

VOLUME NO. 34

Opinion No. 46

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Title 82A, R.C.M. 1947; sections 59-501, 82A-123, 82A-202, 82-1144, 82-1902, 82-1915, 81-1917, 82-1919, 82-1922, R.C.M. 1947.

- HELD: 1. All contracts made pursuant to chapter 19, Title 82, R.C.M. 1947, relating to the state bureau of purchasing, must be approved by the bureau of purchasing of the department of administration;
2. A "public exigency" is defined as a situation in which an unforeseen happening or event necessitates immediate action to protect public interest;
3. In time of a public exigency, articles and services obtained through the bureau of purchasing may be procured by state departments, agencies, boards, bureaus and commissions without the need of competitive bidding;
4. A public exigency nullifies the prohibitions of section 82-1922, R.C.M. 1947, thereby allowing those public officers, and employees, enumerated in said statute, to do business with the state under those statutory provisions relating to the bureau of purchasing of the department of administration;
5. A public exigency does not abrogate the prohibitions concerning contracts which are contained in sections 59-501 and 82-1144, R.C.M. 1947;
6. State officers, employees and members of government can enter into contracts with the state if the contract does not conflict with the prohibitions of sections 59-501, 82-1144 and 82-1922, R.C.M. 1947, or other prohibitions which may exist in statutory sections relating to contracts with a particular agency, board or department.

May 25, 1972

Senator David F. James
Senator Frank W. Hazelbaker
Legislative Council
State Capitol
Helena, Montana 59601

My dear Senators:

You have requested a clarification of 34 **Opinions of the Attorney General**, no. 36, in which I held in effect that the provisions of sections 59-501, 82-1144 and 82-1922, Revised Codes of Montana, 1947, prohibit state officers and employees, as more fully explained in said

opinion, from having an interest in state contracts made under the statutory provisions of chapters 11 and 19, Title 82, R.C.M. 1947, and proscribed by the general application of section 59-501, supra.

Specifically, you have requested my opinion on the following questions:

1. What specific types or classes of contracts or agreements made pursuant to chapter 19, Title 82, but not let by the purchasing department, are subject to the prohibitions of section 82-1922?
2. What specific classes or types of contracts or agreements made with or on behalf of the state by a state officer or employee are not deemed violative of the prohibitions contained in sections 82-1144 and 82-1922 as interpreted by Opinion No. 36, Vo. 34, **Opinions of the Attorney General**, dated March 14, 1972?

Question One

For purposes of explanation, your first question may be divided into two separate considerations. The first is whether all contracts or agreements made pursuant to chapter 19, Title 82, R.C.M. 1947, are in fact let by the purchasing department. The second is whether all contracts or agreements made pursuant to chapter 19, Title 82, are subject to the prohibitions of section 82-1922, supra, which provides 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, . . .”

In reference to the first consideration, an examination of the statutes relative to the bureau of purchasing is helpful. As discussed in 34 **Opinions of the Attorney General**, no. 36, the department of purchasing was created by legislative enactment in 1921 and the statutes relating thereto are currently codified in chapter 19, Title 82, supra. Section 82-1902, R.C.M. 1947, which specifies the duties of the state purchasing agent, provides:

“The state purchasing agent shall, under the restrictions of this act, have full and sole power and authority and it shall be his duty 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 82-1915, R.C.M. 1947, provides:

“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.”

Further, section 82-1917, R.C.M. 1947, provides in part pertinent to this consideration:

“All purchases by the state purchasing agent shall be based on competitive bids.

* * *

“The state officers, superintendents, commissioners, departments or institutions, shall not have the authority to purchase any supplies or material, except on approval of the state purchasing agent.”

From a reading of the foregoing definitive provisions, it is apparent that any and all contracts and agreements made pursuant to chapter 19, Title 82, supra, must be approved by the bureau of purchasing.

It is important to note that the powers and duties of the department of purchasing referred to in chapter 19, Title 82, supra, are transferred to the department of administration by virtue of the Executive Reorganization Act, the relevant provisions of which are currently embodied in Title 82A, chapter 2. Section 82A-202, R.C.M. 1947, provides in part:

“(1) The department of administration and its units, created in Title 82, chapter 33, R.C.M. 1947, including the state purchasing department created in Title 82, chapter 19, R.C.M. 1947, are abolished, and their functions . . . are transferred to the department of administration created in this chapter. . . .

“(2) The office of state controller, created in Title 82, chapter 1, R.C.M. 1947, the position of the state purchasing agent, created in Title 82, chapter 19, R.C.M. 1947 . . . are abolished, and their functions . . . are transferred to the department. Unless

inconsistent with this act, any reference in the Revised Codes of Montana, 1947, to the . . . state purchasing agent, . . . means the department of administration created in this chapter.”

Consequently, the agency formerly known as the department of purchasing now operates as a bureau under the administrative direction of the department of administration as specified above. However, the statutory functions relative to the letting of state contracts, cited earlier, remain in effect pursuant to section 82A-123, R.C.M. 1947, which provides:

“It is not the intent of this act to repeal or amend any laws relating to functions performed by an agency, unless specifically provided in this act or unless there is an irreconcilable conflict between this act and those laws.”

Thus, pursuant to the Executive Reorganization Act, the department of administration is charged with administering the provisions of chapter 19, Title 82, *supra*, and all contracts made thereunder must be approved by the purchasing bureau of the department of administration.

A response to the second consideration of question one necessitates a rather extensive examination of the emergency purchasing provisions of section 82-1919, R.C.M. 1947. This statute provides in pertinent part:

“Likewise, when immediate delivery of articles or performance of service is required by the public exigencies, the articles or service so required may be procured by open purchase or contract at the place and in the manner in which such articles are usually bought and sold or such services engaged between individuals, but under the direction of the state purchasing agent.” (Emphasis supplied)

We must concern ourselves with two propositions in this matter: (1) “immediate delivery . . . (as) . . . required by the public exigencies,” and (2) the manner in which such articles and services may be procured.

THE PUBLIC EXIGENCY

There are no decisions of the Montana Supreme Court, or opinions of former attorneys general of this state interpreting the “public exigency” provisions of section 82-1919, *supra*. However, reference may be made to federal authority in this area. Section 82-1919 is virtually the same as section 3709 of the Revised Statutes of the United States, enacted by the 37th Congress in 1861 and codified as 41 U.S.C.A. § 5, which read in pertinent part:

“ . . . When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals . . . ”

Although the above-quoted statute was subsequently amended in 1946 by 60 Stat. 809, a number of case decisions and United States Attorney General opinions were rendered interpreting section 3709 prior to the amendment. Several of these opinions and decisions are worthy of consideration relative to the scope and intent of section 82-1919. In **Good Roads Machinery Co. of New England v. United States**, 19 F. Supp. 652, 654 (D.C. Mass. 1937), the federal district court, in construing section 3709, supra, stated:

“A ‘public exigency’ demanding immediate delivery, as referred to in the statute, is a sudden and unexpected happening; an unforeseen occurrence or condition; a perplexing contingency or complication of circumstances; or a sudden or unexpected occasion for action. *United States v. Sheridan-Kirk Contract Co.* (D.C.) 149 F. 809; *United States v. Garbish*, 222 U.S. 257, 32 S. Ct. 77, 56 L.Ed. 190; *United States v. Southern Pacific Co.* (C.C.A.) 209 F. 562. See, also, *American Smelting & Refining Co. v. United States*, 259 U.S. 75, 42 S.Ct. 420, 66 L.Ed. 833.”

Also, the Hon. Charles Devens, writing in 15 **Opinions of the United States Attorney General**, 253, 256, of the “public exigency” under section 3709, supra, concluded:

“The ‘public exigency’ contemplated by that section is one of time only. While the officer intrusted with making the contract may be entitled himself to adjudicate whether or not the facts are such as to require immediate delivery of the articles contracted for, or the immediate rendering of the service desired, **yet the exigency cannot be extended beyond that of time only and if he adjudicates any other state of facts to be an exigency he is not proceeding within the authority given him by law.**” (Emphasis supplied)

Although the Supreme Court of Montana has not dealt definitively with the term “public exigency”, under section 82-1919, supra, direction may be gained from the court’s interpretation of the term “exigency” as used in proceedings for an alternative writ of supervisory control. The court in **State ex rel. Odenwald v. District Court**, 98 Mont. 1, 6, 38 P.2d 269 (1934) stated:

“An exigency which will render the ordinary remedy by appeal inadequate may be defined as something arising sud-

denly out of the current of events; an event or combination of circumstances calling for immediate action or remedy (*United States v. Atlantic Coast Line Co.*, 224 Fed. 160); **where something helpful needs to be done at once, yet not so pressing as an emergency.** (*De Angelis v. Laino*, 252 N. Y. Supp. 871, 141 Misc. 518.)” (Emphasis supplied)

In Montana, then, an “exigency” has, in effect, been defined as an event requiring immediate attention yet not as crucial as an emergency.

Thus, “public exigency”, for the purpose of section 82-1919, supra, may be defined as a time in which an unforeseen happening or event necessitates immediate action to protect the public interest.

The purchase of articles and services under the provisions of chapter 19, Title 82, supra, requires competitive bidding and section 82-1922, supra, prohibits, as previously discussed, certain enumerated state officers and employees from having an interest in state contracts. The purpose of that prohibition was discussed at length in 34 **Opinions of the Attorney General**, no. 36. The question then arises as to whether a “public exigency” abrogates the requirement of competitive bidding and the prohibition of section 82-1922.

Section 82-1919, supra, must be viewed essentially as an exception to the provisions of chapter 19, Title 82, supra. The very wording of the provision indicates the exception:

“Fresh fruits and vegetables (other than potatoes) shall not be included in the supplies to be purchased as hereinbefore provided. . . .

* * *

“Likewise, when immediate delivery of articles or performance of service is required by the public exigencies, . . .” (Emphasis supplied)

The “public exigency” then creates an exception to the regulation of purchases under chapter 19, Title 82.

THE MANNER OF PROCUREMENT

The consideration finally turns on the manner in which articles and services, during a time of public exigency, may be procured. Again, section 82-1919, supra, delineates the mode of procedure:

“. . . may be procured by **open purchase or contract** at the place and in the manner in which such articles are usually bought and sold or such services engaged between individuals, but under the direction of the state purchasing agent.” (Emphasis supplied)

Again, my research does not disclose that this or similar provisions have been interpreted by the Montana Supreme Court. However, by referring again to interpretation of similar language in the federal provision (section 3709, *supra*) I feel that a valid conclusion may be drawn as to the meaning of such language.

In 2 **Opinions of the United States Attorney General**, 257, 258, the honorable John MacPherson Berrien stated:

“By the law of England, every shop in London, in which goods are publicly exposed to sale, is *market overt* for such things only as the owner professes to trade in. There can be no objection to applying that doctrine here, with a view to the interpretation of the words ‘open purchase;’ and then it may be said that an open purchase of any article is effected when the same is bought publicly, in the ordinary mode of purchase between individuals, and at the places where goods of like description are usually sold.”

Attorney General Berrien then concluded on page 260:

“3. Where immediate delivery is necessary to the wants of the public service, the article required must be obtained by open purchase; that is, by purchase at the places where articles of the description wanted are usually bought and sold, and **in the mode in which such purchases are ordinarily made between individual and individual.**” (Emphasis supplied)

Again, in 6 **Opinions of the United States Attorney General**, 99, 100, the honorable Caleb Cushing stated:

“This act (section 3709, *supra*) has been repeatedly passed upon by preceding Attorneys General. The leading opinion is that of Mr. Berrien, (citing). He lays down the rule that all such services or supplies as are to be rendered or furnished *at future day*, are to be contracted for on proposals previously advertised, which is one condition of the act; and articles of which the exigency is immediate, and delivery needed at once, may be obtained by ‘open purchase,’ which is the other condition of the act. And he carefully distinguishes the two things as different and distinct processes; defining open purchase to be, in the analogy of market overt, or open market, as the phrase is in the acts of 1850 and 1851, where the article is bought publicly, in the ordinary mode of purchase between individuals, and at places where goods of like description are ordinarily sold.”

In light of the above, I conclude that articles and services, in times of public exigency, may be procured in the same manner as individuals bargaining in a free, open market for similar services and articles, without need of competitive bidding.

THE EFFECT OF SECTIONS 59-501 AND 82-1144, R.C.M. 1947

As noted in 34 **Opinions of the Attorney General**, no. 36, section 59-501, supra, is a general statute which applies to all governmental purchases unless in conflict with special statutes governing the same area. Section 59-501 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.”

Chapter 11, Title 82, R.C.M. 1947, relates to contracts which are let by the state board of examiners, and section 82-1144, R.C.M. 1947, provides:

“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.”

As previously discussed, the prohibition contained in section 82-1922, supra, is abrogated under the conditions of section 82-1919, supra, relating to public exigencies. However, this abrogation is limited in scope to the directives and prohibitions contained in chapter 19, Title 82, supra, and cannot therefore be extended to such provisions as section 59-501 and section 82-1144, supra. Therefore, in times of public exigencies the prohibitions of section 82-1922 are nullified, but the prohibitions of sections 59-501 and 82-1144 remain in full force and effect.

Question Two

You have also requested my opinion as to what specific classes or types of contracts are not violative of the prohibitions contained in sections 82-1144 and 82-1922, R.C.M. 1947.

It must be remembered that the state of Montana, like any large business operation, engages, on a daily basis, in a myriad of contractual obligations. Most of these contracts are unique to a particular department or agency. For this reason, it is virtually impossible to categorically list, in an opinion such as this, each individual contract and the pertinent prohibitions relating thereto. Therefore, in order to answer your request, I would suggest that certain guidelines be followed by those individuals who come within the prohibitions specified in 34 **Opinions of the Attorney General**, no. 36. Specifically, each proposed contractual relationship should be scrutinized to determine: (1) whether the proposed contract is one in which a public official has an interest and which is made by him in his official capacity or by any board or body of which he is a member and thus prohibited by the provisions of section 59-501, supra; (2) whether the proposed contract

is one which must, by virtue of the articles or services to be provided, be let or approved by either the state board of examiners or by the bureau of purchasing; (3) if the proposed contract is one which must be approved by the bureau of purchasing, whether there exists a "public exigency" sufficient to abrogate the prohibitions of section 82-1922, supra; (4) if the proposed contract is not such that it must be let or approved by the bureau of purchasing or the state board of examiners, whether there are any specific prohibitions contained within the particular statutory sections under which the contract is to be made. For example, certain enumerated individuals are prohibited from purchasing or leasing state lands, as stated in section 81-1110, R.C.M. 1947, which provides:

"It shall be unlawful for any member of the state board of land commissioners, or any person or persons appraising lands, or in the employ of the state for the selection, classification, appraisal, sale, or leasing of any state lands or the timber thereon, or of any person connected with the state land office as an officer or employee, to purchase or lease, directly or indirectly, any of the land of the state or any timber thereon."

Similar prohibitions may exist in other areas as well, and consequently a contractor must familiarize himself with those statutory provisions under which he seeks to do business with the state.

If the proposed contract is examined in light of the above considerations, all state officers and employees can determine the status of a contractual relationship, and know whether or not the proposed contract conflicts with the various statutory prohibitions.

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

1. Any and all contracts and agreements made pursuant to chapter 19, Title 82, Revised Codes of Montana, 1947, relating to the state bureau of purchasing, must be approved by the bureau of purchasing of the department of administration;
2. A "public exigency" is a situation in which an unforeseen happening or event necessitates immediate action to protect the public interest;
3. In time of a public exigency, articles and services obtained under the provisions of chapter 19, Title 82, supra, (bureau of purchasing) may be procured by state departments, agencies, boards, bureaus and commissions of the state government without competitive bidding in the same manner as between individuals bargaining in a free, open market for similar articles and services;

4. Pursuant to section 82-1919, R.C.M. 1947, a public exigency nullifies the prohibitions of section 82-1922, R.C.M. 1947, thereby allowing those public officers, and employees, enumerated in said statutes, to do business with the state under the provisions of chapter 19, Title 82, R.C.M. 1947;
5. The public exigency provisions of section 82-1919, R.C.M. 1947, **do not** abrogate the prohibitions concerning contracts contained in sections 59-501 (general statute) and 82-1144 (board of examiners), R.C.M. 1947;
6. All state officers, employees and members of government can enter into contracts with the state if the contract does not conflict with the prohibitions of sections 59-501, 82-1144 and 82-1922, R.C.M. 1947, or prohibitions contained in the statutes relating to contracts with a particular agency, board or department.

Very truly yours,

ROBERT L. WOODAHL
Attorney General