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October 29, 1991

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

Re: Request for Attorney General's Opinion

Dear Mr. Hicks:

You asked our office whether a city council may delegate authority to city employees to approve and award contracts to the lowest responsible bidder. The modern trend in case law is to permit delegation of city council functions such as contracting. However, some of the language of Idaho Code § 50-341 and legislative history indicate the legislature did not intend to permit delegation. Consequently, in our opinion, the safest course would be to seek legislative clarification. However, if the authority is delegated, it would be prudent to provide standards by which the lowest responsible bidder will be selected.

Under Idaho Code § 50-341, city contracts involving an expenditure of more than \$5,000 are awarded to the lowest responsible bidder. In the past, Boise City Council has generally accepted the recommendation of its staff in determining the identity of that bidder. The council would now like to delegate to subordinates the authority to approve and award such contracts.

Idaho has yet to specifically address the issue of when a city council may delegate authority. However, under case law

from other jurisdictions, the general rule is that the same restrictions which apply to a state legislature's delegation of power also apply to a city council. C.S. Rhyne, The Law of Local Government Operations, § 4.10 (1980). Thus, a city council may not delegate its lawmaking authority. 56 Am. Jr. 2d, Municipal Corporations, § 196 (1971). Likewise, it may not leave the resolution of fundamental policy to others or fail to provide adequate direction for the implementation of that policy. Carson Mobile Home Park Owners v. Carson, 672 P.2d 1297 (Cal. 1983).

However, just as a legislature can empower an agency or official to ascertain the existence of facts or conditions upon which a law becomes operative, Kerner v. Johnson, 99 Idaho 433, 583 P.2d 360 (1978), a city council may delegate authority to make a determination as to the existence of facts in order to enforce ordinances. Carson, *supra*. Similarly, a city council may delegate the authority to promulgate rules and regulations in order to enforce ordinances. 56 Am. Jur. 2d, Municipal Corporations, § 196 (1971). And, of course, ministerial and administrative functions not involving discretion may be delegated. *Id.*

Applying these rather broad principles to the delegation of the authority to contract, it appears that today this power may, under some circumstances, be conferred upon a subordinate. Traditionally, the power to contract was considered a discretionary function which could not be delegated away. See 63 C.J.S., Municipal Corporations, § 981. However, the present tendency is to allow delegation from the city council for various municipal officials, boards and departments to enter into contracts. The Law of Local Government Operations, § 27.2. It is felt that if delegation is precluded, city councils will become mired in the details of routine operations, when they should instead be concerned with setting basic priorities and policies. As our Idaho Supreme Court has noted, in the context of state legislative delegation, "The modern view is that broad delegation of legislative authority is proper and indeed necessary." Sun Valley Company v. City of Sun Valley, 109 Idaho 424, 428, 708 P.2d 147, 151 (1985). Thus, today, the authority to contract may, at times, be delegated by the city council. See, e.g., Cleveland Police Patrolmen's Association v. City of Cleveland, 492 N.E.2d 861 (Ohio App. 1985); Subcontractors Trade Association v. Koch, 477 N.Y.S.2d 120 (Ct. App. 1984); Kayatt v.

Dinkins, 560 N.Y.S.2d 736 (Sup. 1990); 10 McQuillen, Municipal Corporations, § 29.15 (3rd ed. 1990).¹

There is, however, an exception to this rule. When the state legislature has evidenced its intent that one particular public body or official is to exercise specified discretionary power, that power is in the nature of a public trust and may not be exercised by others. For example, a statute which imposes a "duty" to employ teachers on a particular political body precludes delegation of this function. Big Sandy School District No. 100-J v. Carroll, 433 P.2d 325 (Colo. 1967). Similarly, a statute which provides "the city council shall fix the compensation of all appointive officers and employees," requires that the city council perform that duty. Bagley v. City of Manhattan Beach, 553 P.2d 1140 (Cal. 1976) (emphasis added). Thus, if the legislature intended to limit delegation, the power to contract may not be conferred on a subordinate or other political body.

Applying this law to the situation at hand, the first task is to determine whether the state legislature has expressed its intent that the city council has the sole duty to award contracts to the lowest responsible bidder. Idaho Code §§ 50-341(A) and (C) provide in pertinent part:

The following provisions relative to competitive bidding apply to all cities . . .

* * * * *

When the expenditure contemplated exceeds five thousand dollars (\$5,000), . . . the expenditure shall be contracted for and let to the lowest responsible bidder (Emphasis added.)

Thus, the function of awarding contracts is not expressly conferred upon the city council. However, other provisions indicate that it is the council which is required to perform this function. Under Idaho Code § 50-341(J) and (K), the task of rejecting all bids, choosing between identical bids and going to

¹ Worth noting is that in the state legislative context, the Idaho Supreme Court has previously upheld the delegation of authority to an interim committee to approve a contract, so long as the legislature retained the final power to veto the committee's actions. Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

the open market is expressly given to the city council.² Because these functions are so closely linked to the responsibility of awarding a contract to the lowest responsible bidder, they indicate an intention on the part of the state legislature to confer solely on the city council the duty of awarding contracts.

Moreover, while the legislative history of Idaho Code § 50-341 does not directly address the council's authority to delegate contract decisions to its staff, the history does provide some insights. Most notable is the statement of purpose to Idaho Code § 50-341(L). Idaho Code § 50-341 provides that if an emergency is declared by the mayor or city manager, money "may be extended without compliance with this section." The 1981 Statement of Purpose for Idaho Code § 50-341(L) states that in an emergency, "a city or county can, in that single instance . . . make whatever purchases are required without complying with the state bid law." (Emphasis added.) This language underscores the importance the legislature attaches to compliance with precise bidding procedure.

Significant also is the statement of purpose to Idaho Code § 50-341(M). Section (M) was added in 1987 to authorize cities to purchase equipment at public auction. The statement of purpose provides in part:

This change would allow cities to take advantage of . . . savings . . . while still requiring council control over the dollar amount of the purchase. (Emphasis added.)

Here, council control over finances is both emphasized and treated as a requirement, again buttressing the position that the legislature intended city councils, and not their staff, to make bidding decisions. Thus, legislative history and the general language of Idaho Code § 50-341 indicate the authority to award bids should be exercised by the city council.

² Idaho Code § 50-341(J) and (K) state:

J. In its discretion, the city council may reject any bids presented and readvertise. If two (2) or more bids are the same and the lowest responsible bids, the city council may accept the one it chooses. If no bids are received, the council may make the expenditure without further compliance with this section.

K. After rejecting bids, the city council may, after finding it to be a fact, pass a resolution declaring that the thing sought to be accomplished by the expenditure can be performed more economically by day labor, or the materials or supplies furnished at a lower price in the open market. Upon adoption of the resolution, it may have the thing sought to be accomplished done in the manner stated without further compliance with this section.

A reasonable policy argument can be made to allow delegation. As noted, delegation is the current trend, and it would free the city council to concentrate on other, more important tasks. Moreover, as noted, Idaho Code § 50-341 does not expressly place the duty of awarding bids on the council. Nevertheless, it is this office's opinion that, given the tenor of the statute and certain excerpts from the legislative history, the safer course would be not to delegate this authority, but to instead ask the state legislature to amend Idaho Code § 50-341 and ameliorate the problem.

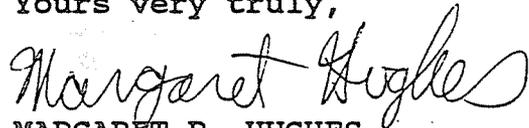
If, upon weighing the risks, the city council still decides it is necessary to delegate the power to award bids, this delegation should not be without limit. As noted, the authority to contract was traditionally thought to be a discretionary function which the city council had to exercise itself. While today some exercise of judgment may be delegated, this should not be unbridled judgment, but should instead be circumscribed by reasonable legislative guidelines. O.M. Reynolds, Jr., Local Government Law, 170 (1982). For example, in Koch, supra, at 124, the New York Court of Appeals stated that the Mayor of New York City could not award construction contracts unless the city council "specifically delegate[d] that power to him and provide[d] adequate guidelines and standards for the implementation of that policy." Similarly, in City of Cleveland, supra, at 864-65, the Ohio Court of Appeals concluded the determination of salary schedules for patrol officers could be delegated as long as the city council established standards and principles to which the arbitration panel had to conform as well as a procedure whereby the panel's exercise of discretion could be reviewed. Thus, if the city council delegates its authority to award contracts, it should provide standards and guidelines so this authority is not exercised in an arbitrary or capricious manner.

Here, a subordinate awarding contracts is not merely determining the lowest bidder. Such would be a relatively simple task. Rather, the subordinate is determining the lowest responsible bidder. The city council should provide a specific policy and guidelines defining a responsible bid and setting forth the factors which must be considered in choosing the lowest responsible bidder. By providing such guidance, the council will decrease the likelihood that contracts will be awarded in an arbitrary or discriminatory manner and increase the chance that its delegation will withstand judicial scrutiny.

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In summary, the modern trend is to allow city councils to delegate their power to award contracts. However, such delegation is not allowed if the state legislature has evidenced its intent that the city council's authority be exercised by that body. While Idaho Code § 50-341 does not expressly impose the duty to award contracts upon the city council, this duty is quite likely so imposed by implication. That being so, this office does not recommend delegation. If, upon weighing this risk, Boise City Council nevertheless decides to delegate its authority to award contracts, this office suggests that the delegation be accompanied with standards to guide the subordinates upon whom the authority is conferred.

Yours very truly,



MARGARET R. HUGHES
Deputy Attorney General

MRH/lp

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