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LEGAL MEMORANDUM

**Prepared for the State Administration, Public Retirement,
and Veterans' Affairs Committee**

by John MacMaster

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**Comparison of State Construction Contracts and State
Contracts for Services**

Introduction

For the Committee's September 1999 meeting, I prepared a memorandum to the Committee that set forth the basic law governing state government contracts for services. The state also enters into contracts for construction projects, primarily buildings. State construction

contracts are primarily governed by Title 18, chapter 2, MCA. State contracts for services are primarily governed by Title 18, chapter 4, MCA. There are some crucial differences in the laws governing the two types of contracts. These differences relate not so much to the contracts themselves as to peripheral matters surrounding the contracts, such as the circumstances in which they may be entered into, authority to enter into the contracts, the process by which a contractor is chosen, and the security given by the contractor for performance of the contract. The purpose of this memorandum is to delineate those differences so that as the Committee works on its study during the remainder of the legislative interim, the Committee can keep the differences between the two types of contracts and contracting processes in mind. In preparing the memorandum, I read and analyzed the laws covering the two types of contracts and compared the salient differences. The analysis of the differences was then submitted to Sheryl Motl, Bureau Chief, State Purchasing Bureau, Department of Administration, for suggestions and comments. The differences are set forth below.

Statutory Differences Between State Construction Contracts and State Contracts for Services

Legislative Consent for Building Contracts

Legislative consent is necessary for the construction of a building costing more than \$150,000, except that the Governor may authorize emergency repair or alteration, the Board of Regents may authorize construction of certain revenue-producing buildings financed wholly from revenue from the building, the Board of Regents (with the Governor's consent) may authorize construction of a building financed wholly with federal or private money if the construction will not result in any new programs, and the Department of Military Affairs (with the Governor's consent) may authorize construction of a building financed wholly with federal or private money if the building is constructed on federal land. See 18-2-102, MCA. State contracts for services do not need the Legislature's consent. The Committee should question the Department of Administration, contractors, and others involved in the contracting process on such matters as the wisdom of requiring legislative consent for building contracts, why consent is not required for services contracts, and the logic of requiring legislative consent for a quarter of a million dollar building contract, but not for a five million dollar services contract.

Bids Versus Requests for Proposals

For a contract for the construction of a building, the state must use the bidding process and must receive at least two formal bids, unless the costs will be between \$25,000 and \$75,000, in which case at least three informal bids are required. See 18-2-103(3) and (4) and 18-2-301(1) and (2), MCA. Under 18-2-301(4) and (5), MCA, the bidding process need not be used if work is to be done by inmates at an institution of the Department of Corrections and need not be used for certain Department of Fish, Wildlife, and Parks historic building preservation work. A state contract for services can be processed through either

the bidding process or the request for proposals process, with certain exceptions noted in my memo to the Committee entitled "MONTANA LAW GOVERNING GOVERNMENT CONTRACTS FOR SERVICES". The Committee should determine why it is that a building construction contract, but not a construction contract for other than a building, must be put to bid and why contracts for services need not use the bidding process. Are these differences justifiable in terms of what the state's best interests are?

Types of Construction Contracts Covered by the Law

Chapter 2 of Title 18, MCA, defines "building" as including a building, structure, or facility. Thus, it is not just contracts for the construction of buildings that are governed by the construction contracts laws. The terms "structure" and "facility" can be, and have been, given broad meaning. It is important to keep in mind whether a particular law governing construction contracts refers just to buildings contracts or to all construction contracts. For example, the law discussed in the two preceding paragraphs refers only to buildings construction contracts.

Security for Performance

Both a bid security bond or other undertaking and a performance bond or undertaking are required for a construction contract, but both types of security are at the discretion of the state for a contract for services. If the construction contract cost is under \$50,000, the state may waive the performance bond. If the construction contract cost is under \$25,000, the state may waive both the performance bond and the bid security bond. See 18-2-201 and 18-2-302, MCA. The Committee may wish to inquire into the reasoning behind, and the wisdom of, this difference.

Standard Prevailing Wage Requirement

Montana has a standard prevailing wage rate law (also called the Little Davis-Bacon Act after the federal Davis-Bacon Act) that applies to state construction contracts, but not to state contracts for services. See Title 18, chapter 2, part 4, MCA. The Committee may wish to determine why employees of a construction contractor, but not employees of a services provider, are protected by a requirement of payment of the standard prevailing wages in the area in which the work is done.

Conclusion

The differences between the law governing construction contracts and the law governing contracts for services are not grounded in or required by traditional contract law itself (that is, the law generally applying to all types of private and government contracts). Rather, they appear to be policy choices that various Legislatures have superimposed on the process by

which those contracts are formed. The Committee should consider revisiting the legislative reasoning behind those differences. From a strictly legal standpoint, for example, the standpoint of an attorney interested primarily in the traditional contract law aspects of the contract, these differences may not always be desirable. However, from the viewpoint of a Legislature seeking to use the contracts for social and other purposes not intrinsically related to the contract, the differences may be quite desirable.

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