

# M E M O R A N D U M

**To:** File

**From:** David L. Nielsen, City Attorney

**Subject:** Review of Public Works Contracts - Version V

**Date:** October 2, 2008

The following items need to be present in public works contracts entered into by the City:

- 1. Bid Security:** This security guarantees that the bidder will execute the contract upon which the contractor has placed a bid. The security may be by bond by a licensed surety company, by cash, or defined negotiable bank instruments. The security is 10% of the bid. Bid security may be waived for projects that cost less than \$25,000. §18-2-302, MCA.
- 2. Contract Price:** Except for bids made on a unit price rather than a total price, the contract price as stated in the agreement should match the bid price, after making allowances for optional bid items that may be added or deleted. If the bid is based upon a unit price, the contract price may differ from the computed cost that is bid since the actual amount of work required may differ from the estimated quantity used for bid comparison purposes only. The contract should show the actual amount of work that is used to determine the contract price. For other variances between bid price and contract price, the contract should contain explanations for these variances and show the adjustments for additions and deletions. The contract should contain sufficient detail of the calculation of the contract price so as to be understandable by the average person.
- 3. Performance Security:** This security guarantees the faithful performance of all the provisions of the contract. The amount of the bond must be in an amount equal to the contract price as shown the agreement. The security may be provided by a bond from a licensed surety company, by a deposit of cash, or by a negotiable instrument issued by a bank, savings and loan or credit union. §18-2-201(2), MCA. Bonds issued by a surety company usually attach a general power of attorney to the bond signed by its agent. The Commission may accept a bond with two or more private sureties. This security requirement may be waived for construction projects that cost less than \$50,000.
- 4. Labor and Materials Security:** This security guarantees the payment of all laborers, mechanics, subcontractors, and material suppliers. The same requirements apply as for performance security.
- 5. Montana Labor Preference:** In public works contracts that exceed \$25,000, whether for construction or non-construction jobs, the bid specifications and contract must both provide that the contractor shall give preference to the employment of bona fide Montana residents. §18-2-403(1), MCA.

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**6. Prevailing Wage Rate:** In public works construction contracts that exceed \$25,000, the contract must provide that the contractor will pay the travel allowance that is applicable and the standard prevailing wage rate, including fringe benefits for health and welfare and pension contributions. §18-2-403(2), MCA. The bid specifications and the contract must provide: **a)** the standard prevailing wage rate, include fringe benefits, for each job classification that will be paid; **b)** a requirement that payroll records be maintained by employer for not less than 3 years after the completion of work; and **c)** a requirement that the contractor post a statement of wages and fringe benefits. §18-2-422, MCA.

The contract should specify that the contractor, subcontractor or employer working on the contract has an obligation to ensure that workers are paid the applicable standard prevailing rate of wages. A.R.M. 24.17.141(6)

Only one of the following schedule of rates (heavy, highway, or building construction) should be used unless the contract is a project of mixed nature and more than 20% is in other categories. For example, if the project is heavy, but more than 20% is building, then the bid document should include both categories. A.R.M. 24.17.526.

“Heavy” construction is defined as any project not properly classified as either “highway” or “building construction.” Thus, in the absence of the project fitting clearly in another category, “heavy” is the default classification. A.R.M. 24.17.501.

**7. Contractor Liability Insurance:** For public works contracts, the contractor must provide certificates of insurance or binders showing coverage for commercial general liability and automobile insurance with policy limits of not less than \$1,500,000 per occurrence. The contractor’s insurance coverage must name the City and the engineer as an additional insured. For contracts under \$25,000, the policy limits may not be less than \$1,000,000 per occurrence and need not name the City as an additional insured.

**8. Owner Protection Liability Coverage:** In addition to the liability coverage for the contractor, the contractor must show proof of obtaining Owner Protection Liability Coverage for the City. This proof is through either a certificate of insurance or binder. The proof should show the City as the insured. This coverage may be by separate liability policy or as an endorsement on the Contractor’s Comprehensive General Liability Policy.

**9. Workers’ Compensation Insurance:** Unless the contractor is exempt from workers’ compensation coverage, the contract should include proof of workers’ compensation and employers’ liability insurance. This proof usually consists of a certificate of insurance or a binder. When the contractor claims to be exempt under §39-71-401, MCA, the exemption should be independently certified by the Montana Department of Labor or by providing proof of the contractor’s registration with the State of Montana.

**10. Nondiscrimination Provision:** All contracts for construction of public buildings, public work, or for goods or services must contain a provision that all hiring by the contractor must be on the basis of merit and qualifications, and there may not be discrimination on the basis of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing the contract. See §39-3-207, MCA.

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- 11. Attorney Approval:** All public works contracts in excess of \$25,000 must contain approval in writing by an attorney from the City Attorney's Office. §18-2-404(1), MCA.
- 12. Contract Price Withholding:** In all public works contracts over \$25,000, at least \$1000 must be withheld until termination of the contract. §18-2-404(2), MCA. The maximum retainage is 5%, provided the contractor is performing the terms of the contract. §18-2-316, MCA.
- 13. Contractor Gross Receipts Tax:** For contracts over \$5,000, the City must withhold 1% of gross receipts from contractors for remission to the Department of Revenue under the Contractor Gross Receipts License. §15-50-205, MCA.