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Legal Opinion 2014-015

TO: Jack Stucky

CC: Mayor John Engen, Bruce Bender, Leigh Griffing, Scott Paasch, Kevin Slovarp, Mike Haynes, Human Resources Department, City Clerk Department, City Attorney Department

FROM: Jim Nugent, City Attorney

DATE: March 31, 2014

RE: Employer may pay sheltered workshop individuals less than prevailing wages if sheltered workshop is compliant with Subsection 18-2-403(5), MCA pursuant to statutory special purchasing conditions for purchasing services from vocational rehabilitation supervised work programs.

FACTS:

An additional inquiry arose associated with City Attorney Legal Opinion 2014-013 pertaining to wages with respect to the City utilizing Opportunity Resources for janitorial services for some city owned buildings, such as city hall and city council chambers. There is Montana state law authorization for the city to purchase such supervised work program services from a sheltered work shop. A copy of Legal Opinion 2014-013 is attached hereto.

ISSUE(S):

May individuals with vocational rehabilitation programs performing public works contracts for non-construction services whose earning capacity is impaired by a mental, emotional, or physical disability be paid less than the standard prevailing wage?

CONCLUSION(S):

Yes, pursuant to Montana state laws in title 18, subsection 18-2-403 MCA an employer may pay a nonprofit organization (sheltered workshop) providing individuals with vocational rehabilitation, whose earning capacity is impaired by a mental, emotional or physical disability less than the standard prevailing wage as long as the nonprofit organization is in compliance with the provisions of subsection 18-2-403 (MCA).

LEGAL DISCUSSION:

Pursuant to subsection 18-2-403 (5), MCA a nonprofit organization providing vocational rehabilitation for individuals whose earning capacity is impaired by a mental, emotional or physical disability may be paid less than prevailing wages, but at least minimum wage. Section 18-2-403 MCA states:

18-2-403. Preference of Montana labor in public works -- wages -- tax-exempt project -- federal exception.

(1) In every public works contract, there must be inserted in the bid specification and the public works contract a provision requiring the contractor to give preference to the employment of bona fide Montana residents in the performance of the work.

(2) All public works contracts for construction services under subsection (1), except those for heavy and highway construction, that are conducted at the project location or under special circumstances must contain a provision requiring the contractor to pay:

(a) the travel allowance that is in effect and applicable to the district in which the work is being performed; and

(b) the standard prevailing rate of wages, including fringe benefits, that is in effect and applicable to the district in which the work is being performed.

(3) In every public works contract for heavy and highway construction, there must be inserted a provision to require the contractor to pay the standard prevailing wage rates established statewide for heavy and highway construction services conducted at the project location or under special circumstances.

(4) Except as provided in subsection (5), all public works contracts for nonconstruction services under subsection (1) must contain a provision requiring the contractor to pay:

(a) the travel allowance that is in effect and applicable to the district in which the work is being performed; and

(b) the standard prevailing rate of wages, including fringe benefits, that is in effect and applicable to the district in which the work is being performed.

(5) An employer who, as a nonprofit organization providing individuals with vocational rehabilitation, 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.

(6) Transportation of goods, supplies, materials, and manufactured or fabricated items to or from the project location is not subject to payment of the standard prevailing rate of wages.

(7) A contract, other than a public works contract, let for a project costing more than \$25,000 and financed from the proceeds of bonds issued under Title 17, chapter 5, part 15, or Title 90, chapter 5 or 7, must contain a provision requiring the contractor to pay the standard prevailing wage rate in effect and applicable to the district in which the work is being performed unless the contractor performing the work has entered into a collective bargaining agreement covering the work to be performed.

(8) A public works contract may not be let to any person, firm, association, or corporation

refusing to execute an agreement with the provisions described in subsections (1) through (7) in it, provided that in public works contracts involving the expenditure of federal-aid funds, this part may not be enforced in a manner as to conflict with or be contrary to the federal statutes prescribing a labor preference to honorably discharged veterans of the armed forces and prohibiting as unlawful any other preference or discrimination among citizens of the United States.

(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)

Title 53, chapter 7 MCA is entitled “VOCATIONAL REHABILITATION”. Part 2 of title 53, chapter 7 MCA is entitled “SHELTERED WORKSHOPS”. Subsection 53-7-201(1) MCA expressly indicates that the purpose of title 53, chapter 7, part 2 pertaining to “SHELTERED WORKSHOPS” “is to encourage the development and improvement of supervised work programs and support services for persons with severe disabilities”. Section 53-7-201 MCA provides:

53-7-201. Legislative findings and purpose. (1) The purpose of this part is to encourage the development and improvement of supervised work programs and support services for persons with severe disabilities.

(2) Supervised work programs and support services should be available to provide persons with severe disabilities the skills and means by which they may lead socially and vocationally productive lives so they can be integrated into society.

(3) The state may encourage the establishment of and provide funding for supervised work programs and support services for persons with severe disabilities. (emphasis added)

Section 53-7-203 MCA is entitled “PURCHASE OF SERVICES” for the purchase of services from a supervised work program for work performed by persons with severe disabilities utilizing funds appropriated or allocated from any sheltered employment provider, work activity center, supported employment provider or support services provider. The MCA Annotations for section 53-7-203 MCA volume 11, at page 600 in identifying and discussing the legislative intent of the 1989 amendment states that the statement of intent attached to the 1989 state legislation states in part:

“IT IS THE INTENT OF THE LEGISLATURE IN ENACTING THIS BILL, TO ESTABLISH A COMPREHENSIVE PROGRAM OF SUPERVISED WORK AND SUPPORT SERVICES FOR PERSONS WITH SEVERE DISABILITIES. THE PROGRAM MUST INCLUDE SHELTERED EMPLOYMENT, SUPPORTED EMPLOYMENT, WORK ACTIVITY, AND SUPPORT SERVICES THAT WILL HELP PERSONS WHO ARE SEVERELY DISABLED TO LEAD SOCIALLY AND VOCATIONALLY PRODUCTIVE LIVES SO THEY CAN BE INTEGRATED INTO SOCIETY.” (emphasis added)

After the identification of the legislative history in the codified MCA, there is a cross reference to special state purchasing conditions pertaining to sheltered workshops in title 18, chapter 5,

part 1 MCA. Title 18 MCA is entitled “PUBLIC CONTRACTS”. Title 18, chapter 5 MCA is entitled “SPECIAL PURCHASING CONDITIONS”. Title 18, chapter 5, part 1 MCA is entitled “SHELTERED WORKSHOPS”.

Section 18-5-101 MCA sets forth definitions, including definitions of a “certified sheltered workshop” or “work activity center” as well as a definition of a “person with a disability”. Section 18-5-101 MCA provides:

18-5-101. Definitions. As used in this part, the following definitions apply:

- (1) "Certified sheltered workshop" or "work activity center" means a nonprofit corporation incorporated under the laws of the state for the purpose of providing vocational services to persons with disabilities, in whole or in part, that:
 - (a) holds a current certificate issued by the United States department of labor for either one or all of the following:
 - (i) evaluation or training;
 - (ii) a regular work program; or
 - (iii) a work activity center;
 - (b) complies with other applicable occupational, health, and safety standards of local, state, and federal governments governing the operation of the facility not otherwise included in this part;
 - (c) in the manufacture of products and in the provision of service, whether or not the product or service is procured under this part, employs and trains persons with disabilities for not less than 75% of the hours of direct labor required for the manufacture of products or the provision of service; and
 - (d) is referred to as a "facility".
- (2) "Department" means the department of administration.
- (3) "Person with a disability" means an individual with a physical, mental, or emotional disability that constitutes a substantial impediment to employment and that prevents the individual with the disability from engaging in normal competitive employment.

Section 18-5-103 MCA entitled “PROCUREMENT REQUIREMENTS” authorizes the purchase of services from a certified sheltered workshop without the requirement of competitive bidding being applicable to the purchase of services from a supervised work program. Section 18-5-103 MCA provides:

“18-5-103. PROCUREMENT REQUIREMENTS”. State departments, institutions, and agencies may procure listed products and services from a facility. THE PROVISIONS OF THIS TITLE (title 18 MCA) RELATING TO COMPETITIVE BIDDING DO NOT APPLY TO PURCHASES MADE IN ACCORDANCE WITH THIS PART. “(emphasis added)

Pursuant to title 18 statutory definitions, a public agency is defined pursuant to subsection 18-1-101(2)(c) MCA as including “political subdivisions”. “Political subdivisions include city or municipal corporations. See for example subsection 2-9-101(5) and 7-7-109(1)(c) MCA.

CONCLUSION(S):

Yes, pursuant to Montana state laws in title 18, subsection 18-2-403 MCA an employer may pay a nonprofit organization (sheltered workshop) providing individuals with vocational rehabilitation, whose earning capacity is impaired by a mental, emotional or physical disability less than the standard prevailing wage as long as the nonprofit organization is in compliance with the provisions of subsection 18-2-403 (MCA).

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/s/ _____
Jim Nugent, City Attorney
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