

County Purchasing/Procurement

Purpose: To give county elected officials general guidance on procuring or purchasing materials or supplies, professional and general services, machinery, equipment, contractors.

General Recommendation: Each county should consider policy that addresses all purchases by county employees and elected officials. The policy should take into consideration the overall size of the county budget, desired levels of oversight, Montana statute, grant program requirements, and federal procurement rules.

Disclaimer: While this document represents MACo's general guidance and non-legal advice on these issues, please defer to your individual County Attorney for interpretation and advisement on the statutes, your policies, and your final decisions/policy adoption.

Small Purchases (Informal):

- Nothing is required by statute and small may mean anything up to \$80,000
- If desired it is defined at the local level via policy
- Authorization for these purchases generally left at the department level
- Budget constraints still apply
- Generally set at \$5,000 or less but processes may be set for any level in the policy
- No process, bidding, or quotes required but if it is a recurring purchase then a process may be appropriate to ensure fiscal responsibility
- Grant programs or federally funded projects may require additional documentation/process

County Commissions are allowed, **by policy**, to define a small purchase. Anything under this amount, as long as it falls within the department's budgetary constraints, may be purchased by the department head at their discretion. The policy may direct that a process of getting quotes or other pricing is necessary for frequently recurring purchases.

Purchases Exceeding Small Purchase Limit (if established) but Less Than Formal Threshold of \$80,000:

- Nothing is required by statute and may be anything less than \$80,000 to \$1 depending on if a small purchase policy is adopted (above)
- If desired it is defined at the local level via policy
- Authority to approve these purchases is a local decision
- Budget constraints still apply
- Establish a process with requirements for quotes or other price comparisons
- Commission may wish to require submittal of documentation and/or maintain approval authority
- Grant programs or federally funded projects will require a process ensuring free and open competition is utilized and may have specific requirements

Suggestions:

- Determine decision making authority (commission or department head)
- Develop specifications in writing prior to soliciting quotes/pricing
- Identify vendors or service providers
- Contact at least two vendors or services providers
- Evaluate quotes and responses
- Determine responsive and responsible quote at lowest price
- Maintain documentation
- If only one qualified vendor or service provider, document along with reasons

Recommendation: MACo recommends that departments are required to solicit quotes or proposals from three vendors, if available, or if less than three vendors are available, all available vendors should be solicited and a note be placed in the file.

Note: In the above two categories, the County has a great deal of latitude based on local circumstances, but MACo recommends adoption of implementation of a formal policy that provides for controls that make sense. Consult your county attorney and your auditor prior to adoption. If contract authority is delegated to an elected office or department head, that contract authority must be included in a resolution as part of the budget adoption process.

Purchases of \$80,000 or more (excluding architectural, engineering, & land surveying):

- Should be contemplated and included in any adopted procurement/purchasing policy
- Statutory requirements apply (MCA 7-5-2301)
- Exemptions exist, but are limited (MCA 7-5-2303; 7-5-2304; 18-4-401)
 - 7-5-2303 provides for the use of public auction to make a purchase of less than \$150,000
 - 7-5-2304 provides an exception for cooperative purchasing agreements as defined in 18-4-401, to include a procurement *conducted by or on behalf of more than one public procurement units*
 - 7-5-2304 also provides an exception for public printing where Title 18, chapter 7, Part 4 was followed and for emergencies
 - 7-5-2315 exempts energy performance contracts
- Requires bidding and proper notice (MCA 7-1-2121)
- County may set the threshold at a lower amount but not higher
- Dividing contracts to circumvent bidding requirements is prohibited (7-5-2305)
- Every contract subject to bidding must be let to the lowest responsible bidder w/ limited exception (MCA 2309, & MCA Title 18 Chapter 2, Part 5)
 - 7-5-2309 provides for optional bidding preferences
 - 18-1-102 provides for reciprocity/in-state contractor preference guide
 1. Preference for MT contractors limited to amount equal to what competitive bidders state allows for preference.
- Maintain all documentation of public notice (affidavits of publication), bid tabulation etc.

MCA triggers bid requirements at greater than \$80,000 - MCA 7-5-2301. That, however, does not mean that a county, at their own discretion, **through policy**, cannot implement that restriction at a lower amount, but the “trigger” for bidding cannot exceed \$80,000. This section speaks to the general circumstances that would surround a purchase or request of greater than \$80,000. If you are buying machinery, equipment, materials, or supplies and the cost exceeds \$80,000 you must bid or find an exception. Exceptions do exist in the law, including auction purchase (7-5-2303) and emergencies (7-5-2304 (2)) and Cooperative Purchasing (7-5-2304). In all instances where you might have question or wish to use an exemption or statutory allowance, please obtain concurrence from your county attorney.

Conflicts of Interest

In the event a county identifies a conflict of interest, either through disclosure or through the opinion of their County Attorney, with the lowest responsible bid and the consulting firm managing the project, the county should disqualify the consulting firm from all portions of the project where the conflict exists.

Exceptions

1. Auction Purchase. MCA § 7-5-2303 allows purchase at public auction of vehicles, machinery, equipment, materials, and supplies up to \$150,000.

Usual auction issues: need to inspect, know how high you’ll go for a particular item, and be willing to live with what you get.

2. Printing and Advertising: Must call for bids from printing companies and qualifying newspapers (publish at least once per week).

3. Emergencies. MCA § 7-5-2304(2) exempts from bidding purchases which in the opinion of the governing body are made:

(2) purchases that, in the opinion of the governing body, are made necessary by fire, blood, explosion, storm, earthquake, other elements, epidemic, riot or insurrection, or for the immediate preservation of order of the public health or for the restoration of a condition of usefulness which has been destroyed by accident, wear, tear, or mischief, or for the relief of a stricken community overtaken by calamity.

Poor planning does not constitute an emergency. The fact that it would be nice to have the snowplow budgeted in August to deal with a January snowstorm probably won’t get you out of a bidding process for the plow. Similarly, the fact that the county road is no longer as useful as it once was because of wear and tear won’t get you out of bidding the repair job. **ONLY YOUR COUNTY ATTORNEY CAN DETERMINE WHETHER THE CURCUMSTANCES CONSTITUTE AN EMERGENCY.**

4. Cooperative Purchasing. 7-5-2304 provides an exception for cooperative purchasing agreements as defined in 18-4-401, to include a procurement *conducted by or on behalf of more than one public procurement units*.

If a County wants to engage directly with a purchasing service cooperative, such as Sourcewell, the County Attorney should offer an opinion on whether the County can engage directly with the purchasing service cooperative in lieu of going through the State Procurement Bureau or a formal procurement process for purchases above \$80,000.

Note: General bidding requirements are directed to the purchase of “things” and do not cover the purchase of services such as insurance, medical care (jail inmates), consultants, and similar nonmaterial purchases. However, you can and should request proposals for major service purchases.

Architectural, Engineering, & Land Surveying Services Procurement

- **Also known as a Request for Proposal(s) (RFP) or Request for Qualifications (RFQ)**
- Different methodology of selection – qualifications 1st, negotiate pricing 2nd
- Must be publicly noticed that the services are required (MCA 7-1-2121)
 - Per occasion/project and/or
 - Generally announcing your projected requirement for any category or type
 - Notice contains a brief summary of the services, contact information, and reference to the “full RFP/RFQ” and how to get a copy, not the entire request
- Required Criteria (MCA 18-8-204)
 - Qualifications of the professional personnel to be assigned
 - Capability to meet time and project budget requirements
 - Location
 - Present and projected workloads
 - Related experience on similar projects
 - Recent and current work for the county
- Full RFP or RFQ will detail the required submittal criteria (above), how you will rank/score the proposals, any length limitations you want to put on the submittals, contact information, background information, and anything else deemed relevant to assist in the respondent’s ability to properly respond.
- Selection (MCA 18-8-204)
 - Evaluate statements of qualifications and performance data
 1. Evaluate written responses
 1. Ranking should be based on a pre-determined scale using the required criteria above and as outlined in the full RFP/RFQ (i.e. assign points to each for a total of 100)
 2. Conduct discussions (interviews) with one or more firms regarding anticipated concepts and the relative utility of alternative methods of providing services
 1. Again, assessment method of those interviewed should be pre-determined and combined with the evaluation of written criteria.
 3. After conducting the evaluation of firms pursuant to 18-8-204 (1) & (2)(b), the county may enter into a contract with one or more of those firms on an as needed basis for one or more projects and for a term to be mutually agreed upon by the parties.

1. Even if you are under contract for a term it does not preclude going through the selection process for a specific project.
- Negotiation for a specified project:
 - Negotiate a contract with the most qualified firm at a price that the county determines to be fair and reasonable taking into account the estimated value, complexity, scope, etc.
 - If you are unable to negotiate a satisfactory contract with the selected firm, negotiations with that firm must be formally terminated and the county shall select the next firm and repeat.
 - Negotiation for general services or “as-needed”:
 - The new language in 18-8-204 allowing for procurement of one or more firms on an as-needed basis allows for one solicitation that may meet a variety of needs. For example, you may have advertised for services ranging from bridges to airports and that the selected engineer for bridges may be different than one selected for airports and so on. In this instance, separate ranking for each type of service may be necessary based on the different professional needs. Depending on how the selection process/ranking comes out, more than one contract may need to be negotiated.
 - The new language allowing for as-needed also means that you may not have specific projects identified and thereby project specific cost negotiations may be impossible. In this instance, hourly personnel rates and reimbursable rates may be negotiated for general inquiries or intermittent requests, but project specific costs should be negotiated as the tasks or projects arise and an addendum or “task order” added to the as-needed/term contract. Worded another way, negotiate the project specific costs at that time with engineers that have been selected following this statute and whom are under contract for as-needed services. Alternatively, the county may advertise for the specific project and go through the procurement process even if firms are under contract on an as-needed basis.

Note: Identify these services based on qualifications first and negotiate costs second. If you determine that one or more term contracts are in the best interest of the county, identify the types of services that may come up during the term and evaluate the respondents accordingly.

Recommendation: Contracts should require disclosure of any potential conflicts of interest prior to any phase of an assigned project or proposed task order. Upon disclosure the county should determine whether the conflicts can be mitigated. If all conflicts cannot be fully mitigated, the county should disqualify the engineering firm from performing duties or task orders where any conflicts exist or will exist since the consulting engineer cannot adequately advise a client or supervise a project when any such conflicts exist.

*Procurement of services by another firm may be required if this occurs.

Exceptions:

1. Under \$50,000
2. Emergencies
3. Energy performance contracts

Required Contract Provisions

A. Bid Bond

1. Required. MCA § 18-1-201 requires bid security for all bids solicited by a county, school district, municipality, irrigation district, or other “public authority”.

2. Notice. MCA § 18-1-202(1) requires that notice of the bid bond requirement be included in the “advertisement, request or solicitation” for the bid. Must specify that a bid bond, guarantee bond, surety bond, cash, cashier’s check, certified check, bank money order, or bank draft may be used to meet the requirement.

3. Amount. MCA § 18-1-202(2) sets a minimum of 2% of the amount bid for sale of bonds and 10% of the amount bid in other cases.

4. Forfeiture. MCA § 18-1-204 provides that the bid bond is forfeited if the bidder is awarded the contract and refuses to accept it.

5. Exceptions. None applicable to local government.

B. Performance and Payment Bonds

1. Required. MCA § 18-2-201 requires, as a condition of any construction contract, the execution and delivery of bonds guaranteeing completion of the work and payment of all laborers and suppliers of material.

2. Notice. The bonds are cost items, and the fact that they will be required should be noted in the bid specifications.

3. Amount. 100% of the contract price.

C. Prevailing Wage for Public Works Contracts in Excess of \$25,000

1. Required. MCA § 18-2-422 provides:

18-2-422. Bid specification and public works contracts to contain prevailing wage rate. All bid specifications and contracts for public works projects must contain a provision stating, for each job classification, the prevailing wage rate, including fringe benefits, that the contractors and subcontractors must pay during construction of the project.

2. Definitions

18-2-401(11). “Public works contract” means a contract for construction services let by the state, county, municipality, school district, or political subdivision or for non-construction services let by the state, county, municipality, or political subdivision in which the total cost of the contract is in excess of \$25,000.

18-2-401(3). (a) “Construction services means work performed by an individual in building construction, heavy construction, highway construction, and remodeling work.

(b) The term does not include:

- (i) engineering, superintendence, management, office, or clerical work on a public works contract; or
- (ii) consulting contracts, contracts with commercial suppliers for goods and supplies, or contracts with professionals licensed under state law.

18-2-401(9). “Non-construction services” means work performed by an individual, not including management, office, or clerical work, for:

(a) the maintenance of publicly owned buildings and facilities, including public highways, roads, streets, and alleys;

(b) custodial or security services for publicly owned buildings and facilities;

(c) grounds maintenance for publicly owned property;

(d) the operation of public drinking water supply, waste collection, and waste disposal systems;

(e) law enforcement, including janitors and prison guards;

(f) fire protection;

(g) public or school transportation driving;

(h) nursing, nurse’s aide services, and medical laboratory technician services;

(i) material and mail handling;

(j) food service and cooking;

(k) motor vehicle and construction equipment repair and servicing; and

(l) appliance and office machine repair and servicing.

3. Prevailing Wages. MCA § 18-2-403(2) requires inclusion of a provision requiring payment of the prevailing wage as established for the district in which the work is being performed, except for heavy and highway construction. MCA § 18-2-403(3) requires the state-wide rates be paid for all heavy and highway projects. **[MCA §**

18-2-403(9) states that failure to include the wage rates per 18-2-422 in the contract shifts the obligation to pay prevailing wages from the contractor to the public contracting agency.]

D. Montana Preference

1. Required

(a) MCA § 18-2-403 requires inclusion of a contract provision requiring the contractor to give preference to the employment of bona fide Montana residents.

Exceptions: When conflicts with a CBA: MCA § 18-2-403(7), or veterans' preference: 18-2-403(8)

(b) MCA § 18-1-102 requires that for public contracts, there is no preference unless the nonresident bidder comes from a state which enforces a preference. In that case, the resident bidder is entitled to the same preference in evaluation bids.

Exception: When prohibited by federal contract provision (§ 18-1-102(2)(b))

E. Nondiscrimination

1. Required. MCA § 49-3-207 provides:

49-3-207. Nondiscrimination provision in all public contracts. Every state or local contract or subcontract for construction of public buildings or for other public work or for goods or services must contain a provision that all hiring must be on the basis of merit and qualifications and a provision that 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.

2. Exceptions. None. MCA § 49-3-102 makes the requirement applicable to all local governments.

F. Workers' Compensation

1. Required. MCA § 39-71-401 requires contractors to carry workers' compensation on their employees. MCA § 39-71-405(1) provides that, when an employer contracts with an independent contractor to have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of the employer, then if the contractor does not obtain coverage, the employer is liable for benefits.

2. Comment. While you are not legally required to demand proof of workers' compensation coverage in a contract, it would seem advisable to do so since the policy consideration for making an injured worker whole will push toward a finding that you are liable if your contractor does not have coverage.

G. General Safety Precautions. Just as a matter of practice, you should include a contract provision that requires the contractor to provide for the safety of other persons and property, included but not limited to traffic control, signage, barriers, and other actions as required.

H. Other Insurance. As a matter of practice, broad-form liability insurance should be required which shows the county or other entity as an additional named insured. The contract should also include a requirement that the

contractor defend and indemnify the county against any claim arising out of the performance of the contract not attributable to the county's negligence. See MCA § 18-2-124.

I. Compliance with All Laws and Regulations. A general provision that makes the contractor responsible for compliance with all laws and regulations applicable to the work and which requires the contractor to use only properly licensed workers when the work being performed requires such licensure is also advisable. If the work requires a building permit, flood-plain permit, or whatever, the contract should specify who is to obtain the permit.