

VOLUME NO. 44

OPINION NO. 45

ARCHITECTS AND ENGINEERS - Consideration of proposed fees as part of selection criteria for architectural, engineering and land surveying services;
CONTRACTS - Consideration by state agency of proposed fees in procurement of architectural, engineering or land surveying services;

FEES - Consideration of proposed fees as part of selection criteria for architectural, engineering and land surveying services;
PROPERTY, PUBLIC - Selection criteria by state agency for architectural, engineering or land surveying services;
PROPERTY, STATE - Selection criteria by state agency for architectural, engineering or land surveying services;
PUBLIC FUNDS - Consideration of proposed fees as part of selection criteria for architectural, engineering and land surveying services;
STATE AGENCIES - Selection criteria by state agency for architectural, engineering or land surveying services;
SURVEYORS - Proposed fees;
SURVEYORS - Selection criteria for architectural, engineering and land surveying services;
MONTANA CODE ANNOTATED - Sections 18-8-201 to 18-8-212;
UNITED STATES CODE - 40 U.S.C. §§ 541-544.

HELD: State agencies may not consider a proposed fee when selecting architectural, engineering or land surveying services, but may negotiate a fair and reasonable fee after the most qualified firm has been selected.

December 31, 1992

Hal Harper, Speaker
Montana House of Representatives
State Capitol
Helena MT 59620

Dear Mr. Speaker:

You have asked my opinion on the following question:

May a state agency request that a proposed fee be included in an architect, engineer, or land surveyor's response to a Request for Proposal, and should the submitted figure be part of the evaluation criteria in selecting the design firm that would be awarded the state contract?

Sections 18-8-201 to 212, MCA, describe the procedures by which a state agency may obtain the services of an architect, engineer or land surveyor. Section 18-8-201, MCA, sets forth the policy of the State for the procurement of such architectural, engineering or land surveying services:

The legislature hereby establishes a state policy that governmental agencies publicly announce requirements for architectural, engineering, and land surveying services and negotiate contracts for such professional services on the basis of

demonstrated competence and qualifications for the type of professional services required and at fair and reasonable prices.

Section 18-8-204, MCA, provides the specific procedure for selection of the firm to provide architectural, engineering and land surveying services. Each agency may encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency may then review that data and conduct discussions with one or more firms regarding anticipated concepts and the relative utility of alternative methods of approach to the project. § 18-8-204(1), MCA. After such review and discussions, the agency "shall then select, based on criteria established under agency procedures and guidelines and the law, the firm considered most qualified to provide the services required for the proposed project." § 18-8-204(2)(a), MCA.

The minimum criteria for the agency procedures and the guidelines are listed in section 18-8-204(2)(b), MCA. It is notable that nowhere in this section is the proposed fee listed as a criterion for selection of the most qualified firm. Moreover, section 18-8-205, MCA, provides:

(1) The agency shall negotiate a contract with *the most qualified firm* for architectural, engineering, and land surveying services *at a price* which the agency determines to be fair and reasonable. In making its determination, the agency shall take into account the estimated value of the services to be rendered, as well as the scope, complexity, and professional nature thereof.

(2) If the agency is unable to negotiate a satisfactory contract with the firm selected at a price the agency determines to be fair and reasonable, negotiations with that firm must be formally terminated and the agency shall select other firms in accordance with 18-8-204 and continue as directed in this section until an agreement is reached or the process is terminated. [Emphasis added.]

The plain language of this section indicates that only after the State has selected the most qualified firm is the fee negotiated. If a reasonable price cannot be negotiated, then the negotiations are formally terminated and a new firm is selected in accordance with the provisions of section 18-8-204, MCA. This interpretation is supported by the rule of statutory construction that statutes involving the same subject matter must be read together, see State ex rel. McHale v. Ayers, 111 Mont. 1, 105 P.2d 686 (1940), and is further supported by their legislative history. The legislative history of sections 18-8-201 to 212, MCA, discloses that the Legislature intended to create a process for the selection of architects, engineers, and land surveyors by state agencies that conforms to requirements of federal law, 40 U.S.C. §§ 541-544. See 1987

Mont. Laws, ch. 51, introduced as House Bill 310; Minutes, House Business and Labor Committee, Hearings on H.B. 310, January 29, 1987 (comments by Rep. Les Kitselman, Billings).

40 U.S.C. §§ 541-544, popularly known as the "Brooks Architect-Engineers Act," sets forth a qualification-based selection procedure for the procurement of such professional services by the federal government. Under the federal procedure, firms are ranked based upon demonstrated competence and qualifications. Negotiations are then conducted with the top-ranking firm to arrive at a fair and reasonable fee for the project. See S. Rep. No. 92-1219, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 4767, 4767-75.

The legislative history of sections 18-8-201 to 212, MCA, also reveals that the statutes were modeled upon the American Bar Association's Model Procurement Code for State and Local Governments (ABA Model Code). See Minutes, House Business and Labor Committee, Hearings on H.B. 310, January 29, 1987; Minutes, Senate Business and Industry Committee, Hearings on H.B. 310, February 10, 1987 (statements and exhibits of James Carpita, P.E., on behalf of the Consulting Engineers Council of Montana). Both the federal law and the ABA Model Code are substantially similar to Montana's law. The federal law and the ABA Model Code provide procedures for the procurement of architectural, engineering and land surveying services which are clearly distinct from the procurement of other goods and services.

The comments to the ABA Model Code reveal that using the qualification-based selection procedure for the selection of architectural, engineering and land surveying services is preferred because of the importance of selecting the best qualified firm, and because the architect, engineer or land surveyor is engaged to represent the interests of the state and thus stands in a different relationship with the state than under the usual buyer-seller arrangement. The ABA Model Code also makes it clear that the principal difference between the procurement of architect, engineer and land surveyor services and the procedures used for most other types of goods and services is the point at which price is considered. Thus, while the proposed fee is highly relevant, the ABA Model Code provides that it is best to discuss the proposed fee only after the best firms are selected. See Model Procurement Code for State and Local Governments § 5-501, comment.

It is apparent from the language of the statutes and the legislative history that the Legislature intended the State adopt and utilize a process for the selection and procurement of architectural, engineering and land surveying services which is based upon a firm's demonstrated competence and qualifications and that price be a factor only at the fee negotiation stage after the most qualified firm has been selected.

THEREFORE, IT IS MY OPINION:

State agencies may not consider a proposed fee when selecting architectural, engineering or land surveying services, but may negotiate a fair and reasonable fee after the most qualified firm has been selected.

Sincerely,

MARC RACICOT
Attorney General