

SENATE BILL NO. 90

INTRODUCED BY P. EKEGREN

BY REQUEST OF THE STATE ADMINISTRATION, PUBLIC RETIREMENT SYSTEMS, AND VETERANS'
AFFAIRS INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING GOVERNMENT CONTRACTING LAWS; EXPANDING THE GENERAL APPLICATION OF THE PROCUREMENT LAWS; CLARIFYING EMPLOYEE AND FORMER EMPLOYEE CONTRACT INVOLVEMENT RESTRICTIONS; PROVIDING THAT MOTOR VEHICLE PURCHASE REQUISITIONS MAY BE SUBMITTED IN THE MANNER SPECIFIED BY THE DEPARTMENT OF ADMINISTRATION; ABOLISHING THE REQUIREMENT THAT POLITICAL SUBDIVISIONS APPLY A RESIDENT BIDDER PREFERENCE FOR THE PROCUREMENT OF GOODS; CLARIFYING THE INTEREST RATE ON OVERDUE PAYMENTS; MAKING THE RESIDENT BIDDER PREFERENCE FOR STATE GOVERNMENT PROCUREMENT OF GOODS RECIPROCAL; ABOLISHING THE MONTANA-MADE GOODS PREFERENCE; EXEMPTING CERTAIN PURCHASES FROM THE GENERAL REQUIREMENTS OF THE LAW; ALLOWING ALTERNATIVE PURCHASING METHODS; REVISING SOLE SOURCE PURCHASE CRITERIA; CLARIFYING THE DURATION OF CERTAIN CONTRACTS; AMENDING SECTIONS 2-2-201, 2-17-403, 7-5-2309, 7-14-2404, 7-14-2406, 7-14-2716, 17-8-244, 18-1-101, 18-1-102, 18-1-103, 18-1-111, 18-1-404, 18-2-306, 18-4-123, 18-4-132, 18-4-133, 18-4-141, 18-4-301, 18-4-302, 18-4-306, 18-4-313, 18-5-308, 18-7-107, AND 60-2-112, MCA; REPEALING SECTION 18-1-112, MCA; AND PROVIDING EFFECTIVE DATES, AN APPLICABILITY DATE, AND A TERMINATION DATE."

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

Section 1. Section 2-2-201, MCA, is amended to read:

"2-2-201. Public officers, employees, and former employees not to have interest in contracts == local government waiver. (1) Members of the legislature; state, county, city, town, or township officers; or any ~~deputy~~ deputies or ~~employee~~ employees of an enumerated governmental entity may not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees if they are directly involved with the contract. A former employee may not, within 6 months following the termination of employment, contract or be employed by an employer who contracts with the state or any of its subdivisions involving matters with which the former employee was directly involved during employment.

(2) In this section, the term:

(a) "be interested in" does not include holding a minority interest in a corporation;

(b) "contract" does not include:

(i) ~~contracts awarded to the lowest responsible bidder or proposer based on competitive bidding procurement procedures conducted after the date of employment termination;~~

(ii) merchandise sold to the highest bidder at public auctions;

(iii) investments or deposits in financial institutions that are in the business of loaning or receiving money;

(iv) a contract with an interested party if, because of geographic restrictions, a local government could not otherwise reasonably afford itself of the subject of the contract. It is presumed that a local government could not otherwise reasonably afford itself of the subject of a contract if the additional cost to the local government is greater than 10% of a contract with an interested party or if the contract is for services that must be performed within a limited time period and no other contractor can provide those services within that time period.

(c) "directly involved" means the person directly monitors a contract, extends or amends a contract, audits a contractor, is responsible for conducting the procurement or for evaluating proposals or vendor responsibility, or renders legal advice concerning the contract;

~~(e)~~(d) "former employee" does not include a person whose employment with the state was involuntarily terminated ~~due to~~ because of a reduction in force or other involuntary termination not involving violation of the provisions of this chapter.

~~(2) The governing body of a city, town, or county may waive the application of the prohibition contained in subsection (1) for a present or former city, town, or county officer or employee who in an official capacity does not influence the decisionmaking process or supervise a function regarding the contract in question. A governing body may grant a waiver under this subsection only after publicly disclosing the nature of the conflict at an advertised public hearing held for that purpose. In determining whether to grant a waiver, the governing body shall consider the following factors, where applicable:~~

~~—— (a) whether the waiver would provide to a program or project a significant benefit or an essential skill or expertise that would otherwise not be available;~~

~~—— (b) whether an opportunity was provided for open competitive bidding or negotiation;~~

~~—— (c) whether the person affected is a member of a clearly identified group of persons that is the intended beneficiary of the program or project involved in the contract; and~~

~~—— (d) whether the hardship imposed on the affected person or the governmental entity by prohibiting the conflict will outweigh the public interest served by avoiding the conflict."~~

Section 2. Section 2-17-403, MCA, is amended to read:

"2-17-403. Requisitions for purchases. All requisitions for motor vehicle purchases ~~shall~~ must be submitted to the department of administration ~~twice yearly at the times~~ in the manner that ~~it~~ the department specifies. ~~Other requisitions for automobile purchases may not be accepted by it unless the governor considers the purchase to be an emergency necessity."~~

Section 3. Section 7-5-2309, MCA, is amended to read:

"7-5-2309. Optional bidding preference for county resident. (1) If there are no out-of-state bidders for a contract subject to competitive bid under this part, the contract may be awarded to the lowest and best responsible bidder that is a county resident and that makes a bid that is no more than \$500 or 3% higher, whichever is less, than the bid of the lowest responsible bidder that is not a county resident.

(2) If there is one or more out-of-state bidders for a contract for construction, repair, or maintenance of a building, road, or bridge that is in excess of \$50,000 and that is subject to competitive bid under this part, the state resident bid preference provided in 18-1-102(1)(a) applies.

(3) For the purposes of this section, "county resident" means a person, corporation, business, or other entity whose principal business location is within the county."

Section 4. Section 7-14-2404, MCA, is amended to read:

"7-14-2404. Competitive bids for county road contracts. Each bidder shall comply with the requirements of Title 18, chapter 1, part 2. The contract ~~shall~~ must be awarded to the lowest responsible bidder in accordance with the requirements of 18-1-102, ~~18-1-112~~, and Title 18, chapter 2, part 4, and the board may reserve the right to reject any ~~and all~~ bids. ~~When~~ If there is no prevailing rate of wages set by collective bargaining, the board shall determine the prevailing rate to be stated in the contract."

Section 5. Section 7-14-2406, MCA, is amended to read:

"7-14-2406. Contracts for bridges. (1) All bids for construction or repair of bridges ~~shall~~ must meet ~~these~~ the following requirements:

(a) If the department of transportation has adopted or established a standard plan and specifications, the bids must be submitted ~~thereon~~ on the standard plan and specifications.

(b) All bids must be sealed. Each bidder ~~shall~~ must meet the requirements of Title 18, chapter 1, part 2.

(2) The board may reject any ~~and all~~ bids. If a contract is awarded, the board shall ~~do so~~ award the contract in accordance with the requirements of 18-1-102, ~~18-1-112~~, and Title 18, chapter 2, part 4. ~~When~~ If there is no prevailing rate of wages set by collective bargaining, the board shall determine the prevailing rate to be stated in the contract. The contract must be entered with the unanimous consent of the members of the board.

(3) Before entering upon performance of the work, the contractor shall comply with the requirements of Title 18, chapter 2, part 2. For the purposes of those sections with relation to contracts with the board, a contract ~~shall~~ may not be completed until the board, while formally convened, affirmatively accepts all of the work ~~thereunder~~ under the contract."

Section 6. Section 7-14-2716, MCA, is amended to read:

"7-14-2716. Award of contract by local improvement district. (1) If the committee awards a contract, it shall ~~do so~~ award the contract in accordance with the requirements of 18-1-102, ~~18-1-112~~, and Title 18, chapter 2, part 4. ~~When~~ If there is no prevailing rate of wages set by collective bargaining, the committee shall determine the prevailing rate to be stated in the contract.

(2) Partial payments may be provided for in the contract and paid when certified by the county surveyor and committee."

Section 7. Section 17-8-244, MCA, is amended to read:

"17-8-244. Exemptions. Section 17-8-242 does not apply to the following:

(1) interagency or intergovernmental transactions;

(2) claims subject to a good faith dispute; brought before a government agency or before a court. Interest in a proceeding subject to this subsection is governed by 18-1-404.

(3) delinquencies ~~due to~~ because of natural disasters, disruptions in postal or delivery service, work stoppage ~~due to~~ because of labor disputes, power failures, or any other cause resulting from circumstances clearly beyond the control of the payer agency;

(4) ~~contracts entered into before October 1, 1983;~~

~~—~~(5) wages due and payable to state employees or payments from any state retirement system created pursuant to Title 19; or

~~(6)~~(5) claims submitted to the state or to its fiscal intermediary by providers of supplies or services under the Montana medicaid or workers' compensation program if reasonable cause for nonpayment exists."

Section 8. Section 18-1-101, MCA, is amended to read:

"18-1-101. Definitions. (1) Unless the context requires otherwise, in this title, "department" means the department of administration provided for in Title 2, chapter 15, part 10.

(2) Unless the context requires otherwise, in this part, the following definitions apply:

(a) "Goods" means supplies, equipment, materials, commodities, and specially manufactured products.

(b) ~~"Montana-made" means manufactured or produced in this state and made with the:~~

~~—— (i) use of parts, materials, or supplies of which 50% or more were manufactured or produced in this state;~~

~~or~~

~~—— (ii) employment of persons of whom 50% or more are bona fide residents of Montana as defined in 18-2-401.~~

~~—— (c) "Nonresident bidder" means a bidder whose residence is not in this state as determined under 18-1-103.~~

~~(d)~~(c) (i) "Public agency" means a department, commission, council, board, bureau, committee, institution, agency, government corporation, or other entity, instrumentality, or official of the legislative, executive, or judicial branch of this state and its political subdivisions, including the board of regents and the Montana university system.

(ii) Public agency does not include a political subdivision for purposes of 18-1-102(1)(b).

~~(e)~~(d) "Resident bidder" means a bidder whose residence is in this state as determined under 18-1-103.

~~(f)~~(e) "Written" means that whenever written or in-writing determinations or documents are required, the public agency responsible for the procurement may specify an appropriate visual medium, such as by computer transmission or by facsimile machine transmission, in the specifications, contract, or rules of the public agency."

Section 9. Section 18-1-102, MCA, is amended to read:

"18-1-102. State contracts to lowest bidder -- reciprocity. (1) ~~(a) Except as provided in subsection (1)(b),~~ in in order to provide for an orderly administration of the business of the state of Montana in awarding public contracts for the purchase of goods and for construction, repair, and public works of all kinds, a public agency shall award:

~~(i)~~(a) a public contract for construction, repair, or public works to the lowest responsible bidder without regard to residency. However, a resident bidder must be allowed a preference on a contract against the bid of any a nonresident bidder from any state or country that enforces a preference for resident bidders. The preference given to resident bidders of this state must be equal to the preference given in the other state or

country.

~~(ii)(b) a public contract for the purchase of goods, if the goods are comparable in quality and performance, to the lowest responsible resident bidder whose:~~

~~———(A) bid is not more than 3% higher than that of the lowest responsible nonresident bidder;~~

~~———(B) offered goods are Montana-made and whose bid is not more than 5% higher than that of the lowest responsible nonresident bidder; or~~

~~———(C) offered goods are Montana-made and whose bid is not more than 3% higher than that of the lowest responsible resident bidder whose offered goods are not Montana-made.~~

~~———(b) The transportation commission or the department of transportation may not enter into a contract for a state-funded highway project or a construction project with a bidder whose operations are not headquartered in the United States unless:~~

~~———(i) the foreign country in which the bidder is headquartered affords companies based in the United States open, fair, and nondiscriminatory access to bidding on highway projects and construction projects located in the foreign country; and~~

~~———(ii) the department of transportation has entered into a reciprocity agreement with the foreign country that addresses:~~

~~———(A) the equal and fair treatment of bids originating in the United States and in the foreign country;~~

~~———(B) specific ownership requirements and tax policies in the United States and in the foreign country that may result in the unequal treatment of all bids received, regardless of their origin;~~

~~———(C) the means by which contractors from both the United States and the foreign country are notified of highway projects and construction projects available for bid; and~~

~~———(D) any other differences in public policy or procedure that may result in the unequal treatment of bids originating in the United States or in the foreign country for projects located in either the United States or the foreign country.~~

~~———(c) (i) If both subsections (1)(a)(ii)(B) and (1)(a)(ii)(C) are applicable to bids for a contract, the contract must be awarded to the resident bidder whose offered goods are Montana-made if the bid is:~~

~~———(A) not more than 3% higher than that of a resident bidder whose offered goods are not Montana-made; and~~

~~———(B) not more than 5% higher than that of the nonresident bidder.~~

~~———(ii) However, a combination of preferences under this subsection (1)(c) may not exceed 5% without regard to residency. However, a resident must be allowed a preference on a contract against the bid of a~~

nonresident if the state or country of the nonresident enforces a preference for residents. The preference must be equal to the preference given in the other state or country.

(2) The preferences in this section apply:

(a) whether the law requires advertisement for bids or does not require advertisement for bids; and

(b) to contracts involving funds obtained from the federal government unless expressly prohibited by the laws of the United States or regulations adopted pursuant to federal laws."

Section 10. Section 18-1-103, MCA, is amended to read:

"18-1-103. Resident defined. (1) For the purpose of 18-1-102, ~~18-1-111~~, and this section, the word "resident" includes actual residence of an individual within this state for a period of more than 1 year immediately prior to bidding.

(2) In a partnership enterprise, limited liability company, or an association, the majority of all partners or ~~association~~ members must have been actual residents of the state of Montana for more than 1 year immediately prior to bidding.

(3) Domestic corporations organized under the laws of the state of Montana are prima facie eligible to bid as residents, but this qualification may be set aside and a successful bid disallowed when it is shown to the satisfaction of the board, commission, officer, or individual charged with the responsibility for the execution of the contract that the corporation is a wholly owned subsidiary of a foreign corporation or that the corporation was formed for the purpose of circumventing the provisions relating to residence.

~~(4) Notwithstanding the foregoing, any bidder on a contract for the purchase of goods, whether an individual, partnership, or corporation, foreign or domestic and regardless of ownership thereof, whose offered goods are Montana-made is a resident for the purpose of 18-1-102, 18-1-111, and this section."~~

Section 11. Section 18-1-111, MCA, is amended to read:

"18-1-111. Impartiality to be shown in letting contracts -- preference to residents. The department may not show any partiality or favoritism not provided for by law in making awards or contracts ~~and shall be absolutely fair and impartial. Where both the bids and quality of goods offered are the same, preference shall be given to articles of local and domestic production and manufacture, and where both the bids and the quality of goods offered are the same, preference shall be given to resident bidders as defined in 18-1-103 over nonresident bidders."~~

Section 12. Section 18-1-404, MCA, is amended to read:

"18-1-404. Liability of state -- interest -- costs. (1) (a) The state of Montana is liable in respect to any contract entered into in the same manner and to the same extent as a private individual under like circumstances, except the state of Montana is not liable for punitive damages.

(b) The state of Montana is liable for interest from the date on which the payment on the contract became due. This liability is retroactive, within the meaning of 1-2-109, and applies to any contract in effect or an action pending on a contract on or after May 1, 1997. ~~For purposes of this section~~ If the contract is subject to a good faith dispute brought before a government agency or before a court, the interest rate is 10% simple interest each year, whether due before or after a ~~judgment~~ decision by the government agency or court. If the contract does not specify when interest is payable before a ~~judgment~~ decision, interest must be paid at the time provided in 17-8-242(2). If the contract is not subject to a good faith dispute brought before a government agency or before a court, the interest rate is governed by 17-8-242.

(2) Costs may be allowed as provided in 25-10-711. In all other cases, costs must be allowed in all courts to the successful claimant to the same extent as if the state of Montana were a private litigant. The costs must include attorney fees. The liability for attorney fees is retroactive, within the meaning of 1-2-109, and applies to any contract in effect or an action pending on a contract on or after May 1, 1997.

(3) This section does not apply to a contract governed by Title 19."

Section 13. Section 18-2-306, MCA, is amended to read:

"18-2-306. Time of final acceptance and final payment on construction contracts -- interest. (1) A government entity that enters into a contract for the construction of a building shall, unless otherwise provided by law or the contract and within 10 days after a request by the construction contractor for final acceptance, decide whether or not to make final acceptance. Within 30 days after final acceptance by the government entity, the government entity shall make the final payment of the contract price specified in the contract to the other party to the contract.

(2) Except as provided by law or the contract, a government entity that fails to complete the payment of the contract price at the time required by subsection (1) shall pay to the other party to the contract interest at the rate specified in 17-8-242 or 18-1-404, as applicable. Collection of interest pursuant to this section does not preclude any other legal remedy.

(3) The following definitions apply to this section:

(a) "Building" has the meaning provided in 18-2-101.

(b) "Construction" has the meaning provided in 18-2-101.

(c) "Final acceptance" means the government entity's acceptance of the construction of a building by the contractor upon certification by the architect, project engineer, or other representative of the government entity of final completion of the building.

(d) "Final completion" means that the building has been completed in accordance with the terms and conditions of the contract documents.

(e) "Government entity" means a department, agency, commission, board, authority, institution, or office of the state, including the board of regents and the Montana university system, a municipality, county, consolidated municipal-county government, school district, or other special district."

Section 14. Section 18-4-123, MCA, is amended to read:

"18-4-123. Definitions. In this chapter, unless the context clearly requires otherwise or a different meaning is prescribed for a particular section, the following definitions apply:

(1) "Business" means a corporation, partnership, individual, sole proprietorship, joint-stock company, joint venture, or other private legal entity.

(2) "Change order" means a written order, signed by an authorized department representative, directing the contractor to make changes ~~which~~ that the changes clause of the contract authorizes the department to order without the consent of the contractor.

(3) "Contract" means all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies or services.

(4) "Contract modification" means a written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of a contract accomplished by mutual action of the parties to the contract.

(5) "Contractor" means a person having a contract with a governmental body.

(6) "Data" means recorded information, regardless of form or characteristic.

(7) "Department" means the department of administration.

(8) "Designee" means an authorized representative of a person holding a superior position.

(9) "Director" means the director of the department of administration.

(10) "Employee" means an individual drawing a salary from a governmental body, whether elected or not, and any noncompensated individual performing personal services for a governmental body.

(11) "Governmental body" means a department, commission, council, board, bureau, committee,

institution, legislative body, agency, government corporation, or other entity, instrumentality, or official of the executive, legislative, or judicial branch of this state, including the board of regents and the Montana university system.

(12) (a) "Grant" means the furnishing by the federal government of assistance, whether financial or otherwise, to a person or agency to support a program authorized by law.

(b) ~~†~~ Grant does not include an award whose primary purpose is to procure an end product, whether in the form of supplies or services. A contract resulting from an award is not a grant but a procurement contract.

(13) "Person" means any business, individual, union, committee, club, other organization, or group of individuals.

(14) (a) "Printing" means the reproduction of an image from a printing surface generally made by a contact impression that causes a transfer of ink or the reproduction of an impression by a photographic process and includes graphic arts, typesetting, binding, and other operations necessary to produce a finished printed product.

(b) Printing does not include rebinding or repair by a library or an office, department, board, or commission of books, journals, pamphlets, magazines, and literary articles held as a part of its library collection.

(15) (a) "Procurement" means acquisition with or without cost, buying, purchasing, renting, leasing, or otherwise acquiring any supplies or services. ~~It also~~ The term includes all functions that pertain to the 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.

(b) Procurement does not include the acquiring of supplies or services by gift.

(16) "Procurement officer" means any person authorized to enter into and administer contracts and make written determinations with respect to contracts. The term ~~also~~ includes an authorized representative acting within the limits of the representative's authority.

(17) "Purchasing agency" means any governmental body, other than the department, that is authorized by this chapter or its implementing rules or by way of delegation from the director to enter into contracts.

(18) (a) "Services" means the furnishing of labor, time, or effort by a contractor.

(b) ~~The term~~ Services does not include employment agreements or collective bargaining agreements, the provision of human services administered by the department of public health and human services, or services related to construction contracts.

(19) "Supplies" means all property except as otherwise provided by law, including but not limited to equipment, materials, printing, and commodities, and excluding land or any interest in land.

(20) "Using agency" means any governmental body of the state that uses any supplies or services procured under this chapter.

(21) "Vendor" means a person who offers or may offer supplies or services to a public agency."

Section 15. Section 18-4-132, MCA, is amended to read:

"18-4-132. Application. (1) This chapter applies to the expenditure of public funds irrespective of their source, including federal assistance money, by this state acting through a governmental body, ~~as defined in 18-4-123~~, under any contract, ~~except a contract exempted from this chapter by this section or by a statute that provides that this chapter does not apply to the contract.~~ This chapter applies to a procurement of supplies or services that is at no cost to the state and from which income may be derived by the vendor and to a procurement of supplies or services from which income or a more advantageous business position may be derived by the state. This chapter does not apply to either grants or contracts between the state and its political subdivisions or other governments, except as provided in part 4. This chapter also applies to the disposal of state supplies. This chapter or rules adopted pursuant to this chapter do not prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

(2) This chapter does not apply to construction contracts.

(3) This chapter does not apply to expenditures of or the authorized sale or disposal of equipment purchased with money raised by student activity fees designated for use by the student associations of the university system.

(4) This chapter does not apply to contracts entered into by the Montana state lottery that have an aggregate value of less than \$250,000.

(5) This chapter does not apply to contracts entered into by the state compensation insurance fund to procure insurance-related services.

(6) This chapter does not apply to employment of:

(a) a registered professional engineer, surveyor, real estate appraiser, or registered architect;

(b) a physician, dentist, pharmacist, or other medical, dental, or health care provider;

(c) an expert witness hired for use in litigation, a hearings officer hired in rulemaking and contested case proceedings under the Montana Administrative Procedure Act, or an attorney as specified by executive order of the governor;

(d) consulting actuaries;

(e) a private consultant employed by the student associations of the university system with money raised

from student activity fees designated for use by those student associations;

- (f) a private consultant employed by the Montana state lottery;
- (g) a private investigator licensed by any jurisdiction; or
- (h) a claims adjuster.

(7) (a) This chapter does not apply to electric energy purchase contracts by the university of Montana or Montana state university, as defined in 20-25-201.

(b) Any savings accrued by the university of Montana or Montana state university in the purchase or acquisition of energy must be retained by the board of regents of higher education for university allocation and expenditure."

Section 16. Section 18-4-133, MCA, is amended to read:

"18-4-133. Purchases exempt from general requirements. (1) When immediate delivery of articles or performance of service is required by the public exigencies, the articles or service required may be procured by open purchase or contract at the place and in the manner in which the articles are usually bought and sold or the services engaged between individuals but under the direction of the department.

(2) (a) The department may exempt the department of corrections and the department of public health and human services from the provisions of this chapter for the purchase of suitable clothing by the department of corrections and the department of public health and human services for residents of its institutions and community-based programs.

~~(3)~~(b) As used in this section, "suitable clothing" means styled, seasonable clothing, which will allow the resident to make a normal appearance in the community.

(3) When none of the bids or proposals received in response to a valid solicitation are from a responsible bidder or offeror or responsive bidder or offeror, as defined in 18-4-301, the procurement officer may:

(a) cancel and reissue the solicitation. If the procurement officer reissues the solicitation, the procurement officer shall attempt to increase the number of potential vendors and may modify any specification in the original solicitation.

(b) directly negotiate with a vendor if the procurement officer determines that a second or subsequent solicitation would also be unsuccessful.

(4) The department shall adopt rules describing the conditions under which a procurement officer may negotiate directly with a vendor. The rules must reflect the purposes described in 18-4-122.

(5) When a state department, agency, or official administers a grant of public funds and contracts with

a landowner to carry out a recreational or environmental remediation, reclamation, or conservation project that benefits the state, the department may exempt the landowner from the provisions of chapter 1 and this chapter if the landowner conducts the work or conducts a form of competitive procurement allowed by the terms of the contract."

Section 17. Section 18-4-141, MCA, is amended to read:

"18-4-141. Contract transfers and collusion prohibited -- violations and penalty. (1) A contract or order or any interest in a contract or order may not be transferred, assigned, or subcontracted by the party to whom the contract or order is given to any other party without the express written approval of the state, and the state may declare void any unapproved transfer, assignment, or subcontract.

(2) Collusion or secret agreements between ~~bidders~~ vendors for the purpose of securing any advantage to the ~~bidders~~ vendors as against the state in the awarding of contracts ~~is~~ are prohibited. The state may declare the contract void if the department finds sufficient evidence after a contract has been let that the contract was obtained by a ~~bidder~~ vendor or ~~bidders~~ vendors by reason of collusive or secret agreement among the ~~bidders~~ vendors to the disadvantage of the state.

(3) All rights of action for a breach of a contract by the contracting parties are reserved to the state.

(4) A person who violates the provisions of 2-2-201 or this section, or both, is guilty of a misdemeanor and shall be fined an amount of not less than \$500 or more than \$5,000, and the state of Montana may at its option declare any contract in violation of the provisions of 2-2-201 or this section, or both, void ab initio."

Section 18. Section 18-4-301, MCA, is amended to read:

"18-4-301. Definitions. As used in this part, the following definitions apply:

(1) "Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs ~~which~~ that are allowable and allocable in accordance with the contract terms and the provisions of this chapter; and a fee, if any.

(2) (a) "Displacement" means the layoff, demotion, or involuntary transfer of a state employee.

(b) ~~The term~~ Displacement does not include changes in shift or days off or reassignment to other positions within the same class and at the same general location.

(3) "Established catalog price" means the price included in a catalog, price list, schedule, or other form that:

(a) is regularly maintained by a manufacturer or contractor;

(b) is either published or otherwise available for inspection by customers; and

(c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.

(4) "Invitation for bids" means all documents, whether attached or incorporated by reference, ~~utilized~~ used for soliciting bids.

(5) "Office supply" means an item included under the office supply commodity class codes maintained by the department.

(6) "Purchase description" means the words used in a solicitation to describe the supplies or services to be purchased and includes specifications attached to or made a part of the solicitation.

(7) "Request for proposals" means all documents, whether attached or incorporated by reference, ~~utilized~~ used for soliciting proposals.

(8) "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability ~~which that~~ will ~~assure~~ ensure good faith performance.

(9) "Responsive bidder or offeror" means a person who has submitted a bid ~~which~~ or proposal that conforms in all material respects to the invitation for bids or request for proposals.

(10) "Term contract" means a contract in which supplies or services are purchased at a predetermined unit price for a specific period of time."

Section 19. Section 18-4-301, MCA, is amended to read:

"18-4-301. Definitions. As used in this part, the following definitions apply:

(1) "Alternative procurement method" means a method of procuring supplies or services in a manner not specifically described in this chapter, but instead authorized by the department under 18-4-302.

~~(1)~~(2) "Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs ~~which that~~ are allowable and allocable in accordance with the contract terms and the provisions of this chapter; and a fee, if any.

~~(2)~~(3) (a) "Displacement" means the layoff, demotion, or involuntary transfer of a state employee.

(b) ~~The term~~ Displacement does not include changes in shift or days off or reassignment to other positions within the same class and at the same general location.

~~(3)~~(4) "Established catalog price" means the price included in a catalog, price list, schedule, or other form that:

(a) is regularly maintained by a manufacturer or contractor;

(b) is either published or otherwise available for inspection by customers; and

(c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.

~~(4)~~(5) "Invitation for bids" means all documents, whether attached or incorporated by reference, ~~utilized~~ used for soliciting bids.

~~(5)~~(6) "Office supply" means an item included under the office supply commodity class codes maintained by the department.

~~(6)~~(7) "Purchase description" means the words used in a solicitation to describe the supplies or services to be purchased and includes specifications attached to or made a part of the solicitation.

~~(7)~~(8) "Request for proposals" means all documents, whether attached or incorporated by reference, ~~utilized~~ used for soliciting proposals.

~~(8)~~(9) "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability ~~which that~~ will ~~assure~~ ensure good faith performance.

~~(9)~~(10) "Responsive bidder" means a person who has submitted a bid ~~which that~~ conforms in all material respects to the invitation for bids.

~~(10)~~(11) "Term contract" means a contract in which supplies or services are purchased at a predetermined unit price for a specific period of time."

Section 20. Section 18-4-302, MCA, is amended to read:

"18-4-302. Methods of source selection -- authorization for alternative procurement methods. (1)

Unless otherwise authorized by law, all state contracts for supplies and services must be awarded by a source selection method provided for in this title. Supplies or services offered for sale, lease, or rental by public utilities are exempt from this requirement if the prices of the supplies or services are regulated by the public service commission or other governmental authority.

(2) ~~At the time that~~ When the department or another agency opens bids or proposals, if a supplier's current publicly advertised or established catalog price is received at or before the time that the bids or proposals are opened and is less than the bid of the lowest responsible and responsive bidder or offeror or improves upon the conditions for the best proposal received using the same factors and weights included in the proposal, the department or agency may reject all bids and purchase the supply from that supplier without meeting the requirements of 18-4-303 through 18-4-306.

(3) An office supply procured by the department's central stores program may be purchased by an agency, without meeting the requirements of 18-4-303 through 18-4-306, from a supplier whose publicly advertised price, established catalog price, or discount price offered to the agency is less than the price offered by the central stores program if the office supply conforms in all material respects to the terms, conditions, and quality offered by the central stores program. A state office supply term contract must include a provision by which the contracting parties acknowledge and agree to the provisions of this subsection.

(4) (a) Under rules adopted by the department, an agency may request from the department authorization for an alternative procurement method.

(b) A request for authorization must specify:

(i) the problem to be solved;

(ii) the proposed alternative procurement method;

(iii) the reasons why the alternative procurement method may be more appropriate than a method authorized by law; and

(iv) how competition and fairness will be achieved by the alternative procurement method.

(c) Within 30 days after receiving the request, the department shall:

(i) evaluate the request;

(ii) approve or deny the request; and

(iii) issue a written statement providing the reasons for its decision.

(d) Whenever the department approves a request submitted under this section, the department:

(i) may authorize the alternative procurement method on a trial basis; and

(ii) if the alternative procurement method is employed, shall make a written determination as to the success of the method.

(e) If the department determines that the alternative procurement method is successful and should be an alternative that is generally available, it shall promulgate rules that establish the use of the alternative procurement method as an additional source selection method. The rules promulgated by the department under this subsection must reflect the purposes described in 18-4-122."

Section 21. Section 18-4-306, MCA, is amended to read:

"18-4-306. Sole source procurement -- records. (1) A contract may be awarded for a supply or service item without competition when, under rules adopted by the department, the director, the head of a purchasing agency, or a designee of either officer above the level of the procurement officer determines in writing that:

- (a) there is only one source for the ~~required~~ supply or service item;
- (b) only one source is acceptable or suitable for the supply or service item; or
- (c) the supply or service item must be compatible with current supplies or services.

(2) The department may require the submission of cost or pricing data in connection with an award under this section.

~~(2)~~(3) The department shall maintain or shall require the head of a purchasing agency to maintain a record listing all contracts made under this section for a minimum of 4 years. The record must contain:

- (a) each contractor's name;
- (b) the amount and type of each contract; and
- (c) a listing of the supplies or services procured under each contract.

~~(3)~~(4) The record must be available for public inspection."

Section 22. Section 18-4-313, MCA, is amended to read:

"18-4-313. Contracts -- terms, extensions, and time limits. (1) Unless otherwise provided by law, a contract, lease, or rental agreement for supplies or services may not be made for a period of more than 7 years. However, the department may contract for the lease or purchase of hardware, software, or services for telecommunications equipment and systems, or data processing, equipment, the department of revenue liquor agencies, and the department of public health and human services medicaid management information system (MMIS) for a period not to exceed 10 years. A contract, lease, or rental agreement may be extended or renewed if the terms of the extension or renewal, if any, are included in the solicitation, if funds are available for the first fiscal period at the time of the agreement, and if the total contract period, including any extension or renewal, does not exceed 7 years. Payment and performance obligations for succeeding fiscal periods are subject to the availability and appropriation of funds for the fiscal periods.

(2) Prior to the issuance, extension, or renewal of a contract, it must be determined that:

- (a) estimated requirements cover the period of the contract and are reasonably firm and continuing; and
- (b) the contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement.

(3) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract must be canceled."

Section 23. Section 18-5-308, MCA, is amended to read:

"18-5-308. (Temporary) Construction with other sections. Procurement from small businesses under this part is subject to all other statutes governing state procurement and all rules promulgated ~~thereunder, as now or hereafter amended~~ under those statutes, except that in case of conflict, this part governs and the provisions set forth in 18-1-102, ~~18-1-111, and 18-1-112 shall do~~ not apply. (Repealed effective June 30, 2003--secs. 4(2), 5(2), Ch. 271, L. 1999.)"

Section 24. Section 18-7-107, MCA, is amended to read:

"18-7-107. State printing, binding, and stationery work. All printing, binding, and stationery work for the state of Montana ~~must be printed in the state of Montana by the lowest responsible bidder if the bid, including the cost of delivery, does not exceed the lowest bid by a nonresident printer by more than 8%. If there is no responsible in-state bidder, the work may be performed by the lowest responsible bidder outside the state~~ is subject to the preference in 18-1-102(1)(b). Federal exemptions as specified in 18-1-102(2)(b) apply."

Section 25. Section 60-2-112, MCA, is amended to read:

"60-2-112. Competitive bidding -- reciprocity. (1) Except as provided in subsections (2) through (5), ~~when~~ if the estimated cost of any work exceeds \$50,000, the commission shall ~~let~~ award the contract by competitive bidding to the lowest responsible and responsive bidder. ~~Award~~ The award must be made upon the notice and terms that the commission prescribes by its rules. However, except when prohibited by federal law, the commission shall make awards and contracts in accordance with 18-1-102 ~~and 18-1-112.~~

(2) The commission may ~~let~~ award a contract by means other than competitive bidding if it determines that special circumstances so require. The commission shall specify the special circumstances in writing.

(3) The commission may enter into contracts with units of local government for the construction of projects without competitive bidding if it finds that the work can be accomplished at lower total costs, including total costs of labor, materials, supplies, equipment usage, engineering, supervision, clerical and accounting services, administrative costs, and reasonable estimates of other costs attributable to the project.

(4) The commission may delegate to the department the authority to enter, without competitive bidding, agreed-upon price contracts for projects costing \$50,000 or less.

(5) The commission or the department may not enter into a contract for a state-funded highway project or a construction project with a bidder whose operations are not headquartered in the United States unless:

(a) the foreign country, ~~OR PROVINCE OR OTHER POLITICAL SUBDIVISION OF THAT COUNTRY,~~ in which the bidder is headquartered affords companies based in the United States open, fair, and nondiscriminatory access

to bidding on highway projects and construction projects located in the foreign country, OR PROVINCE OR OTHER POLITICAL SUBDIVISION OF THAT COUNTRY; and

(b) the department has entered into a reciprocity agreement with OR HAS EXCHANGED LETTERS OF UNDERSTANDING WITH the foreign country, OR PROVINCE OR OTHER POLITICAL SUBDIVISION OF THAT COUNTRY, that addresses:

(i) the equal and fair treatment of bids originating in the United States and in the foreign country, OR PROVINCE OR OTHER POLITICAL SUBDIVISION OF THAT COUNTRY;

(ii) specific ownership requirements and tax policies in the United States and in the foreign country, OR PROVINCE OR OTHER POLITICAL SUBDIVISION OF THAT COUNTRY, that may result in the unequal treatment of all bids received, regardless of their origin;

(iii) the means by which contractors from both the United States and the foreign country, OR PROVINCE OR OTHER POLITICAL SUBDIVISION OF THAT COUNTRY, are notified of highway projects and construction projects available for bid; and

(iv) any other differences in public policy or procedure that may result in the unequal treatment of bids originating in the United States or in the foreign country, OR PROVINCE OR OTHER POLITICAL SUBDIVISION OF THAT COUNTRY, for projects located in either the United States or the foreign country, OR PROVINCE OR OTHER POLITICAL SUBDIVISION OF THAT COUNTRY.

(6) For the purposes of subsection (5), "construction" has the ~~same~~ meaning ~~as is~~ provided in 18-2-101."

NEW SECTION. Section 26. Repealer. Section 18-1-112, MCA, is repealed.

NEW SECTION. Section 27. Effective dates. (1) Except as provided in subsection (2), [this act] is effective October 1, 2001.

(2) [Section 18] is effective July 1, 2005.

NEW SECTION. Section 28. Applicability. [This act] applies to contracts for which the contracting government entity begins the contracting process after October 1, 2001.

NEW SECTION. Section 29. Termination. [Sections 19 and 20] terminate June 30, 2005.

- END -

