

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2014-027

**TO:** Donna Gaukler; Alan White; David Selvage; Neil Miner; MRA Staff; Kevin Slovarp; Doug Harby; Monte Sipe; Jason Diehl; Jeff Brandt; Chad Nicholson; Mike Brady; Scott Hoffman; Mike Colyer; Chris Odlin; Richard Stepper; Brian Hensel; Jack Stucky; Anne Guest; Ron Regan; Don Verrue; Mike Haynes; Bruce Bender; Dale Bickell; Leigh Griffing; and Scott Paasch

**CC:** Mayor John Engen and Legal Department Staff

**FROM:** Jim Nugent, City Attorney

**DATE** October 27, 2014

**RE:** Public Works contracts for construction or non-construction services that potentially cost in excess of \$25,000.00 must include a copy of current standard prevailing wages in both the bid specifications as well as in the Construction Services Contract.

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### **FACTS:**

Throughout the past year, drafts of numerous bid specifications have not initially included the standard prevailing wages when a public works contract for construction or non-construction services would potentially cost in excess of \$25,000.00.

### **ISSUE:**

If a public works contract for construction or non-construction services may potentially cost in excess of \$25,000.00, must a copy of the current standard prevailing wages be included in both the bid specifications as well as the construction services contract for that project?

### **CONCLUSION:**

Yes, if a public works contract for construction services or non-construction services might cost in excess of \$25,000.00, Montana state law requires that the current standard prevailing wages be included in both the bid specifications as well as in the public works contract for construction services.

## **LEGAL DISCUSSION:**

Title 18, Chapter Two Montana Code Annotated (MCA) is entitled “Construction Contracts”. Title 18, Chapter Two, Part Four MCA is entitled “Special Conditions-Standard Prevailing Rate of Wages”.

The Statutory definitions applicable to the standard prevailing rate of wages part are set forth in Section 18-2-401, MCA. Key important words or phrases as defined in Section 18-2-401, MCA include; but are not necessarily limited to “construction services”, “contractor”, “fringe benefits”, “non-construction services”, and “public works contract” which are defined as follows in subsections 18-2-401 (3), (4), (8), (9), and (11), MCA:

....

(3) (a) “Construction services” means work performed by an individual in building construction, heavy construction, highway construction, and remodeling work.

(b) The term does not include:

(i) engineering, superintendence, management, office, or clerical work on a public works contract; or

(ii) consulting contracts, contracts with commercial suppliers for goods and supplies, or contracts with professionals licensed under state law.

(4) “Contractor” means any individual, general contractor, subcontractor, firm, association, partnership, corporation, limited liability partnership, or limited liability company engaged in construction services.

....

(8) “Fringe benefits” means health, welfare, and pension contributions that meet the requirements of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, et seq., and other bona fide programs approved by the U.S. department of labor.

(9) “Nonconstruction services” means work performed by an individual, not including management, office, or clerical work, for:

(a) the maintenance of publicly owned buildings and facilities, including public highways, roads, streets, and alleys;

(b) custodial or security services for publicly owned buildings and facilities;

(c) grounds maintenance for publicly owned property;

(d) the operation of public drinking water supply, waste collection, and waste disposal systems;

(e) law enforcement, including janitors and prison guards;

(f) fire protection;

(g) public or school transportation driving;

(h) nursing, nurse's aid services, and medical laboratory technician services;

(i) material and mail handling;

(j) food service and cooking;

(k) motor vehicle and construction equipment repair and servicing; and

(l) appliance and office machine repair and servicing.

....

(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.

(b) The term does not include contracts entered into by the department of public health and human services for the provision of human services. (Emphasis added)

Section 18-2-402, MCA provides that the Montana Commissioner of Labor and Industry determines the standard prevailing rate of wages, including fringe benefits, applicable to public works contracts pursuant to Title 18, Chapter Two, Part Four, MCA.

Section 18-2-422 MCA is the section of Montana State prevailing wage law that requires that all public works contracts (contracts costing in excess of \$25,000.00) must contain the current prevailing wages in both the bid specifications as well as in the public works contract. Section 18-2-422, MCA provides:

**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. (Emphasis added)

Inclusion of the prevailing wages in both the bid specification as well as the contract is extremely important for City of Missoula employees to know, understand, and implement because subsection 18-2-403 (9) of Montana Standard Prevailing Wage Law provides:

“(9) Failure to include the provisions required by 18-2-422 in a public works contract relieves the contractor from the contractor's obligation to pay the standard prevailing wage rate and places the obligation on the public contracting agency. (Emphasis added)

Pursuant to Sections 18-2-407 and 18-2-432, MCA the penalties imposed for violations of Montana's Standard Prevailing Wage Rate laws are quite significant. These sections provide:

**18-2-407. Forfeiture for failure to pay standard prevailing rate of wages.** (1) Except as provided in 18-2-403, a contractor, subcontractor, or employer who pays workers or employees at less than the standard prevailing rate of wages as established under the public works contract shall forfeit to the department a penalty at a rate of up to 20% of the delinquent wages plus fringe benefits, attorney fees, audit fees, and court costs. Money collected by the department under this section must be deposited in the general

fund. A contractor, subcontractor, or employer shall also forfeit to the employee the amount of wages owed plus \$25 a day for each day that the employee was underpaid. (2) Whenever it appears to the contracting agency or to the commissioner that there is insufficient money due to the contractor or the employer under the terms of the contract to cover penalties, the commissioner may, within 90 days after the filing of notice of completion of the project and its acceptance by the contracting agency, maintain an action in district court to recover all penalties and forfeitures due. This part does not prevent the individual worker who has been underpaid or the commissioner on behalf of all the underpaid workers from maintaining an action for recovery of the wages due under the contract as provided in Title 39, chapter 3, part 2. (Emphasis added)

**18-2-432. Penalty for violation.** (1) (a) If a person, firm, or corporation fails to comply with the provisions of this part, the state, county, municipality, school district, or officer of a political subdivision that executed the public works contract shall retain \$1,000 of the contract price as liquidated damages for the violation of the terms of the public works contract, and the money must be credited to the proper funds of the state, county, municipality, school district, or political subdivision.

(b) If a person, firm, or corporation fails to comply with the provisions of this part due to gross negligence, as determined by the commissioner, the commissioner may retain up to an additional \$10,000 above the amount provided for in subsection (1)(a) as a penalty for the violation of the terms of the public works contract. The money retained pursuant to this subsection (1)(b) must be credited to the proper funds of the state, county, municipality, school district, or other political subdivision.

(2) Whenever a contractor or subcontractor is found by the commissioner to have aggravatedly or willfully violated the labor standards provisions of this chapter, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest is ineligible, for a period not to exceed 3 years after the date of the final judgment, to receive any public works contracts or subcontracts that are subject to the provisions of this chapter.

(3) Whenever an action has been instituted in a district court in this state against any person, firm, or corporation for the violation of this part, the court in which the action is pending is authorized to issue an injunction to restrain the person, firm, or corporation from proceeding with a public works contract with the state, county, municipality, school district, or political subdivision, pending the final determination of the instituted action.

(Emphasis added)

There are several other statutory provisions in Montana's standard prevailing wage laws. A subsection that also is important to be aware of because it is utilized by the City of Missoula is Subsection 18-2-403 (5), MCA which provides:

(5) An employer who, as a nonprofit organization providing individuals with vocations rehabilitations, performs a public works contract for nonconstruction services and who employs an individual whose earning capacity is impaired by a mental, emotional, or physical disability may pay the individual wages that are less than the standard prevailing wage if the employer complies with the provisions of section 214(c) of the Fair Labor

Standards Act of 1938, 29 U.S.C. 214 and 29 CFR, part 525, and the wages paid are equal to or above the minimum wage required in 39-3-409. (Emphasis added)

Title 53, 7 MCA is entitled “Vocational Rehabilitation”. Title 53, Chapter 7, Part 2 is entitled “Sheltered Workshops” and pertains to supervised work programs and support services for persons with severe disabilities.

**CONCLUSION(S):**

Yes, if a public works contract for construction services or non-construction services might cost in excess of \$25,000.00, Montana state law requires that the current standard prevailing wages be included in both the bid specifications as well as in the public works contract for construction services.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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