

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2014-029

TO: Donna Gaukler; Chris Boza; Neil Miner; David Selvage; Alan White; MRA Staff; Kevin Slovarp; Doug Harby; Monte Sipe; Dan Jordan; Don Verrue; Brian Hensel; Anne Guest; Mike Haynes; Dale Bickell; Leigh Griffing; Bruce Bender; Jack Stucky; Ron Regan; Scott Paasch; Jason Diehl; Jeff Brandt; Chad Nicholson; Mike Brady; Scott Hoffman; Mike Colyer; Chris Odlin; Richard Stepper; Laurie Clark; Human Resources Staff; Kathy Mehring; Betsy Willett; Jessica Miller; Linda Jordan; and Heidi Bakula

CC: Mayor John Engen; Ginny Merriam; City Clerk Staff; and Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE November 13, 2014

RE: Montana state law requires that every local government contract or subcontract for construction of public buildings or other public works or for goods or services must contain provisions that all hiring must be on the basis of merit and qualifications as well as a nondiscrimination provision.

FACTS:

This year there have been many draft contracts submitted to our office for review that did not include the statutorily required provisions that all hiring must be on the basis of merit and qualifications as well as must contain a nondiscrimination provision. The purpose of this Legal Opinion is to remind everyone that these provisions are Montana state law statutory requirements that must be complied with.

ISSUE:

Does Montana state law statutorily require that every public contract or subcontract must contain provisions providing that all hiring must be on the basis of merit and qualifications as well as a provision that a nondiscrimination provision be included in the contract or subcontract?

CONCLUSION:

Yes, pursuant to Montana's statutory "Governmental Code of Fair Practices" laws, pursuant to section 49-3-207 MCA every local government contract or subcontract must contain a provision

that all hiring must be on the basis of merit and qualifications as well as must contain a nondiscrimination provision.

LEGAL DISCUSSION:

Montana's "GOVERNMENTAL CODE OF FAIR PRACTICES" is set forth in title 49, chapter 3 Montana Code Annotated (MCA). Part 2 of title 49, chapter 3 MCA is entitled "DUTIES OF GOVERNMENTAL AGENCIES AND OFFICIALS". Set forth within title 49, chapter 3, part 2 MCA is section 49-3-207 MCA entitled "NONDISCRIMINATION PROVISION IN ALL PUBLIC CONTRACTS" stating as follows:

49-3-207. Nondiscrimination provision in all public contracts. Every state or local contract or subcontract for construction of 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 and a 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. (emphasis added)

The Montana statutory language requiring that every Montana local government contract or subcontract must contain a provision that all hiring must be on the basis of merit and qualifications as well as a nondiscrimination provision are specific and explicit statutory requirements.

In addition, to the statutory non discrimination language set forth in section 49-3-207 MCA, ever since the Missoula City Council's adoption of ordinance 3428 on April 10, 2010, the City of Missoula also includes language to the effect that there also must be no discrimination based on "sexual orientation, gender identity or gender expression". Sometimes it does occur that a Montana state agency or department that for example is providing monies to the City of Missoula for a road project, etc., will not agree to include the "sexual orientation, gender identity or gender expression" language in their Montana state form contracts. Therefore, the language adopted pursuant to Missoula City council ordinance 3428 is not included; so that the City of Missoula does not lose the opportunity to receive either state or federal monies for a specific purpose. However, most generally the language from Missoula City Council ordinance 3428 is included in city contracts and subcontracts. A copy of sample language that could be utilized for both provisions is attached hereto as attachment "A".

Sometimes it appears that the draft contract language submitted to our office is from a retained consulting professional engineer. It would be prudent as well as efficient for the contractual reviews that city staff must perform to always be sure to provide the retained professional engineer consultant notice about section 49-3-207 MCA as well as section 18-2-422 MCA pertaining to prevailing wage rate inclusions in both the bid specifications as well as the contract for any and all contracts governed by title 18, chapter 2, part 4 MCA that exceed \$25,000.00 in monetary costs. See City Attorney Legal Opinion 2014-027, issued October 27, 2014.

CONCLUSION:

Yes, pursuant to Montana's statutory "Governmental Code of Fair Practices" laws, pursuant to section 49-3-207 MCA every local government contract or subcontract must contain a provision that all hiring must be on the basis of merit and qualifications as well as must contain a nondiscrimination provision.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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ATTACHMENT A

NON-DISCRIMINATION. All hiring shall be on the basis of merit and qualification and there shall be no discrimination in employment on the basis of race, ancestry, color, physical or mental disability, religion, national origin, sex, age, marital or familial status, creed, ex-offender status, physical condition, political belief, public assistance status, sexual orientation or gender identity/expression, except where these criteria are reasonable bona fide occupational qualifications.

AFFIRMATIVE ACTION POLICY. Contractors, subcontractors, sub grantees, and other firms doing business with the City of Missoula must be in compliance with the City of Missoula's Affirmative Action Plan, and Title 49 Montana Codes Annotated, entitled "Human Rights" or forfeit the right to continue such business dealings.

The City's Affirmative Action Policy Statement is:

The Mayor of the City of Missoula or the Mayor's designee may adopt an affirmative action plan to provide all persons equal opportunity for employment without regard to race, ancestry, color, handicap, religion, creed, national origin, sex, age, or marital status. In keeping with this commitment, we are assigning to all department heads and their staff the responsibility to actively facilitate equal employment opportunity for all present employees, applicants, and trainees. This responsibility shall include assurance that employment decisions are based on furthering the principle of equal employment opportunity by imposing only valid requirements for employment and assuring that all human resource actions are administered on the basis of job necessity.

Specific responsibility for developing, implementing, monitoring and reporting are assigned to the City Human Resource staff under the supervision and direction of the Chief Administrative Officer and the Mayor.

It is the policy of the City of Missoula to eliminate any practice or procedure that discriminates illegally or has an adverse impact on an "affected" class. Equal opportunity shall be provided for all City employees during their terms of employment. All applicants for City employment shall be employed on the basis of their qualifications and abilities.

The City of Missoula, where practical, shall utilize minority owned enterprises and shall ensure that subcontractors and vendors comply with this policy. Failure of subcontractors and vendors to comply with this policy statement shall jeopardize initial, continued, or renewed funds.

Our commitment is intended to promote equal opportunity in all employment practices and provide a positive program of affirmative action for the City of Missoula, its employees, program participants, trainees and applicants.