

SENATE BILL NO. 51

INTRODUCED BY S. FITZPATRICK

BY REQUEST OF THE DEPARTMENT OF ADMINISTRATION

A BILL FOR AN ACT ENTITLED: "AN ACT MODIFYING THE OPENING, SUBMISSION, AND INSPECTION OF BIDS AND PROPOSALS; ALLOWING PUBLIC COMMENT WITHIN 7 DAYS OF NOTICE OF INTENT TO AWARD A CONTRACT; AND AMENDING SECTIONS 18-3-110, 18-4-132, 18-4-303, 18-4-304, AND 18-4-307, MCA."

WHEREAS, MODERNIZING THE LAW GOVERNING PROCUREMENT BY THE STATE OF MONTANA IS A STATED PURPOSE OF THE MONTANA PROCUREMENT ACT; AND

WHEREAS, THE PROVISIONS REGARDING INVITATIONS FOR BID AND REQUESTS FOR PROPOSALS HAVE NOT BEEN UPDATED IN MORE THAN 15 YEARS; AND

WHEREAS, BUSINESS AND TECHNOLOGY HAVE CHANGED SIGNIFICANTLY IN THE LAST 15 YEARS WITH INNOVATIONS SUCH AS SMART PHONES AND VIDEO CONFERENCING TOOLS AND THE PREVALENCE OF REMOTE WORK AND ELECTRONIC MEETINGS; AND

WHEREAS, UNNECESSARILY COMPLEX GOVERNMENT PROCUREMENT AND CONTRACTING PROCESSES DISCOURAGE MONTANA SMALL AND MEDIUM-SIZED BUSINESSES FROM COMPETING WITH LARGE AND SOPHISTICATED MULTINATIONAL AND OUT-OF-STATE CORPORATIONS; AND

WHEREAS, CURRENT PROCUREMENT PROCESSES PLACE BUSINESS INNOVATIONS AND INTELLECTUAL PROPERTY AT RISK; AND

WHEREAS, INNOVATIONS AND INTELLECTUAL PROPERTY ARE THE MOST VALUABLE ASSETS OF MOST SMALL BUSINESSES IN THE INFORMATION AGE AND ONE OF THE PRIMARY COMPETITIVE ADVANTAGES SMALL BUSINESSES HAVE OVER LARGE COMPANIES; AND

WHEREAS, SMALL BUSINESSES LACK THE RESOURCES OF LARGE COMPANIES TO DEFEND THEIR INNOVATIONS AND INTELLECTUAL PROPERTY; AND

WHEREAS, VENDOR AND BUSINESS SURVEYS INDICATE CURRENT PROCUREMENT PROCESSES AND REQUIREMENTS PROVIDE AN ADVANTAGE TO INCUMBENT CONTRACTORS AND CREATE OTHER BARRIERS AND

1 DISINCENTIVES TO SEEKING PUBLIC CONTRACTS IN MONTANA; AND

2 WHEREAS, PROCUREMENT METHODS THAT DISCOURAGE COMPETITION ARE IN DIRECT CONFLICT WITH THE
 3 MONTANA PROCUREMENT ACT'S OBJECTIVES TO PROVIDE INCREASED ECONOMY IN STATE PURCHASING AND TO
 4 MAXIMIZE, TO THE FULLEST EXTENT PRACTICABLE, THE PURCHASING VALUE OF PUBLIC FUNDS OF THE STATE; AND

5 WHEREAS, THE MONTANA PROCUREMENT ACT EXISTS TO ENSURE THE FAIR AND EQUITABLE TREATMENT OF
 6 ALL PERSONS WHO DEAL WITH THE PROCUREMENT SYSTEM OF THE STATE AND TO FOSTER EFFECTIVE, BROAD-BASED
 7 COMPETITION WITHIN THE FREE ENTERPRISE SYSTEM; AND

8 WHEREAS, MORE THAN 40 STATES AND THE FEDERAL GOVERNMENT UTILIZE MODERN PROCUREMENT
 9 PRACTICES THAT ALLOW FREE, OPEN, AND TRANSPARENT GOVERNMENT CONTRACTING WITHOUT COMPROMISING THE
 10 SECURITY OF BUSINESSES' INNOVATIONS AND INTELLECTUAL PROPERTY; AND

11 WHEREAS, A STATED PURPOSE OF THE MONTANA PROCUREMENT ACT IS TO MAKE AS CONSISTENT AS
 12 POSSIBLE THE PROCUREMENT LAWS AMONG VARIOUS JURISDICTIONS; AND

13 WHEREAS, MODERN PROCUREMENT PRACTICES ALLOW CITIZENS TO OBSERVE AND PARTICIPATE IN
 14 GOVERNMENT CONTRACTING DECISIONS WHILE PROTECTING THE CONFIDENTIALITY OF BUSINESSES' INNOVATIONS AND
 15 INTELLECTUAL PROPERTY AND ALLOW FREE AND OPEN COMPETITION THAT MAXIMIZES THE PURCHASING VALUE OF
 16 PUBLIC FUNDS.

17

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

19

20 **Section 1.** Section 18-3-110, MCA, is amended to read:

21 **"18-3-110. Requests for proposals.** (1) The department, with the cooperation of the departments
 22 that will occupy the rental property, shall develop a request for proposals defining the state's program and
 23 building specification requirements. A request for proposals must be administered in accordance with 18-4-
 24 304(3) through ~~(6)~~ (7).

25 (2) For projects valued at less than \$2 million, the departments may develop the request for
 26 proposals. For projects valued at \$2 million or more, the departments shall contract with a licensed architect or
 27 engineer selected in accordance with 18-2-112 for the development of the request for proposals.

28 (3) A successful proposer, general contractor, or subcontractor engaged in construction under this

1 part shall pay the standard prevailing rate of wages to employees engaged in the construction of the leased
2 property."

3

4 **Section 2.** Section 18-4-132, MCA, is amended to read:

5 **"18-4-132. Application.** (1) This chapter applies to:

6 (a) the expenditure of public funds irrespective of their source, including federal assistance money,
7 by this state acting through a governmental body under any contract, except a contract exempted from this
8 chapter by this section or by another statute;

9 (b) a procurement of supplies or services that is at no cost to the state and from which income may
10 be derived by the vendor and to a procurement of supplies or services from which income or a more
11 advantageous business position may be derived by the state; and

12 (c) the disposal of state supplies.

13 (2) This chapter or rules adopted pursuant to this chapter do not prevent any governmental body
14 or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative
15 agreement.

16 (3) This chapter does not apply to:

17 (a) either grants or contracts between the state and its political subdivisions or other governments,
18 except as provided in part 4;

19 (b) construction contracts;

20 (c) expenditures of or the authorized sale or disposal of equipment purchased with money raised
21 by student activity fees designated for use by the student associations of the university system;

22 (d) contracts entered into by the Montana state lottery that have an aggregate value of less than
23 \$250,000;

24 (e) contracts entered into by the state compensation insurance fund to procure insurance-related
25 services;

26 (f) ~~employment of~~ contracts with:

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

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

- 1 (iii) an expert witness hired for use in litigation, a hearings officer hired in rulemaking and contested
2 case proceedings under the Montana Administrative Procedure Act, or an attorney as specified by executive
3 order of the governor;
- 4 (iv) consulting actuaries;
- 5 (v) a private consultant employed by the student associations of the university system with money
6 raised from student activity fees designated for use by those student associations;
- 7 (vi) a private consultant employed by the Montana state lottery;
- 8 (vii) a private investigator licensed by any jurisdiction;
- 9 (viii) a claims adjuster; or
- 10 (ix) a court reporter appointed as an independent contractor under 3-5-601;
- 11 (g) electrical energy purchase contracts by the university of Montana or Montana state university,
12 as defined in 20-25-201. Any savings accrued by the university of Montana or Montana state university in the
13 purchase or acquisition of energy must be retained by the board of regents of higher education for university
14 allocation and expenditure.
- 15 (h) the purchase or commission of art for a museum or public display;
- 16 (i) contracting under 47-1-121 of the Montana Public Defender Act;
- 17 (j) contracting under Title 90, chapter 4, part 11; or
- 18 (k) contracting under Title 90, chapter 14, part 1, when the total contract value is \$12,501 or less.
- 19 (4) (a) Food products produced in Montana may be procured by either standard procurement
20 procedures or by direct purchase. Montana-produced food products may be procured by direct purchase when:
- 21 (i) the quality of available Montana-produced food products is substantially equivalent to the
22 quality of similar food products produced outside the state;
- 23 (ii) a vendor is able to supply Montana-produced food products in sufficient quantity; and
- 24 (iii) a bid for Montana-produced food products either does not exceed or reasonably exceeds the
25 lowest bid or price quoted for similar food products produced outside the state. A bid reasonably exceeds the
26 lowest bid or price quoted when, in the discretion of the person charged by law with the duty to purchase food
27 products for a governmental body, the higher bid is reasonable and capable of being paid out of that
28 governmental body's existing budget without any further supplemental or additional appropriation.

1 (b) The department shall adopt any rules necessary to administer the optional procurement
2 exception established in this subsection (4).

3 (5) As used in this section, the following definitions apply:

4 (a) "Food" means articles normally used by humans as food or drink, including articles used for
5 components of articles normally used by humans as food or drink.

6 (b) "Produced" means planted, cultivated, grown, harvested, raised, collected, processed, or
7 manufactured."

8

9 **Section 3.** Section 18-4-303, MCA, is amended to read:

10 **"18-4-303. Competitive sealed bidding.** (1) An invitation for bids must be issued and must include a
11 purchase description and conditions applicable to the procurement.

12 (2) Adequate public notice of the invitation for bids must be given a reasonable time before the
13 date set forth in the invitation for the ~~opening~~ submission of bids, in accordance with rules adopted by the
14 department. Notice may include publication in a newspaper of general circulation at a reasonable time before
15 the bid ~~opening~~ submission deadline.

16 (3) ~~Bids must be opened publicly at the time and place designated in the invitation for bids. Each~~
17 ~~bidder and any member of the public has the right to be present, either in person or by agent, when the bids are~~
18 ~~opened and has the right to examine and inspect all bids after they are opened. After bids have been evaluated~~
19 ~~as provided in the invitation for bids and reviewed by the procurement officer for release, bids may be inspected~~
20 ~~by the public, subject to the same limitations specified in 18-4-304(4) for competitive sealed proposals. Bids~~
21 ~~and other information received from bidders in response to an invitation for bids may not be inspected by the~~
22 ~~public until the department provides notice of intent to award a contract as provided in subsection (9).~~

23 (4) ~~The amount of each bid and other relevant information as may be specified by rule, together with~~
24 ~~the name of each bidder, must be recorded. The record must be open to public inspection.~~

25 (5) ~~After the time of award, all bids and bid documents must be open to public inspection in~~
26 ~~accordance with the provisions of 18-4-126.~~

27 (6)(4) Bids must be unconditionally accepted without alteration or correction, except as authorized in
28 this chapter. Bids must be evaluated based on the requirements set forth in the invitation for bids, which may

1 include criteria to determine acceptability, such as inspection, testing, quality, workmanship, delivery, and
2 suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for
3 award must be objectively measurable, such as discounts, transportation costs, and total or life-cycle costs.
4 The invitation for bids must set forth the evaluation criteria to be used. Only criteria set forth in the invitation for
5 bids may be used in bid evaluation.

6 ~~(7)~~(5) Correction or withdrawal of inadvertently erroneous bids, before or after award, or cancellation
7 of awards or contracts based on bid mistakes may be permitted in accordance with rules adopted by the
8 department. After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the
9 state or fair competition may not be permitted. Except as otherwise provided by rule, all decisions to permit the
10 correction or withdrawal of bids or to cancel awards or contracts based on bid mistakes must be supported by a
11 written determination made by the department.

12 ~~(8)~~(6) If an award is made, it must be made with reasonable promptness by written notice to the
13 lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the
14 invitation for bids, including the preferences established by Title 18, chapter 1, part 1. If all bids exceed
15 available funds as certified by the appropriate fiscal officer and the lowest responsible and responsive bid does
16 not exceed the funds by more than 5%, the director or the head of a purchasing agency may, in situations in
17 which time or economic considerations preclude resolicitation of a reduced scope, negotiate an adjustment of
18 the bid price, including changes in the bid requirements, with the lowest responsible and responsive bidder in
19 order to bring the bid within the amount of available funds.

20 ~~(9)~~(7) When it is considered impractical to initially prepare a purchase description to support an award
21 based on price, an invitation for bids may be issued requesting the submission of unpriced offers, to be followed
22 by an invitation for bids limited to those bidders whose offers have been qualified under the criteria set forth in
23 the first solicitation.

24 ~~(10)~~(8) In case of a tie bid, preference must be given to the bidder, if any, offering American-made
25 products or supplies.

26 (9) Prior to awarding a contract, the department shall provide to the public notice of intent to award
27 a contract and of 7 days to submit written comments regarding the proposed award."

28

1 **Section 4.** Section 18-4-304, MCA, is amended to read:

2 "**18-4-304. Competitive sealed proposals.** (1) The department may procure supplies and services
3 through competitive sealed proposals.

4 (2) Proposals must be solicited through a request for proposals.

5 (3) Adequate public notice of the request for proposals must be given in the same manner as
6 provided in 18-4-303(2).

7 (4) Proposals and other information received from offerors in response to a request for proposals
8 may not be inspected by the public until the department provides notice of intent to award a contract as
9 provided in subsection (7). After the proposals have been ~~opened at the time and place designated~~ evaluated
10 as provided in the request for proposals and reviewed by the procurement officer for release, proposal
11 documents may be inspected by the public, subject to the limitations of:

12 (a) the Uniform Trade Secrets Act, Title 30, chapter 14, part 4;

13 (b) matters involving individual safety as determined by the department; and

14 (c) other constitutional protections.

15 (5) The request for proposals must state the evaluation criteria and their relative importance. If an
16 award is made, it must be made to the responsible and responsive offeror whose proposal best meets the
17 evaluation criteria. Other criteria may not be used in the evaluation. The contract file must demonstrate the
18 basis on which the award is made.

19 (6) The department may discuss a proposal with an offeror for the purpose of clarification or
20 revision of the proposal.

21 (7) Prior to awarding a contract, the department shall provide to the public notice of intent to award
22 a contract and of 7 days to submit written comments regarding the proposed award."

23

24 **Section 5.** Section 18-4-307, MCA, is amended to read:

25 "**18-4-307. Cancellation of invitations for bids or requests for proposals.** (1) An invitation for bids,
26 a request for proposals, or other solicitation may be canceled or any or all bids or proposals may be rejected in
27 whole or in part, as may be specified in the solicitation, when it is in the best interests of the state. The reasons
28 ~~therefor~~ must be made part of the contract file.

