

VOLUME NO. 37

OPINION NO. 59

CONTRACTS - County water and sewer district; CONTRACTS - Resident bidders; CONTRACTS - Federal funding (HUD); CONSTITUTIONAL LAW - Preference for resident contractors; REVISED CODES OF MONTANA, 1947 - Section 82-1924.

- HELD: 1. Section 82-1924, R.C.M. 1947, requires the County Water and Sewer District to apply a three percent preference to the lowest responsible resident bidder with respect to the entire contract cost regardless of the source of funds;
2. In determining the lowest responsible resident bidder and the lowest responsible nonresident bidder, the district may exercise its discretion;
3. Having exercised its discretion in determining the lowest responsible resident and nonresident

bidders, the district's function becomes ministerial and it must award the contract to such resident bidder if his bid is not more than 3% higher than that of the nonresident bidder.

31 August 1977

John Forsythe, Esq.  
Rosebud County Attorney  
Rosebud County Courthouse  
Forsyth, Montana 59327

Dear Mr. Forsythe:

You have requested my opinion on the following question:

Does section 82-1924, R.C.M. 1947, require a county water and sewer district to apply a three percent preference to a resident Montana contractor with respect to the entire contract cost, regardless of the source of funds, or does the preference apply only to those funds derived from the state or its political subdivision?

The Rosebud County Water and Sewer District requested bids for a new sewer system. The low bidder was an out-of-state construction company. The second low bidder was a resident Montana construction company. If the three percent preference of section 82-1924 is deducted from the bid of the resident construction company, it then becomes the low bidder for the project.

The sewer system is being financed with a \$51,000 grant from the Montana Coal Board, and a \$200,000 grant from the Housing and Urban Development (HUD) Department of the federal government. If the three percent preference attaches only to funds received from the State of Montana, the out-of-state construction company remains the low bidder. The district, as a public corporation, sections 16-4501 and 4505, is subject to the provisions of section 82-1924.

Section 82-1924 provides as follows:

In order to provide for an orderly administration of the business of the State of Montana in awarding contracts for materials, supplies, equipment, construction, repair and public works of all

kinds, it shall be the duty of each board, commission, officer or individual charged by law with the responsibility for the execution of the contract on behalf of the state, board, commission, political subdivision, agency, school district or a public corporation of the State of Montana, to award such contract to the lowest responsible bidder who is a resident of the State of Montana and whose bid is not more than three percent (3%) higher than that of the lowest responsible bidder who is a nonresident of this State. In awarding contracts for purchase of products, materials, supplies or equipment such board, commission, officer or individual shall award the contract to any such resident whose offered materials, supplies or equipment are manufactured or produced in this state by Montana industry and labor and whose bid is not more than three percent (3%) higher than that of the lowest responsible resident bidder whose offered materials, supplies or equipment are not so manufactured or produced, provided that such products, materials, supplies and equipment are comparable in quality and performance. This requirement shall prevail whether the law requires advertisement for bids and it shall apply to contracts involving funds obtained from the federal government unless expressly prohibited by the laws of the United States or regulations adopted pursuant thereto. (Emphasis added.)

It is not clear whether the last sentence applies to the resident preference in awarding contracts in general, as provided in the first sentence of section 82-1924, or whether such language was intended to speak only to the preference granted resident bidders supplying Montana products over resident bidders supplying foreign products.

In cases of such ambiguity, the title of the act may help in determining the purpose and meaning of the statute. Board of County Commissioners v. Lamoreaux, 168 Mont. 102, 105, 540 P.2d 975 (1975); State v. Midland National Bank, 132 Mont. 339, 343, 317 P.2d 880 (1957).

This language was added by amendment in 1969. Laws of Montana (1969), ch. 197. The title of the Act is as follows:

An Act To Amend Sections 82-1924, 82-1925, and 82-1926, R.C.M. 1947, to Provide that All Contracts of the State of Montana, Agencies Thereof, Political Subdivision Thereof, School Districts and Other Public Corporations for Materials, Supplies, Equipment, Construction Repair and Public Works, Including Contracts Involving Funds Obtained From The Federal Government Unless Expressly Prohibited by the Laws of the United States or Regulations Adopted Thereto, Shall be Awarded to the Lowest Responsible Bidder Who is a Resident of or Has Its Principal Place of Business in the State of Montana Whose Bid Is Not More Than Three Percent Higher Than That of the Lowest Responsible Bidder Who Is Not a Resident of the State of Montana. (Emphasis added.)

Laws of Montana (1969), ch. 197.

The federal funds reference explicitly relates to the resident/nonresident preference. Therefore section 82-1924 must be construed to require the County Water and Sewer District to apply the three percent preference to a resident contractor with respect to the entire contract cost even though the contract involves federal funds. The preference is mandatory unless a federal statute or regulation prohibits its application. Section 82-1924.

The District received the federal grant, referred to as a federal block grant, pursuant to the Housing and Community Development Act of 1974. Pub. L. 93-383 (codified at 42 U.S.C. §§ 5301 or 5317). Neither the Act nor regulations interpreting the Act prohibits application of state preferences to contracts financed in part with federal block grants.

On the basis of the following decisions, it appears that section 82-1924 would be found not to violate either the United States or the Montana Constitutions: Heim v. McCall, 239 U.S. 175, 194 (1915) (upholding the constitutionality of a New York statute forbidding the employment of aliens in the construction of public works and giving preference to citizens of New York); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940) (challenge to application of Public Contracts Act minimum wage provision); Schrey v. Allison Steel Manufacturing Co., 75 Ariz. 282, 255 P.2d 604, 607 (1953) (Arizona statute giving preference to taxpaying domestic contractors was constitutional). See also Hersey v. Neilson, 47 Mont.

133, 146-149, 131 P.2d 30 (1913); Strange v. Esva, 67 Mont. 301, 306, 215 P. 807 (1923); State v. Board of Commissioners, 70 Mont. 252, 255-258, 225 P. 389 (1924) (constitutionality of statutes providing that county printing must be done within the state or county).

Pursuant to section 82-1924, the district must award the contract to the lowest responsible resident bidder whose bid is not more than 3% higher than that of lowest responsible nonresident bidder. The district must accordingly make two initial determinations: the lowest responsible resident bidder and the lowest responsible nonresident bidder. In making these determinations the district may exercise its discretion, Koich v. Cvar, 111 Mont. 463, 466, 110 P.2d 964 (1941), but not arbitrarily or unfairly. Id. In determining the lowest responsible bidder within each category, resident and nonresident, "the phrase 'lowest responsible bidder' does not merely mean the lowest bidder whose pecuniary ability to perform the contract is deemed the best, but the bidder who is most likely in regard to skill, ability and integrity to do faithful, conscientious work, and promptly fulfill the contract according to its letter and spirit." Id.

Having made these determinations, the district's function becomes ministerial, and it must award the contract to the lowest responsible resident bidder, if any, whose bid is not more than 3% higher than that of the lowest responsible nonresident bidder. See Strange v. Esva, 67 Mont. at 306-307.

The statute does not provide that the District may find a nonresident bidder "more responsible" than the lowest responsible resident bidder, and award the contract to such bidder on that basis in disregard of the statutory preference. Such a power may not be read into the statute. The purpose in construing a statute is to "ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted...." In Re Transportation of School Children, 117 Mont. 618, 622, 161 P.2d 901 (1945). Moreover, as a public corporation, the Water and Sewer District has only those powers expressly conferred by the Constitution or statutes, or by necessary implication from those expressly given. See Morse v. Granite County, 44 Mont. 79, 88-89, 119 P. 286 (1911); Roosevelt County v. State Board of Equalization, 118 Mont. 31, 37, 162 P.2d 887 (1945).

THEREFORE, IT IS MY OPINION:

1. Section 82-1924, R.C.M. 1947, requires the County Water and Sewer District to apply a three percent preference to the lowest responsible resident bidder with respect to the entire contract cost regardless of the source of funds;
2. In determining the lowest responsible resident bidder and the lowest responsible nonresident bidder, the district may exercise its discretion;
3. Having exercised its discretion in determining the lowest responsible resident and nonresident bidders, the district's function becomes ministerial and it must award the contract to such resident bidder if his bid is not more than 3% higher than that of the nonresident bidder.

Very truly yours,

MIKE GREELY  
Attorney General