

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2017-016

TO: City Council; Mayor Engen; Municipal Court Judge Kathleen Jenks; Dale Bickell; Tina Reinicke; Leigh Griffing; Steve Johnson; Scott Paasch

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE June 21, 2017

RE: Montana municipal contract laws do not require competitive bidding for (1) professional, (2) technical, (3) engineering, or (4) legal services retained by a Montana municipality

FACTS:

Inquiries have arisen pertaining to the City of Missoula Municipal Court's desire to retain certain professional services to assist the City of Missoula Municipal Court with respect to certain criminal defendant monitoring.

ISSUE(S):

Do Montana's municipal contract statutes require competitive bidding for the retention of professional services?

CONCLUSION(S):

No. Montana municipal contract law, section 7-5-4301, MCA, provides that a Montana municipality is not required to engage in competitive bidding to retain professional services, technical services, engineering services or legal services.

LEGAL DISCUSSION:

Title 7, chapter 5 MCA is entitled "GENERAL OPERATION AND CONDUCT OF BUSINESS". The chapter sets forth numerous parts pertaining to Montana local county and municipal government operations. Title 7 chapter 5, part 43, MCA, is entitled "MUNICIPAL CONTRACTS AND FRANCHISES". Section 7-5-4301, MCA, is entitled "POWER TO ENTER AND EXECUTE CONTRACTS". Section 7-5-4301 MCA provides that all necessary municipal contracts for (1) professional, (2) technical, (3) engineering, and (4) legal services are excluded from the municipal contract laws pertaining to competitive bidding.

Section 7-5-4301 MCA states as follows:

7-5-4301. Power to enter and execute contracts. (1) A city or town is authorized to make any contracts necessary to carry into effect the applicable powers granted by this chapter and to provide for the manner of executing the contracts.

(2) (a) All necessary contracts for professional, technical, engineering, or legal services are excluded from the provisions of **7-5-4302** through **7-5-4304**, **7-5-4306**, and **7-5-4307**. However, contracts in which the value of the majority of the services to be rendered constitute services other than professional, technical, engineering, or legal services must be awarded under the bidding procedure provided for in **7-5-4302** through **7-5-4304**, **7-5-4306**, and **7-5-4307**.

(b) (i) Except as provided in subsection (2)(b)(ii), supervision over or operation of a physical plant that provides water, sewer, or power services to a municipality does not constitute a service excluded under the provisions of subsection (2)(a).

(ii) A city, town, or municipality may extend, renew, or amend a contract or series of contracts for the supervision or operation of a physical plant that provides water, sewer, or power services without proceeding under the bidding procedure provided for in **7-5-4302** through **7-5-4304**, **7-5-4306**, and **7-5-4307** if:

(A) one or more of the contracts were awarded to the entity in accordance with the competitive bidding procedures provided in **7-5-4302** through **7-5-4304**, **7-5-4306**, and **7-5-4307**; and

(B) the entity has provided the services to the city, town, or municipality for the immediately preceding 5-year period.

Of course, a municipality does always have discretion to request or invite proposals for obtaining professional, technical, engineering and legal services.

Further, section 7-5-4301 MCA should not be confused with title 18, chapter 8, part 2 entitled “ARCHITECTURAL, ENGINEERING, AND LAND SURVEYING SERVICES”, which is a statutory process for government to identify architectural, engineering and land surveyors who have demonstrated competence and qualifications for various types of professional services that a government may be retaining in the future at fair and reasonable prices. Once competent and qualified architectural, engineering and land surveying service providers are identified, when the government has a need for that specific service, the government shall negotiate with the most qualified firm; but if the government agency is unable to negotiate a satisfactory contract with the firm initially selected, the government may select another firm to negotiate with. See sections 18-8-201, 18-8-204 and 18-8-205, MCA.

Section 7-5-4302 MCA is entitled “COMPETITIVE, ADVERTISED BIDDING REQUIRED FOR CERTAIN PURCHASE AND CONSTRUCTION CONTRACTS”. Section 7-5-4302, MCA, requires that competitive bidding occur with respect to contracts for the purchase of (1) any automobile, (2) truck, (3) other vehicle, (4) road machinery, (5) other machinery, (6) apparatus, (7) appliances, (8) equipment, (9) materials, (10) supplies, (11) construction, (12) repair, (13) maintenance in excess of \$80,000..

Section 7-5-4302 MCA states as follows:

- 7-5-4302. Competitive, advertised bidding required for certain purchase and construction contracts.** (1) Except as provided in **7-5-4303**, **7-5-4310**, or Title 18, chapter 2, part 5, a contract for the purchase of any automobile, truck, other vehicle, road machinery, other machinery, apparatus, appliances, equipment, or materials or supplies or for construction, repair, or maintenance in excess of \$80,000 must be let to the lowest responsible bidder after advertisement for bids.
- (2) The advertisement must be published as provided in **7-1-4127**, and the second publication must be made not less than 5 days or more than 12 days before the consideration of bids. If the advertisement is made by posting, 15 days must elapse, including the day of posting, between the time of the posting of the advertisement and the day set for considering bids.
- (3) The council may:
- (a) postpone awarding a contract until the next regular meeting after bids are received in response to the advertisement;
 - (b) reject any or all bids; and
 - (c) readvertise as provided in this section.

The City of Missoula purchasing and contracts policy pursuant to provision 8(D) provides for invitation for bids for procurement of goods, services, and equipment greater than \$80,000 where vendor selection is determined exclusively on price.

CONCLUSION(S):

No. Montana municipal contract law, section 7-5-4301, MCA, provides that a Montana municipality is not required to engage in competitive bidding to retain professional services, technical services, engineering services or legal services.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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