

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2022-002

**TO:** John Engen, Dale Bickell, Leigh Griffing, Jeremy Keene, Kevin Slovarp, Troy Monroe, Brian Hensel, Monte Sipe, Logan McInnis, Ross Mollenhauer, Donna Gaukler, Shirley Kinsey, David Selvage, Nathan McLeod, Matt Lawson, Gordy Hughes, Brad Davis, Jaeson White, Scott Hoffman, Mike Brady, Morgan Valiant, Jolanda Cummings, Ashley Stayer, Erin Pehan, Marty Rehbein

**CC:** Department Attorney

**FROM:** Jim Nugent, City Attorney

**DATE** January 20, 2022

**RE:** Important statutory measures related to public works construction contracts.

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### **FACTS:**

This legal opinion is intended to assist and remind city staffs of important statutorily required measures to generally include in public works contracts.

### **ISSUE(S):**

Are there many statutory measures applicable to public works construction contracts to be aware of?

### **CONCLUSION(S):**

Yes. There are many important statutory public works construction contract measures identified herein.

### **LEGAL DISCUSSION:**

There are numerous statutory measures in Montana state law that are important to be aware of with respect to public works construction contracts. The following is an itemization of some key statutory measures to be aware of.

- (1) Pursuant to Montana's Little Davis Bacon Act (Montana Prevailing Wages) laws subsection 18-2-401(11)(a) MCA defines "public works contract" as meaning a

contract for construction services or for non-construction services let by the municipality in which the total cost of the contract is in excess of \$25,000.

- (2) Pursuant to Montana's Little Davis Bacon Act (Montana Prevailing Wages) section 18-2-422 MCA both the bid specifications as well as the public works contract must contain a provision for each job classification the standard prevailing wage rate including fringe benefits that contractors shall pay; requirement that payroll records be maintained for not less than 3 years as well as a provision requiring each contractor to post a statement of all wages and fringe benefits.
- (3) Pursuant to section 18-2-201 MCA entitled "SECURITY REQUIREMENTS" the municipality must require both a performance as well as a payment bond or other lawful money, such as cash, cashier's check in an amount at least equal to the contract sum to guarantee the faithful performance of the contract as well as payment of all laborers and contractors. Pursuant to subsection 18-2-201(4) MCA a municipality may waive the performance and payment bonds for projects that cost less than \$50,000 and assume the security risk associated with the project.
- (4) Pursuant to section 18-2-302 MCA generally each bid must be accompanied by bid security in the amount of 10% of the bid submitted.
- (5) Pursuant to section 49-3-207 MCA every state or local contract or subcontract for construction off public buildings or for other public work or for goods or services must contain a provision that all hiring must be on the basis of merit and qualifications as well as a second provision that there may not be discrimination on the basis of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability or national origin by the persons performing the contract.
- (6) In addition to the provisions of section 49-3-207 MCA April 13, 2010, the Missoula City Council adopted an ordinance prohibiting discrimination in city related matters on the basis of "sexual orientation, gender identity, or gender expression. See Missoula City Council ordinance number 3428.
- (7) Pursuant to section 7-5-4302 MCA entitled COMPETITIVE ADVERTISED BIDDING REQUIRED FOR CERTAIN PURCHASE AND CONSTRUCTION CONTRACTS; generally a contract for the purchase of any automobile, truck, other vehicle, road machinery, other machinery, apparatus, appliances, equipment, or materials or supplies for construction, repair or maintenance in excess of \$80,000 must be let to the lowest responsible bidder after advertisement for bids.
- (8) Please note that even if the cost is going to be less than \$80,000 it is a prudent practice to solicit multiple bids without advertising competitively in order to reduce or eliminate the potential for someone to allege fraud, collusion, bid favoritism between city staff and the successful recipient of the contract award.

- (9) Note some limited statutory exemptions from bidding or advertising requirements are set forth in sections 7-5-4301 and 7-5-4303 MCA.
- (10) With respect to required advertising for competitive bids; the general Montana state law to utilize for advertising for competitive bids is section 7-1-4127 MCA entitled “PUBLICATION OF NOTICE-CONTENT PROOF”.
- (11) Title 18, chapter 8 part 2 entitled “ARCHITECTURAL, ENGINEERING AND LAND SURVEYING SERVICES sets forth provisions of Montana state law applicable to retaining those services.
- (12) There also are SPECIAL PURCHASING CONDITIONS statutorily established for employing sheltered workshop clientele. See title 18, chapter 5, part 1 entitled “SHELTERED WORKSHOPS” as well as title 53-chapter 7 VOCATIONAL REHABILITATION; part 1 entitled “GENERAL VOCATIONAL REHABILITATION” and part 2 entitled “SHELTERED WORKSHOPS” MCA.

**CONCLUSION(S):**

Yes. There are many important statutory public works construction contract measures identified herein.

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/s/ Jim Nugent

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Jim Nugent, City Attorney

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