

February 27, 1990

Nancy Michael
Public Works Contractors
State License Board
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Competitive Bid Requirements, Subcontractor for State Public Works Project

Dear Ms. Michael:

You have asked several questions concerning Idaho Code §§ 67-2310 and 54-1902 and the requirements that subcontractors for state public works projects be named and licensed. For purposes of this discussion, "general contractor" refers to the person who directly bids or contracts the state project. "Subcontractor" refers to the persons who contract directly with the general contractor.

1. Does failure to list an appropriate state license number for a subcontractor required to be named pursuant to the provisions of Idaho Code § 67-2310 make the submitted bid unresponsive and void?

Idaho Code § 67-2310 requires only that the subcontractor be named, not that the state license number be listed. Idaho Code § 54-1902 specifically provides, however, "nor shall a public works contractor accept a bid from any person who at the time does not possess the appropriate license for the project involved." [Emphasis added.] Therefore, while the naming statute does not require listing the license number, it is unlawful to accept bids from persons who do not have the requisite license. Since it is unlawful to accept a bid from unlicensed persons, it is apparent that the subcontractor must possess the appropriate license by the time the contractor accepts the bid. Failure by a general contractor to name a properly licensed subcontractor, however, renders the bid unresponsive and void. Further, Idaho Code § 54-1914(i) provides that the public works contractors licensing board may take disciplinary action against any contractor who is guilty of:

[k]nowingly accepting a bid from, or entering into a contract with another contractor for a portion of a public works project if at that time such contractor does not possess the appropriate license to do that work as provided in this Act.

2. Does the licensing requirement exception for projects financed by federal aid funds found in Idaho Code § 54-1902 apply to subcontractors as well as to general contractors?

Idaho Code § 54-1902 reads, in pertinent part:

Provided, however, that no contractor shall be required to have a license under this act in order to submit a bid or proposal for contracts for public works financed in whole or in part by federal aid funds, but at or prior to the award and execution of any such contract by the State of Idaho, or any other contracting authority mentioned in this act, the successful bidder shall secure a license as provided in this act.

(Emphasis added.)

Reference in the act to "contractor" also means "public works contractor," which is defined as synonymous with "subcontractor" pursuant to Idaho Code § 54-1901(b). This reference is confusing because while the first clause of § 19-5402 refers to "contractor," which is apparently inclusive of "subcontractor" under the definitions of the act, the last clause clearly refers only to the successful bidder in the contract with the State of Idaho. The clause clearly does not address subcontractors, since their contract is not with the state, but with the general contractor. Read together, Idaho Code §§ 67-2310 and 54-1902 do indeed provide that while a contractor bidding on a state project for public works financed in whole or in part by federal aid funds is not required to have a state license until the bid is accepted, that same contractor must name in his bid licensed subcontractors or the bid will be rendered unresponsive and void. This interpretation is consistent with the purpose of the naming statute, which is "to invite effective competition, prevent fraud, and to secure subcontractors who were capable of satisfactorily performing the work and furnishing supplies at the lowest overall cost." Neilsen & Co. v. Cassia and Twin Falls County Joint Class A School District, 96 Idaho 763, 766, 536 P.2d 1113 (1975).

3. Is it permissible to use subcontractors different from those listed on the bid?

Because the Idaho Code provides that it is unlawful for the general contractor to accept a bid from a subcontractor who does not possess the appropriate license at the time of the bid, failure of that same named but unlicensed subcontractor to obtain a license subsequent to the state of Idaho's award of the contract to the general contractor renders the original bid unresponsive and void under the provisions of Idaho Code § 67-2310.

4. Under what circumstances might a general contractor use a subcontractor other than the one he names pursuant to Idaho Code § 67-2310?

Again, the purpose of the naming law was to stop bid-shopping. To allow general contractors to name any subcontractor at will would defeat the legislative intent in passing this law. The code is silent on this specific issue.

Arguably, substitution of another licensed mechanical subcontractor in a situation which did not present the issue of "bid-shopping" and the attendant evils the law was designed to avoid would not violate the intent of the naming statute. Such a substitution, however, would likely cause the bid to be ruled unresponsive and void if the originally named subcontractor were still able to perform the contract and challenged the action in the courts. This is not to suggest, however, that the subcontractor has acquired any contract rights by virtue of being named in the bid. The Idaho Supreme Court has expressly held that the naming law is designed to benefit not the subcontractor, but the public. No contractual status is conferred on the subcontractor named. Mitchell v. Siqueiros, 99 Idaho 396, 401, 582 P.2d 1074 (1978).

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental Affairs Division