

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2020-005

TO: Mayor John Engen, Dale Bickell, Ellen Buchanan, Chris Behan, Jeremy Keene, Dennis Bowman, Donna Gaukler, Morgan Valiant, David Selvage, Aaron Bowman, Tiffany Brander, Mike Colyer, Scott Hoffman, Jeff Brandt, Gordy Hughes, Brad Davis, Kevin Slovarp, Troy Monroe, Monte Sipe, Leigh Griffing, Jessie Hogg

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE January 22, 2020

RE: No levy of attachment or writ of execution shall issue against any property of a governmental entity for the security or collection of any claim or judgment against any governmental entity with respect to public building or construction projects. Whenever a municipality contracts with a person or corporation with respect to building or construction contracts the municipality shall require good and sufficient performance and payment bonds for the project to avoid the municipality being liable for employee, subcontractors or material supplier's claims.

FACTS:

Recently the City received a construction contractor notice of intent to file a construction lien with respect to a public building that is under construction. While generally building and construction property liens are not able to be asserted against public government building or construction projects; it is imperative that the public body requires both performance and payment bonds from the contractor for public building and construction projects in order to avoid potential city liability for contractors that fail to pay their employees, subcontractors, materials suppliers, etc..

ISSUE(S):

May a building or construction contractor for a public building or construction project successfully assert a property lien claim against public property?

CONCLUSION(S):

Pursuant to Montana State law Section 2-9-318 MCA no levy of attachment or writ of execution shall issue against any property of a governmental entity for the security or collection of any claim or judgment against any governmental entity.

LEGAL DISCUSSION:

Article XIII, Section 5, of the Montana Constitution entitled EXEMPTION LAWS, provides as follows:

“Section 5. EXEMPTION LAWS. The legislature shall enact liberal homestead and exemption laws.”

One exemption law that the Montana State Legislature enacted was section 2-9-318 MCA entitled ATTACHMENT AND EXECUTION” which states as follows:

“2-9-318. ATTACHMENT AND EXECUTION. No levy of attachment or writ of execution shall issue against any property of a governmental entity for the security or collection of any claim or judgment against any governmental entity under parts 1 through 3 of this chapter.

However, it is imperative that public government entities require performance and payment bonds for building and construction projects; so that payment of contractor employees, subcontractors, materials suppliers, etc. is ensured. If the government entity does not require or waives performance and payment bonds, lawful money, cashier’s check or letter of credit for building and construction contracts, the government will be liable for paying the unpaid costs and expenses associated with the building or construction project including debts of both contractors and subcontractors. See the statutory provisions of Title 18, Chapter 2, Part 2 MCA entitled “PERFORMANCE, LABOR AND MATERIALS BONDS”, Section 18-2-201 MCA.

Section 18-2-201 MCA requires government entities to require good and sufficient bonds with a surety company or other adequate monetary security for government building and construction projects. Section 18-2-202 MCA provides that government is liable to the full extent and for the full amount of the contracted debt if the debts of the building or construction contract are not fully paid by the contractor.

CONCLUSION(S):

Pursuant to Montana State law Section 2-9-318 MCA no levy of attachment or writ of execution shall issue against any property of a governmental entity for the security or collection of any claim or judgment against any governmental entity.

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/s/

Jim Nugent, City Attorney

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