

VOLUME NO. 37

OPINION NO. 175

MUNICIPAL CORPORATIONS - Competitive bidding requirements; self-government cities; CONTRACTS - Construction management contract; competitive bidding requirements; LOCAL GOVERNMENT - Self-government unit; competitive bidding requirements; PURCHASING - Construction management contract; competitive bidding requirements; self-government units; REVISED CODES OF MONTANA, 1947 - Section 11-1202, and Title 47A.

- HELD: 1. A contract for the employment of a construction manager, which requires the use of the manager's skill and expertise in supervising a proposed construction project undertaken by local government, is a necessary contract for professional and technical services excluded from the competitive bidding requirements outlined in section 11-1202, R.C.M. 1947.
2. A local government unit with self-government powers cannot supersede by the passage of a resolution or ordinance the requirements of competitive bidding outlined in section 11-1202, R.C.M. 1947.

7 December 1978

Ken Peterson, Esq.
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Dear Mr. Peterson:

You have requested my opinion on the following questions:

1. Do the requirements for competitive bidding outlined in section 11-1202, R.C.M. 1947, apply to a contract for employment of a construction manager for a single project?
2. May a local government unit with self-government powers pass a resolution or ordinance to supersede the statutory requirements of competitive bidding outlined under section 11-1202, R.C.M. 1947?

Section 11-1202, R.C.M. 1947, requires that "[a]ll contracts for the purchase of any automobile, truck or other vehicle or road machinery, ... or for construction for which must be paid a sum exceeding four thousand dollars (\$4,000) must be let to the lowest responsible bidder after advertisement for bids" The last sentence of this section creates an exemption from competitive bid requirements and states, "[a]ll necessary contracts for professional, technical, engineering and legal services are excluded from the pro-

visions of this act." This last sentence codifies a well-recognized rule that "[t]he employment of a person who is highly and technically skilled in his science or profession is one which may properly be made without competitive bidding." Kennedy v. Ross, 28 Cal.2d 569, 170 P.2d 904, 912(1946). Accord Krohnberg v. Pass, 187 Minn. 73, 244 N.W. 329, 330(1932); Hunter v. Whiteaker & Washington, 230 S.W. 1096, 1098 (Tex. Ct. App. 1921).

To determine whether the employment of a construction manager properly falls within the exemption of section 11-1202, R.C.M. 1947, it is necessary to determine if the duties of such a manager are technical and professional in character and the services provided are of a personal nature. Krohnberg v. Pass, 187 Minn. 73, 244 N.W. 329 (1932).

There are no Montana cases which examine the activities of a construction manager in light of the requirements of the competitive bidding statute. There are, however, cases in other jurisdictions which have considered whether public contracts for similar activities fall within an exemption from the competitive bidding requirements.

In Krohnberg v. Pass, supra, the Minnesota Supreme Court considered various employment contracts entered into without the acceptance of competitive bids in connection with the construction of a school building. The Minnesota court considered specifically the contract for employment of a superintendent of construction. In reviewing the duties of the superintendent the court stated:

He watched the contractors to see that the work was done in accordance with the plans and specifications of the architects and engineers. It was not the intention of the statute that for such services there should be a public advertising for bids and a letting of a contract of employment to the lowest responsible bidder,....

244 N.W. at 331. The court found the superintendent to be a personal representative of the school district and therefore not subject to the competitive bidding statute. 244 N.W. at 330.

A California case, City of Inglewood-Los Angeles Co. Civic Center Authority v. Superior Court of Los Angeles, 7 Cal.3d 861, 103 Cal.Rptr. 689, 500 P.2d 601(1972), also considered the applicability of a competitive bidding statute to the employment of a construction manager. The court in this case held:

It is true that the management contractor was to perform services and to lend his experience and expertise in the preparation of the final plans, and in that respect may be likened to an engineer or an architect whose services may be procured without strict compliance with competitive bidding requirements. (Citations omitted.) However, our view of the other duties and obligations which were required of the management contractor in this case, including his guarantee of the outside price based on the subcontract bids, persuades us that the management contracting procedure as proposed and followed here is too closely akin to traditional lump sum general construction contracting to be held exempt from the statutory competitive bidding requirements.

500 P.2d at 604.

From these cases it is clear that where a construction management contract calls only for the application of the contractor's technical expertise and experience in a supervisory capacity and does not involve the procurement of supplies or actual construction, the services of a construction manager are within the meaning of professional services exempted from the bidding requirements of section 11-1202, R.C.M. 1947.

Your second question is whether a local government unit with self-government powers may pass a resolution or ordinance which would supersede the competitive bidding requirements of section 11-1202, R.C.M. 1947. You state that the city of Billings has adopted a charter which states in Article I, section 1.01:

The City shall have all powers possible for a self-government city to have under the constitution and laws of this state as fully and completely as though they were specifically enumerated in this chapter.

As a result of the adoption of the charter the city has apparently become a self-governing local government unit pursuant to Article XI, section 5, Montana Constitution 1972, and section 47A-3-208, R.C.M. 1947. A local government unit with self-government powers may exercise any power not prohibited by the constitution, law, or charter. Montana Constitution, Art. XI, section 6, section 47A-7-101, R.C.M. 1947, 37 OP. ATT'Y GEN. NO. 68 (1977).

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Section 47A-7-106 requires that the powers of a self-governing local government unit be liberally construed and that every reasonable doubt as to the existence of a local government power be resolved in favor of the existence of that power.

Section 47A-7-204, R.C.M. 1947, requires that local government units with self-government powers act in accordance with specified state laws. Subsection (7) prohibits such units from enacting ordinances contrary to "[a]ny law regulating the budget, finance or borrowing procedures and powers of local government...."

The requirements established under section 11-1202, R.C.M. 1947, constitute a law regulating the budget and finance procedures of local government. Cf. Sangamon County Fair & Agricultural Association v. Stanard, 9 Ill. 2d 267, 137 N.E. 2d 487, 491 (1956) (defining finance as "the science and practice of raising and expending public revenue"); In re Borough of Sharpsburg, 163 Pa.Super. 84, 60 A.2d 557, 560 (1948) (holding that laws prescribing annexation procedures are "laws affecting the budget" of a political subdivision). Since the letting of governmental contracts necessarily involves the expenditure of public revenue, the procedures for the letting of contracts form an integral part of the budget and finance functions of local government. The requirements of competitive bidding outlined in section 11-1202, R.C.M. 1947, have long been imposed on local government units. The first competitive bidding statute was passed in Montana in 1907 and has been effective, with minor amendments, until the present. The purpose of competitive bidding statutes is to guard against collusion and corruption in the letting of governmental contracts and to assure economy in the use of tax dollars.

The liberal construction required by section 47A-7-106 cannot overcome the express prohibition with regard to matters of the budget and finance. Therefore, the requirements for competitive bidding expressed in section 11-1202, R.C.M. 1947, are mandatory provisions applicable to local government units with self-government powers.

THEREFORE, IT IS MY OPINION:

1. A contract for the employment of a construction manager, which requires the use of the manager's skill and expertise in supervising a proposed construction project undertaken by local government, is a necessary contract for professional and technical services excluded from the competitive bidding requirements outlined in section 11-1202, R.C.M. 1947.
2. A local government unit with self-government powers cannot supersede by the passage of a resolution or ordinance the requirements of competitive bidding outlined in section 11-1202, R.C.M. 1947.

Very truly yours,

MIKE GREELY
Attorney General