



Montana Legislative Services Division
Legal Services Office

MEMORANDUM

TO: Dave Bohyer

FROM: David S. Niss, Staff Attorney

RE: Your Request for an Opinion Whether SAVA May Contract For Actuarial Services, etc.

DATE: September 2, 2009

I
INTRODUCTION

You've inquired whether the State Administration and Veterans' Affairs (SAVA) interim committee may contract for actuarial services for the purposes of its interim responsibilities. Your question states: "Can the SAVA enter into an MOU with PERB and TRB to have the PERB or TRB request their actuary to "run some numbers" on a matter of interest to SAVA, with the SAVA simply reimbursing the PERB or TRB for the cost of the actuary's services? What other options does SAVA have? Will SAVA need to issue its own RFP for actuarial consulting services? (If it does, what is the process to be followed?)" This memorandum responds to your inquiry.

II
DISCUSSION

A. Can SAVA Enter Into a Memorandum of Understanding (MOU) With the Public Employees' Retirement Board (PERB) and the Teachers' Retirement Board (TRB)?

The authority of SAVA as an interim committee is governed by several authorities, the first being Title 5, chapter 5, part 2, MCA, the statutes governing the powers and duties of interim legislative committees generally. Nowhere in that part is there direct statutory authority for SAVA to contract for actuarial services, although it may be able to do so through the Executive Director of the Legislative Services Division.¹ However, because any contract for actuarial services would be pursuant to the interim study required by House Bill 659, Ch. 420, L. 2009, the provisions of that legislation directly apply. Section 1(3)(a) of that bill and chapter provides: "The

¹The Executive Director has the authority under section 5-11-111, MCA, to engage consultants. This authority may apply for the purposes of SAVA by virtue of the director's duties under sections 5-5-214 and 5-5-215, MCA.

committee may hire consulting services as needed." That bill and chapter contains no further grants of authority for nor any limitations upon SAVA's authority to hire consulting services. To determine any restrictions on the authority of SAVA to contract as provided in that bill and chapter, other more general law must be consulted.

The only general law concerning the authority for purchasing of services and not goods, and non-construction services, by a legislative committee is the Montana Procurement Act, contained in Title 18, chapter 4, MCA. Section 18-4-132(3)(f)(iv), MCA, of that Act provides that the entire Act does not apply to the employment of "consulting actuaries". Because of this exception from the application of the Act as a whole, there are no statutory limitations or procedures applicable to the authority granted SAVA by section 1(3)(a) of Ch. 420, L. 2009. Because the Montana Procurement Act is inapplicable and there is not other law restricting the authority or manner in which SAVA purchases actuarial services, with the exception addressed below, my conclusion is that SAVA may, as a matter of law, enter into an MOU directly with the actuaries now employed by the PERB and TRB. I've addressed below, in conjunction with a discussion answering your other questions, whether SAVA should use an MOU or some other vehicle to obtain actuarial consulting services.

While I've not located any other law concerning the authority for purchasing actuarial services, Karen Berger has, as you know, brought to our attention an issue concerning the manner of purchasing actuarial services that will likely have to be followed regardless of whether the documents used are an MOU, a request for proposal, a request for information, or some combination of those alternatives. That requirement, based upon the requirements of section 17-7-138, is that the Legislative Council approve an operating plan showing how money appropriated to SAVA will be spent. If necessary, because of the timing of Legislative Council meetings and the signing of contractual documents, the documents should be made subject to approval of an operating plan for the expenditure of the money by SAVA.

I've reviewed several of the MOUs on file in the Central Services Office of the LSD, one with the Secretary of State's Office, and one with the Governor's Office, both of them for the expansion of the RF coaxial cable connections within the Capitol building. Both are one page in length. Lenore Adams, from whom the MOUs were received, indicated that the services covered by the MOUs were of approximately \$200 in value. Because these MOUs are for one-time, time-limited, relatively inexpensive projects, I view their content as wholly unsuited for the entirely different purpose of obtaining the costing information regarding changes to the PERS and TRS. An agreement for that type of information will likely run over a much longer period of time, involve data upon which law will be written, may cost as much as 1,000 times more than either of the coaxial cable projects, and for those reasons should have more protections for the SAVA Committee and more detail regarding the work to be performed written into it. I envision that the contents of the contract for SAVA's actuarial services would include at the very minimum the following contract terms: designation of the parties, effective date and duration, services and/or reports to be provided, consideration and

timing of payments, verification of data with PERB and TRB, communications with the Committee staff, termination for conflict of interests and ongoing disclosure of conflicts of interest, retention of and Committee access to records, the contractor as an independent contractor, subcontracting or assignment of the contract, indemnification, insurance requirements, workers' compensation requirements, intellectual property, compliance with state and federal laws, contract amendments, contractor's warranty, penalty for poor performance, contract termination, and choice of laws and venue. Some of these provisions may be in the contracts between the PERB and TRB and their actuaries, but without examining those contracts first, there's no way of knowing whether those provisions exist, if they do exist, what they provide for, and whether those provisions are suited to the intended work of a legislative committee during this interim.

In short, because of the lack of legal restrictions on SAVA, under the contracting authority of House Bill 659, Ch. 420, L. 2009, and under current law, SAVA may enter into an MOU with the actuaries now under contract with PERB and TRB, but the contracts, call them MOUs, contracts, agreements for services, or by any other name, should include more extensive provisions than those MOUs now on file with our Central Services Office and reviewed for the purposes of this memorandum.

B. Other Options for SAVA

You've also asked what the alternatives are to an MOU. At the suggestion of Sheryl Olson and after discussions with Connie Welsh and Brad Sanders, all with the Department of Administration (DOA), I've listed here the two major alternatives to an MOU, a Request for Proposal and a Request for Information. I've not listed here a request for a quotation (RFQ) because it seems to me that the potential scope of the solution to the funding problems of the PERB and TRB involve more than obtaining a price on a single, well-defined product, which is what an RFQ is designed to do.

Request For Proposal (RFP). An RFP involves a bidding process where, according to Wikipedia, a proposal is submitted for a "specific commodity or service". The advantage of the RFP is the structure that it brings to the process, as can be seen in the RFP written by the CPERS staff for the design of the current defined contribution retirement system. However, the process is time-consuming, both for the writing of the RFP and receiving and evaluating responses, as the records of the 1997-1998 CPERS more than adequately show. Some time period may be shortened, however, by the use of conference calls with prospective bidders.

Request For Information (RFI). An RFI is used to determine the availability of skills in the market place, or, as Wikipedia says, to collect written information about the "capabilities of various suppliers", before an RFP or MOU is issued. While the use of an RFI will add even more time to the use of an MOU or RFP, it can nevertheless be especially beneficial if the purchaser is unsure whether a particular vendor has the skills necessary to complete the required project.

Retainer. If actuarial services are needed over an extended period of time and consultations with an actuary are expected to be ongoing during that time, actuaries, like attorneys, can be employed by retainer and the retainer fee could then also be renewed depending upon the length of time that the actuarial services are needed. I don't see this method of employing an actuary to be useful for the SAVA Committee because the services of an actuary are only necessary for the purpose of HB 659.

C. Will SAVA Need to Issue its Own RFP and the Procedure to be Used

After reading HB 659 several times, I've concluded that whether SAVA needs to use an MOU, RFI, RFP, or some combination of those documents depends very much upon (1) what the Legislature truly knows about the cause of the problem(s) it's attempting to solve and (2) the degree of change that the Legislature feels is necessary to solve the problem(s). For example, if the Legislature is convinced that the cause of the current financial difficulties of the retirement systems is such that a solution requires only small adjustments to a limited number of aspects of the system(s), such as the type or size of a particular retirement benefit, and that a credible solution can be adequately determined by the actuaries now under contract with the state, then an MOU or a limited agreement for services used in conjunction with the previously mentioned provisions would likely be sufficient. However, if the Legislature is unsure of or does not truly know the cause(s) of the existing problem, is unsure how large a change needs to be made, and/or is unsure whether the actuaries now under contract can provide credible and adequate solutions, then a procedure that determines the required skills of possible consultants and then structures the responses of appropriate consultants will be necessary to be sure that the appropriation in HB 659 is well spent. If an RFI, and perhaps an RFP, is used, the document should state the problem that is to be solved or issue that is to be addressed by the services provided for in the contract.

A second part of my answer to this question involves not only the skills, experience, and personnel of the actuaries now employed by the state but also their loyalties or the appearance of them. If the PERB and TRB see their primary function as involving fiduciary responsibilities to current employees and retirees and not the design of systems involving changes to the existing systems under which those current employees and retirees are served, then the Boards and their actuaries may be less able to provide the independent and accurate advice on changes to the existing systems that HB 659 contemplates. Also, if changes to the existing retirement systems will involve changes in the employment or employment conditions of those actuaries in their relationship to the PERB or TRB, or will involve work for which the actuaries are unprepared, then the actuaries may also be less able for those reasons to provide that independent and accurate advice. These factors need to be considered in determining whether an RFP is necessary and, therefore, no categorical answer to your question whether an RFP will be necessary can be given.

As to the procedure to be used in making the agreement between the SAVA

Committee and its actuary, because there is so little guidance in HB 659 and current law applicable to the precise type of contract being contemplated, the procedure that is to be used by the Committee is left up to the sound discretion of the Committee. However, no matter what process is used to secure actuarial consulting services, SAVA and its staff should ensure that a system fair to other competitors, and especially a system that complies with the Standards of Conduct in Title 2, chapter 2, MCA, should be used. This is not meant to imply that an MOU presented to existing state actuaries cannot be used, but only that the real necessity for using that procedure and those actuaries be well- documented in SAVA Committee records.

III CONCLUSION

HB 659 provides all of the authority necessary for SAVA to contract, whether by MOU, RFP, RFI, or a combination of those documents, for consulting actuarial services for the purposes of HB 659. Because consulting actuarial services are exempt from the Montana Procurement Act, previous documents and procedures of the Legislative Services Division and the DOA, whether they comply with the Montana Procurement Act or not, may be used for guidance as to form, content, and procedure for employing those services. The skills, experience, and loyalties, or the appearance of them, of the needed actuaries, along with the needs of the Legislature, should be used to determine which of those documents or processes is used for employing the actuaries now under contract with the state or other actuarial services providers. The name of the document, whether an MOU, contract, agreement for services, or some other name, is not as important as the minimum provisions, discussed above, for making sure that the appropriation provided for the services by HB 659, Ch. 420, L. 2009, is well-spent. Because I've not seen the current contracts between the PERB and TRB and their actuaries and know nothing about the ability of those actuaries to assist SAVA in the design of any changes to the PERS or TRS, such as hybrid defined benefit or hybrid defined contribution retirement systems, I question whether those actuaries are the proper ones for the job of assisting the Committee in carrying out the study assigned by HB 659, Ch. 420, L. 2009. Whatever system is used for concluding an agreement for actuarial services to assist the SAVA Committee, that system should provide basic fairness to competitors and comply with the Standards of Conduct contained in Title 2, chapter 2, MCA.

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