

HOUSE BILL NO. 462

INTRODUCED BY M. MORE

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A BILL FOR AN ACT ENTITLED: "AN ACT CREATING THE SUBCONTRACTORS FAIR PRACTICES ACT WITH RESPECT TO PUBLIC CONSTRUCTION CONTRACTS; PROVIDING DEFINITIONS; ESTABLISHING BID GUIDELINES; REGULATING THE SUBSTITUTION OF SUBCONTRACTORS; PROVIDING BOND REQUIREMENTS; ESTABLISHING PENALTIES FOR VIOLATING PROVISIONS RELATING TO THE SUBSTITUTION OF SUBCONTRACTORS; AMENDING SECTION 60-2-111, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 9] may be cited as the "Subcontractors Fair Practices Act".

NEW SECTION. **Section 2. Legislative findings.** The legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public works projects often result in poor quality of materials and workmanship to the detriment of the public, deprivation of the full benefits of fair competition among contractors and subcontractors, and insolvencies and loss of wages to employees.

NEW SECTION. **Section 3. Definitions.** As used in [sections 1 through 9], the following definitions apply:

- (1) "Contractor" means the prime or general contractor on a public works construction project who contracts directly with the using agency.
- (2) "Listing threshold" means the dollar amount, stipulated in the bidding documents, above which subcontractors must be listed.
- (3) "Notice" means information, advice, or a written warning intended to apprise a contractor, subcontractor, or using agency of some proceeding in which the contractor's, subcontractor's, or using agency's interests are involved. Notice may be sent to a contractor, subcontractor, or using agency by certified mail and must be considered completed upon the date of mailing.



1 (4) "Subcontractor" means a person who contracts directly with the contractor.

2 (5) "Using agency" means any state or local government entity requiring services related to a public
3 works construction project.

4
5 **NEW SECTION. Section 4. Listing of subcontractors -- requirements.** (1) (a) A using agency taking
6 bids for a public works construction project shall provide in the bidding documents prepared for that project a
7 listing threshold that must be the greater of \$5,000 or 1/2 of 1% of the architect's or engineer's estimate of the
8 total project cost. If the bidding documents do not include a listing threshold, then the using agency shall supply
9 the listing threshold.

10 (b) If the listing threshold has not been included in the bidding documents or supplied by the using
11 agency, the bid opening must be postponed until the using agency has complied with this section. Any contractor
12 or subcontractor interested in bidding may apply to the district court in the county in which the project will be
13 located for an injunction preventing the bid opening until the using agency has complied with this section.

14 (2) (a) A person submitting a bid shall set forth in the bid:

15 (i) the name and the city or county of the place of business of each subcontractor that will perform work
16 or labor or render service to the contractor in connection with the public works construction project in an amount
17 in excess of the listing threshold; and

18 (ii) the category of the work that will be done by each subcontractor.

19 (b) The contractor may list only one subcontractor for each category as defined by the contractor in the
20 bid.

21 (3) A bid submitted by a contractor that does not comply with the provisions of subsection (2) must be
22 considered a nonresponsive bid and may not be accepted by a using agency.

23
24 **NEW SECTION. Section 5. Substitution of subcontractors.** (1) A contractor whose bid is accepted
25 may not substitute any person as subcontractor in place of the subcontractor listed in the original bid unless the
26 using agency consents to the substitution of another person as a subcontractor in the following circumstances:

27 (a) the subcontractor listed in the bid, after having had a reasonable opportunity to do so, fails or refuses
28 to execute a written contract after the written contract, based upon the general terms, conditions, plans, and
29 specifications for the project and the terms of subcontractor's written bid, has been presented to the subcontractor
30 by the contractor;

1 (b) the subcontractor listed in the original bid becomes bankrupt or insolvent prior to execution of a
2 subcontract;

3 (c) the using agency refuses to approve the subcontractor listed in the original bid if the right of approval
4 has been reserved in the bidding documents;

5 (d) the contractor demonstrates to the using agency that the name of the subcontractor was listed as
6 the result of an inadvertent clerical error;

7 (e) a bid alternate accepted by the using agency causes the listed subcontractor's bid not to be the low
8 bid;

9 (f) the contractor can substantiate to the using agency that a listed subcontractor's bid is incomplete;

10 (g) the listed subcontractor fails or refuses to meet the bond requirements of the contractor; or

11 (h) it is determined that the listed subcontractor does not have a proper license to perform the work and
12 the contractor has submitted the name of the subcontractor along with proof that the subcontractor bid on work
13 for which the subcontractor was not properly licensed or registered.

14 (2) (a) Prior to approval of the contractor's request for substitution of a subcontractor, the using agency
15 shall give notice in writing to the listed subcontractor of the contractor's request to substitute a subcontractor and
16 of the reasons for the request. The notice must be sent by certified mail to the last-known address of the
17 subcontractor.

18 (b) The subcontractor has 5 working days from receipt of the notice to submit a written objection to the
19 substitution to the using agency. Failure to file written objections constitutes the listed subcontractor's consent
20 to the substitution.

21 (c) If a written objection is filed, the using agency shall give to the subcontractor, in writing, at least 5
22 working days notice of a hearing to be held by the using agency on the contractor's request for substitution.

23 (3) A contractor whose bid is accepted may not permit any subcontract to be voluntarily assigned or
24 transferred or allow the contract to be performed by anyone other than the original subcontractor listed in the
25 original bid without the consent of the using agency.

26 (4) A contractor whose bid is accepted, other than in the performance of change orders causing changes
27 or deviations from the original contract, may not sublet or subcontract any portion of the work unless:

28 (a) the contractor fails to receive a bid for a category of work and designates on the listing form that no
29 bid was received; or

30 (b) the contractor fails to receive more than one bid for a category of work. The contractor shall state

1 on the listing form that only one subcontractor's bid was received, together with the name of the subcontractor.
2 This designation may not occur more than one time on the subcontractor list.

3
4 **NEW SECTION. Section 6. Bond requirements.** (1) It is the responsibility of each subcontractor
5 submitting a bid to a contractor to be prepared to submit a performance bond if requested to do so by the
6 contractor.

7 (2) If a subcontractor submits a bid to a contractor but does not, upon the request of the contractor,
8 furnish to the contractor a bond guaranteeing prompt and faithful performance of the subcontract and the payment
9 of all claims for labor and materials furnished for work to be performed under the subcontract, the contractor may
10 reject the bid and make a substitution of another subcontractor subject to the provisions of [section 5].

11 (3) A bond may be required at the expense of the subcontractor only if the contractor in the contractor's
12 written or published request for subcontract bids:

13 (a) specifies that the expense for the bond must be borne by the subcontractor; and

14 (b) specifies the amount and requirements of the bond.

15
16 **NEW SECTION. Section 7. Failure to specify subcontractor.** (1) If a contractor fails to list a
17 subcontractor in excess of the listing threshold and the contractor does not state that a bid was not received or
18 that only one bid was received, the contractor represents that the contractor is fully qualified to perform that
19 portion of the work and that the contractor will perform that portion of the work.

20 (2) Except as otherwise provided in [sections 1 through 9], if after the award of the contract, the
21 contractor subcontracts for any portion of the work referred to in subsection (1), the contractor is subject to the
22 penalties provided in [section 9].

23
24 **NEW SECTION. Section 8. Emergency subcontracting.** Subcontracting any portion of the work in
25 excess of the listing threshold for which a subcontractor was not designated in the original bid may be permitted
26 only in the case of public emergency or necessity and then only upon a written finding by the using agency that
27 sets forth the facts constituting the emergency or necessity.

28
29 **NEW SECTION. Section 9. Penalties.** (1) A using agency shall assess a contractor that substitutes
30 another subcontractor in violation of [section 5] a penalty in an amount equal to the greater of 10% of the amount

1 bid by the listed subcontractor or the difference between the amount bid by the originally listed subcontractor and
2 the amount bid by the substituted subcontractor.

3 (2) In the case of a subcontractor knowingly participating in a violation of [section 5], the using agency
4 shall assess the substituted subcontractor a penalty in an amount equal to the greater of 10% of the amount bid
5 by the originally listed subcontractor or the difference between the amount bid by the originally listed
6 subcontractor and the substituted subcontractor.

7 (3) In the case of a contractor that violates the provisions of [section 7], the using agency shall assess
8 the contractor a penalty of 8% of the amount of the subcontract issued for the first violation and 30% of the
9 amount of the subcontract issued for any subsequent violation on any one project.

10 (4) Penalties assessed pursuant to the provisions of this section must be deposited into the fund from
11 which the contract was awarded.

12 (5) In a proceeding under this section, the contractor is entitled to a hearing after notice.

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14 **Section 10.** Section 60-2-111, MCA, is amended to read:

15 **"60-2-111. Letting of contracts on state and federal-aid highways.** (1) Except as provided in
16 subsection (2), all contracts for the construction or reconstruction of the highways and streets located on highway
17 systems and state highways as defined in 60-2-125, including portions in cities and towns, and all contracts
18 entered into under 7-14-4108 must be let by the commission. Except as otherwise specifically provided, the
19 commission may enter the types of contracts and upon terms that it may decide. All contracts must meet the
20 requirements of Title 18, chapter 2, part 4, and [sections 1 through 9]. When there is no prevailing rate of wages
21 set by collective bargaining, the commission shall determine the prevailing rate to be stated in the contract.

22 (2) The commission may delegate the authority, with all applicable statutory restrictions, to award any
23 contract covered by this section to the department or to a unit of local government.

24 (3) The commission may award contracts for projects that the department has determined are part of
25 the design-build contracting program authorized in 60-2-137."

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27 **NEW SECTION. Section 11. Codification instruction.** [Sections 1 through 9] are intended to be
28 codified as an integral part of Title 18, chapter 2, and the provisions of Title 18, chapter 2, apply to [sections 1
29 through 9].

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