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FILED
PAIGE TRAUTWEIN, CLERK

AUG 13 2020

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DEPUTY

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

BRANDON E. DEWEY,

Plaintiff,

vs.

LEANNA RODABAUGH, and REGINA
PLETTENBERG, RAVALLI COUNTY
ELECTION ADMINISTRATOR,

Defendants.

Cause No. DV-20-231 / 16

Department No. 1

HOWARD F. RECHT

OPINION & ORDER

This matter comes before the Court upon Plaintiff's motion for preliminary injunction and motion for summary judgment. The motions are fully briefed and ripe for ruling.

Plaintiff Brandon E. Dewey ("Dewey") is represented by Natasha Prinzing Jones of Boone Karlberg P.C. Defendant Leanna Rodabaugh ("Rodabaugh"), initially pro se, is currently represented by Charles H. Carpenter of Carpenter Law Firm PLC. Defendant Regina Plettenberg ("Plettenberg"), Ravalli County Election Administrator, is represented by Deputy Ravalli County Attorneys Royce McCarty and Clay Leland.

PROCEDURAL BACKGROUND

On June 22, 2020, Dewey filed his *Complaint for Injunctive Relief, Writ of Prohibition and Declaratory Relief* in this matter. Dewey, the elected Mayor of the Town of Stevensville,

Montana, seeks relief in the form of an injunction and/or writ of prohibition prohibiting Plettenberg from further processing a recall petition (hereinafter, "Recall Petition") and from scheduling a recall election; and declaratory relief in the form of a declaration that the Recall Petition is invalid under the Montana Recall Act. The Recall Petition was instigated by Rodabaugh, a citizen. Dewey alleges Rodabaugh's statement of factual allegations that form the justification for the Recall Petition are false or misleading and the Recall Petition lacks legal basis.

On June 30, 2020, the Court entered a temporary restraining order prohibiting Defendants from processing the Recall Petition beyond the gathering of signatures and set a show cause hearing for July 9, 2020.

All parties appeared at the show cause hearing on July 9, 2020. Rodabaugh called three witnesses who testified and were cross-examined by Dewey's counsel: former Mayor Jim Crews, former Town Council President Steve Gibson who was president during the 2020 fiscal year budget process and approval, and current Town Council President Robert Michalson. Rodabaugh was examined by the Court. After testimony and argument by counsel, the Court ordered additional briefing which has now been submitted.

Meanwhile, Dewey's summary judgment motion filed on July 20, 2020, has been fully briefed as of July 24, 2020, on an expedited schedule and is now ripe.

At the show cause hearing, Plettenberg informed the Court that the November ballot will be certified by the Secretary of State on August 20 or 21, 2020. Therefore, time is of the essence in the issuance of a decision in this matter.

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OPINION

I. FACTUAL BACKGROUND

The facts that gave rise to the Recall Petition have been presented by Dewey through his affidavit and exhibits and are undisputed by all parties:

1. The Town of Stevensville has and continues to be in need of a qualified IT service provider to maintain the workflow of its eight municipal departments by servicing the technology in use, securing work product, and mitigating potential security breaches. *Compl.*, Ex. A (*Aff. Brandon E. Dewey* ¶ 4 (June 22, 2020)).

2. On May 19, 2019, the Town Council of Stevensville (“Town Council”) issued a Request for Proposal (“RFP”) for contracted IT services for an initial term of three years.¹ *Id.*, Ex. A (*Aff. Dewey* ¶ 5); Ex. A-1 (RFP).

3. After receiving no bids, Dewey, in his capacity as Mayor, attempted to solicit bids on his own. *Id.*, Ex. A (*Aff. Dewey* ¶ 5).

4. On November 7, 2019, Dewey received a reasonable quote from First Call Computer Solutions (“First Call”); this was the only quote he received despite attempting to solicit bids from multiple vendors. *Id.*, Ex. A (*Aff. Dewey* ¶ 6); Ex. A-2 (First Call quote). The quote offered a non-binding, three-year contract with an on-boarding fee of \$4,200 and monthly servicing fees of \$2,100. *Id.*

5. Five weeks later, at the Town Council meeting on December 12, 2019, the Town Council approved Resolution 449 to adopt the Fiscal Year 2020 Budget (“2020 Budget”).² *Id.*,

¹ The RFP in Exhibit A-1 contains a discrepancy in its specifications: the initial contract term shall be for three years commencing on July 1, 2019, and terminating on June 30, 2021.

² Fiscal Year 2020 runs from July 1, 2019, to June 30, 2020. Section 7-6-610, MCA; § 2-346, Stevensville Municipal Code (“SMC”). Hearing testimony indicated that the budget process in 2019 ran behind schedule.

Ex. A (*Aff. Dewey* ¶ 7); A-3 (Minutes of 12/12/19 meeting). The budget that was adopted included seven line items scattered throughout the 31-page budget under the heading "356 Internet Technology Se": (1) \$1,200 for #410360 City/Municipal Court (p. 2); (2) \$3,600 for #410550 Administration (p. 4); (3) \$3,600 for #420100 Law Enforcement Services (p. 6); (4) \$1,200 for #420410 Fire Department – Administration (p. 8); (5) \$6,000 for #430510 Administration (p. 23); (6) \$6,000 for #430610 Administration (p. 27); and (7) \$1,200 for #430300 Airport (p. 30).³ *Id.*, Ex. A-4 (Resolution 449).

6. The proposed contract from First Call was not on the agenda for the December 12, 2019, meeting and was never mentioned or discussed at the meeting.

7. Rodabaugh attended the meeting on December 12, 2019, and gave public comment. *Id.*, Ex. A-3 (Minutes of 12/12/19 meeting).

8. The Minutes reflect that the meeting began at 7:00 p.m. and ended at 10:33 p.m. *Id.*

9. On December 12, 2019, after approval of the 2020 Budget, Dewey executed a contract with First Call titled Master Customer Agreement.⁴ *Id.*, Ex. A (*Aff. Dewey* ¶ 9); Ex. A-5 (First Call Master Customer Agreement). The Master Customer Agreement is a form document that contains no specific terms but does contain signatures and date of execution.⁵

10. At the Town Council meeting on January 9, 2020, during the approval of claims, the Town Council approved Claim #15695 for First Call's on-boarding fee of \$4,200. *Id.*, Ex. A (*Aff. Dewey* ¶ 11); Ex. A-7 (Minutes of 1/9/20 meeting); Ex. A-8 (1/2/20 Claim Approval List). The contract with First Call was not on the agenda for that meeting and was never discussed.

³ These amounts total \$22,800. However, Dewey represents that the three-year contract, less the one-time onboarding fee of \$4,200, costs \$25,200 per year for a total of \$79,800. *Compl.*, Ex. A (*Aff. Dewey* ¶ 16).

⁴ Because there is no reference to this contract or its execution in the Minutes, Dewey presumably executed the contract after the meeting had concluded.

⁵ Presumably, the four-page quote Dewey received in November 2019 was incorporated within it.

11. At the Town Council meeting on February 27, 2020, during the approval of claims, discussion was had on Claim #15796 by First Call for \$2,100 in monthly service fees, after which the Town Council declined to approve this claim and tabled it until the March 12, 2020, meeting. *Id.*, Ex. A (*Aff. Dewey* ¶ 12); Ex. A-9 (Minutes of 2/27/20 meeting); Ex. A-10 (2/20/20 Claim Approval List).

12. The Agenda for the Town Council's meeting on March 12, 2020 included "New Business" as Item 11. *Id.*, Ex. A-11 (Minutes of 3/12/20 meeting). Item 11(b) was noticed as "Discussion/Decision: Agreement with First Call Computer Solutions for managed IT services." *Id.* Jessica Stenberg, Virtual Chief Information Officer from First Call, was present and gave an overview of the services First Call was currently providing the Town. *Id.* (Apparently, the Town Council learned of the existence of the contract with First Call through their Agenda Packet for this meeting.) Extensive discussion and public comment on the contract followed. *Id.* The Minutes reflect that Town Council members and citizens expressed concern and dismay over the previously executed contract and questioned Dewey's authority to do so without Town Council approval. *Id.* After discussion and comment, the Town Council moved and voted to reject the First Call contract.⁶ *Id.*, Ex. A (*Aff. Dewey* ¶ 12); Ex. A-11 (Minutes of 3/12/20 meeting). A motion was made to reject Claim #17956 from First Call that had been tabled at the meeting on February 9, 2020. *Id.*, Ex. A-11 (Minutes of 3/12/20 meeting). After discussion and advice from the Town's attorney that the Town had already received the services billed in this claim, the Town Council ultimately voted to approve the claim. *Id.*

⁶ Although the Town Council voted to reject the contract, the Minutes do not reflect that it determined that the contract was void.

13. On March 25, 2020, the Town Council advertised a second RFP for bids for IT services with a due date of March 27, 2020, which received no bids. *Id.*, Ex. A (*Aff. Dewey* ¶ 15); Ex. A-12.

14. A third RFP for IT services was issued, also with a due date of March 27, 2020.⁷ *Id.*, Ex. A (*Aff. Dewey* ¶ 15; Ex. A-13). As of June 22, 2020, no bids had been received and First Call was continuing to provide service to the Town on a month-to-month basis. *Id.*

15. On March 30, 2020, Rodabaugh swore under oath that Dewey violated his oath of office by “sign[ing] a contract for Services with First Call Computer Solutions...that had not been authorized by the Stevensville Town Council in accordance with Mont. Code Ann. § 7-3-203(7).” *Compl.* at ¶ 4. Rodabaugh further alleged that Dewey’s execution of the contract had denied the citizens of their Montana constitutional rights to participate and to know. *Id.*

16. On May 22, 2020, Rodabaugh filed a Statement and Recall Petition against Dewey.

17. The required number of signatures for the Petition have been obtained and verified by Plettenberg.

II. RECALL PETITION STATEMENT

The following is the statement in the Recall Petition:

The Mayor’s action circumvented the requirements of § 7-3-203(7) MCA, § 2-399 thru 403 of the Stevensville Municipal Code (SMC) and the Town of Stevensville Purchasing Policy Section 7.b) and 7.b)ii). The Mayor assumed the Power to Make Contracts, a Power that is assigned to the Stevensville Town Council via § 7-3-203(7), § 7-5-4301, § 7-5-4121(2) MCA and § 2-59 SMC. The Mayor’s action resulted in bypassing the competitive bid and contract award process. The Town Council was not allowed to participate in the contract award process and the City Attorney was not afforded the opportunity to review the contract prior to the signing by the mayor per § 7-4-4604(3) MCA. The Mayor’s actions resulted in denying Citizens the Right of Participation, Article II, Part II,

⁷ It would appear that this third RFP would have been issued after its stated deadline for submission of proposals.

Section 8, and the Right to Know, Article II, Part II, Section 9 of The Constitution of the State of Montana, thereby violating his Oath of Office.

Compl., Ex. A-14.

III. IS DEWEY ENTITLED TO A PRELIMINARY INJUNCTION AND/OR SUMMARY JUDGMENT ON HIS COMPLAINT?

Typically, a petition for a preliminary injunction comes on for determination at the onset of a case, and a motion for summary judgment is filed later. In the case at bar, both motions have become ripe for ruling at the same time.

Dewey seeks a preliminary injunction on two grounds, pursuant to § 27-19-201, MCA:


27-19-201. When preliminary injunction may be granted. An injunction order may be granted in the following cases:

- (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
- (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant[.]

Findings that satisfy only one situation are sufficient for an injunction to issue. *Sweet Grass Farms, LTD. v. Bd. of County Commrs. of Sweet Grass County*, 2000 MT 147, ¶ 27, 300 Mont. 66, ¶ 27, 2 P.3d 825, ¶ 27. The relevant inquiry is whether the moving party has made out a prima facie case under any of the statutory situations or shown that it is at least doubtful whether he will suffer irreparable injury before his rights can be fully litigated. *Id.*, citing *Porter v. K & S P'ship.*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981). "The limited function of a preliminary injunction is to preserve the status quo and to minimize the harm to all parties pending full trial; findings and conclusions directed toward the resolution of the ultimate issues are properly reserved for trial on the merits." *Flying T Ranch, LLC v. Catlin Ranch, LP*, 2020 MT 99, ¶ 12, 400 Mont. 1, 462 P.3d 218 (quoting *Yockey v. Kearns Properties, LLC*, 2005 MT

27, ¶ 18, 326 Mont. 28, ¶ 18, 106 P.3d 1185, ¶ 18, citing *Porter*, 192 Mont. at 183, 627 P.2d at 840).

Dewey also seeks summary judgment on his complaint, which is a determination on the ultimate issue. He contends the statement in the Recall Petition is false and, as such, renders the Petition fatally defective and entitles him to permanent injunctive relief, a writ of prohibition, and a declaration that the Recall Petition is invalid.

The Court deems Dewey's motion for preliminary injunction to have been subsumed within his motion for summary judgment. 

Motions for summary judgment are governed by M.R.Civ.P. 56 which provides in (c)(3): “The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” The moving party has the initial burden of establishing both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. *Ternes v. State Farm Fire and Casualty Co.*, 2011 MT 156, ¶ 17, 361 Mont. 129, 257 P.3d 352. Once the moving party meets this initial burden, the party opposing summary judgment must present substantial evidence, as opposed to mere denial, speculation, or conclusory statements, raising a genuine issue of material fact. *Id.*, ¶ 17.

A. Montana Recall Act

The Montana Recall Act is codified at Title 2, Chapter 16, Part 6. “Any person holding a public office of the state or any of its political subdivisions, either by election or appointment, is subject to recall from office.” Section 2-16-603, MCA. The only permissible grounds for recall are: physical or mental lack of fitness, incompetence, violation of the oath of office, official misconduct, or conviction of a felony offense enumerated in Title 45. Section 2-16-603, MCA.

“[T]he right of recall of a public officer is an important part of the rights of citizenship in Montana.” *Sheehy v. Ferda*, 235 Mont. 63, 69, 765 P.2d 722, 726 (1988).


In a proper case, the voters determine whether the officeholder should continue in office. *Sheehy*, 235 Mont. at 69-70, 765 P.2d at 726. However, the officeholder is entitled to at least a level playing field in that his removal from office “must be based on true statements which demonstrate” his incompetence or any other charges on which recall may be sought. *Id.*

“Recall petitions for elected officers shall be filed with the official who is provided by law to accept the declaration of nomination or petition for nomination for such office.” Section 2-16-615(1), MCA. A recall petition must substantially follow a statutory form, including the requirement that it contain a general statement of the reasons for the recall in up to 200 words; the petition must be accompanied by a written statement containing the reasons for the desired recall as stated on the petition, and the truth of the purported facts contained in the statement must be sworn to by at least one of the petitioners before a persona authorized to administer oaths. Section 2-16-616, -617(4), MCA.

The form of the circulation sheets for the collection of signatures is specified in § 2-16-617, MCA. Before a petition may be circulated for signatures, a sample circulation sheet must be submitted to the officer with whom the petition must be filed in the form in which it will be circulated, and the filing officer shall review the petition for sufficiency as to form and approve or reject the form within one week of receiving it. Section 2-16-617(3), MCA.

Within three months of the date the recall petition from was approved under § 2-16-617, MCA, signed circulation sheets or sections of a petition must be submitted to the officer responsible for registration of electors in the county in which the signatures were obtained, upon which the county clerk shall verify and compare the signatures of each signatory to ensure that

the person is an elector in that county; if satisfied that the signatures are genuine, the officer shall certify that fact to the Secretary of State. Sections 2-16-619, -620, MCA. Upon filing of a petition containing the required number of valid signatures, the official with whom the petition is filed shall immediately give written notice to the officer named in the petition; such notice must notify the subject of the petition that he or she has the right to prepare and have printed on the ballot a statement containing not more than 200 words giving reasons why the officer should not be recalled. Section 2-16-621, MCA.

The election administrator is charged with reviewing the petition's sufficiency as to form. The district court is charged with determining whether the allegations in a recall petition are legally sufficient.  The Montana Recall Act does not contemplate that the electors will decide the truth of charges made against a public officer in a recall petition. *Sheehy*, 235 Mont. at 70, 765 P.2d at 726. "The Recall Act requires truth in the beginning of the process." *Id.*

[T]he legislature has limited the grounds for recall and has given the District Court the power to determine the legal sufficiency of the allegations in the recall petition. The legal sufficiency of the allegations is not left to the electorate. Therefore, a petition may never reach the electorate because it fails to specify acts legally sufficient to constitute grounds for recall under section 2-16-603(3).

Id. (quoting *Foster v. Kovich*, 207 Mont. 139, 142, 150, 673 P.2d 1239, 1242, 1246 (1983).

Thus, the legal sufficiency of the allegations in a recall petition is a judicial as opposed to a political question and is to be decided by a district court.

"Recall charges are sufficiently specific if they are definite enough to allow the charged official to meet them before the tribunal of the people." *Steadman v. Halland*, 197 Mont. 45, 54, 641 P.2d 448, 453 (1982).

In the event an official fails to file a recall petition, an elector's remedy is through a writ of mandamus; the remedy for the filing of a petition that is deficient is through injunction.

Section 2-16-615(2), MCA; *Sheehy*, 235 Mont. at 71, 765 P.2d at 727. On a showing that any filed recall petition is not sufficient, a court may enjoin certification, printing, or a recall election. Section 2-16-615(2), MCA.


B. Parties' Arguments

Dewey contends Rodabaugh's statements in the Recall Petition "were deliberately and recklessly false and misleading, and are contrary to Montana law" *Br. in Supp. of Pl.'s Mot. for P.I.* at 4. He argues his execution of the First Call contract was legally justified under § 7-5-4301(2)(a), MCA, which exempts technical contracts from the requisite bidding procedure set forth in §§ 7-5-4302 through 7-5-4304, 7-5-4306, and 7-5-4307, MCA; and under the Town's Purchasing Policy at § 7b)ii), or alternatively, § 7b)iii). He contends that by approving the 2020 Budget on December 12, 2019, which included eight separate line items for IT services, the Town Council delegated its authority to approve a contract for IT services to him under the Purchasing Policy.⁸ Then, by approving First Call's claim for its on-boarding fee of \$4,200 at its meeting on January 9, 2020, Dewey contends the Town Council ratified his authority to execute the First Call contract.

Dewey contends the statement in the Recall Petition contains two false allegations: (1) he executed the First Call contract in violation of § 7-3-207(3), MCA; and (2) he denied the citizens of Stevensville their constitutional rights to participate and to know. He further contends the first sentence in the statement is false and was made recklessly to mislead the citizens of Stevensville by failing to inform the citizens that the contract was a three-year contract, it covered services for eight different Town departments, and it included a one-time onboarding fee of \$4,200. Dewey contends he has shown that he is entitled to injunctive relief and that he and the Town will suffer


⁸ As noted above, the Court was able to find only seven line items attributed to Internet services.

damages for which there is no plain, speedy and adequate remedy in the ordinary course of law if the Recall Petition is allowed to proceed to an election. He further contends he has shown his entitlement to a declaration that the Recall Petition is fatally defective and must be enjoined.

Rodabaugh counters that Dewey engaged in an official act without legal authority and then sought to conceal his actions. nce the scope of his actions became known and the recall drive began, she contends Dewey began arguing that he had legal authority to execute the contract and that she had misstated the facts. Rodabaugh contends the governing statutes and ordinances are unambiguous, and she argues Dewey's interpretation of the Town's Purchasing Policy would require the Court to ignore other provisions in the policy. She contends the Purchasing Policy was adopted for the purpose of advancing transparency and Dewey's actions have failed to meet that goal and in the process have deprived her and other citizens of their rights to participate and to know. She asks the Court to deny Dewey's motions and to dismiss the temporary restraining order issued on June 30, 2020.

Plettenberg takes no position on this issue.

C. Discussion

The issue before the Court is whether the Recall Petition is legally sufficient his requires a two-part analysis: (1) whether the Recall Petition's statement is accurate, and (2) if so, whether the acts alleged in the statement are sufficient to make out a charge of violation of the oath of office. Both Dewey and Rodabaugh have submitted high-quality briefing on the issues.

As persuasive authority, Dewey attaches and relies on a district court ruling granting summary judgment to a county commissioner who sought to enjoin a recall petition. The *Order Granting Summary Judgment* entered on January 16, 2015, in *Underdal v. Lager*, DV-14-055, Ninth Judicial District Court, Toole County, is attached to his summary judgment motion brief as

Exhibit B. The defendant in *Underdal* filed a recall petition alleging in her sworn statement that Underdal had retained counsel and authorized payment of county funds of some \$57,000 to such counsel without proper authority, actions that constituted official misconduct. Based on affidavits from co-commissioners and public records available to the defendant if only she had attempted to investigate the facts that contradicted the defendant's allegations, District Judge Brenda R. Gilbert determined the defendant's statement in the petition was "materially false" and, therefore, the petition fatally defective, and ruled for Underdal. Dewey asks the Court to do the same here.

The issue in *Underdal* turned on whether the factual basis for the petition was truthful. Here, the factual basis for the Recall Petition is undisputed. The issue presented here is one of statutory construction. Dewey contends his actions were legal under the governing authorities, and Rodabaugh contends they were not. Both parties contend the governing legal authorities are unambiguous.

In construing a statute, ordinance, or policy, a court's role is to ascertain and declare what is in the terms or substance therein and not to insert what has been omitted or to omit what has been inserted. Section 1-2-101, MCA. A court may not read into a statute what is not there. *Bates v. Neva*, 2014 MT 336, ¶ 13, 377 Mont. 350, 339 P.3d 1265.

In the discussion of the governing legal authorities in Subsections 1 through 4 below, all underlining has been added by the Court to emphasize the relevant language.

1. Contract Authority

The duties of the executive in the commission-executive (or council-mayor, per § 7-3-201, MCA) form of government, which applies to Stevensville, are set forth in statute. These duties include executing contracts subject to the approval of the council.

7-3-203. Duties of executive. The executive shall:

(7) execute bonds, notes, contracts, and written obligations of the commission, subject to the approval of the commission[.]

Title 7, Chapter 5, Part 41, of the MCA governs the conduct of municipal government. In addition to setting forth the general powers of a municipal government (§ 7-5-4101), and the powers and duties of the mayor related to administration and executive function (§ 7-5-4102), this part prescribes how council business is to be conducted:

7-5-4121. Conduct of council business. (1) A majority of the members of the council constitute a quorum for the transaction of business, but a less number may meet and adjourn to any time stated and may compel the attendance of absent members, under such rules and penalties as the council may prescribe.

(2) The ayes and noes must be called and recorded on the final passage of any ordinance, bylaw, or resolution or the making of any contract. The voting on the election or appointment of any officer must be viva voce. A majority of the whole number of the members elected is requisite to appoint or elect an officer, and such vote must be recorded.

In accordance with Montana law that requires council approval of the making of any contract, the SMC provides:

Section 2-59. – Contracts.

The council has power to make any and all contracts necessary to carry into effect the powers granted by state law, and to provide for the manner of executing the same.⁹

2. City Attorney's Role in Executing Contracts

The duties of the city attorney are set forth in Montana law and include:

7-4-4604. Duties. The city attorney shall:

* * * * *

⁹ All provisions of the Stevensville Municipal Code have been taken from this website: https://library.municode.com/mt/stevensville/codes/code_of_ordinances?nodeId=STMOMUCO

(3) when required, draft for the city council contracts and ordinances for the government of the city[.]

In accordance with Montana law, the SMC provides:

Sec. 2-402. - Preparation of contract.

Upon receiving the statement of the awarding of a contract, it shall be the duty of the municipal attorney to prepare a contract and bond in accordance with the statement. All contracts shall be executed on the part of the municipality by the mayor and attested by the clerk, and, together with the bond therefore, shall be filed with the clerk.

3. Process for Executing Contracts

Title 7, Chapter 5, Part 43, of the MCA governs municipal contracts and franchises.

Section 7-5-4301, MCA, provides in relevant part:

7-5-4301. Power to enter and execute contracts. (1) A city or town is authorized to make any contracts necessary to carry into effect the applicable powers granted by this chapter and to provide for the manner of executing the contracts.

(2)(a) All necessary contracts for professional, technical, engineering, or legal services are excluded from the provisions of 7-5-4302 through 7-5-4304, 7-5-4306, and 7-5-4307. However, contracts in which the value of the majority of the services to be rendered constitute services other than professional, technical, engineering, or legal services must be awarded under the bidding procedure provided for in 7-5-4302 through 7-5-4304, 7-5-4306, and 7-5-4307.

The statutes referenced in § 7-5-4301(2)(a), MCA, that apply to contracts for services *other* than professional, technical, engineering, or legal govern the bidding and awarding of contracts (§ 7-5-4302); exemptions from bidding during emergencies (§ 7-5-4303); those contracts that must be submitted to voters (§ 7-5-4304); the use of installment contracts (§ 7-5-4306); and the sale or trade-in of old supplies or equipment (§ 7-5-4307).

The SMC includes similar provisions:

Sec. 2-398. - Awarding certain contracts; vote by electors.

(a) Except as provided in MCA 7-5-4303, 7-5-4310, or MCA title 18, chapter 2, part 5 (MCA 18-2-501 et seq.), all contracts of the municipality for the purchase of any automobile, truck or other vehicle, road machinery, other machinery, apparatus, appliances, equipment, or materials or supplies or for construction, repair, or maintenance in excess of \$80,000.00 must be let to the lowest responsible bidder after advertisement for bids.

(b) The council shall not let any contract extending over a period of five years or more, except contracts for solid waste management systems as defined in MCA 75-10-103, which may not exceed ten years, or obligations issued pursuant to MCA 7-7-4104, without first submitting the question to a vote of the electors of the municipality.

Similar to the corresponding statutes, § 2-399 addresses advertising requirements; § 2-400 exempts advertising requirements for bids during emergencies; and § 2-403 provides for a public works contractor's bond.

Section § 2-401 is titled "Reception of bids" and provides:

(a) The bids for contracts shall be opened by the clerk in the presence of the council while the council is in actual session at a regular, adjourned or special meeting. After the bids shall have been opened, the contract shall be let or awarded by the council. The award shall be made to the lowest responsible bidder.

(b) The council may postpone action as to any such contract until the next regular meeting after bids are received, or may reject any and all bids and re-advertise.

4. Town's Purchasing Policy

On October 23, 2014, the Town Council enacted Resolution No. 361 which adopted a Purchasing Policy for Stevensville, which was modified April 9, 2015.¹⁰ The purpose of the Purchasing Policy is set forth in its first paragraph:

The Town of Stevensville takes care to ensure that we comply with federal and state laws and Town ordinances for all expenditures. The public can rely on us to make fair, competitive, and open purchasing decisions that are in the best interest of the Town.

¹⁰ See

https://www.townofstevensville.com/sites/default/files/fileattachments/ordinance/3487/resolution_no_361.pdf

The Purchasing Policy governs all of the Town's contracts and purchases. Section 7 is titled "Documentation and selection of vendors." Section 7a) addresses the purchasing of goods; and Section 7b) addresses the purchasing of services.

Section 7b) provides in its entirety:

b) Purchasing services. Contracts for services are awarded to the lowest most-responsible vendor or bidder. When determining which vendor or bidder is the lowest most responsible you may take into consideration generally available information regarding their skill, ability, their integrity to do faithful, conscientious work, and promptly, fulfill the contract according to its letter and spirit. (Including: qualifications, available Staff, references, delivery date, inspection, testing, quality and workmanship, etc.). All contracts for services must be approved by the Town Council.

i) For all Architectural, Engineering, and Land-Surveying services: Advertised Requests for Proposals or Requests for Qualifications must be made for services costing over \$20,000. Refer to Section 18-8-201 MCA for the procedures required for selection of these vendors.

ii) Other Professional Services: as per the Town's policy, any contract must be approved in advance by the Town Council. In regard to contracting for other professional services, including non-construction services as defined in Section 18-2-401(9) MCA:

- Professional services totaling up to \$1,500 per agreement
 - The department may purchase at the Department Supervisor's authorized signatory's discretion
- Professional services totaling between \$1,501 - \$25,000 per agreement;
 - At least three written quotes must be accumulated, with the lowest most-responsible vendor selected

For purchases contained in the Department's current fiscal year budget or the Town's current Capital improvement budget, Department Supervisor's [sic] need only get confirmation by the Mayor prior to purchasing.

For purchases not contained in the Department's current fiscal year budget or the Town's current Capital Improvement budget, Department Supervisor's [sic] must obtain prior purchase approval from the Mayor and the Town Council.

- Professional Services totaling \$25,001 or more per agreement;
 - A published Request for Proposals must be made, with the lowest most-responsible vendor selected

For purchases contained in the Department's current fiscal year budget or the Town's current Capital Improvement budget, Department Supervisor's [sic] need only get confirmation by the Mayor prior to purchasing.

For purchases not contained in the Department's current fiscal year budget or the Town's current Capital Improvement budget, Department Supervisor's [sic] must obtain prior purchase approval from the Mayor and the Town Council.

ii) Government Services (GSA, WSCA, etc.) Procurement:¹¹ Supplies, equipment, and other professional services may be purchased from another government entity (including government purchasing programs) without bids or advertisements when does so at a substantial savings to the Town.

◦ It should be noted that these purchasing arrangements are often, but not always the lowest price available.

◦ Requirements for prevailing wages must still be met for public works construction contracts and non-construction contracts over \$25,000. Refer to Section 17-2-401 MCA for definitions of these services.

iii) Special Cases for Sole Source Purchases: In the case of some of the Town's information technology, building mechanical, public works utility, and other infrastructure, it is in the best interest of the Town to maintain a compatible and reliable system provided by a single vendor.

For cases where:


- There is only one source for the supply or service item, or
- Only one source is acceptable or suitable for the supply or service item, or service item.

Refer to specific dollar amount purchasing authority guidelines to determine Department Supervisor purchasing authority limits.

5. Application of Legal Authorities to Facts

Dewey argues that because contracts for technical services are excluded from the bidding process pursuant to § 7-45-4301(2)(a), MCA, he had no obligation to follow the bidding process. Although he acknowledges Montana statutes and local ordinances vest the Town Council with power to make and approve contracts, he contends the Town's Purchasing Policy delegates authority to the Mayor to execute contracts once the Town Council has passed a budget that

¹¹ Paragraph 7b) has two subsections numbered ii).

includes funding for such contracts or when such contracts involve single source services. In support of this interpretation, Dewey relies on two provisions in the Purchasing Policy 

The first provision on which Dewey relies is found in § 7b)ii), underlined above, which provides:


For purchases contained in the Department's current fiscal year budget or the Town's current Capital improvement budget, Department Supervisor's [sic] need only get confirmation by the Mayor prior to purchasing.



The second provision is the last sentence of § 7b)iii), underlined above, which provides in pertinent part:


For cases where:

- There is only one source for the supply or service item, or
- Only one source is acceptable or suitable for the supply or service item, or service item.

Refer to specific dollar amount purchasing authority guidelines to determine Department Supervisor purchasing authority limits.

Dewey argues it makes sense that these provisions in the Purchasing Policy grant him authority to execute contracts for approved budget items or single source services “because if every contract for approved budget items had to return to the Town Council, government would be overwhelmed by such redundancies.”  *Br. in Supp. of Pl. 's Mot. for S.J.* at 12.


Dewey's argument is unpersuasive.  Although § 7-5-4301(2)(a) excludes contracts for technical services from the bidding process requirement, nothing in this statute exempts  contracts for technical services (or any other services) from statutory-required approval by a town council. Dewey has cited no legal authority—statute or ordinance or other—that excludes technical contracts (or any other contracts) from the Town Council's authority granted by the legislature to make and approve contracts, pursuant to §§ 7-3-203 and 7-5-4121(2), MCA; and § 2-59, SMC.

Furthermore, regardless of the fact that § 7-5-4301(2)(a) excludes technical contracts from bidding process requirements, Dewey has cited no legal authority that prohibits a city or town council from using a bidding process for a technical contract. The undisputed fact  that the Town Council chose to use the bidding process to obtain a contract for IT services and published an RFP for IT services in May 2019, a fact of which Dewey was well aware.

The Purchasing Policy governs both purchases *and* contracts, which are two different things. Section 7b) governs the purchase of services and contains four subsections. Subsection i) governs Architectural, Engineering, and Land-surveying services. Subsection ii) addresses Other Professional Services. The second Subsection ii) addresses Government Services Procurement. Subsection iii) addresses Special Cases for Sole Source Purchases.

The entirety of the first Subsection ii) spells out the purchasing authority delegated to Departments. This subsection specifies when Departments may purchase services upon a Department Supervisor's signature, when quotes are required, when RFPs are required, when confirmation is needed from the Mayor prior to purchasing, and when confirmation is needed from the Mayor and Town Council prior to purchasing.

Similarly, Subsection iii) addresses those situations where a single vendor of services may be in the Town's best interest and directs Department Supervisors to prior specific dollar amount purchasing authority guidelines to determine their purchasing authority limits.

The provisions on which Dewey rely govern the purchasing authority of Departments and their Supervisors, not the Mayor  the first provision provides that for *purchases* that are funded in the Department's current fiscal year budget, Department Supervisors need only obtain confirmation by the Mayor prior to purchasing. In other words, so long as anticipated purchases of services are budgeted in the current fiscal year budget, Department Supervisors need approval

only from the Mayor before purchasing. Nothing in this provision addresses the *Mayor's* purchasing authority or authority to execute contracts. Furthermore, despite Dewey's argument that he was delegated authority to contract without Town Council oversight because the contract was funded in the 2020 Budget, the 2020 Budget funded only a fraction of the multi-year contract. The contract that Dewey executed was required for the purchase of IT services and was in Dewey's hand weeks before the Town Council's meeting on December 12, 2019.

Dewey's tortured interpretation of the Purchasing Policy would require the Court to substitute "Mayor" for "Department" and "contracting authority" for "purchasing authority," and would also require the Court to ignore the two explicit provisions in § 7b) that address contracts: (1) the provision in the initial paragraph of Section 7b) that states: "All contracts for services must be approved by the Town Council," and (2) the provision in the first § 7b)ii): "**ii) Other Professional Services:** as per the Town's policy, any contract must be approved in advance by the Town Council." (See underlined provisions in Subsection 4 above.) These provisions are clear and unambiguous. In the construction of a government policy, the role of the court:

is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Section 1-2-101, MCA. Dewey's argument is not supported by the plain language of the Purchasing Policy.

Dewey's argument that the Town Council ratified his authority to execute the First Call contract when it approved the First Call claim at its meeting on January 9, 2020, is disingenuous. Dewey does not even attempt to explain how the Town Council could ratify a contract it did not know existed.

With respect to Dewey's argument that Rodabaugh not only was able to exercise her constitutional rights to participate and to know but did so when she attended the public Town Council meetings in December 2019 and January 2020 and participated in the budget process and approval of claims, such argument is nothing short of specious. Rodabaugh's beef is not with the budget process or the items discussed at the meetings she attended but is with Dewey's unilateral execution of a contract out of sight of the Town Council and the public. It is the Town Council's responsibility to notice the public of the subjects of future meetings; however, the Town Council cannot be expected to notify the public of topics of which the Mayor has not made it aware. Despite his extensive motion briefing, Dewey does not attempt to explain how Rodabaugh (or any other citizen) was reasonably able to exercise constitutional rights to participate and to know with regard to the First Call contract when the contract was not made public or placed on an agenda until three months after the deed had been done.

By soliciting a quote from First Call outside of the channel utilized by the Town Council, by receiving and opening the quote in private, and by proceeding to execute the First Call Contract on his own without notice to or approval from the Town Council and outside of a public meeting, Dewey acted outside of the law and without legal authority by doing so, he violated several statutes, ordinances, and the Purchasing Policy, as well as the policy's stated purpose to ensure compliance with federal and state laws and Town ordinances for all expenditures and to make "open purchasing decisions"; and he deprived the citizenry of Stevensville of their rights to participate in and to know what their government was doing.

The Court now turns to the statement in the Recall Petition:

Mayor Brandon Dewey on 12-12-19 signed a contract for Services with First Call Computer Solutions totaling \$79,800.00 that had not been authorized by the Stevensville Town Council in accordance with § 7-3-203(7) MCA.

The Mayor's action circumvented the requirements of § 7-3-203(7) MCA, § 2-399 thru 403 of the Stevensville Municipal Code (SMC) and the Town of Stevensville Purchasing Policy Section 7.b) and 7.b)ii).

The Mayor assumed the Power to Make Contracts, a Power that is assigned to the Stevensville Town Council via § 7-3-203(7), § 7-5-4301, § 7-5-4121(2) MCA and § 2-59 SMC.

The Mayor's action resulted in bypassing the competitive bid and contract award process.

The Town Council was not allowed to participate in the contract award process and the City Attorney was not afforded the opportunity to review the contract prior to the signing by the mayor per § 7-4-4604(3) MCA.

All of the above statements are clearly stated and, as discussed and determined above, are true.

The last sentence in the statement is:

The Mayor's actions resulted in denying Citizens the Right of Participation, Article II, Part II, Section 8, and the Right to Know, Article II, Part II, Section 9 of The Constitution of the State of Montana, thereby violating his Oath of Office.

The first part of this sentence is true: by carrying on government business outside of the law and without notice to the public (or the Town Council), Dewey denied citizens of their constitutional rights to participate and to know. The latter part of this sentence raises the issue of whether the statement as a whole is sufficient to state a charge of violation of the oath of office. A recall petition must set forth a clear statement of the official's alleged acts constituting the ground for recall. *Steadman v. Halland*, 197 Mont. at 54, 641 P.2d at 453. See also *Sheehy*, 235 Mont. at 70, 765 P.2d at 726.

The oath of office is set forth in Article III, § 3, of the Montana Constitution which provides in relevant part:

Section 3. Oath of office. Members of the legislature and all executive, ministerial and judicial officers, shall take and subscribe the following oath or affirmation, before they enter upon the duties of their offices: "I do solemnly

'swear (or affirm) that I will support, protect and defend the constitution of the United States, and the constitution of the state of Montana, and that I will discharge the duties of my office with fidelity (so help me God).'"

(Underlining added.)

Section 7-1-4137, MCA, requires every elected and appointed municipal officer to take the oath of office prescribed in Article III, § 3, of the Montana Constitution and that the oath, certified by the official before whom the oath was taken, be filed before the officer may perform any official duties.

"Fidelity" is not defined in statute. The common meaning of "fidelity" is the quality or state of being faithful.¹² The legal issue here is whether Dewey's actions taken with regard to the First Call contract that did not comply with governing statutes, ordinances, or policies constitute the discharge of the duties of his office *without* the requisite fidelity or faithfulness. The Court determines they do. The discharge of the duties of the office of any elected official requires compliance with governing legal authorities. In the case of a mayor in a council-mayor government, the duties of the office require clear and adequate communication with the Town Council. Montana's constitutional guarantees of its citizens' rights to participate in their government and to know how their government is conducting its business require transparency in the discharge of the duties of the office of a mayor. Dewey has failed to meet his burden to show that he is entitled to summary judgment as a matter of law. His motion for summary judgment should be denied.

Generally, no formal cross-motion is necessary for a court to enter summary judgment in favor of the nonmoving party. *In re Estate of Marson*, 2005 MT 222, ¶ 9, 328 Mont. 348, 120 P.3d 382 (citing *Hereford v. Hereford*, 183 Mont. 104, 107, 598 P.2d 600, 602 (1979)). However,

¹² See <https://www.merriam-webster.com/dictionary/fidelity>

before a court does so, the movant must have been afforded with notice and a full and fair opportunity to be heard. *Id.* Here, Dewey has had a full and fair opportunity to be heard on the subject of his complaint—whether the Recall Petition is legally sufficient. He has presented the facts in this matter which the Court has accepted and Defendants have not disputed. His motions for preliminary injunction and summary judgment are fully briefed. At the hearing, he cross-examined Robadaugh’s witnesses and gave argument. The issue is a legal issue; there is no factual dispute. Having determined that Dewey has failed to meet his burden to show that the Recall Petition is legally insufficient, and having further determined that the statement in the petition is legally grounded, the Court determines that summary judgment should be granted in favor of Defendants. Because the Recall Petition is legally sufficient, it should proceed to a recall election where the citizens may decide whether Dewey should be recalled.



ORDER

IT IS HEREBY ORDERED that *Plaintiff’s Motion for Summary Judgment* (Doc. 10) on his complaint is **DENIED**.

IT IS FURTHER ORDERED that, pursuant to *Estate of Marson and Hereford v. Hereford*, summary judgment on Plaintiff’s complaint is **GRANTED** in favor of Defendants.

IT IS FURTHER ORDERED that the Temporary Restraining Order issued on June 30, 2020, is **DISSOLVED**.

IT IS FURTHER ORDERED that *Plaintiff’s Motion for Preliminary Injunction, Temporary Restraining Order and Writ of Prohibition* (Doc. 4) is **DENIED AS MOOT**.

DATED this 13 day of August, 2020.

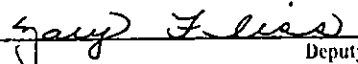


HON. HOWARD F. RECHT, District Judge

cc: counsel of record

OPINION & ORDER

I certify that I forwarded copies of this instrument to counsel of record *by email*
August 13, 2020
Paige Trautwein, Clerk



Deputy