

Montana's Public Bidding Laws

Tips, Tricks, and Things to Remember

SAM Spring Legal & Technology Conference, March 11-12, 2024

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Public Bids – Why in the heck do we have to do this?

- We live in an information age, and transparency in government is an ongoing concern, especially in financial matters. Montana's public bidding statutes exist to:

“ . . . prevent favoritism and to secure to the public the best possible return for the expenditure of the [public] funds“.

Debcon, Inc., v. City of Glasgow (Mont. 2001).

Public bidding requirements further the goals of open meetings law and serves as a check on waste and fraud.

Public bidding benefits to school districts

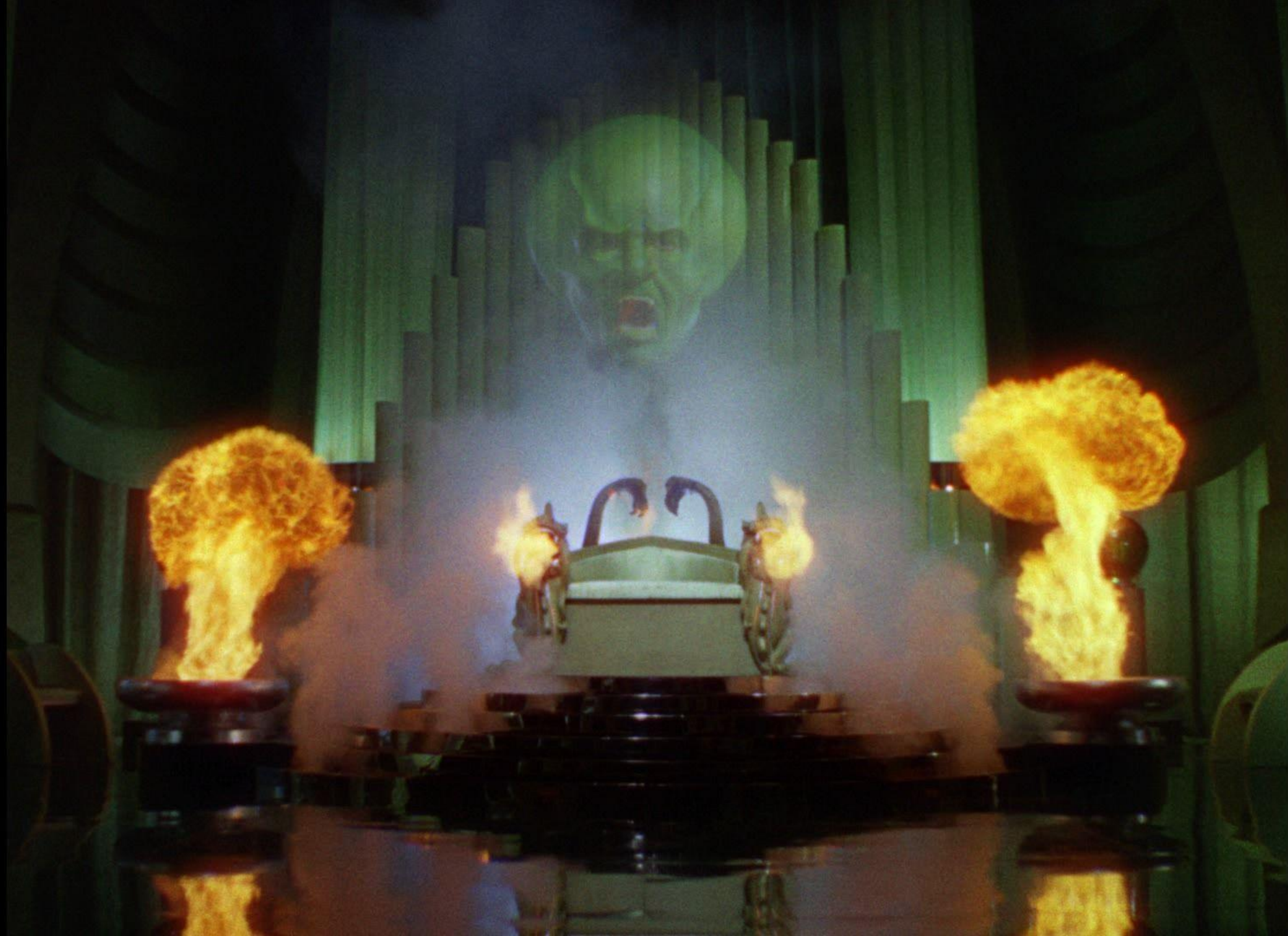
- Public bidding provides a consistent process and framework for districts to work. Clear processes and standards provide for an efficient and effective means to evaluate bids, bidders, and to define district needs.
- Public bidding allows for school personnel to conduct effective searches for providers of essential services and supplies.
- An established bid process makes purchasing simpler, efficient, and creates bright-line standards and expectations that can be enforced.

Who is responsible for the bid process?

- Ultimate responsibility for compliance with state bidding laws lies, as with everything else, with the board of trustees. **See generally** Section 20-3-324, MCA.
- A school district cannot make a contract without the approval of the trustees, and a contract made without prior trustee approval is void.

Motta v. Phillipsburg S.D. (2005)

This general rule applies to ALL contracts, not only those for which a bid process is required.







What contracts are required to be bid?

- Subject to limited exceptions (to be discussed later), there is a bright-line to bidding:

“ . . . Whenever any building, furnishing, repairing, or other work for the benefit of the district or purchasing of supplies for the district is necessary, the work done or the purchase made must be by contract if the sum exceeds \$80,000.”

Section 20-9-204(3)(a), MCA.

TIP: Contracts and projects cannot be divided to stay under the mandatory bid amount. Section 20-9-205, MCA.

TIP: This does not mean that the ONLY contracts that can be bid are those in excess of \$80,000. Consider whether a purchase for a lesser amount may justify publication

To whom must bids be awarded?

- The standard is rather nuanced:

“ . . . Each contract must be let to the **lowest responsible bidder** after advertisement for bids.”

Section 20-9-204(3)(b), MCA (emphasis added).

So who is the lowest responsible bidder?

- The trustees have discretion in their determination of the lowest responsible bidder:

"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."

Debcon, supra.

“Lowest Responsible bidder” means more than the lowest monetary bid.

- “The term ‘**responsible**’ did not refer to pecuniary ability only and included ‘judgment, skill, ability, capacity, and integrity;’ and, therefore, contract need not go to the **lowest bidder** who tendered a sufficient bond.” **Debcon.**
- In awarding a contract bid the trustees should evaluate not only the pecuniary amounts involved, but also factors important to the board in the performance of the project or supplying goods and services, e.g.:
 - History of performance;
 - Relevant qualifications;
 - Recommendations from advisors or professional staff

TIP: A record of the factors that the trustees consider is important. The trustees’ award of a contract is a discretionary matter that can be set aside only with proof of bad faith, fraud, or corruption. The more complete your record the more defensible your decision.

The mechanics of publication

- Publication requirements are explicit:
- The advertisement for bids must be published in “the **newspaper** that will give notice to the largest number of people in the district as determined by the trustees.” Section 20-9-204(3)(b), MCA
- Electronic advertisement and/or physical posting is NOT a substitute.
- The advertisement must run for two consecutive weeks, and the second ad must run not less than five or more than twelve days before the bids are considered.
- TIP: does not preclude publication in other outlets, by electronic means, posted notice, or direct solicitation, but those efforts must be made in conjunction with newspaper publication.

The bid document

- The short, concise, but complete:
- Project/product requirements (specify how details are available);
- Timeline for delivery;
- Bonding requirements (bid bond and/or performance bond);
- Bid submission timeline (when, where, how, to whom);
- Contact information for district;
- Statement of non-discrimination;
- Reservation of right to reject bids and to waive irregularities.
- TIP: if federal dollars involved, check any specialized requirements.

Bid Security

- All school districts are required to have bidder properly secure their bids. Section 18-1-201, MCA. This is a mandatory bid requirement! Bid amount is generally 10% of the bid price.
- If a performance bond is not provided bidders should also be required to indemnify the district against the full cost of contracting with another party. 18-1-202, MCA.
- The security serves to defray any added cost to the district if a bidder fails or refuses to enter a contract with the district.
- Acceptable bid security includes: cash, certified funds, or a bid bond, surety bond, or guaranty bond issued by a surety corporation.
- All bid security must be payable to the district.
- The security is forfeit if a winning bidder fails or refuses to contract, and is returned (promptly) to non-winning bidders.

Contract Security – Performance Bonds

- To ensure proper performance of a public contract, including full and proper performance, and payment of all workers, subcontractors, and materialmen, school districts are required to obtain security guaranteeing full performance. This requirement may be waived for contracts of less than \$7,500; and
- Proper forms of security are the same as for bid bonds, but the amount of the security is to be at least equal to the contract sum.
- If security is not waived the school district is responsible for the full amount of all contracted debts of the contractor or subcontractor. Section 18-2-202, MCA.
- The performance bond should be provided in the full amount of the agreed contract price.

Bid Award

- Notice up bid opening for public meeting (specify time)
- Open bids at meeting;
- Read each bid individually and publicly (make list/spreadsheet);
- Compile results – DISCUSS!!
- Ask for positive motion to accept bid;
- If not lowest pecuniary bid, be sure to make record of discussion of factors supporting award.
- Notify all bidders promptly.
- Present contract to winning bidder promptly. If no execute, move against posted bid bond
- If subcommittee is evaluating bids, decision will be made by full board

Bid exceptions: Exempt Services

- The following service providers are not required to have bid contracts:
- Registered professional engineer, surveyor, real estate appraiser, or architect;
- Health care provider;
- Attorney;
- Actuary;
- Private investigator;
- Claims adjuster;
- Accountant.
- TIP: these are not REQUIRED to be bid, but may put out for bids or solicit requests for qualifications nonetheless.

Bid Exceptions continued . . .

- Alternative project delivery contracts (Section 18-2-501, et seq., MCA)
- Construction management (CM) projects;
- General contractor CM contract;
- Design-build contract.
- TIP: there are specific requirements for the award of these contracts, found at Section 18-2-502(2), MCA. These require detailed written findings regarding significant scheduling issues, significant cost savings, demonstrable public benefits, and finding that award will not encourage favoritism or substantially diminish competition. TALK TO YOUR ATTORNEY!!!

Bid Exceptions continued . . .

- Districts need not bid energy performance contracts (Section 90-4-1101 et seq., MCA)
- These are contracts between a district and a “qualified energy service provider” (from list maintained by Montana DEQ) to obtain guaranteed cost savings;
- Does not require public bidding, but DOES require a request for proposal from at least three qualified energy service providers from state list
- Awarded on lowest responsible bidder standard
- List of mandatory factors to be evaluated (Section 90-4-1112(2), MCA)

Bid Exceptions continued . . .

- Unforeseen emergencies trump mandatory bid process:
- "unforeseen emergency" means a storm, fire, explosion, community disaster, insurrection, act of God, or other unforeseen destruction or impairment of school district property that affects the health and safety of the trustees, students, or district employees or the educational functions of the district. Section 20-3-322(5), MCA
- NOTE: trustees may meet in special sessions WITHOUT requirement of 48 hours' public notice to address unforeseen emergencies. Section 20-3-322(3), MCA
- May award contract to restore property or address threat without necessity of bid – DOCUMENT EMERGENCY!
- TIP: address only emergent needs; be restrained in emergency awards.

Finally, a positive exception – cooperative purchasing

- Districts may have a cooperative purchasing group do the heavy lifting!
- Public bid process is not required if the school district is a member of a cooperative purchasing group.
- The cooperative purchasing group is required to have have a “publicly available master list of items available with pricing included.”
- The cooperative purchasing group is required to allow all vendors, including Montana vendors, to compete based on a lowest responsible bidder standard, to have its supplies and services included on the master list.
- TIP: If joining a cooperative purchasing group, document discussion at a public meeting that the group meets this standard.
- TIP: a master list is not limited to only one provider.

Bidding and Open Meetings

- The board acts primarily at its regular and special board meetings, which are described in Sections 20-3-322 and 20-3-323, MCA, prescribing the general procedure applicable to the meetings.
- In addition, and most germane to our discussion today, trustees and trustee meetings are subject to the requirements of Montana's Open Meetings Act.

Open Meetings: the General Rule

- Montana has among the strongest open meetings laws in the nation. It is fundamental that the public has the right and ability to observe all meetings and operations of public entities.
- Article II, Sec. 9 of the Montana Constitution embodies this concept:

“No person shall be deprived of the right . . . To observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demands of individual privacy exceed the merits of public disclosure.”

This includes all meetings of a public school board of trustees.

Things to Remember: Section 20-3-322, MCA

- Business is generally transacted during regular meetings of the trustees – policy sets regular day and time;
- Meeting must be in school buildings or, with unanimous vote of trustees, in a publicly accessible building within the school district;
- Special meetings may be called by the presiding officer or any two trustees on 48 hours' written notice to each member;
- Emergency meetings may be called without requirement of the 48 hour notice, but a properly noticed meeting must be called to ratify the actions at the emergency meeting
- Business can only occur at a properly called meeting

More rules . . .

- A quorum is a majority of the trustee membership (probably)
- We know that all meetings of public bodies must be open to the public. Section 2-3-201, MCA.
- A meeting occurs when a quorum of the membership of the public agency (e.g., board members) is convened to discuss or act upon a matter over which the agency has supervision and control. Section 2-3-202, MCA. This includes a majority of the trustees of a school board. Section 20-3-322(4), MCA.
- However, a quorum is not created when a board member attends a meeting as an observer. **The Boulder Monitor v. Jefferson High School Dist. No. 1**, 316 P.3d 848 (Mont. 2014).

Attendance by a school board trustee as an observer of a meeting conducted by other trustees did not establish a quorum, even though a majority of the members was present.

The Court cautioned, however, “that this Opinion should not be taken as an invitation for subterfuge . . . To conduct business in violation of the open meeting statutes.”

What are not open meetings?

- We know that all meetings of public bodies must be open to the public. Section 2-3-201, MCA.
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Serial “one on one” discussions of state legislators do not create a “constructive quorum. **Willems v. State**, 325 P.3d 1204 (Mont. 2014).

But:

Regular meetings of public employees discussing and formulating policy for the state university system were deemed to be public meetings in consideration of the members’ status as public employees, the meetings were funded with public money, the frequency of the meetings, and the results of the meetings. **Assoc. Press v. Crofts**, 89 P.3d 971 (Mont. 2004).

Even though there was no “quorum”, the public had a right to observe the meetings and know what was being discussed and decided.

- More recently the Montana Supreme Court has determined that regular meetings of same-party legislators did not violate Open Meetings Laws even though those legislators controlled a legislative committee. **AP v. Usher**, 503 P.3d 1086 (2022).
- The Court has been reluctant to impose any firm restrictions on public officials to discuss matters informally among themselves or with their constituents. Great caution needs to be taken with this; the consideration given to legislators may (probably will) not be extended to, say, school district trustees.

So – How do we communicate with the public?

In meetings: only if the public member is on the agenda.

Every public meeting has a public comment period in which members of the public can make comments to the board on any matter. Reasonable restrictions can be placed on public comment: no profanity, personal attacks.

Public comment is not the time for a public give and take, and generally any discussions between the public and the board should be limited to items on the meeting agenda if the board chair invites outside comments or information consistent with the board's operating rules.

If a commenter raises an issue that the board wishes to discuss, that matter should be added to the agenda and duly noticed before board members engage in any substantive discussion.

Making a record (20-3-232, MCA)

- A full and permanent record of all acts (including bids) must be maintained;
- Minutes of each regular and special meeting **MUST** be approved by the trustees within one month;
- The minutes are not official until they are approved.

So what's the big deal?

- Violations of the Open Meetings Act can subject the public body to a lawsuit to overturn any decisions that were illegally made.
- This can cost the district significant dollars for its own attorney, and a party who wins a lawsuit will also receive an award of his attorney fees, so the school district gets to pay twice.

AND

After having its decisions undone, the trustees have to go back and decide the matter(s) again in a proper meeting, which can significantly impact hiring, firing, contracts, and financial matters.

