



Montana Legislative Services Division
Legal Services Office

March 6, 2012

TO: Speaker Mike Milburn

FR: Todd Everts, Legal Services Director

RE: Requested Legal Analysis Regarding the Proposed On-Site State Employee Health Center

You requested that I legally analyze the State's authority with respect to the proposed On-Site State Employee Health Center (Health Center). Set out below is my response.

ISSUES

Specifically, you requested that I address three questions regarding the concept of the Health Center and the Request for Proposal (RFP) in particular.

- I. Is legislative approval/authorization needed for the State to either proceed with the RFP process or to enter into the contract?
- II. Does the State need to go through a separate procurement process to purchase the equipment needed for the Health Center? If the successful bidder obtains the equipment and then sells it to the state, would this be a violation of state procurement laws?
- III. Does the State have the authority to enter into a long-term lease or otherwise acquire office space for this center without legislative approval/authorization?

SHORT ANSWER

In establishing the Health Center, if the State, through the Department of Administration (Department), is acting within its statutorily mandated authority to administer state employee group benefits, legislative approval/authorization is likely not required for the Department to enter into a contract or lease or to procure equipment. If the Department is exceeding its authority, legislative approval/authorization would be required. The question of whether the Department is acting within the scope of its authority is not ripe for analysis until a bid is received and accepted.

BRIEF OVERVIEW OF RFP

The Department has released an RFP for a Health Center to deliver health services to state employees and their dependents. The deadline for submitting bids is April 9, 2012. The

Department explains that it seeks proposals "from qualified Health Services vendors to assist in the design, operation, and management of . . . Health Centers for the State." (Section 3.1, RFP.) The Health Center is intended to "provide primary health care, acute and episodic health care, wellness services, health screenings, pharmacy services, and other services depending on the needs of the State" and "will be a health care option for State employees and their dependents." (Section 1.1, RFP.)

The RFP requires the bidder to describe in detail how it will fulfill the following requirements:

1. The contractor must assist the State in the design and acquisition of necessary office space, medical equipment, furniture, and supplies.
2. The State desires to be the leaseholder of record. This would mean the contractor is a sub-lessee. Confirm your agreement with this requirement. If this is not acceptable, provide an alternative for the State's consideration.
3. The State desires to own all Health Center fixtures, furniture, and medical equipment. If this is not acceptable, provide an alternative for the State's consideration.
4. The State desires to obtain best pricing through the contractor for acquisition of all medical supplies, pharmaceuticals, and other supplies. The State reserves the right to negotiate other contracts for medical supplies, pharmaceuticals, and other supplies. Confirm your agreement with this requirement. If this is not acceptable, provide an alternative for the State's consideration.

(Section 3.5, RFP.)

The bidder must also "[p]rovide a comprehensive list of equipment and supplies necessary to initially outfit" the Health Center, including pharmacy equipment and supplies. (Section 5.1, RFP.)

RELEVANT STATUTES

Title 2, chapter 18, part 8, MCA, governs state employee group insurance. The purpose of state employee group insurance "is to establish a program under which the state may provide state employees with adequate group hospitalization, health, medical, disability, life, and other related group benefits in an efficient manner and at an affordable cost." (2-18-808, MCA (emphasis added).) Pursuant to 2-18-811(2) and (3), MCA, the Department has the authority to and is mandated to:

- negotiate and administer contracts for state employee group benefit plans for a period not to exceed 10 years; and
- design state employee group benefit plans, establish specifications for bids, and make recommendations for acceptance or rejection of bids.¹

Group benefits include "group hospitalization, health, medical, surgical, disability, life, and other similar and related group benefits provided to officers and employees of the state, including flexible spending account benefits." Group benefits do not include casualty insurance, marine insurance, property insurance, surety insurance, or title insurance. (2-18-809(4), MCA.)

In addition to the duties outlined in 2-18-811, MCA, the Department is also authorized to establish alternatives to conventional insurance for providing state employee group benefits. However, before the Department can establish an alternative, it must demonstrate that the following requirements contained in 2-18-812, MCA, are met:

- (1) The department shall maintain state employee group benefit plans on an actuarially sound basis.
- (2) The department shall maintain reserves sufficient to liquidate the unrevealed claims liability and other liabilities of state employee group benefit plans.
- (3) The department shall deposit all reserve funds and premiums paid to a state employee group benefit plan account within the state self-insurance reserve fund, and the deposits must be expended for claims under the plan.
- (4) The department shall deposit income earned from the investment of a state employee group benefit plan's reserve fund into the account established under subsection (3) in order to offset the costs of administering the plan. Expenditures for actual and necessary expenses required for the efficient administration of the plan must be made from temporary appropriations, as described in 17-7-501(1) or (2), made for that purpose.
- (5) The department shall deposit into the account provided for in subsection (3) all portions of a state employee's salary designated by the employee to be withheld for the purposes of flexible spending account benefits as well as any employee-designated portion of the employer contribution for group benefits provided for in 2-18-703 that is not required to be used for mandatory or elected benefits. Income earned on

¹For a complete list of the Department's duties, see 2-18-811, MCA.

the deposits must be retained within the account and used for the purposes provided in this subsection. The money deposited and income earned on the deposits must be used for:

- (a) payment of claims made by the employee;
- (b) payment of reasonable costs of administration of the flexible spending account program;
- (c) offsetting losses of the flexible spending account program; and
- (d) reducing administration fees collected from participants in the program.

In addition, the Department must present evidence to the State Employee Group Benefits Advisory Council that the alternative is more efficient, less costly, or otherwise superior to contracting for conventional insurance. (2-18-812, MCA.)

ANALYSIS

I. Is legislative approval/authorization needed for the State to either proceed with the RFP process or to enter into the contract?

The Department is likely not prevented from extending an RFP which purports to "establish a program under which the state may provide state employees with adequate group hospitalization, health, medical, disability, life, and other related group benefits in an efficient manner and at an affordable cost" in accordance with 2-18-808, MCA. To the extent the RFP seeks to provide more than or something other than "group benefits," the Department may be exceeding its statutory authority, in which case legislative approval/authorization would be needed. However, because the RFP allows the bidder to provide alternatives for the State's consideration, the question of whether the Department has the authority to contract is not ripe for analysis. Thus, no final analysis can be conducted until a bid is received and accepted by the Department.

II. Does the State need to go through a separate procurement process to purchase the equipment needed for the center? If the successful bidder obtains the equipment and then sells it to the State, would this be a violation of state procurement laws?

The Montana Procurement Act applies to the procurement of supplies. (18-4-132(1)(b), MCA.) It does not apply to the employment of physicians, dentists, pharmacists, or other medical, dental, or health care providers. (18-4-132(3)(f)(ii), MCA.)

Under Section 3.5(3) of the RFP, the State desires to own all fixtures, furniture, and medical equipment. At the Preproposal Conference, Department representatives were asked how the State would acquire the equipment for the Health Center. Representatives responded that they were unsure how the State would acquire the fixtures, furniture, and medical equipment.

To the extent the State is seeking to purchase medical and pharmacy supplies and equipment, fixtures, and furniture, the Montana Procurement Act would apply. The broader question is whether the Department has the authority to procure such items for the stated purpose. As noted in Issue I, to the extent the RFP seeks to provide more than or something other than "group benefits," the Department likely does not have the authority to secure these supplies by any means, including the procurement process.

III. Does the State have the authority to enter into a long-term lease or otherwise acquire office space for this center without legislative approval/authorization?

The RFP states that the Department seeks to be the leaseholder of record and does not contemplate the construction of an office space for the Health Center. If the Department is acting within its authority regarding group benefits as discussed in Issue I, legislative approval/authorization is not required for it to enter into a lease for a building pursuant to 18-2-101, MCA, unless the State is leasing with an option to later purchase or the lease is for more than 40,000 square feet or for a term of more than 20 years pursuant to 2-17-101, MCA.

CONCLUSION

The question of whether the Department is acting within the scope of its authority is not ripe for analysis until a bid is received and accepted. If the Department, in establishing the Health Center, is acting within its statutorily mandated authority to administer state employee group benefits, legislative approval/authorization is likely not required for the Department to enter into a contract or lease or to procure equipment. If the Department is exceeding its authority, legislative approval/authorization would be required.

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