included in the calculation. General overhead expenses should not be included since these costs would be incurred whether or not the project were contracted out. If the above estimated costs, together with any goods or services to be purchased in connection with the project, exceed five thousand dollars, the project should be referred to the department of administration.

3. Department Of Administration Jurisdiction Is Not Determined By A Project's Characterization As A Maintenance Or Non-Maintenance Project.

We have also been asked if there is a distinction between "public works" projects subject to department of administration jurisdiction and "maintenance" projects not subject to department of administration jurisdiction. Idaho Code § 67-5711 provides in pertinent part that the department of administration has jurisdiction of:

. . .the construction, alteration, equipping and furnishing and repair of any and all buildings, improvements of public works of the state of Idaho, the cost of which . . .exceeds the sum of five thousand dollars (\$5,000). . .

The statute does not directly express an exception for maintenance or other types of projects. Rather, it expresses the types of activities included within the jurisdiction of the department of administration. These include construction,

alteration, equipping and furnishing and repair of any and all buildings [or] improvements of public works. Consequently, it is not pertinent whether a project could be characterized as "maintenance." Rather, jurisdiction depends only upon whether the project involves construction, alteration, equipping and furnishing or repair of a building or improvement of a public work.

For example, a roof "maintenance" project which involved roof "repair" would be subject to the jurisdiction of the department of administration provided the cost of the repair exceeded \$5,000.

Similarly, if a pump in a building failed, requiring the installation of a new \$7,000 pump, it would be irrelevant whether the change could be characterized as "maintenance." The installation of the new pump would involve "equipping" the building at a cost exceeding \$5,000. Consequently, the project would be subject to department of administration jurisdiction.

4. Limitations Upon The Use Of Permanent Building Funds For Payment Of Salaries Of Employees Of Other Agencies.

Your next question asks if permanent building funds may be used to pay the salaries of employees of other agencies involved in public works contracts. Idaho Const. art. 7, § 13, provides:

No money shall be drawn from the state treasury, but in pursuance of appropriations made by law.

Thus, the availability of funds for payment of salaries depends upon the appropriation involved and the general statutes dealing with appropriations. The general statutes dealing with appropriations are codified at chs. 35 and 36, title 67, Idaho Code. Chapter 313, 1988 Session Laws, sets forth the most recent appropriation for the permanent building fund. Section 1 of the act states, in pertinent part, that the appropriation is:

. . . for the purpose of paying the cost of any land, building, equipment, or the rehabilitation, renovation or repair of the following. . .

Thereafter, the act makes various lump sum appropriations for various projects. Section 4 of the act exempts the appropriations from Idaho Code § 67-3516 and from ch. 36, title 67, Idaho Code (the Standard Appropriations Act). The Standard Appropriations Act includes various restrictions, including restrictions on the use of appropriations for payment of salaries and wages. (See, e.g., Idaho Code § 67-3602.) However, as noted above, section 4

exempts the permanent building fund appropriation from those restrictions.

Similarly, Idaho Code § 67-3516 provides rules for interaccount billings between agencies when one agency provides another agency with goods and services. Since section 4 exempts the permanent building fund appropriation from Idaho Code § 67-3516, these rules and restrictions would also not apply.

Thus, it appears that the permanent building fund advisory council is given wide latitude in the manner in which it expends its appropriations, provided the expenditures are for the purposes of the appropriations (i.e., payments for land, buildings, equipment, rehabilitation, renovation or repair). For example, with the council's consent, another agency could provide employees to assist with a project and permanent building funds could be paid to the agency for the services provided.

Whether an agency receiving permanent building funds could use those funds in the current fiscal year would depend upon its own appropriation. In general, an agency providing goods or services to another agency may be paid for those goods or services. However, if the collecting agency is operating with state operating funds or dedicated funds, the funds may be expended in the current fiscal year only to the extent provided in its appropriation. Idaho Code § 67-3516(3). If the collecting agency is funded with a trust account or agency asset account, it may expend the funds in the same manner as other receipts for those accounts. Idaho Code § 67-3516(3).

Although the permanent building fund advisory council may pay other agencies for services rendered, the council should consider the impact of such a decision on the appropriation process. For example, the legislature may have appropriated funds to an agency to pay the salary of various employees. The agency might also receive funds from the permanent building fund for services provided by the same employees. By receiving two payments for the same employees, an agency's budget could expand beyond that anticipated by the legislature if the employees are funded from trust accounts or agency asset accounts.

The example points out that payment from the permanent building fund for services rendered by an agency can impact the appropriation process in certain circumstances. Therefore, we recommend the joint finance-appropriations committee be consulted concerning the policy to be established regarding payments to other agencies for services rendered.

In summary, the permanent building fund advisory council may agree to pay other agencies for services rendered in connection with a permanent building fund project. The collecting agency may expend those receipts in the current fiscal year if authorized by its own appropriation or if it is operating with a trust or agency asset account which does not require prior legislative authorization for expenditures from the account. We recommend, however, that the joint finance-appropriations committee be consulted concerning the policy to be established regarding payments to other agencies for services rendered by their employees.

5. Use Of Inmate Labor On Public Works Projects.

Question five asks for a clarification regarding inmate labor on public works projects. This question was first addressed in 1978 by Attorney General Opinion 78-2. In 1978, the legislature clarified, by the addition of Idaho Code § 67-5713, the circumstances under which inmate labor could be utilized on public works projects.

That statute authorizes the administrator of the division of public works, subject to permanent building fund advisory council approval, "to construct or to alter either in whole or in part state owned correctional facilities" with inmate labor. It is clear that the work performed by the inmate labor is under the supervision of the administrator of the division of public works and thus must be done in compliance with written plans and specifications prepared by licensed architects and engineers. The only exception is work performed under the supervision of the division of public works pursuant to a declared emergency under Idaho Code § 67-5711B.

AUTHORITIES CONSIDERED:

Idaho Constitution:

Idaho Const. art. 7, § 13.

Idaho Statutes:

Idaho Code § 54-1901.  
Idaho Code § 67-3516.  
Idaho Code § 67-3602.  
Idaho Code § 67-5711.  
Idaho Code § 67-5711B.

Idaho Code § 67-5713.  
Idaho Code § 67-5716(5).  
Idaho Code § 67-5718.

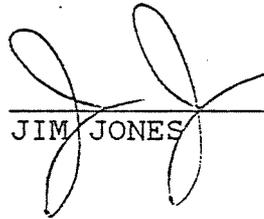
Chapter 35, Title 67, Idaho Code.  
Chapter 36, Title 67, Idaho Code.  
Chapter 313, 1988 Session Laws.

Other Authorities Cited:

Attorney General Opinion 78-2.

DATED this 23rd day of January, 1989.

JIM JONES  
Attorney General  
State of Idaho



JIM JONES

Analysis by:

Mike Jones  
Deputy Attorney General  
Department of Administration

David G. High  
Deputy Attorney General  
Chief, Business Regulation  
and State Finance Division

cc: Idaho Supreme Court  
Supreme Court Library  
Idaho State Library