

SENATE BILL NO. 490  
INTRODUCED BY M. TAYLOR

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING THE DEPARTMENT OF ADMINISTRATION TO AWARD CERTAIN CONSTRUCTION CONTRACTS ON THE BASIS OF BEST VALUE; REQUIRING THAT CERTAIN CRITERIA BE CONSIDERED WHEN AWARDING CERTAIN CONSTRUCTION CONTRACTS ON THE BASIS OF BEST VALUE; AUTHORIZING THE DEPARTMENT OF ADMINISTRATION TO REQUEST CERTAIN INFORMATION FROM CONTRACTORS WISHING TO PARTICIPATE IN PROJECTS TO BE AWARDED BY A BEST VALUE DETERMINATION; REQUIRING THE DEPARTMENT OF ADMINISTRATION TO DETERMINE THAT A CONTRACTOR IS RESPONSIBLE IN THE CONTEXT OF PROJECTS TO BE AWARDED ON THE BASIS OF BEST VALUE; PROVIDING FOR AN APPEAL PROCESS FOR A CONTRACTOR WHO IS DETERMINED TO BE NONRESPONSIBLE FOR THE PURPOSES OF CONTRACTS AWARDED ON THE BASIS OF BEST VALUE; ESTABLISHING A DEADLINE FOR AWARDING A CONTRACT FOR A PROJECT AWARDED ON THE BASIS OF BEST VALUE; AND AMENDING SECTIONS 18-1-101, 18-1-102, AND 18-2-103, MCA."

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

NEW SECTION. **Section 1. Optional best-value award for construction contracts.** (1) The department may award a construction contract on the basis of a best value determination.

(2) The determination of best value must be based upon objective criteria that are clearly delineated in the request for proposals. The criteria to be considered in determining best value must be assigned a weight as follows:

- (a) the price quoted in the proposal must be at least 70% but not more than 80% of the overall weight;
- (b) the schedule for completing the project must be at least 20% but not more than 30% of the overall weight; and
- (c) other objective criteria clearly identified in the request for proposals may not exceed, in total, 10% of the overall weight.

(3) The department shall rank the proposals according to the established criteria and weighting and award the contract to the proposal that earns the highest ranking.

**NEW SECTION. Section 2. Information from contractors.** (1) Subject to the provisions of subsection (2), the department may require a contractor who desires to submit a proposal for a construction contract that will be awarded on the basis of best value under [section 1] to provide any of the following information:

(a) an audited financial statement or financial statement review completed within the preceding 12 months by an accountant certified under 37-50-302.

(b) the contractor's experience on other public or private projects, including but not limited to the size, complexity, and scope of the contractor's prior projects;

(c) reviews of the contractor's performance on public works or private construction projects undertaken by the contractor within the preceding 5 years;

(d) any civil judgments and any criminal history of the contractor or the contractor's principals within the preceding 5 years;

(e) any debarment or suspension of the contractor by any local, state, or federal governmental entity within the preceding 5 years;

(f) any violation of labor standards by the contractor within the preceding 5 years;

(g) any revocation or suspension of a license held by the contractor or any action taken by a board, as defined in 37-1-130, against the contractor within the preceding 5 years; or

(h) any bankruptcy filings or proceedings by the contractor within the preceding 7 years.

(2) With respect to any project that is to be awarded on the basis of best value, if the department requests information described in subsection (1)(a) from any contractor who wishes to submit a proposal for the project, the same information must be requested from all contractors who wish to submit a proposal for the project.

**NEW SECTION. Section 3. Determination of responsibility -- prequalification -- appeal.** (1) Based upon the information provided to the department under [section 2], the department may determine a contractor to be either responsible or nonresponsible for a project to be awarded on the basis of best value.

(2) The department may find a contractor to be nonresponsible for any of the following reasons:

(a) insufficient financial ability to perform the contract;

(b) inadequate experience to undertake the project;

(c) documented failure to perform on a prior public or private construction contract, including but not limited to final adjudication or admission of violations of prevailing wage laws in Montana or in any other state;

(d) a prior judgment for breach of contract that indicates the contractor has not performed the work or

completed the project as contracted for;

(e) a criminal conviction for fraud, misrepresentation, or theft relating to contract procurement;

(f) previous debarment or suspension of the contractor by any local, state, or federal government agency that indicates the contractor may not be capable of performing the work or completing the project;

(g) previous revocation or suspension of a license that indicates the contractor may not be capable of performing the work or completing the project;

(h) a previous disciplinary action taken against the contractor by any board, as defined in 37-1-130, that indicates the contractor may not be capable of performing the work or completing the project;

(i) bankruptcy proceedings that indicate the contractor may not be capable of performing the work or completing the project;

(j) a previous violation of law or labor standards that indicates the proposing contractor may not be capable of performing the work or completing the project;

(k) failure or refusal to provide any of the information requested under [section 2]; or

(l) providing false information.

(3) (a) For the purpose of enhancing the efficiency and effectiveness of projects that are to be awarded on the basis of best value, the department may adopt rules to provide for the prequalification of contractors who may desire to submit proposals.

(b) As used in this section, prequalification applies only to a determination by the department of a contractor's status as responsible or nonresponsible.

(c) Prequalification under this section may not extend for a period in excess of 2 years.

(4) (a) The department shall assess the responsibility of each contractor separately for each project to be awarded under [section 1].

(b) If the department determines that a contractor is nonresponsible for a project, the determination has no bearing on a determination for any other project.

(5) If the department determines that a contractor is nonresponsible, the department shall notify the contractor in writing within 5 working days of the determination.

(6) If the department receives a proposal from a contractor who has been determined to be nonresponsible under this section, the department shall reject the proposal.

(7) A contractor who is declared nonresponsible by the department may request the department to review the determination, and the provisions of 18-4-242 apply.

**NEW SECTION. Section 4. Requirements for consideration of best-value proposal.** For a proposal submitted pursuant to [section 1] to be considered by the department:

- (1) the proposal must conform in all material respects to the requirements and criteria set forth in the request for proposals, including any contract plans or specifications included by reference; and
- (2) the contractor submitting the proposal must be determined by the department to be responsible under [section 3].

**NEW SECTION. Section 5. Award of contract for best-value project.** For a project awarded on the basis of best value under [section 1], the department shall award the contract within 30 days of the date on which proposals were required to be submitted, unless the request for proposals specifically states a different date by which the contract will be awarded.

**Section 6.** 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) "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.

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

(f) "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.

(3) Unless the context requires otherwise, as used in this chapter and chapter 2 of this title, the term "bid" includes a proposal requested or offered for a project to be awarded on the basis of a best-value determination under [section 1]."

**Section 7.** Section 18-1-102, MCA, is amended to read:

**"18-1-102. State contracts to lowest bidder -- reciprocity.** (1) (a) Except as provided in [section 1] or subsection (1)(b) of this section, 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 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 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) 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%.

(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 8.** Section 18-2-103, MCA, is amended to read:

**"18-2-103. Supervision of construction of buildings.** (1) For the construction of a building costing more than \$150,000, the department shall:

(a) review and accept all plans, specifications, and cost estimates prepared by architects or consulting engineers;

(b) approve all bond issues or other financial arrangements and supervise and approve the expenditure of all money;

(c) solicit, accept, and reject bids and, unless a project is to be awarded as provided in [section 1], award all contracts to the lowest qualified bidder considering conformity with specifications and terms and reasonableness of the bid amount;

(d) review and approve all change orders; and

(e) accept the building when completed according to accepted plans and specifications.

(2) The department may delegate on a project-by-project basis any powers and duties under subsection

(1) to other state agencies, including units of the Montana university system, upon terms and conditions specified by the department.

(3) Before a contract under subsection (1) is awarded, two formal bids must have been received, if reasonably available.

(4) The department need not require the provisions of Montana law relating to advertising, bidding, or supervision when proposed construction costs are \$75,000 or less. However, with respect to a project having a proposed cost of \$75,000 or less but more than \$25,000, the agency awarding the contract shall procure at least three informal bids from contractors registered in Montana, if reasonably available.

(5) For the construction of buildings owned or to be owned by a school district, the department shall, upon request, provide inspection to ensure compliance with the plans and specifications for the construction of the buildings. "Construction" includes construction, repair, alteration, equipping, and furnishing during construction, repair, or alteration. These services must be provided at a cost to be contracted for between the department and the school district, with the receipts to be deposited in the department's construction regulation account in a state special revenue fund.

(6) It is the intent of the legislature that student housing and other facilities constructed under the authority of the regents of the university system are subject to the provisions of subsections (1) through (3).

(7) The department of military affairs may act as the contracting agency for buildings constructed under the authority of 18-2-102(2)(d). However, the department of administration may agree to act as the contracting agency on behalf of the department of military affairs. Montana law applies to any controversy involving a contract."

**NEW SECTION. Section 9. Codification instruction.** [Sections 1 through 5] are intended to be codified as an integral part of Title 18, chapter 2, part 1, and the provisions of Title 18, chapter 2, part 1, apply to [sections 1 through 5].

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