

OFFICE OF THE CITY ATTORNEY

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

Legal Opinion 2015-020

TO: Mayor John Engen; Dale Bickell; Steve Johnson; Donna Gaukler; Chris Boza; David Selvage; Alan White; Bob Worthen; Morgan Valiant; John Wilson; Mike Haynes; Kevin Slovarp; Doug Harby; Monte Sipe; Ellen Buchanan; Chris Behan; Mike Brady; Scott Hoffman; Jason Diehl; Jeff Brandt; Chad Nicholson; Anne Guest; Brian Hensel; Wayne Gravatt; Ron Regan; and Marty Rehbein

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE July 21, 2015

RE: Public works contracts may not be separated into multiple contracts, work orders or similar devices so that the effect is circumvention or avoidance of bidding requirements of public contracts such as prevailing wages.

FACTS:

Two city department staffs recently received inquiries from private contractors pertaining to whether they were required to pay standard prevailing wages if a change order to their public works contract caused the total cost of the public works project to exceed \$25,000.00.

ISSUE:

If a contractor with a municipal government public works contract is not paying prevailing wages and a public contract change order causes the total cost of a public works project contract to exceed \$25,000.00 does a monetary cost exceeding \$25,000.00 require the contractor to pay prevailing wages for all contractor work performed pursuant to the public works project contract?

CONCLUSION:

Yes. There is a statutory prohibition in Montana municipal government law that prohibits division of public contracts to circumvent or avoid compliance with public contract bidding requirements. Pursuant to Montana bidding law requirements, prevailing wages must be paid for all public work contracts the monetary cost of which is in excess of \$25,000.00. Further, pursuant to Section 7-5-4305, MCA there is a prohibition against utilizing several contracts,

separate work orders or similar devices to circumvent or avoid public contract bidding requirements.

LEGAL DISCUSSION:

Title 18 MCA is entitled “PUBLIC CONTRACTS”. Title 18, chapter 2 MCA is entitled “CONSTRUCTION CONTRACTS”. Title 18, chapter 2, part 4 is entitled “SPECIAL CONDITIONS-STANDARD PREVAILING WAGES”.

Section 18-2-401 MCA pertaining to definitions define the terms “public works contract” and “standard prevailing wages” as follows:

18-2-401. Definitions. Unless the context requires otherwise, in this part, the following definitions apply:

...

(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.

...

(13) "Standard prevailing rate of wages" or "standard prevailing wage" means the rates established as provided in:

(a) 18-2-413 for building construction services;

(b) 18-2-414 for heavy construction services and for highway construction services; and

(c) 18-2-415 for nonconstruction services. (emphasis added)

The total cost of a contract obviously would include any and all work orders or change orders. Pursuant to section 18-2-403 MCA all public works contracts must contain a provision requiring the contractor to pay the standard prevailing wages including fringe benefits.

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)

Pursuant to Montana state law section 18-2-422 MCA both the bid specifications as well as the public works contract itself must include provisions stating for each job classification the standard prevailing wages to be paid. 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)

Clearly the standard prevailing wage requirements are bidding requirements for Montana municipal public works contracts.

Section 7-5-4305 MCA prohibits separating a public works contract into multiple contracts, separate work orders or similar devices thereby having the effect of circumventing or avoiding complying with bidding requirements for municipal contracts, such as the prevailing wage standards. Section 7-5-4305 MCA provides as follows:

7-5-4305. Prohibition on division of contracts to circumvent bidding requirements. Whenever any law of this state provides a limitation upon the amount of money that a city or town can expend upon any public work or construction project without letting such public work or construction project to contract under competitive bidding procedures, a city or town shall not circumvent such provision by dividing a public work or construction project or quantum of work to be performed thereunder, which by its nature or character is integral to such public work or construction project or serves to accomplish one of the basic purposes or functions thereof, into several contracts or separate work orders or by any similar device. (Emphasis added)

CONCLUSION:

Yes. There is a statutory prohibition in Montana municipal government law that prohibits division of public contracts to circumvent or avoid compliance with public contract bidding requirements. Pursuant to Montana bidding law requirements, prevailing wages must be paid for all public work contracts the monetary cost of which is in excess of \$25,000.00. Further, pursuant to Section 7-5-4305, MCA there is a prohibition against utilizing several contracts, separate work orders or similar devices to circumvent or avoid public contract bidding requirements.

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/s/

Jim Nugent, City Attorney

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