

MINUTES

**MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON FINANCE & CLAIMS

Call to Order: By **CHAIRMAN CHUCK SWYSGOOD**, on March 6, 1997, at 8:05 a.m., in Room 108.

ROLL CALL

Members Present:

Sen. Charles "Chuck" Swysgood, Chairman (R)
Sen. Thomas F. Keating, Vice Chairman (R)
Sen. Larry Baer (R)
Sen. Thomas A. "Tom" Beck (R)
Sen. James H. "Jim" Burnett (R)
Sen. B.F. "Chris" Christiaens (D)
Sen. Eve Franklin (D)
Sen. Loren Jenkins (R)
Sen. Greg Jergeson (D)
Sen. John "J.D." Lynch (D)
Sen. Dale Mahlum (R)
Sen. Ken Miller (R)
Sen. Arnie A. Mohl (R)
Sen. Linda J. Nelson (D)
Sen. Mike Taylor (R)
Sen. Daryl Toews (R)
Sen. Mignon Waterman (D)

Members Excused: None

Members Absent: None

Staff Present: Taryn Purdy, Legislative Fiscal Division
Sharon Cummings, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 7, 2/25/97; HB 139,
2/25/97; SB 374, 2/25/97
Executive Action: HB 7, BCC

HEARING ON HB 7

Sponsor: REP. ERNEST BERGSAGEL, HD 95, MALTA

Proponents: John Tubbs, DNRC

Opponents: None

Opening Statement by Sponsor:

REP. ERNEST BERGSAGEL, HD 95, MALTA HB 7 appropriates \$3 million from the Department of Natural Resources and Conservation (DNRC) for 15 projects with two projects below the funding line. REP. BERGSAGEL explains the projects (EXHIBIT #1)

{Tape: 1; Side: A; Approx. Time Count: 8:09; Comments: None.}

Proponents' Testimony:

John Tubbs, DNRC We support HB 7 and are here to answer questions.

Opponents' Testimony: None

{Tape: 1; Side: A; Approx. Time Count: 8:10; Comments: None.}

Questions From Committee Members and Responses:

SEN. TOM KEATING What are dry hydrants? REP. BERGSAGEL A dry hydrant is a pipe that goes into the ground below the frost line into the water table which may be a reservoir or a stream. An access site is provided so rural fire trucks can drop their suction hose into the pipe to draw up water.

SEN. KEATING Are others responsible for the Butte-Silver Bow subsidence reclamation and are they paying a part of this? REP. BERGSAGEL There is no other money as this is an orphaned project. SEN. J.D. LYNCH The subsidence holes being taken care of in Butte are the ones accessible to the public.

SEN. KEATING HB 7 spends \$3 million RIT money under reclamation and development grants. How much other money is in this account? Mr. Tubbs Additional interest funds deposited to the reclamation grants account total the \$3 million for grants and another \$4.6 million in additional interest. SEN. KEATING What is the other \$4 million being spent on? Mr. Tubbs Agency operations are funded from this.

SEN. DALE MAHLUM Is the \$4.6 million used to fund other agencies? Mr. Tubbs These are HB 2 appropriations, salaries and capital expenses for the DNRC, DEQ and NRIS.

SEN. ARNIE MOHL Is that in addition to the \$3.65 million you talked about yesterday? Mr. Tubbs Yes it is.

{Tape: 1; Side: A; Approx. Time Count: 8:13; Comments: None.}

Closing by Sponsor:

REP. BERGSAGEL Thank you.

HEARING ON HB 139

Sponsor: REP. EMILY SWANSON, HD 30, BOZEMAN

Proponents: Lois Menzies, Department of Administration
Marvin Eicholtz, Department of Administration
Bill Gianoulis, Department of Administration
Laurence Hubbard, State Fund
Rob Specter, MSU-Bozeman

Opponents: Bill Squires, Montana Telephone Association

Opening Statement by Sponsor:

REP. EMILY SWANSON, HD 30, BOZEMAN HB 139 has no appropriation in it. A revised fiscal note is handed out. (EXHIBIT #2) This bill is a rewrite of the Montana Procurement Act which was written in 1983. It is an effort to bring the department and the procurement process into the 1990's. Preferences were amended back into the bill in House Appropriations. I would like to give you a letter from REP. BARDENOW to myself. (EXHIBIT #3) This bill reaffirms the intent of the 1983 legislature when they created this act. Disappointed bidders should be allowed to go through an administrative process to be able to stop the bid if it was done badly and be able to redress their grievances by redoing the whole bid. They should not be allowed to sue the state for damages which is what is currently allowed. If we allow vendor's to sue the state for lost potential profits we are creating an incredible liability. HB 139 allows direct negotiations for computer purchases and some limited partnering in contracting.

{Tape: 1; Side: A; Approx. Time Count: 8:20; Comments: None.}

Proponents' Testimony:

Lois Menzies, Department of Administration (DOA) Testimony handed in. (EXHIBIT #4)

Marvin Eicholtz, DOA Testimony handed in. (EXHIBIT #5)

Bill Gianoulis, DOA Testimony handed in. (EXHIBIT #6)

Laurence Hubbard, State Fund We support HB 139.

Rob Specter, MSU-Bozeman The university sees HB 139 as an opportunity to get better prices, faster service and lower administrative costs in procurement. We support HB 139 and urge your support.

{Tape: 1; Side: A; Approx. Time Count: 8:30; Comments: None.}

Opponents' Testimony:

Bill Squires, Montana Telephone Association (MTA) MTA represents 11 independent telephone companies across the State of Montana. MTA and its members oppose two specific sections of HB 139, sub-sections 4 & 5 on page 15 of the bill. Section 4 would allow the DOA to contract for information technology systems and services without going through the competitive bid process. MTA and its members are in the information technology systems and services business. We believe the competitive bid process has served our industry and the state well. We have been involved in the competitive bid process for information technology services and believe the end product purchased by the state was better because of this competitive bid process. Section 5 allows the DOA to partner with private business for the purchase of information technology systems. We believe this provides an unfair and anti-competitive advantage to anyone who would partner with the state. We have been told the primary concern of the DOA is the purchasing of software, if these sections were limited to software procurement we would support them. We ask the committee to strike sub-sections 4 & 5 of section 11.

{Tape: 1; Side: A; Approx. Time Count: 8:34; Comments: None.}

Questions From Committee Members and Responses:

SEN. CHRIS CHRISTIAENS Could you talk a little about the potential lawsuit on the mental health contract? **Mr. Gianoulas** I'm not sure what you are asking. If we don't pass this, can a lawsuit be filed, yes. If the law stays as it is the unsuccessful bidders could sue and if they can show that there was negligence or bad faith in the bid letting process, they could seek to recover damages. I believe the measure of those damages would be the lost profits on the contract.

SEN. TOM BECK Please explain Section 11, page 15. **REP. SWANSON** The DOA is proposing to be able to go to a computer company and ask for help solving a problem, the RFP process has them using "square corners" and having bidders fit preestablished criteria that the department may not have known when buying something as fast moving as computer technology. The idea is to give them greater flexibility in buying computer technology. The House amendments set this up on a two year trial basis with the department reporting to the Legislative Finance Committee when they do a contract of this type.

SEN. DARYL TOEWS Why should we go back and get the state out of a bind on a past contract? It seems there was good reason in that the state was negligent in how they handled that particular situation. **Mr. Gianoulas** ISC will be allowed to go forward with their case, we are not getting off the hook for what happened with ISC. The legislative auditors report that was done in August 1991 shows that there was no wrong doing found along the lines you may have heard about or may be suggesting. ISC

could have sought rescission if it is a bad contract. Good policy would be to get rid of the bad contract and not have taxpayers have to pay twice. The rescission process will discover if there is wrong doing.

SEN. MIKE TAYLOR How long does the bidding process currently take? **Mr. Eicholtz** It depends on the complexity of the contract. Generally, it takes less than 30 days but can take longer on complex technology contracts.

SEN. TAYLOR The statement was made that states spend 5 cents on procurement and the private sector spends approximately 1 cent per dollar. Who would like to stand up and say we will save 4 cents on the dollar if this bill is passed? **Mr. Eicholtz** That information is from a study in Texas, not Montana. The process can be speeded up and eventually we may have some efficiencies. In my opinion, reforming the procurement process will save us time and money down the road.

{Tape: 1; Side: A; Approx. Time Count: 8:43; Comments: None.}

SEN. TAYLOR Can you give me an example of a long process? **Tony Herbert, DOA** I could give you several examples but will give you two. The SummitNet RFP was for the data network that covers the entire state. That bid process began on May 19, 1995 and we signed a contract in January 1996. In the area of information technology it takes a great deal of time to figure what we need to do and write it down in the right form. We are currently working on an RFP process for a new E-Mail software package for approximately 8,000 terminals in the state. We have been involved in the assessment of that environment for the last year with approximately 30 state employees in different departments. We issued an RFP in December which will probably come to closure in May. This is a dual RFP process in which we are determining companies to tell us which products we should look for and then determining the company that distributes those products. The complications continue because the business of technology is more complicated.

SEN. TAYLOR If this bill were to pass, what do you think the net effect will be? **Mr. Herbert** The key item in subsections 4 & 5 on page 11 is that it gives us a two year opportunity to look at doing some of these things in a different way. We may be able to come back to you after two years with suggestions on better ways to handle this type of procurement that may save the money you've been hearing about today.

SEN. MOHL Why are the second bidders suing? **Mr. Eicholtz** I believe that, since our contracts are getting bigger, losers are coming in to challenge us on the "square corners" we may have rounded. If they can sue the state for monetary damages on a large contract, they will. This doesn't happen in the private sector or most other jurisdictions in the country. We need to be

in the situation where the remedy for the disappointed bidder is to go through a process if the bid is bad.

SEN. MOHL What contracts are covered by this? **Mr. Eicholtz** This would be on all contracts that we bid. Bidders have to meet certain criteria and we usually go with the low bidder.

SEN. MOHL Is there a limit to what you can negotiate? How about reimbursing the person who has money invested in the bidding process? **Mr. Eicholtz** We don't throw people out because we don't like their bid. We select the vendors and the bidders based upon criteria evaluated on each bid. It is scored on a point basis by a variety of people and the vendor with the highest score is the winner. The next bidder can then challenge us on our scoring methodology.

SEN. LOREN JENKINS In testimony it was stated that if HB 139 didn't pass we would be sued and if it did pass we wouldn't be sued. How can we change a contractual agreement? **Mr. Eicholtz** If we pass this bill as it is written today it will allow ISC to proceed in district court to sue us for monetary damages on a bid situation. The retroactivity date means if they haven't filed a lawsuit by that date, they won't be able to sue us for monetary damages. That doesn't prevent them from going through the process to cancel or protest the bid.

SEN. JENKINS Are there any cases filed since 1992 that this would cover? **Mr. Eicholtz** I believe there is one case dealing with the Department of Commerce, Travel Montana and a California company.

SEN. LYNCH You mentioned rounding these "square corners," when you do that are you knowingly violating the law? **Mr. Eicholtz** Some requirements are more important than others in these large contracts. For example, they may have to have documentation provided with their product at the time of the bid and they may not have gotten it in, we may give them 24 hours to get it to us. Or going over a page limit.

SEN. LYNCH I believe we should have some flexibility for you to do that rounding without breaking the law and being sued. If I'm A company, did everything right and I see you rounding these corners, it would look to me like you're going to make sure B company gets it no matter what I do. **Mr. Eicholtz** That is what the process is all about. That vendor can protest the bid through our process procedure or a contested case hearing.

SEN. LYNCH If you've made the exceptions for company B and you are the one writing the protest procedure it seems you'd say everything is okay. **Mr. Eicholtz** The protest procedure with us is only at the beginning and if that doesn't work they go to a contested case hearing where a hearings officer is appointed. That is outside our jurisdiction. If they are still not satisfied they can request judicial review.

SEN. BECK I received a letter from a company that was written out of the contract for a copier because they couldn't meet the specs of the contract. Do you have many problems with restrictive specifications? **Mr. Eicholtz** Yes, we do. Vendors frequently try to do business with an agency and develop specifications. Our job is to try and recognize them and make the RFP a broad based bid that all parties can bid on. Sometimes there are specific reasons for that product to be restricted.

SEN. BECK In section 6 of the bill, vegetables and fresh fruit are taken out. Why was that in the original procurement bill and taken out now? **Mr. Eicholtz** I don't know why it was in the original bill, it is at a dollar limit that is delegated to agencies. This is a clean-up item.

{Tape: 1; Side: B; Approx. Time Count: 8:58; Comments: None.}

SEN. KEATING Are we allowing just one bureau to have the freedom to negotiate or does this bill allow greater latitude for negotiating in other departments as well? **Ms. Menzies** The procurement environment is fairly decentralized, we have a small staff within the DOA that does oversight functions and assists on large procurements. For the most part agencies have the flexibility to purchase small dollar items without intervention by the department. In the case of direct negotiations, agencies would have to ask us whether it would be appropriate to do it. Ultimately, I would have to give approval for that.

SEN. KEATING This bill allows information technology to negotiation directly for high tech material but with a two year sunset. **Ms. Menzies** This is an effort to get one more tool to allow us to get our work done. To increase the comfort level in the House we said we would report to the finance committee in the interim if they would let us test it for two years. If you consider what we did to be irresponsible then this will sunset and we'll admit it was a bad idea.

SEN. KEATING To what extent does the director have oversight on what the bureau's are doing? **Ms. Menzies** We do not have a highly significant oversight function on smaller purchases. We get involved on large purchases and attempt to make the RFP's as open as possible. We think it makes better sense to use our resources on large procurements.

SEN. KEATING I'm speaking specifically in regard to the information technology systems, to what extent would you have overview on the negotiations? **Ms. Menzies** There are two avenues of participation, by statute and the general procurement laws. I rely heavily on my administrators to advise me in these areas. Agencies go through ISD and procurement for approval, under this law they would also need the approval of the director before they could directly negotiate.

SEN. KEATING HB 139 repeals a section of law dealing with consultants and the good faith statute. Why is that being repealed? **Ms. Menzies** We currently have two parallel systems, one for consultants and one for everything else. We are suggesting it makes more sense to merge those and have a single process. That is why we are repealing the consultant law. **Mr. Gianoulis** Page 6, section 2 deals with the good faith area. This language makes the other language repetitive, it is not exactly the same language but similar. Part of the reason we took 18-4-131 out is because that is what the Supreme Court decided the ISC case on.

SEN. MIGNON WATERMAN Regarding the rounding corners question, I was involved in the managerial health contract, I believe we put in a requirement of 100 pages. According to what I've read in the papers there was a 144 pages in the winning bid. If we are going to put those requirements in, we need to live by them or we shouldn't put them in. **Mr. Eicholtz** You are correct in that the bid is being protested and is going through the process now. The page count may seem like a big discrepancy and it may end up being one. Normally we are talking about small things where we may have put in "must" and it should be "should".

SEN. WATERMAN I would like some assurance that we are talking about the same small rounding and that if we give you this flexibility you will exercise some responsibility to see that we won't end up in a challenge situation. **Mr. Eicholtz** I believe that is what the recision process is for. Direct negotiation has to be approved by the director. We will write administrative rules regarding when this process can be used for large information technology systems.

SEN. TOEWS What has been the future success rate on vendors who have gone through the appeal process? Are they outside the system after a protest? **Mr. Eicholtz** Are you saying that because they protest we would not do business with them? We would never do that.

CHAIRMAN SWYSGOOD Why would the department not put a project of this magnitude out for bid? Why is it necessary to change from the current bid process? **Ms. Menzies** It is our suggestion that we use direct negotiations on a limited basis to procure complicated information technology systems. I am currently involved in a process to develop an RFP in anticipation of purchasing management information systems for the state because of year 2000 problems, roughly \$16 million. We don't know exactly what we want or need for the State of Montana. It has been many years since we have dropped a large computer system into place. We plan to use the RFP process for this but don't know what specifications to ask for, what the market is like, or what the technology is about. Suppose we decide we need this, this and this and get into the process to find out we are evaluating the wrong things.

CHAIRMAN SWYSGOOD I have a real problem with this part of the bill and you have just solidified that concern for me. If you don't know what to put in an RFP, how will you know who to go to in the technology field to get the information without having more than one firm in the process? **Mr. Specter** Frequently, there is more than one solution to an information technology problem. We seek the lowest cost and best solution. We don't always know the best way to get to the solution so we talk with service providers who can help us think the issues through. The RFP process adds from 6-12 months to this process.

CHAIRMAN SWYSGOOD I can't believe a technology firm won't say their product is the best. You may be getting only one or two suggestions and you are not doing the taxpayers justice by not allowing everyone with these capabilities to bid in an RFP process. **Mr. Specter** Adding 12 months of frustration and difficulty to an complex process does not serve the state either.

{Tape: 1; Side: B; Approx. Time Count: 9:20; Comments: None.}

Closing by Sponsor:

REP. SWANSON Direct negotiation will give the state the possibility of knowing if a vendor can provide the service, understand the problems and answer the questions. I think direct negotiation is a great idea and hope you will give the department two years to give it a try and report back to us. Remember that the taxpayers of Montana pay the bill when a vendor sues the state for damages. We should allow vendors a way to stop the process but not allow them to sue the state for lost damages. It is difficult for government to find ways to be more efficient and run more like a business. I believe this bill is a good step in the right direction by giving the department some tools to be more business like, save money and be more efficient.

{Tape: 2; Side: A; Approx. Time Count: 9:25; Comments: None.}

HEARING ON SB 374

Sponsor: SEN. DON HARGROVE, SD 16, BOZEMAN

Proponents: Mary Ann Wellbank, Department of Public Health and
Human Services
John Larson, Missoula District Judge

Opponents: None

Opening Statement by Sponsor:

SEN. DON HARGROVE, SD 16, BOZEMAN SB 374 has had a hearing in the Senate Judiciary Committee and is directly required by the personal responsibility and work opportunity reconciliation act otherwise known as the federal welfare reform act. Upon it rides

our federal child support and welfare money. This is to get tough on deadbeat dads and there are many unpleasant things in it. There are items directly related to the Families Achieving Independence in Montana (FAIM) program that was passed by the 1995 legislature.

{Tape: 2; Side: A; Approx. Time Count: 9:31; Comments: None.}

Proponents' Testimony:

Mary Ann Wellbank, Department of Public Health and Human Services (DPHHS) Ms. Wellbank gives an overview of the bill and (EXHIBIT #7) There is some clean-up language in the bill that is not federally driven. The blue book (EXHIBIT #8) is a summary of federal information. DPHHS is interested in working with you on this so it works for Montana.

John Larson, Missoula District Judge I am in support of the bill but have several concerns and would like to work with the subcommittee to clarify how we work. This bill impacts all our cases in child support, abuse and neglect, juvenile and many other cases we deal with. We would like to lessen confrontations with the Child Support Enforcement Division.

Opponents' Testimony: None

{Tape: 2; Side: A; Approx. Time Count: 9:43; Comments: None.}

Questions From Committee Members and Responses:

SEN. KEATING Is there anything in SB 374 that is not mandated?
Ms. Wellbank Yes.

SEN. EVE FRANKLIN Do we have the flexibility to pick and choose what we want in this bill? Ms. Wellbank I don't feel we have any flexibility at all.

{Tape: 2; Side: A; Approx. Time Count: 9:46; Comments: None.}

Closing by Sponsor:

SEN. HARGROVE closes.

CHAIRMAN SWYSGOOD Members of the subcommittee to work on this bill are: SEN. KEATING, Chairman; SEN. BAER, SEN. WATERMAN, SEN. MAHLUM, SEN. JERGSON, SEN. HALLIGAN and SEN. HOLDEN.

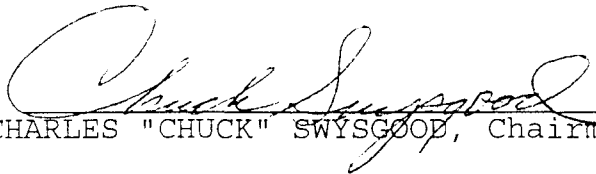
{Tape: 2; Side: A; Approx. Time Count: 9:49; Comments: None.}

EXECUTIVE ACTION ON HB 7

Motion/Vote: SEN. LYNCH MOVES HB 7 BE CONCURRED IN. THE MOTION CARRIED UNANIMOUSLY. SEN. LYNCH will carry HB 7.

ADJOURNMENT

Adjournment: 9:51 a.m.


SEN. CHARLES "CHUCK" SWYSGOOR, Chairman


SHARON CUMMINGS, Secretary

CS/SC