

Senate Bill 237

I would first like to thank Senator Weinberg for seeing the need to amend this law and for sponsoring the bill.

We're here today to right a wrong. We're here to help the common men and women, to protect the taxpayers in Montana. In 1987, the Montana State Legislature created a process for the selection of architects, engineers, and land surveyors by state agencies that conforms to requirements of federal law. When Marc Racicot was attorney general he issued an opinion on the interpretation of MCA sections 18-8-201 to 212. He states and I quote: "State agencies may not consider a proposed fee when selecting architectural, engineering, or land surveying services, but may negotiate a fair and reasonable fee after the most qualified firm has been selected." He further states, "that only after the State has selected the most qualified firm is the fee negotiated. If a reasonable price cannot be negotiated, then the negotiations are formally terminated and a new firm is selected in accordance with the previous section 18-8-204, MCA." He doesn't mention local governments, but we seem to be bound by the same handcuffs. This process makes government procurement of contracts unnecessarily cumbersome, slow, and expensive. Qualifications and prices from multiple companies could and should be considered concurrently.

I have served as deputy mayor of the City of Whitefish for the past year. I, like you folks, see a need to serve my constituents to the best of my ability. One of my duties on the council is to approve contracts between the City and private companies, including land surveyors, engineers, and architects. There are two considerations that I find important when doing this: 1. Qualifications 2. Price. I was dumbfounded when we were first told by city staff that a state law forbids us from considering what a project will cost. This seems like fiscal neglect at its worst. As I started looking into the matter, I found out that this law came into being so that Montana would be in compliance with federal law. I can't emphasize too strongly that Montana is not required to adopt this federal law. As Mr. Marks has already told you, other states don't comply. The matter is further muddled by the fact that this law ONLY applies to architects, land surveyors, and engineers. This in itself makes the whole thing smell fishy. We need to examine this law from two angles: 1. Why just surveyors, architects, and engineers? 2. How can after-the-fact negotiating possibly be fair to the taxpayer?

First, are engineers, surveyors, and architects the only important contractors in the construction of a building, roadway, bridge, etc.? What about the builder, the excavator, the electrician, the plumber? A 20-story building with a bad plumbing system that requires you to go outside and use a porta-potty every time it backs up is pretty important. And quality becomes a big issue when a building burns down due to faulty wiring. Architects, engineers, and surveyors are not the only important professionals involved in public projects. Second, the lack of ability to comparison shop flies in the face of a free-market economy. It's also just plain bad business. How many private companies do you know that make deals without knowing a price? Ask our opposition

here today if they get by with this when they do work in the private sector. The engineers I know say no.

Our current method of securing contracts consists of sending a letter to potential companies to see if they're interested in the job. Staff then culls out some and comes up with a short list. Then two staffers and a councilor listen to presentations from different companies. Once I helped select an engineering firm to design a critical water distribution system in Whitefish, yet I know nothing about engineering. I am entrusted to determine the most qualified firm, but not entrusted to compare their price with another company. As business people, you all must know that being qualified in your field includes your ability to bid correctly. If you bid too low, you're going out of business. Bid too high, and you've priced yourself out of the market. If a company is going to work with the City of Whitefish, I want them to be competent not just in their field, but in their management and their budget. This current law prevents us from checking out a company's competency. It reduces the transaction to the equivalent of buying a used car. The engineer comes in with a price (say \$100,000). The public works director or the city manager says, no, I think you should be able to do this job for \$70,000. The architect comes back with \$85,000. The public works director says okay. How do we know it's okay? The engineering firm just showed us that they're willing to overcharge us by \$15,000 that 's obviously not justified, or they would not have dropped their price. The public works director showed that he really doesn't know how much the job should cost, because he just agreed to pay an additional \$15,000. If he had been allowed to compare prices between qualified companies, he would have been able to make an intelligent decision.

I am a small business owner. I have a landscape company. Numerous times during the 20 years I've been in business, I've had potential customers ask if my price is negotiable after I've given them a bid. The answer is always "no, but the scope of work is. I can't drop my price because I didn't build anything into it to negotiate with." If I had to negotiate with my customers, how could they ever trust me, knowing that I was trying to get more money out of them than I could really justify? The prudent thing to do is to take bids and compare them before you sign on the dotted line.

I'm not sure how this law came about, but it is obviously self-serving to a few elite groups who have figured out how to rig the system to line their pockets. As you listen to everyone's testimony today, I encourage you to question our motivation. What could be my motivation to spend my unpaid afternoon in coat and tie talking with strangers about state law? I won't make an extra dime if this bill passes. My motivation is pure and simple. It's wrong to fleece the public, the taxpayer, which includes you and me. As the legislature looks for ways to reduce frivolous spending, and to find money for worthy causes, like education, look here. You're getting ripped off by a bad law, and you have the ability to stop it. Don't be swayed by the paid lobbyists who are getting rich off of this law. Their motives aren't pure, they're greedy. They care about themselves at the expense of the rest of us.

Have you ever been in a skyscraper or a high-rise hotel? Did it fall down on you? Was it built with private funds? Yes, it was. Was price a consideration in the selection process of the contractors who built it? Sure it was. Nobody wants to be in a collapsing building, no whether it was built with public or private money. Do you really think there's a difference in quality? Do these people here today not work on private projects? Of course they do. And the private sector asks for prices as part of the selection process. Are we to infer that these same engineers, architects, and surveyors are doing lesser quality work just because a customer isn't a government entity? If that's the case, they're not worth hiring in the first place, forget the price. If this is not the case, then this law is useless. The current law doesn't protect the public at all; it just takes their money.

That's my sales pitch in favor of SB 237. Since we had to go first, and won't get to rebut the opposition, let me tell you what the special interest lobbyists will tell you, a prebutter, if you will.

Numerous people will speak in opposition to the "lowest bid", which is something we've never advocated and no government would be required to do. In fact, any government that chooses to not consider price, for whatever reason, can go about business as usual. But this law would give the 28 cities and towns and 6 counties who support it (representing over 140,000 residents) a prudent method of comparing companies and ensuring that they are not way out of line. The opposition will tell you that they're scared of the lowest bid. Could it be that they're actually afraid that their government customers will find out that they've been overcharged all these years?

They'll tell you that if we are to consider cost, they'll have to over- or under design their projects. This is truly a desperate argument. If they are competent, honest business people, they will never over- or under design anything. They'll design what is needed and give their clients a good design at a fair price.

They're going to tell you they are concerned that the scope of some consultant work might be too vague to give a price, but if governments provide a professionally prepared scope of work (like they do in Oregon), then that problem is solved. At the very least, hourly rates should be disclosed, although I'm sure someone has an argument why that also should be kept secret.

I'll bet that the Engineering Council of Montana will say that Quality Based Selection, QBS, has saved the taxpayer millions of dollars. It would be nice to think that they're really so community-minded, but I don't believe it. Ask for proof. If they can't prove it, then it isn't so.

An architect will tell you that their projects are fluid, and, as a result, the price of a project will change. True, but not without some kind of authorization or change order, and not without a price. Builders are able to work in this way all the time. What's the difference, you ask? A powerful lobby.

Someone will speak about ensuring quality projects through the use of QBS. Interestingly enough, a few years ago when I as a city councilor helped select an engineering firm (not represented here today) to finish design work on the water distribution system in Whitefish, it was because the city had fired another engineering firm (represented here today), in spite of their impressive resume. They were fired because they weren't cost efficient, had bad attitudes, didn't communicate well, and didn't give us what we thought we were getting. Where was the value? QBS didn't serve us well in that instance. It cost us extra time and extra money. At other times when the council has been asked to approve contracts, Mr. Garberg, my fellow councilor and an engineer, questioned city staff about what he thought were excessive engineering charges. The only thing the public works director could do was shrug his shoulders and say that was the price they had negotiated. I would rather him be able to say that he interviewed three companies,

looked at their qualifications, hired the best one, and by the way, their price came in the middle of the other two, so we know that it's a fair price.

Lastly, the opposition will argue that industry insurance rates will increase if price is considered in the selection process. This is just sad. Is the architects', engineers', and surveyors' work is so suspect that not even their own insurance companies can trust their quality? This simply tells us that without an inflated and exorbitant fee, these supposed professionals put the insurance companies at great risk with questionable workmanship. But ask the opposition to prove that their rates would go up. I'll bet they've never talked to an insurance company about it, and they have no paper work to prove it.

In closing, I ask you, for the sake of your constituents, don't maintain the status quo. Don't cave in to special interest groups. Thank you.