

VOLUME NO. 34

Opinion No. 36

**BOARD OF EXAMINERS - State contracts, officers and employees interest in; DEPARTMENT OF ADMINISTRATION - BUREAU OF PURCHASING - State contracts, officers and employees interest in; OFFICES AND OFFICERS - State contracts, interest in; PUBLIC EMPLOYEES - State contracts, interest in; OFFICES AND OFFICERS - State officer, definition; CONTRACTS - State contracts, officers and employees interest in; CONTRACTS - State contracts, what constitutes interest in. Art. V, sec. 30, Constitution of Montana; chapters 11 and 19, Title 42, R.C.M. 1947; sections 59-501, 82-1144, 82-1922, R.C.M. 1947.**

- HELD:**
- 1. Section 59-501, R.C.M. 1947, being a general statute, applies to all government contracts not otherwise provided by law;**
  - 2. Section 82-1144, R.C.M. 1947, prohibits all members and officers of any department of government from having an interest in state contracts let by the board of examiners;**

3. Section 82-1922, R.C.M. 1947, prohibits enumerated state officers and employees from having an interest in state contracts let by the bureau of purchasing;
4. The definition of "state officer" is set forth in *State ex rel. Barney v. Hawkins*, 79 Mont. 506, 528;
5. A prohibited interest in a state contract which prevents or tends to prevent the free and impartial exercise of a public office is the interest which is sought to be avoided.

March 14, 1972

Mr. H. F. Weggenman  
Chief, Purchasing Bureau  
State Department of Administration  
State Capitol  
Helena, Montana 59601

Dear Mr. Weggenman:

This is in response to your letter of February 25, 1972, in which you ask the following question:

"Can the purchasing bureau award a low bid contract to a person who is a member of the legislature, constitutional convention, state board or commission, or a state officer or employee?"

Because of the nature of this opinion I have taken the liberty of expanding the area of consideration to contracts let by both the bureau of purchasing and by the state board of examiners. Before beginning a discussion of these two areas I would note that the legislature has provided a general statute concerning public contracts under the terms of section 59-501, Revised Codes of Montana, 1947, which states:

"Members of the legislative assembly, state, county, city, town, or township officers must not be interested in any contract made by them in their official capacity or by any body or board of which they are members."

This section, originally adopted in 1895, affects public contracts on all levels of government within the state of Montana. The restrictions therein apply only to the enumerated classes of public officials and limit the prohibition to only such contracts as made by such public officials in their official capacity.

#### BOARD OF EXAMINERS

The provisions concerning contracts to be made through the state board of examiners are found in chapter 11, Title 82, R.C.M. 1947.

Contained within that chapter is section 82-1144, R.C.M. 1947, which states:

“No member or officer of any department of the government must be in any way interested in any contract made under the provisions of this chapter.”

This section was originally enacted as section 713, Political Code of 1895, and has remained virtually unchanged to the present date. During that period of time the application of this section has never been judicially determined in the Supreme Court of Montana, nor has an attorney general issued a formal written opinion concerning it. The problem, therefore, comes to me as a question of first impression within the state of Montana.

The application of the prohibition in section 82-1144, *supra*, is limited to those contracts let by the board of examiners under the provisions of chapter 11, Title 82, *supra*, and should not be further extended.

The terms of section 82-1144, *supra*, are exacting and admit of no exceptions. This provision is an absolute restriction against all members and officers of the government being interested in any contract with the state made under chapter 11, Title 82, *supra*. A similar provision was considered by the Supreme Judicial Court of Maine in *In re Opinion of the Justices*, 82 Atl. 90 (1911). The statute in that case was section 11, Chapter 121, of the Revised Statutes, which read in part:

“No trustee, superintendent, treasurer or **other person holding a place of trust in any state office** or public institution of the state shall be pecuniarily interested directly or indirectly in **any contracts made in behalf of the state** or of the institution in which he holds such place or trust . . .” (Emphasis supplied)

In holding that the section applied to the secretary of state who was a stockholder in the bidding corporation, despite the fact that the secretary of state had nothing to do with the formation or acceptance of the contract, the court stated at page 93:

“The Legislature must be presumed to have had in contemplation **all of the contracts which might have been made by the different state officers**, and to have enacted the statute for the purpose of removing any temptation on their part to bestow reciprocal benefits upon each other, and of preventing favoritism, extravagance, and fraudulent collusion among them under any circumstances which might be reasonably anti-

pated as likely to arise under different state governments in the years to follow.

\* \* \*

“But it was obviously impracticable to anticipate and specify in the statute the great variety of situations that might arise, and, in order to accomplish the purpose of the statute and prevent the mischief designed to be remedied, the Legislature was compelled to declare **in general terms that no state officer should have a pecuniary interest in ‘any contract made in behalf of the state’.**” (Emphasis supplied)

In the same manner, I hold that the prohibition of section 82-1144, supra, is absolute and that no member or officer of any department of the government may have an interest in **any** contract made in behalf of the state of Montana pursuant to chapter 11, Title 82, supra.

#### BUREAU OF PURCHASING

By Chapter 197, Laws of 1921, the legislature created the department of purchasing and subsequent enactments and amendments defined its duties which are now codified under chapter 19, Title 82, R.C.M. 1947. In 1971, by virtue of the Executive Reorganization Act, the powers and duties of the department of purchasing were transferred to the department of administration (see 82A-202, R.C.M. 1947), and now such powers and duties, for the most part, are exercised by the bureau of purchasing of the department of administration.

In 1923 the legislature adopted section 12, Chapter 66, Laws of 1923, now section 82-1922, R.C.M. 1947, which states in pertinent part:

**“No member of the legislature nor any elective or appointive state officer, nor any deputy or employee thereof, nor superintendent of any state institution or any employee thereof, nor any person in the employ of the state of Montana in any capacity whatsoever, shall directly, himself, or by any other person in trust for him or for his use or benefit or on his account, undertake, execute, hold or enjoy, in whole or in part, any contract or agreement made or entered into by or on behalf of the state of Montana under the provisions of this act, . . .”** (Emphasis supplied)

Again, it should be noted that this act has remained unchanged since its adoption in 1923, and to date this section has never been judicially determined in Montana, nor has an attorney general issued a formal written opinion concerning it. Again, the application of this section comes as a question of first impression in the state of Montana.

The language of section 82-1922, *supra*, is so exacting and absolute that it admits of no interpretation or application other than that which is apparent on its face. In **People v. Adduci**, 412 Ill. 621, 108 N.E.2d 1 (1952), the Supreme Court of Illinois applied a similar provision to a member of the Illinois House of Representatives, who had an interest in a contract between a printing corporation and the state of Illinois. The statute in question stated:

**“No contract shall be let to any person holding any state office in this state or a seat in the General Assembly, or to any person employed in any of the offices of the state government, or the wife of a state officer, member of the General Assembly, or employees as aforesaid, nor shall any state officer, member of the General Assembly, or wife of employee as aforesaid, become, directly or indirectly, interested in any such contract, . . .”** (Emphasis supplied)

The Illinois court then stated in its opinion on page 3:

**“It seems clear to us that these particular persons designated by the statute are prohibited from becoming interested in any state contract. Any other construction would be unnatural and not in accordance with the clear intent of the act as a whole, and it certainly would not be in accordance with the usual rules of statutory construction.”** (Emphasis supplied)

Similarly, I hold that those officers and employees enumerated in section 82-1922, *supra*, are absolutely prohibited from having an interest in any contract made in behalf of the state of Montana pursuant to chapter 19, Title 82, *supra*.

My opinion concerning the application of both section 82-1144 and section 82-1922, *supra*, is further buttressed by **Parking Printing and Stationery Co. v. Arkansas Printing and Lithographing Co.**, 354 S.W. 2d 560 (1962), which interprets an Arkansas constitutional provision which is virtually identical to Art. V, sec. 30, Constitution of Montana. Art. 19, sec. 15, Arkansas Constitution, states:

**“All stationery, printing, paper, fuel, for the use of the General Assembly and other departments of Government, shall be furnished and the printing, binding and distributing of the laws, journals, department reports and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees, shall be performed under contract to be given to the lowest bidder below such maximum price and under such regulations as shall be prescribed by law. No member or officer of any department of the government shall in any way be interested in**

**such contracts**, and all such contracts shall be subject to the approval of the Governor, Auditor and Treasurer.” (Emphasis supplied)

(The emphasized provision is virtually identical to not only Art. V, sec. 30, *supra*, but to section 82-1144, *supra*.) The court in applying this provision to a printing contract where the president of the printing company was also a member of the highway commission, noted that no irregularities or collusion appeared, but found on page 565:

“There is no ambiguity in the plain language which says: ‘No member or officer of any department of the government shall in any way be interested in such contracts \*\*\*’ The Constitution says what it means and means what it says, and we are sworn to follow it.”

The legislators in Montana, as well as in the aforementioned states, have not acted idly nor have they expressed their intent in ambiguous terms. The language is capable of only one interpretation and that interpretation is one of absolute prohibition.

The term “state officer” is used in the aforementioned sections, and a question has arisen as to what constitutes a state officer. The question was resolved in **State ex rel. Barney v. Hawkins**, 79 Mont. 506, 528, 247 Pac. 411, wherein the court stated:

“After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) it must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they may be those of an inferior or subordinate office, created or authorized by the legislature and be it placed under the general control of a superior officer or body; (5) it must be of some permanency and continuity and not be only temporary or occasional.” Cited with approval in **42nd Legislative Assembly v. Lennon**, Mont. , 481 P.2d 330.

Each of the five criteria must be present before one is to be classified a public officer, or in this case a state officer.

The final question concerns whether delegates to the constitutional convention are state officers within the meaning of the term in section 82-1922, *supra*. In **42nd Legislative Assembly v. Lennon**, *supra*, the court stated at page 333:

“A delegate to the constitutional convention is a ‘state officer’ holding a public office of a civil nature.”

In concluding this portion of the opinion, however, it should be noted that section 82-1922, *supra*, applies not only to officers but to such persons “in the employ of the state of Montana in any capacity whatsoever”.

#### NECESSARY INTEREST IN THE CONTRACT

In the final portion of your request you suggest that corporations may have as directors, officers, or shareholders, persons already prohibited by sections 82-1144 and 82-1922, *supra*, from being interested in state contracts. Your question then pertains to whether the individual’s disability applies to a corporation of which he is an officer, director, or stockholder. Because of the degree of interest that different persons occupy in corporations, associations, etc., it would be relatively impossible to set forth an absolute formula for determining the extent of the prohibitions found in section 82-1144 and 82-1922, *supra*. Each situation must be resolved on a case by case basis. I would only suggest that the language found in the opinion of the Supreme Court of Illinois in **People v. Adduci**, *supra*, at page 4, may operate as a guide in your determination:

“The interest against which the prohibition is leveled is such an interest as prevents or tends to prevent the public official from giving to the public that impartial and faithful service which he is in duty bound to render and which the public has every right to demand and receive. Not every interest is a bad or corrupt interest. The desire of every public official to serve the public faithfully necessarily requires him to take a keen interest in the affairs of his office and the prohibition is manifestly not leveled against this interest. Whether or not the interest in any given case comes within the prohibition of the statute may well become a question of construction for the court in view of all the facts and circumstances shown in the particular case. (Citing authority)” (Emphasis supplied)

#### CONCLUSION

Your letter indicates that the past practice of the bureau of purchasing has been to rely on the provisions of section 59-501, *supra*, in

prohibiting the officers named therein from being interested in such state contracts made by them in their official capacity. Evidently this has been a long-standing, but erroneous, practice which should henceforth cease. The bureau of purchasing and the board of examiners should rely on the provisions of section 82-1922, *supra*, and section 82-1144, *supra*, respectively, in awarding contracts let under their particular powers and duties.

THEREFORE, IT IS MY OPINION, in view of the foregoing discussion, that:

1. Section 59-501, R.C.M. 1947, is a general statute which applies to contracts at all levels of government and is applicable in all instances where a special statute has not been enacted.
2. Section 82-1144, R.C.M. 1947, is a special statute which applies to only such contracts let by the state board of examiners pursuant to chapter 11, Title 82, R.C.M. 1947, and that said section prohibits any member or officer of any department of government from having an interest in any contract made in behalf of the state pursuant to chapter 11, Title 82, *supra*.
3. Section 82-1922, R.C.M. 1947, is a special statute which applies to only such contracts let by the bureau of purchasing pursuant to chapter 19, Title 82, R.C.M. 1947, and that said section prohibits the officers and employees mentioned therein from having an interest in any contract made in behalf of the state pursuant to chapter 19, Title 82, *supra*.
4. Each of the five criteria set forth in **State ex rel. Barney v. Hawkins**, *supra*, must be present before one is determined to be a state officer.
5. A prohibited "interest" in a state contract is such an interest that prevents or tends to prevent a public official or employee from exercising full, impartial and faithful performance of the duties and trust of his public position.

Very truly yours,

ROBERT L. WOODAHL  
Attorney General