

## Opinion No. 49

**STATE PURCHASING AGENT; Bids; services—STATE PURCHASING AGENT; Powers; purchase of services—UNIVERSITY OF MONTANA; Competitive Bidding; not required for food service—Sections 82-1906, 82-1924 and 82-1926, Revised Codes of Montana, 1947.**

- Held:**
- 1. Contracts for the preparation and service of meals need not be awarded by competitive bidding.**
  - 2. The State Purchasing Agent has the power to regulate and control contracts for the preparation and service of meals in college dining facilities.**

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October 2, 1962

Honorable Walter Anderson  
State Controller & ex-officio Purchasing Agent  
State Capitol  
Helena, Montana

Dear Mr. Anderson:

You have advised me that a unit of the University of Montana has contracted with a food service corporation for the operation of the student dining facilities at the contracting unit. Under the terms of this contract, the food service is to procure, prepare and serve meals for the students at the unit in return for a money payment by the unit, which money is derived from student boarding fees.

Upon these facts, you have requested my opinion on the following questions:

1. May such a contract be awarded without competitive bidding?
2. Since this service is purchased with student boarding fees, you wish to know if you have the authority to "regulate and control" the purchase of this service under Section 82-1906, RCM, 1947.

In answer to your first question, Section 82-1924, RCM, 1947, as amended by Section 1, Chapter 183, Laws of 1961, provides:

"In order to provide for an orderly administration of the business of the State of Montana in awarding contracts for **materials, supplies, equipment, construction, repair and public works of all kinds**, it shall be the duty of each board, commission, officer or in-

dividual charged by law with the responsibility for the execution of the contract on behalf of the state, board, commission, political subdivision, agency, school district or public corporation of the State of Montana, to award such contract to the lowest responsible bidder who is a resident of the State of Montana and whose bid is not more than two per cent (2%) higher than that of the lowest responsible bidder who is a nonresident of this state. This requirement shall prevail whether the law required advertisement for bids or does not require advertisement for bids." (Emphasis supplied.)

If a contract to furnish, prepare, and serve meals to college students is a contract for "materials, supplies, equipment, construction, repair," or "public works," it must be awarded after competitive bidding. It is my opinion that this is a contract to provide a service and thus is not within the scope of Section 82-1924. The New York Court of Appeals has held that a school cafeteria is a service, **Warney v. Board of Education**, 290 N. Y. 329, 49 N.E. 2d 466 (1943). The Court of Appeals for the Ninth Circuit has stated, in **Consolidated Timber Co. v. Womack**, 132 F. 2d 101 (9th Cir. 1942):

"We think it quite generally understood by both lawyer and layman alike that an ordinary restaurant or eating place renders a service rather than makes a sale and that a restaurant is a service rather than a retail establishment."

Thus it is clear that the contract under consideration is for "services" and competitive bidding is not a prerequisite to its award. The preparation of food is a special skill, when done well, it is a minor art. Contracts for the services of artists, architects, engineers, physicians, etc. are not awarded through competitive bidding. The reason is obvious. These professions involve the exercise of skill which cannot be measured by a monetary yardstick. In **Adams v. Ziegler**, 22 Cal. App. 2d 135, 70 Pac. 2d 537 (1937), it was held that a statute requiring cities to let all contracts to the lowest responsible bidder did not apply to contracts for actors and musicians employed to present a summer music and drama program in a public park. The court stated:

"The present case affords an excellent example of the necessity of omitting the provisions for competitive bidding in contracts for . . . services. If an actor or musician should be employed after proposals for competitive bidding, the lowest bidder might be financially responsible, but with vocal or histrionic ability of a quality to destroy the recreational value of the play."

Similarly, if the contract in question were to be awarded through competitive bidding, the meals furnished even though acceptable as to calories and basic sustenance, might be culinary catastrophes. Admittedly, a great quantity of materials and supplies are involved in a contract of this kind, but skill and service are the dominant factors of

the contract. Paint and canvas are material elements of the artist's work, yet no one would suggest that an artist should be selected by competitive bidding. Raw meats and vegetables are the palette and canvas of the cooking art. It is the ability which the cook brings to these materials which results in either a pleasant repast or a gastro-nomic disaster, depending upon the skill of the cook. These considera-tions indicate the wisdom of the legislature in not requiring competitive bidding for services.

In answer to your second question, Section 82-1906, RCM, 1947, provides in part:

"The state purchasing agent shall have exclusive power to . . . authorize, regulate and control the purchase . . . of . . . serv-ice . . . required by any state institution . . ."

The fact that this particular service is purchased with student boarding fees does not affect your authority under this statute. In con-nection with your authority in this area, I would point out that the con-tract in question does not comply with Section 82-1926, which provides in part:

"Each contract awarded by any political subdivision, school district, public corporation or agency of the State of Montana shall contain among its provisions a requirement that in all instances products manufactured or produced in this state by Montana in-dustry and labor shall be preferred for use in all projects and in all materials, supplies and equipment, if such products, materials, equipment and supplies are comparable in price and quality. Fur-ther, in this connection, it is the intent of this act that wherever pos-sible products manufactured and produced in this state which are suitable substitutes for products manufactured or produced outside the state and comparable in price, quality and perform-ance, shall be preferred for use in all projects and in all state in-stitutions. . ."

The contract should be amended to include a provision incorporating the requirements of this statute.

Very truly yours,  
FORREST H. ANDERSON  
Attorney General