

**Contracts—Purchasing Agent—Constitutional Law.**

It is the duty of the governor and the state treasurer under section 30 of article V of the state constitution to approve all contracts entered into by the purchasing agent relating to stationery, printing, paper, fuel and lights used in the legislative and other departments of government and the printing and binding and distribution of the laws, journals and department reports and other printing and binding and the repairing and furnishing the halls and rooms used for the meeting of the legislative assembly and its committees. No such contracts are valid without the approval of said officers.

F. E. Williams, Esq.,  
State Treasurer,  
Helena, Montana.

May 29, 1929.

My dear Mr. Williams:

You have requested my opinion whether it is the duty of the governor and the state treasurer to approve certain contracts entered into by the State of Montana. The answer to the question involves the Constitution, certain legislative enactments upon the subject, and decisions of the Supreme Court of Montana, which will be hereinafter referred to.

Section 30 of Article V, of the Constitution of Montana reads:

“All stationery, printing, paper, fuel and lights used in the legislative and other departments of government, shall be furnished, and the printing, and binding and distribution of the laws, journals, and department reports and other printing and binding, and the repairing and furnishing the halls and rooms used for the meeting of the legislative assembly, and its committees shall be performed under contract, to be given to the lowest responsible bidder below such maximum price and under such regulations as may be prescribed by law. No member or officer of any department of the government shall be in any way interested in any such contract; and all such contracts shall be subject to the approval of the governor and state treasurer.”

It is elementary that any legislation upon the subject mentioned in the foregoing constitutional provision must not be in conflict therewith. The legislation upon the subject may be briefly outlined as follows:

The political code of 1895 provided that the governor, secretary of state, and attorney general constituted ex-officio a furnishing board and that the board of examiners (composed of the same officers) constituted also a board of supplies and furnishing board, and that it was the duty of the board, among other things:

“To contract for the furnishing of all stationery, printing, binding, paper, fuel, lights, and other necessary supplies, to be used by the legislative assembly and all other departments of

the government, and the printing, binding and distributing of the laws, codes, journals, department reports, reports of the decisions of the Supreme Court, and all other printing and binding, and repairing of any books used by any state officer or department.

“To hire all offices for the state officers, and to furnish the same; to keep the furniture in repair, and to hire and furnish halls and rooms for the use of the legislative assembly, and to provide furniture therefor, and keep the same in repair.”

In conformity with the constitutional provision above set forth, the said code further provided that all contracts made by the board should be approved by the governor and state treasurer. (Sections 702-710, both inclusive).

The Supreme Court of Montana, while these provisions of the statutes of the state were in force, had occasion to pronounce both the reason for and the effect of the constitutional provision requiring the contracts to be approved by the governor and state treasurer. As to the reason:

“The governor, having a general knowledge of the affairs of the state, and presumptively being fitted by his superior qualifications to pass judgment upon the action of the board, it was thought proper by the constitutional convention that he should give the taxpayers the benefit of his judgment and discretion. The treasurer being in a position in which he is presumed to be especially informed as to the condition of the state’s finances, it was thought proper to require the exercise of his judgment and discretion also. The ultimate purpose was, by this system of counterchecks, to secure economy and prevent favoritism.” (State ex rel. State Pub. Co. vs. Smith, 23 Mont. 44).

As to the effect:

“The Constitution says that such a contract for printing as relator claims to have shall be given, not only to the lowest responsible bidder, below such maximum price and under such regulations as may be prescribed by law, but that it shall be subject to the approval of the Governor and State Treasurer. The approval of these officials completes the contract. With such approval, the agreement between the printer and the State becomes one whereby the printer acquires a right in relation to the printing; but without it he has no right whatever to demand the papers to print, or to compel their delivery to him. And to the same effect is Section 710 of the Political Code, which provides that all contracts made by the Board of Examiners ‘must be approved by the Governor and the State Treasurer’. If relator has done work for the State under any agreement made with the Board of Examiners, purporting to be a valid contract, that fact cannot help it in this proceeding, or make a contract where none exists.

“It being indispensable that the agreement of the Board shall be approved by the Governor and Treasurer, before there

can be a valid contract, mere allegations that the Board of Examiners received bids, and made a contract with relator, whose bid was the lowest, are wholly insufficient; for the conclusion therefrom that a contract exists is unsupported by such facts, independent of certain other facts, which, as said, must exist, to make a contract. The approval of the Governor and Treasurer is by way of a check upon possible extravagances of the Board of Examiners. Call it a power like the veto power of a governor as the court did in *People vs. Croton Aqueduct Board*, 26 Barb. 240, or one of annihilation, as did the counsel for relator in his argument herein; it nevertheless exists as a portion of the Constitution, in clear and unambiguous language,—so plain that but the one construction can possibly obtain. And, until relator can show that such approval has been had, it fails to set forth those substantial matters essential to constitute the contract which it would have the Secretary of State ordered to comply with." (*State ex rel. State Pub. Co. vs. Hogan*, 22 Mont. 384).

These statutory provisions were carried forward in the revised codes of 1907 (Sections 248-258, both inclusive) and into the revised codes of 1921 (Sections 254-264, inclusive) and they have never been directly repealed. However, in 1921 the legislature enacted Chapter 197 of the session laws of that year, which created the state purchasing department and placed the same in charge of the state purchasing agent. The chapter is a part of the Revised Codes of Montana of 1921, and comprises Sections 284-293, inclusive. This act provided that the state purchasing agent, under the restrictions of the act, shall have

"full and sole power and authority and it shall be his duty upon approval of the state board of examiners to contract for and purchase or direct and supervise the purchase and sale of all supplies of whatever nature necessary for the proper transaction of the business of each and every state department, commission, board, institution, or official. For the purpose of making such purchases and contracts the state purchasing agent shall be and is hereby made the purchasing agent of and for each and every state department, commission, board, institution and official." Section 4 of the act reads as follows:

"An estimate or requisition approved by the department, commission, board or state official in control of the appropriation or fund against which such contract and purchase is to be charged, shall be full authority for any contract and any purchase made by the state purchasing department."

Section 6 provided:

"The state purchasing agent shall have exclusive power, subject to the consent and approval of the state board of examiners, to contract for all printing and to purchase, sell, or otherwise dispose of, or to authorize, regulate and control the purchase, sale or other disposition of, all materials and supplies, service, equipment, and other physical property of every kind, required by any state institution or by any department of the

state government; and to purchase or cause to be purchased all needed commissary supplies, and all raw material and tools necessary for any manufacturing carried on at any of said institutions; and to sell all manufactured articles, and collect the money for the same, and generally to regulate and control all purchases by any department of the state government; or by any state institution; and also to furnish, repair, and maintain the executive residence for the governor."

Section 9 provided as follows:

"All stationery, printing, paper, fuel and lights used in the legislative and other departments of government, shall be furnished, and the printing, and binding and distribution of the laws, journals, and department reports and other printing and binding, and the repairing and furnishing the halls and rooms used for the meeting of the legislative assembly and its committees, shall be performed under contract, to be given to the lowest responsible bidder; and all such contracts shall be let by the state purchasing agent, but shall be subject to the approval of the board of examiners."

It will be noted that by this legislation the contracts let by the purchasing agent were subject only to the approval of the board of examiners. The approval of the governor as such and not as a member of the board and of the state treasurer was not made a condition precedent to the validity of the contract concerning printing and other things mentioned in the Constitution.

In 1923 the legislature again enacted an original act upon the subject, being Chapter 66 of the session laws of that year, Section 5 of which provided as follows:

"Unless otherwise provided by law, the state purchasing agent shall have exclusive power, subject to the consent and approval of the governor, to let to the lowest bidders and enter into contracts with the lowest bidders for the furnishing of all supplies, stationery, paper, fuel, water, lights, and other articles required by the legislative assembly and all other offices, departments, boards, commissions and institutions of the state."

Section 6 provided:

"The state purchasing agent shall have exclusive power, subject to the consent and approval of the governor, to contract for all printing for any purpose used by the State of Montana in any state office, elective or appointive, or by any state board, commission, bureau, state institution or department \* \* \* .

"Unless otherwise provided by law, the state purchasing agent in letting contracts as provided in this act, for the printing, binding and publishing of all laws, journals and reports of the various offices, departments, boards, commissions and institutions of the state, shall have the power to determine the quantity, quality, style and grade of all such printing, binding, and publishing. \* \* \* "

Said act repealed all acts and parts of acts in conflict with it. From 1921 to 1925, Section 287 of the Revised Codes of Montana, being part of the act creating the state purchasing department, provided that the estimate or requisition approved by the department, commission, board or state official in control of the appropriation or fund against which the contract and purchase was to be charged was full authority for any contract and any purchase made by the state purchasing department. In 1925, by Chapter 17 of the session laws of that year, the legislature enacted that in addition thereto the approval of the state board of examiners was required before any furniture, fixtures, apparatus or equipment could be made.

The act of 1923 is the existing statutory enactment upon the subject under consideration. It will be observed that by Section 6 thereof the contract made by the purchasing agent relating to printing for state offices, boards, commissions, institutions and departments is subject only to the approval of the governor, while Section 5 provides that the contract made by the purchasing agent for furnishing of all supplies, stationery, paper, fuel, water, lights and other articles required by the legislative assembly and all other offices, departments, boards, commissions and institutions of the state shall be subject to the approval of the governor "unless otherwise provided by law." As to those things mentioned in the constitutional provision above mentioned, to-wit:

1. All stationery, printing, paper, fuel and lights used in the legislative and other departments of government;
2. Printing and binding and distribution of the laws, journals, department reports and other printing and binding;
3. The repairing and furnishing the halls and rooms used for the meeting of the legislative assembly and its committees; it is otherwise provided by law, by the highest law of the state, the Constitution, which requires all contracts concerning the things mentioned in the constitutional provision above quoted to be approved by the governor and state treasurer. Any statute which seeks to permit these contracts to be entered into without the approval of the governor and state treasurer is contrary to the Constitution and cannot have the effect of depriving these officers of their powers and duties under the Constitution. The statute, insofar as it seeks to take this power and duty away from the state treasurer, is a nullity.

It is therefore my opinion that as to those things mentioned in the Constitution and hereinabove enumerated, any contract entered into by the state purchasing agent must have the approval of the governor and state treasurer, without which approval there is no contract. As was held in the case of *State ex rel. State Pub. Co. vs. Smith*, supra, in giving or withholding their approval to the proposed contracts the governor and state treasurer do not act ministerially but must use their judgment and discretion as to all matters bearing upon the subject of entering into the contract.

Very truly yours,

L. A. FOOT,

Attorney General.

By L. V. Ketter, First Assistant.