

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2014-009

TO: Mayor John Engen, Bruce Bender, Kevin Slovarp, Doug Harby, Monte Sipe, Ellen Buchanan, Chris Behan, Donna Gaukler, Alan White, Morgan Valiant, Jason Diehl, Jeff Brandt, Chad Nicholson, Mike Brady, Scott Hoffman, Leigh Griffing, Scott Paasch, Marty Rehbein, Nikki Rogers, Anne Guest, Doug Waters, Mike Haynes, Don Verrue, Carl Horton.

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE February 20, 2014

RE: City waiver or failure to require performance, labor and material bonds for building or construction projects means the City could be liable to persons intended to be protected by such bonds to the full extent and for the full amount of the contracted debts of any subcontractor or contractor on the building or construction project.

FACTS:

Each year there are inquiries concerning whether requiring performance, labor and materials bonds on city building and construction projects is required. The inquiries have already commenced for this calendar year.

ISSUE(S):

May a city waive the performance, labor and material bonds required for city building and construction projects pursuant to title 18, chapter 2, part 2 Montana Code Annotated (MCA).

CONCLUSION(S):

Pursuant to subsection 18-2-201(4) MCA for city building and construction projects costing less than \$50,000 a Montana city may waive the performance, labor and materials bonds for a specific city building or construction project. However, city officials and city employees need to be aware that pursuant to section 18-2-202 MCA, whenever a city waives or fails to require performance, labor and material bonds for city building and construction projects, the city then is liable to the persons intended to be protected by the performance, labor and material bonds to the

full extent and for the full amount of all of the contracted debts of any subcontractor or contractor working on the that specific city building or construction project.

LEGAL DISCUSSION:

Title 18 Montana Code Annotated (MCA) is entitled “PUBLIC CONTRACTS” and chapter 2 of title 18 is entitled “PUBLIC CONTRACTS GENERALLY” and chapter 2 of title 18 is entitled “CONSTRUCTION CONTRACTS”.

Part 2 of title 18, chapter 2 is entitled “PERFORMANCE, LABOR AND MATERIALS BONDS”. Section 18-2-201 MCA entitled “SECURITY REQUIREMENTS” provides as follows:

18-2-201. Security requirements. (1) (a) Except as otherwise provided in 85-1-219 and subsections (3) through (5) of this section, whenever any board, council, commission, trustees, or body acting for the state or any county, municipality, or public body contracts with a person or corporation to do work for the state, county, or municipality or other public body, city, town, or district, the board, council, commission, trustees, or body shall require the person or corporation with whom the contract is made to make, execute, and deliver to the board, council, commission, trustees, or body a good and sufficient bond with a surety company, licensed in this state, as surety, conditioned that the person or corporation shall:

- (i) faithfully perform all of the provisions of the contract;
- (ii) pay all laborers, mechanics, subcontractors, and material suppliers; and
- (iii) pay all persons who supply the person, corporation, or subcontractors with provisions, provender, material, or supplies for performing the work.

(b) The state or other governmental entity listed in subsection (1)(a) may not require that any bond required by subsection (1)(a) be furnished by a particular surety company or by a particular insurance producer for a surety company.

(2) The state or other governmental entity listed in subsection (1)(a) may, in lieu of a surety bond, permit the deposit with the contracting governmental entity or agency of the following securities in an amount at least equal to the contract sum to guarantee the faithful performance of the contract and the payment of all laborers, suppliers, material suppliers, mechanics, and subcontractors:

- (a) lawful money of the United States; or
- (b) a cashier's check, certified check, bank money order, certificate of deposit, money market certificate, bank draft, or irrevocable letter of credit, drawn or issued by:
 - (i) any federally or state-chartered bank or savings and loan association that is insured by or for which insurance is administered by the federal deposit insurance corporation; or
 - (ii) a credit union insured by the national credit union share insurance fund.

(3) Any board, council, commission, trustee, or body acting for any county, municipality, or public body other than the state may, subject to the provisions of subsection (1)(b), in lieu of a bond from a licensed surety company, accept good and sufficient bond with two or more sureties acceptable to the governmental entity.

(4) Except as provided in subsection (5), the state or other governmental entity may waive the requirements contained in subsections (1) through (3) for building or construction projects, as defined in 18-2-101, that cost less than \$50,000.

(5) A school district may waive the requirements contained in subsections (1) through (3) for building or construction projects, as defined in [18-2-101](#), that cost less than \$7,500. (emphasis added)

Section 18-2-201 MCA generally establishes performance, labor and materials bonds for public building and construction projects. Pursuant to subsection 18-2-201(4) MCA it is possible for building or construction projects costing less than \$50,000 a Montana governmental entity has discretion to waive the performance, labor and materials bonds for a public building or construction project costing less than \$50,000.

However, pursuant to section 18-2-202 MCA if a city waives or fails to require performance, labor or material bonds for a building or construction project, the city “is liable to the persons mentioned in 18-2-201 to the full extent and for the full amount of all of the contracted debts by any subcontractor as well as the contractor”. Section 18-2-202 MCA entitled “FAILURE TO REQUIRE SECURITY-WAIVER” provides in its entirety as follows:

18-2-202. Failure to require security -- waiver. If any board, council, commission, trustee, or body acting for the state or any board of county commissioners or any mayor and common council of any incorporated city or town or tribunal transacting the business of any such municipal corporation waives or fails to take the security required or authorized by [18-2-201](#), the state or the county, incorporated city or town, or other municipal corporation is liable to the persons mentioned in 18-2-201 to the full extent and for the full amount of all of the contracted debts by any subcontractor as well as the contractor. (emphasis added)

It should also be noted that pursuant to section 18-2-203 MCA entitled “AMOUNT AND TERMS OF SECURITY”, it is required that “the security mentioned in 18-2-201 MUST BE IN THE AMOUNT EQUAL TO THE FULL CONTRACT PRICE AGREED TO BE PAID FOR THE WORK OR IMPROVEMENT and must be to” the city. (emphasis added).

Subsequent provisions of title 18, chapter 2, part 2 MCA provide a process for someone making claims. Section 18-2-207 MCA provides that the prevailing party in a suit or action is entitled to also recover their litigation costs, including reasonable attorney fees.

Finally it should be noted that subsection 18-2-208(2) MCA authorizes a city to “impose any other or further conditions and obligations in the security that is considered NECESSARY FOR ITS PROPER PROTECTION IN THE FULFILLMENT OF THE TERMS OF THE CONTRACT and not in conflict with” the provisions of title 18, chapter 2, part 2 MCA. (emphasis added)

CONCLUSION(S):

Pursuant to subsection 18-2-201(4) MCA for city building and construction projects costing less than \$50,000 a Montana city may waive the performance, labor and materials bonds for a specific city building or construction project. However, city officials and city employees need to be aware that pursuant to section 18-2-202 MCA, whenever a city waives or fails to require

performance, labor and material bonds for city building and construction projects, the city then is liable to the persons intended to be protected by the performance, labor and material bonds to the full extent and for the full amount of all of the contracted debts of any subcontractor or contractor working on the that specific city building or construction project.

OFFICE OF THE CITY ATTORNEY

Jim Nugent, City Attorney

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