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Legal Opinion 2017-006

TO: City Council; Mayor John Engen; Dale Bickell; Ellen Buchanan; Chris Behan; Rod Austin; Tiffany Brander; Leigh Griffing; Scott Paasch; John Wilson; Kevin Slovarp; Monte Sipe; Doug Harby; Mike Haynes; Donna Gaukler; Mike Brady; Scott Hoffman; Jason Diehl; Department City Clerk

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE February 7, 2017

RE: Pursuant to Montana state law 18-2-425, City may not require a Public Works project contract contractor, subcontractor, material supplier or carrier to execute or otherwise become a party to any project labor, agreement, collective bargaining agreement, prehire agreement or other agreement with employees, their representatives, or any labor organization as a condition of bidding, negotiating, being awarded, or performing work on a Public Works contract

FACTS:

General discussion pertaining to living wages, prevailing wages as well as potential union jobs have recently broadly occurred with respect to construction projects that the City of Missoula has had at least some involvement with.

ISSUE(S):

May the City legally require contractors, subcontractors or material suppliers for City Public Works contracts to execute or otherwise become a party to any project labor agreement, collective bargaining agreement, prehire agreement, or other agreement with employees, their representatives, or any labor organization as a condition of bidding, negotiating, being awarded, or performing work on a public works contract?

CONCLUSION(S):

NO. Section 18-2-425 MCA of Montana construction contract law prohibits a city from requiring that a contractor, subcontractor, material supplier, or carrier engaged in construction, maintenance, repair or improvement of public works execute or otherwise become a party to any project labor agreement, collective bargaining agreement, prehire agreement or other agreement with employees, their representatives, or any labor organization as a condition of bidding, negotiating, being awarded, or performing a public works contract.

LEGAL DISCUSSION:

Title 18 MCA is entitled "CONSTRUCTION CONTRACTS". Title 18, chapter 2, part 4 MCA is entitled "SPECIAL CONDITIONS-STANDARD PREVAILING WAGES".

Pursuant to subsection 18-2-401(11)(a) MCA "public works contract" is statutorily defined:

(11) (a) "Public works contract" means a contract for construction services let by the state, county, municipality, school district, or political subdivision or for nonconstruction services let by the state, county, municipality, or political subdivision in which the total cost of the contract is in excess of \$25,000. The nonconstruction services classification does not apply to any school district that at any time prior to April 27, 1999, contracted with a private contractor for the provision of nonconstruction services on behalf of the district.

"Standard prevailing rate of wages" is defined pursuant to subsection 18-2-401(13) MCA. This subsection states as follows:

(13) "Standard prevailing rate of wages" or "standard prevailing wage" means the rates established as provided in:

- (a) **18-2-413** for building construction services;
- (b) **18-2-414** for heavy construction services and for highway construction services; and
- (c) **18-2-415** for nonconstruction services

Two important Montana statutory laws pertaining to standard prevailing rate of wages are set forth in sections 18-2-402 and 18-2-422 MCA, which respectively provide as follows:

18-2-402. Standard prevailing rate of wages. (1) The commissioner may determine the standard prevailing rate of wages, including fringe benefits, applicable to public works contracts under this part. The commissioner shall keep and maintain copies of collective bargaining agreements and other information on which the rates are based.

(2) The provisions of this part do not apply in those instances in which the standard prevailing rate of wages is determined by federal law.

(3) Whenever this part is applicable, the standard prevailing rate of wages, including fringe benefits, is the greater of the highest applicable rate of wages in the area for the particular work in question as negotiated under existing and current collective bargaining agreements or the rate determined by the applicable survey under this part.

18-2-422. Bid specification and public works contract to contain standard prevailing wage rate and payroll record notification. All public works contracts and the bid specifications for those contracts must contain:

- (1) a provision stating for each job classification the standard prevailing wage rate, including fringe benefits, that the contractors and employers shall pay during construction of the project;
- (2) a provision requiring each contractor and employer to maintain payroll records in a manner readily capable of being certified for submission under **18-2-423**, for not less than 3 years after the contractor's or employer's completion of work on the project; and
- (3) a provision requiring each contractor to post a statement of all wages and fringe benefits in compliance with **18-2-423**.

This is important background information to be aware of with respect to what wages must be paid when the City is engaged in bidding and awarding a statutorily defined "Public Works contract".

With respect to the question raised, section 18-2-425 MCA entitled "PROHIBITION-PROJECT LABOR AGREEMENT" is the important Montana state law to be aware of. Section 18-2-425 MCA states as follows:

18-2-425. Prohibition -- project labor agreement. (1) Except as otherwise provided in this chapter, the state or any political subdivision that contracts for the construction, maintenance, repair, or improvement of public works may not require that a contractor, subcontractor, or material supplier or carrier engaged in the construction, maintenance, repair, or improvement of public works execute or otherwise become a party to any project labor agreement, collective bargaining agreement, prehire agreement, or other agreement with employees, their representatives, or any labor organization as a condition of bidding, negotiating, being awarded, or performing work on a public works contract.

- (2) For the purposes of this section, "public works" means:
 - (a) a building, road, street, sewer, storm drain, water system, irrigation system, reclamation project, or other facility owned or to be contracted for by the state or a political subdivision and that is paid for in whole or in part with tax revenue paid by residents of the state; or

(b) any other construction service or nonconstruction service as defined in **18-2-401**. *(Emphasis added)*

CONCLUSION(S):

NO. Section 18-2-425 MCA of Montana construction contract law prohibits a city from requiring that a contractor, subcontractor, material supplier, or carrier engaged in construction, maintenance, repair or improvement of public works execute or otherwise become a party to any project labor agreement, collective bargaining agreement, prehire agreement or other agreement with employees, their representatives, or any labor organization as a condition of bidding, negotiating, being awarded, or performing a public works contract.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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