



## MONTANA DEPARTMENT OF ADMINISTRATION

### Director's Office

Greg Gianforte, Governor

Misty Ann Giles, Director

doa.mt.gov

406.444.2460

doadirector@mt.gov

## MEMORANDUM

**To:** Bob Brown, Montana Lottery Director

**From:** Don Harris, Department of Administration Chief Legal Counsel

**Date:** July 18, 2024

**Re:** 2023 SB 51 Changes to Lottery Procurement Requirements.

### BACKGROUND

You have requested my opinion regarding the effect of changes made by 2023 Senate Bill 51 (2023 Mont. Laws ch. 489) on the Lottery's exemptions under the Montana Procurement Act. Questions have arisen as to SB 51's impact on the Lottery's contracts and procurement of contractors that provide materials, equipment, and supplies to be used in the operation of the Lottery.

### LAW

"With the concurrence of the commission or pursuant to commission rules, the [Lottery] director may enter into contracts for materials, equipment, and supplies to be used in the operation of the state lottery, for the design and installation of games, for consultant services, for promotion of the lottery, for the sale of tickets, chances, wagers, and bets, and for other services." Mont. Code Ann. § 23-7-211(2)(a). This statute was not amended in 2023 by the 68th Legislature and allows the Lottery to contract for goods and services necessary to carry out the Lottery.

During the 2023 Legislative Session, the Legislature enacted Senate Bill 51. The short title of SB 51 begins, "An act modifying the opening, submission, and inspection of bids and proposals." SB 51 amended the Montana Procurement Act (Procurement Act), Montana Code Annotated Title 18, chapter 4, to alter the procedures and timelines associated with invitations for bid and requests for proposals. SB 51 sections 3-4. Further, SB 51 mandated that a public comment process be incorporated in these commonly used procurement methods. SB 51 sections 3-5.

Section 2 of SB 51 made unrelated changes to Mont. Code Ann. § 18-4-132(3)(f). Previously, Mont. Code Ann. § 18-4-132(3)(f) provided:

This chapter does not apply to:

\* \* \* \*

(f) employment of:

- (i) a registered professional engineer, surveyor, real estate appraiser, or registered architect;
- (ii) a physician, dentist, pharmacist, or other medical, dental, or health care provider;
- (iii) an expert witness hired for use in litigation, a hearings officer hired in rulemaking and contested case proceedings under the Montana Administrative Procedure Act, or an attorney as specified by executive order of the governor;
- (iv) consulting actuaries;
- (v) a private consultant employed by the student associations of the university system with money raised from student activity fees designated for use by those student associations;
- (vi) a private consultant employed by the Montana state lottery;
- (vii) a private investigator licensed by any jurisdiction;
- (viii) a claims adjuster; or
- (ix) a court reporter appointed as an independent contractor under 3-5-601;

Mont. Code Ann. § 18-4-132(3) (2021).

SB 51, as introduced, struck the first two words of subsection (3)(f), “employment of,” and replaced them with “contracts with.” SB 51 (Introduced version available at: <https://docs.legmt.gov/download-ticket?ticketId=47282439-9a8d-4684-aa2b-2379411b4eb0>). After passing through the Senate, SB 51 was amended in the House of Representatives. Some of those amendments modified Mont. Code Ann. § 18-4-132(3)(f)(v)-(vi) by replacing the words “consultant employed” with “person contracted.” SB 51 (House amendments available at: <https://docs.legmt.gov/download-ticket?ticketId=2cb64faa-32e3-4e56-bd1f-a6c29e89cb8f>). The Senate concurred in the House amendments, and the final, enacted bill amendments to Mont. Code Ann. § 18-4-132(3)(f)(vi) provided in relevant part: “This chapter does not apply to: . . . ~~employment of~~ contracts with: . . . a private ~~consultant employed~~ person contracted by the Montana state lottery.” SB 51 (Enacted version available at: <https://bills.legmt.gov/#/bill/20231/LC0222>) (strikethrough indicates deleted material, underline indicates added material). The resulting codified text of Mont. Code Ann. § 18-4-132(3)(f)(vi) now provides: “This chapter does not apply to: . . . contracts with: . . . a private person contracted by the Montana state lottery.”

## **ANALYSIS**

The issue is whether the requirements of the Procurement Act apply to the Montana Lottery's contracts with private contractors who provide materials, equipment, and supplies to be used in the operation of the Lottery after enactment of SB 51 by the 68th Legislature in 2023. SB 51 amended Mont. Code Ann. § 18-4-132(3)(f)(vi). The subsection used to provide: "[The Procurement Act] does not apply to: . . . **employment of:** . . . a private **consultant employed** by the Montana state lottery." Mont. Code Ann. § 18-4-132(3)(f)(vi) (2021) (emphasis added). It now provides: "[The Procurement Act] does not apply to: . . . **contracts with:** . . . a private **person contracted** by the Montana state lottery." Mont. Code Ann. § 18-4-132(3)(f)(vi) (2023) (emphasis added).

Statutory interpretation, the goal of which is to give effect to the legislature's intent, begins with the text of the statute." *Westview Mobile Home Park, LLC v. Lockhart*, 2023 MT 201, ¶ 11, 413 Mont. 477, 538 P.3d 1. "We must, to the extent possible, effect the manifest intent of the Legislature in accordance with the clear and unambiguous language of its enactments in context, without resort to other means of construction." *Id.* This is done by "first attempting to construe the subject term or provision in accordance with the plain meaning of its express language, in context of the statute as a whole, and in furtherance of the manifest purpose of the statutory provision and the larger statutory scheme in which it is included." *Id.*

The statute formerly exempted the Lottery from procurement requirements for "employment of a private consultant. It now exempts the Lottery from procurement requirements for "contracts with a private person." Changing from "employment of a consultant" to "contracts with a private person" was a significant expansion of the exemption. A court "must presume in construing . . . statutes that the Legislature intended to make some change in existing law by passing it." *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 15, 344 Mont. 1, 185 P.3d 1003.

The words "employment" and "consultant" are not defined in statute. However, "[w]hen the legislature has not defined a statutory term, [courts will] consider the term to have its plain and ordinary meaning." *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666. "Employment" refers to "the act of employing." Merriam-Webster, *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary> (last accessed July 16, 2024). To "employ" is "to use or engage the services of; to provide with a job that pays wages or a salary." *Id.* A "consultant" is "a person who gives professional or expert advice." *Id.*

Both "contract" and "person" are terms defined in statute. " 'Contract' means all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies or services." Mont. Code Ann. § 18-4-123(3). " 'Person' means any business, individual, union, committee, club other organization or group of individuals." Mont. Code

Ann. § 18-4-123(13). “ ‘Business’ means a corporation, partnership, individual, sole proprietorship, joint-stock company, joint venture, or other private legal entity.” Mont. Code Ann. § 18-4-123(1). More generally, a “[p]erson includes a corporation or other entity as well as a natural person.” Mont. Code Ann. § 1-1-201. A “person” is not limited to someone who gives expert advice.

The plain language of Mont. Code Ann. § 18-4-132(3)(f)(vi) indicates the Lottery exemption from the Procurement Act is now much broader than it was prior to enactment of SB 51. The scope of the phrase “employment of consultants” previously used in the Lottery’s exemption is a narrower concept than the “contracts with private persons” language included in Mont. Code Ann. § 18-4-132(3)(f)(vi) with the enactment of SB 51.

The Procurement Act, codified at Montana Code Annotated Title 18, chapter 4, encompasses a number of requirements that apply when state agencies purchase goods and services. Under Mont. Code Ann. § 18-4-302, agencies are required to use solicitation methods authorized by the Procurement Act to procure goods and services whenever the Act applies to a purchase. The Procurement Act also provides the maximum allowable length of most contracts with vendors is seven years. Mont. Code Ann. § 18-4-313(1). The same section establishes requirements for extending or renewing contracts. Mont. Code Ann. § 18-4-313(1), (3). None of these statutes apply when an agency or circumstance is exempted from application of the Procurement Act.

Therefore, the impacts of SB 51’s expansion of the Lottery’s exemption from the Procurement Act include that the Procurement Act no longer requires the Lottery to terminate a contract after seven years, no longer requires the Lottery to engage in the analysis required by the Act prior to renewing a contract, and no longer requires the Lottery to use the methods specified in the Act to acquire goods and services under contracts with private persons.

For any Lottery contract with a private person that expired or will expire after the May 16, 2023, effective date of SB 51, the Lottery is empowered to negotiate with that person to renew the contract for a term that may exceed the seven-year limit established by the Procurement Act. Alternately, should the Lottery identify a different private person with whom it wanted to contract upon expiration of the current agreement, the Lottery could negotiate and sign a new contract with that private person to perform the services previously provided by the other vendor. The Lottery could engage in direct contract negotiations with one or more of these private persons without utilizing one of the formal solicitation methods set forth in the Procurement Act.

While SB 51 gave the Lottery more leeway to procure contracts for goods and services with private persons, it did not prohibit the Lottery from procuring contracts in the same way it had before. The Lottery is free to continue to use procurement methods such as invitations for bid and requests for proposals alongside other methods, like direct negotiations, when

soliciting contracts for Lottery services. Although compliance with the Procurement Act is not mandatory when the Lottery is contracting with private persons, its ideals to provide for increased public confidence in procurement, to ensure the fair and equitable treatment of all, and to foster competition, see Mont. Code Ann. § 18-4-122(4)-(7), remain a useful benchmark for the Lottery regardless of the exemption.

## **CONCLUSION**

SB 51 expanded the Lottery's exemption from the requirements of the Procurement Act from "employment of a private consultant" to "contracts with a private person." The expanded exemption allows the Lottery to choose from all available procurement methods when procuring goods and services from a private person rather than only those methods allowed by the Procurement Act. Further, exempting the Lottery's existing contracts with private persons from application of the Procurement Act means these contracts may be renewed or amended in ways that the Procurement Act would not have allowed. Notwithstanding this freedom, the public policy underpinnings of the Procurement Act warrant consideration and may continue to guide the Lottery to ensure its procurement processes and outcomes are in the best interests of the State.