EXHIBIT #1
DATE Feb 8th
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Chapter III – Facility Contract Procurement

Introduction

The Department of Corrections (department) contracts for a wide variety of goods and services. All contracted services are acquired through a method of procurement. In department policy (Policy 1.2.8) the department defines procurement as:

> Acquisition with or without cost, buying, purchasing, renting, leasing, or otherwise acquiring any supplies or services. It includes all functions that pertain to obtaining of any supply or service, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

Since contracting for government services often involves substantial sums of money, safeguards for the maintenance of a procurement system to ensure quality and integrity are important. Contract procurement is an area subject to vendor protests and litigation and as a result it is an area of risk. Because of this, it is critical that agencies have a strong system of controls to ensure procurement of services that:

- Adheres to state law, administrative rule and internal policies
- Is well documented
- Is legally defensible
- Fosters effective, broad-based competition within the free enterprise system
- Provides increased economy in state procurement activities and maximizes the purchasing value of state funds
- Is conducted in a manner that ensures fair and equitable treatment of all persons that deal with the procurement system.

This chapter discusses improvements the department can make to strengthen its processes and procedures for procuring contracted services.

Improving Contract Procurement Practices

Our review of the department's contracts procurement process noted inconsistencies in the application of procurement laws, lack of clarity in administrative rules for siting prerelease centers (PRC), inadequate documentation, questionable use of Request for Proposal (RFP) evaluation criteria, inconsistent treatment of vendors, and a practice of procuring vendor services without written contracts. Our audit noted several areas where the department should make changes to improve the procurement aspects of contracts management. These areas include:

- Complying with existing state law when procuring contracted correctional facilities

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- Amending administrative rules relating to the physical siting of prerelease centers
- Developing and following policy to ensure fair and equitable treatment of all vendors
- Developing policy to address selection and composition of RFP evaluation committee members and specify documentation to be maintained for the RFP process to support scoring decisions
- Developing controls to ensure compliance with the Montana Procurement Act (Title 18, MCA) regarding competitive proposals and executing written contracts for services

The remainder of this chapter discusses these issues and presents our recommendations for improvement.

Competitive Processes Not Always Used in Facility Procurement

Title 53, MCA provides the department the authority to contract for many different types of services, including:

- Community correctional facilities
- Prerelease centers
- Methamphetamine (meth) treatment facilities
- Sex offender treatment facilities
- Regional prisons
- Private prisons

In some cases, such as for meth treatment facilities (§53-1-203, MCA) and private prisons (§53-30-605, MCA), statute instructs the department that an RFP process must be used. An RFP is an invitation to vendors to submit a detailed proposal regarding how and at what cost a vendor can meet a specific need identified by the state.

For prerelease centers and community correctional facilities, Title 53, MCA is silent on the method of procurement. In these cases, Title 18 (the Montana Procurement Act) would therefore apply. Facilities obtained under the Montana Procurement Act should generally be procured through a competitive bid process.

Audit work revealed four facilities that have begun operations since 2005 and were obtained without the benefit of a competitive procurement process. These include:

- A DUI treatment center was opened as an expansion of an existing treatment

center contract rather than as a new facility. The new location was more than 450 miles away from the pre-existing location and charges a different rate per offender.

- An assessment and sanction center was obtained by expanding an existing prerelease center's scope of services. The assessment and sanction center is located in the same building as the PRC but provides a different set of services. The department pays a different rate per offender housed there and the department and vendor recognize it as a unique program.
- A drug and alcohol treatment center was obtained by expanding an existing prerelease center's scope of services. The drug and alcohol treatment center is also located in the same building as the PRC, but again the department pays a different rate, the program provides specialized treatment programs, and is identified by the department and vendor as a unique program.
- A prerelease center was opened in which the department contracts with a county government, rather than a Montana nonprofit corporation, which is required by law (§53-1-203, MCA). The county government subcontracts with a private nonprofit corporation to operate the center. This PRC was opened without the benefit of state procurement procedures.

Together, the cost of these services during fiscal year 2009 was approximately $4.5 million and none were acquired through a competitive procurement process. Because they were obtained without competition and the safeguards designed for state procurement, it is unknown whether the stated purposes of the Montana Procurement Act were achieved. These include:

- Public confidence in procurement
- Fair and equitable treatment of all involved with procurement
- Maximizing the purchasing value of state funds
- Effective, broad-based competition within the free enterprise system

The department has contracted to open these expanded facilities because it believes they are simply expansions of existing services. State law does not define what constitutes an expansion of services, however, the services constitute new facilities for which a competitive procurement should have been completed. The facilities in question are either located in different geographic areas, charge different rates per offender, provide different services, or are defined in department information as different facility types. Under these conditions, the services constitute a new facility and therefore should be obtained through the procurement processes set forth in state law.

RECOMMENDATION #1

We recommend the Department of Corrections comply with state law when entering into contracts for new facilities by:

A. *Contracting with Montana nonprofit corporations for prerelease centers as required in §53-1-203, MCA.*

B. *Procuring all facilities according to the provisions of the Montana Procurement Act when Title 53, MCA is silent.*

Prerelease Center Procurement

The location of prerelease centers within a community is often a contentious issue—over the years two PRC projects have been delayed because of siting concerns. Siting is the selection of a specific geographic area where a PRC facility is to be located and is a very important step in the procurement process for any correctional facility, but particularly for PRCs. At a PRC, offenders are able to leave the facility for employment and are beginning to transition from incarceration to life in the community. Offenders need ready access to employment opportunities but area residents may be concerned with having a concentrated number of offenders living in a specific area.

The 1997 Legislature passed House Bill 125 (§53-1-203, MCA), which authorizes the department to adopt rules for siting PRCs and specifies that "a prerelease center may not be sited at any location without community support." Administrative Rules of Montana (ARMs 20.7.501-511) require certain steps be taken by the department, such as:

- The department documents the need for a center in the area
- The department contacts local officials to determine support for a facility
- Local media members are notified of the process to consider a PRC
- A working committee of concerned local residents must be formed to determine general support for and to approve a specific geographic area of the city, town, or county for the center
- The department contracts to conduct a survey of the local officials and general public to determine support for the facility.

When conducting the procurement for one PRC project, the department issued the RFP for the facility prior to verifying community support for a specific geographic location for the facility. Following the RFP process, the location proposed was not supported by local residents. As a result, the department and the vendor are seeking local approval for a new site.

Having to complete the local approval steps at this late stage has delayed the process for opening the proposed PRC. The original projected opening date of the facility was spring 2009. The project is now at least a year behind schedule. It is also unclear what will happen once a new location is approved. If the new location causes the proposal to become significantly more expensive it may require the department to reopen the entire procurement process lest it face legal action from one or more of the involved vendors. It is also possible that the selected vendor may file a grievance if it must go through a new RFP process. Vendors report that it costs $50,000 or more to develop a competitive proposal for a prerelease RFP, so the vendors have a significant concern over potential problems with the process.

According to department legal staff members, the existing administrative rules are clear regarding what steps must be taken by the department during the siting and procurement processes but the order in which each required step is to be completed is not clear. This lack of clarity has allowed the department to issue an RFP prior to verifying local support for the facility causing the resulting delay in facility opening and may subject the department to protests or legal challenges to the procurement. Clarifying the order in which steps are to be taken may help the department avoid issues during future PRC procurement efforts.

RECOMMENDATION #2

We recommend the Department of Corrections amend ARM 20.7.501-511 to clarify the order in which prerelease center site approval and procurement steps are to be completed.

RFP Decision Making and Documentation

An RFP provides a means for a state agency to judge a vendor's qualifications, experience, and approach to determine the best solution to the state's needs. The department generally uses an RFP process to select service providers to operate facilities such as prerelease centers and chemical dependency treatment centers.

We reviewed RFP files for two of the department's contracted prerelease centers and four treatment centers. We reviewed files which contained documentation that was unrelated to the RFP or was not needed to make a contract award decision. For example, some RFP files contained documentation for other procurement processes, department employee training certificates, and inmate treatment notes from department treatment programs unrelated to the contract. We also noted the department was not

always consistent in the types of documentation maintained from one RFP process to another. Procurement files for both PRCs and treatment centers often lacked important information, such as a meaningful explanation regarding how RFP scoring was completed, documentation supporting significant decisions or changes made during the RFP process, and scoring summaries sometimes lacking enough detail to determine why a particular score was given for a category. For example, when scoring PRC proposals, vendor references were one of the evaluation criteria. Each of the four vendors received the maximum of 50 points for the category with the following four comments:

- "Good references"
- "Met requirements"
- "19 reference sheets"
- "Scores from 3 to 5"

The seemingly diverse comments did not provide sufficient detail for an observer to determine why the given scores were appropriate. This range of comments leads an observer to question why each of the responses earned the maximum amount of points.

Scoring Criteria Should Consider Range of Possible Responses

Scoring criteria for RFPs need to be made clear to all potential vendors at the time an RFP is issued so that vendors can clearly understand the expectations of the agency. In the case of the RFP for a meth treatment center, vendors had the option of submitting a proposal for a male-only facility, a female-only facility, or a combined facility. The department issued the RFP with standard cost scoring criteria—that is, the highest scoring proposal would receive full points for the cost portion and the others would receive a correlated percentage of the maximum.

As it turned out, the highest scoring proposal was for a female-only facility so the award was made to this vendor. But, the department also required male beds for meth treatment. There was only one proposal for male-only beds so that vendor was also offered the opportunity—even though this proposal was the third-highest scoring and well behind the second-best proposal which was for a coed facility. The standard scoring criteria developed for this RFP did not sufficiently consider the different facility options.

The combined male and female facility scored only three points (out of a possible 2000 total points) lower than the female-only facility but the department did not include a mechanism to evaluate each of the possible different response scenarios and we were

unable to find documentation clearly explaining how the winning combination was determined. The single facility would have been approximately $800,000 less expensive during the first fiscal year, with commensurate savings in future years.

Contracted Facility Located on Former Department Property

One of the contracted meth treatment centers is located on property that was once owned by the department. The department transferred this land to a county government, which now leases the land to the contractor operating the meth treatment center. The land was transferred free of charge to the county by the Board of Land Commissioners, which deemed the transfer necessary to meet a public purpose—and was made with the specific provision that it be used for a meth treatment center. This type of transfer is authorized by §77-2-351, MCA; however, the department did not make all vendors aware of the land's availability by including information about it in the RFP document or through other means.

The department does allow vendors to use agency property for other contracted facilities and could have also done so in this case. For example, the department contracts for two DUI treatment centers—both are provided in facilities that are owned by the department. The availability of these properties was not made known to all vendors through the RFP document. If the department desired to have the property used by a vendor, it should have made all potential vendors aware of its availability. The Montana Procurement Act (§18-4-122(5), MCA) has, among its stated purposes, to "ensure the fair and equitable treatment of all persons who deal with the procurement system of the state."

We reviewed county records, including a resolution passed by county commissioners in support of the land transfer, and noted only a single vendor is named as a potential contractor for the facility. Interviews with other vendors indicated that they were unaware that the department wished to make this land available to host a meth treatment facility. The failure to notify all vendors of its availability resulted in unequal treatment of vendors.

The decision to transfer the land now costs the department approximately $20,000 annually. Based on county records, the vendor has agreed to lease the land from the county for $100 per month plus 1 percent of facility revenues. In fiscal year 2009 the maximum contract value paid by the department for this facility was $1.825 million. We were unable to determine why the department made the decision to grant the land to a county or why only one vendor was aware that the land was available. The department did not provide documentation containing rationale as to why this

occurred. As a result, all vendors did not receive fair and equitable treatment from the department. In order to demonstrate compliance with the Montana Procurement Act, the department should maintain documentation of significant decision points in procurement processes.

Procurement Activities Should be Documented

Our review of state law and state policy noted expectations that state government procurement activities be well documented. For example, §18-4-304, MCA, requires that RFPs state the evaluation criteria used and the criteria's relative importance, make awards to the responsible and responsive vendor whose proposal best meets the evaluation criteria, and that contract files demonstrate the basis on which the award is made. Additionally, state policy (MOM 1-0719.20) requires RFP files clearly document the process to award a contract. Specifically, this policy recommends agencies maintain documentation supporting the determination of award detailing the basis on which the award was made. Finally, the Department of Corrections Delegation of Authority Agreement from the Department of Administration requires the department "maintain adequate records to document the procurement process." The department's internal control policies also require controls be in place to ensure the department's resources are protected and risk to the department is minimized.

Department Policy Does Not Address Required Documentation

While statute and state policy specify the RFP process will be documented to support contract award decisions, they do not provide specific details on the extent of documentation that should be maintained. During interviews with department staff and our review of policies, we found no agency policies and procedures exist that specify the kinds and extent of documentation that should be maintained. Specific guidance on how the department's RFP process is to be documented should be outlined in department policies and procedures. This would help ensure transparency and accountability within the RFP process.

RECOMMENDATION #3

We recommend the Department of Corrections comply with the Montana Procurement Act by:

A. *Developing and following a policy that ensures fair and equitable treatment of all vendors during procurement.*

B. *Developing and following a policy to demonstrate the basis upon which procurement awards are made.*

RFP Evaluation Committee Membership

RFPs are typically evaluated by a group of individuals who are sufficiently knowledgeable about a proposed project yet free of conflicts of interest. In order to obtain the knowledge of subject matter experts, the department has allowed an employee of a vendor that is a competitor for department services to serve on one of its RFP evaluation committees. For example, an employee of a vendor who supplies PRC services and potential competitor on future PRC or treatment program RFPs served on an evaluation committee to score PRC proposals.

Competition for facility contracts is generally limited and by statute some facilities, such as PRCs, must be operated by Montana nonprofit corporations. Of the six RFPs we reviewed, one attracted four responses while each of the others generated at most two offers per facility. Two RFPs attracted only one responsive proposal. Since there is a small pool of potential service providers for services like PRCs, using providers who may compete against one another does not convey a good perception to the public regarding the fairness of the department's process. This practice also increases the risk of inappropriate activities occurring in the department's contract award process.

There is a perception among vendors that the department's procurement process is not always fair or very well organized. For example, some vendors stated they did not believe scoring criteria was always clear and at times it appeared RFPs were scored by individuals who did not receive sufficient instruction. Comments made by a vendor during one RFP process indicated the process was "wrought with problems" and another RFP was formally protested by a vendor.

When procuring goods and services for public entities, even the perception that there is a potential conflict should be avoided. According to the department purchasing manual and Department of Administration guidance, evaluation committee selection,

"should be guided by the principle of trying to avoid any potential appearance of conflict of interest."

Serving on an evaluation committee is an intensive time commitment, but there are other places the department could go to obtain similar levels of subject matter expertise. For example, potential sources of expertise could be obtained from state or local law enforcement or other state government agencies, such as the Department of Public Health and Human Services, which uses some similar types of services as the Department of Corrections.

During interviews with department staff and our review of policies, we found no agency policies and procedures exist that provide guidance related to evaluation committee composition. Specific guidance should be outlined in department policies and procedures. This would help ensure transparency and accountability within the RFP process. A written policy that specifies the composition of evaluation committees could help the department avoid the appearance of inappropriate behavior.

RECOMMENDATION #4

We recommend the Department of Corrections develop a policy to assure selection and composition of request for proposal evaluation committees avoids potential conflicts of interest.

Some Services Performed Without Written Contract

The department purchasing manual states, "the only method of contracting with the department is by written agreement." We identified instances in which the department has obtained services from vendors without executing a written contract. One vendor provides inmate transportation services while another vendor operates a drug and alcohol treatment center and a sanction and assessment facility. Both vendors have been providing these services for more than two years without a signed, written contract. Similar issues have been identified in other Legislative Audit Division audits of the department dating back to 2000.

Inmate Transportation Agreement

One of the vendors who responded to the meth treatment RFP included in its proposal an offer to provide transportation services outside the scope of what was requested. The department did not consider these services as part of the RFP evaluation but believed that such services could potentially benefit the department. So, the department

entered into a verbal agreement with the vendor for the services. The department did not conduct a competitive procurement process, nor did it execute a written contract for these services. The department pays the vendor $54,000 annually. According to the vendor and to department staff, the vendor transfers inmates between a variety of state-owned and contracted correctional facilities. Without a written contract, it is unclear what each party's responsibilities are and the state is not able to minimize its liability for the actions of the vendor. Our review of invoices for these services did not indicate the volume of transportation services that have been provided.

Drug and Alcohol Treatment Center and Assessment and Sanction Facility

In late 2006, the department identified a need for additional drug and alcohol treatment beds and for a secure assessment and sanction center. According to department records, the services have been in place since approximately March 2007. To obtain these services, it sought to expand the contract of an existing PRC, but no signed written contract for the new services yet exists. Several draft contracts have been passed back and forth between the department and the vendor but as of January 2010, no version had been approved by both parties. The vendor provides 50 beds within its assessment and sanction center program and an additional 40 beds in its chemical dependency treatment facility. In its 2009 biennial report, the department indicates the annual cost of these programs combined is over $1.6 million.

Lack of Written Contracts Increases Risk to State

In both of the cases above, it is not clear what the responsibilities of the contractor and the department are, nor if the contractor has obtained adequate insurance coverage. Without written contracts the state lacks the ability to determine if services provided are those requested or that important safeguards to limit state liability exist. There is also no assurance that all parties clearly understand expectations. In addition, since the department did not use a competitive procedure to obtain the services, there is no assurance that the state is receiving the best available services.

There are a number of provisions which, by statute, must be included in any contract with the state. In the absence of a written contract, the following provisions cannot be met:

- The Legislative Audit Division must have access to records of contracting entities (§18-1-118, MCA).
- A contract may not be transferred, assigned, or subcontracted without the express written approval of the state (§18-4-141, MCA).
- If funds are not appropriated or otherwise made available to support continuation of a contract, the contract must be canceled (§18-4-313(4), MCA).

- The venue for disputes arising over state contracts must be the district courts of Montana (§18-1-401, MCA).
- Contracts must contain a provision that hiring must be on the basis of merit and qualifications and there may not be discrimination (§49-3-207, MCA).

Accounts among department staff differ as to why there has never been an executed written contract in these particular instances, but it is clear that the department should complete written agreements as soon as possible. If similar services are still desired by the department at the end of the terms of these newly written contracts, the department should seek offers from all interested vendors through a competitive process.

RECOMMENDATION #5

We recommend the Department of Corrections ensure all contracts are executed in writing.