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OPINION NO. 118

CONTRACTORS - Public;
CONTRACTORS - Public contractors' license tax;
CONTRACTS - Public construction;
TAXATION AND REVENUE - Public contractors' license tax;
MONTANA CODE ANNOTATED - Sections 15-501-101, 15-50-205,
15-50-207.

HELD: The turnkey method of production of new public housing units is a public contract subject to the public contractor's licensing tax.

31 December 1980

Jeffrey M. Sherlock, Esq.
Helena City Attorney
Civic Center Building
Helena, Montana 59601

Dear Mr. Sherlock:

You have requested my opinion on the following question:

Whether a "turnkey" contract of sale between a public housing authority and a private contractor, executed pursuant to a regulation of the United States Department of Housing and Urban Development is a contract for performing public construction as contemplated by the Montana statutes imposing a public contractor's tax.

A public contractor's license tax is provided for in sections 15-50-101 to 15-50-303, MCA. This tax has been imposed in Montana in some form since 1935. Pursuant to these statutes, licensed public contractors are required to pay to the State a sum (denominated an additional license tax) equal to one percent of the gross receipts from public contracts. § 15-50-205, MCA.

Whether this tax ultimately results in an overall increase in a public contractor's tax liability is dependent upon each contractor's particular income tax and property tax position in any given year. Pursuant to section 15-50-207, MCA, a public contractor is entitled to a credit against his corporation license, income, and/or personal property taxes for amounts paid as public contractor taxes. § 15-50-207, MCA. For purposes of the public contractor's license and tax, a public contractor is defined as follows:

[A]ny person who submits a proposal to or enters into a contract for performing all public construction work in the state with the federal government, state of Montana or with any board, commission, or department thereof, or with any board of county commissioners or with any city or town council or with any agency of any thereof, or with any other public board, body, commission, or agency authorized to let or award contracts for any public work when the contract cost, value, or price thereof exceeds the sum of \$1,000. § 15-50-101(1)(a), MCA.

In July of 1979, the Helena Housing Authority, a public body created by ordinance of the city of Helena pursuant to the terms of Title 7, chapter 15, part 44, MCA, entered into a so-called "turnkey" contract of sale with a private construction company. The "turnkey" contract is one of the

alternative legal vehicles which a public housing authority may utilize pursuant to federal regulations to secure new public housing units funded in large measure by the federal government.

There can be no doubt that the contract in question is a public contract. The precise issue presented by this opinion request is whether a "turnkey" contract is a contract for performance of construction work as contemplated by section 15-50-101(1)(a), MCA.

A detailed description of the procedures involved in the "turnkey" method of providing public housing units can be found at 24 C.F.R. section 841.201, et seq. (1980). Numerous agreements are involved. The basic concept is, however, that the Public Housing Authority (PHA) contracts for a completed development to be produced by the developer on his own land and with payments to be made upon the "turning over the keys" of the development to the PHA. See, Burnstein, "New Techniques For Public Housing", 32 L. CONTEMP. PR 528 (1967).

[t]he turnkey system completely reverses the traditional method of producing public housing-- site acquisition by purchase or condemnation, preparation of competitive-bidding type plans and specifications by an architect retained by the [PHA], competitive bidding and award, and construction by the low bidder.

Burnstein at 530.

Despite the substantial differences between the "turnkey" method and the traditional process for providing public housing units, it would be simplistic to view the arrangement as a mere contract of sale. From the initial designation of the "turnkey" developer to the signing of a letter of intent, contract of sale and through the construction process, mutual obligations arise and strict controls are in place.

One such example is site acquisition:

The PHA shall not authorize a turnkey developer to acquire a site, or to make a commitment to acquire a site until after the execution of [the contract between HUD and the PHA authorizing the particular development].... Ownership of the site by the

developer...shall be accomplished prior to... commencement of construction....

24 C.F.R. section 841.114(c)(1980).

Similarly, the turnkey agreement for the project here at issue provides:

2.6 Inspections During Construction.

(a) A Clerk-of-the-Works shall make routine inspections of the sites. Members of the Helena Housing Authority Board and staff as well as the inspecting architect and HUD employees shall have free access to the construction sites to make inspections to determine conformity with Contract. All comments concerning inspections will be communicated to the Seller through the Purchaser's inspecting architect. The results of the Purchaser's inspection shall be incorporated in written reports which shall include any observed defects or deficiencies in the improvements. Purchaser shall send copies of these reports, within five (5) working days of each inspection, to the Seller and to the Seller's architect for the project. In the event of any dispute as to compliance with Exhibit B, which arises in the course of the work and which cannot be resolved between Purchaser and Seller, the Purchaser, upon request by the Seller, will estimate the amount required for correcting the defect or deficiency.

Whether the turnkey production method involves a public contract for construction work has not been decided or discussed by the Montana Supreme Court or in previous opinions of the Attorney General. A number of decisions from other jurisdictions reviewing the applicability of state competitive bidding statutes to turnkey projects contain no discussion of the issue here presented. See e.g., Lehigh Const. Co. v. Housing Auth., 56 N.J. 447, 267 A.2d 41, 42 (1970).

Whether the statute contemplates the application of the tax to turnkey contracts is a function of what the legislature intended, which intention is derived from the plain meaning of the language employed. Dunphy v. Anaconda, 151 Mont. 76, 79, 438 P.2d 660 (1968). A construction of the statute which will best give effect to that intent is mandatory. Great Northern Ry. Co. v. P.S.C., 88 Mont. 180, 206, 293 P. 294 (1930).

As discussed previously, a turnkey contract is a departure from the traditional legal vehicles utilized to procure public housing. Nevertheless, all of the essential elements identified in the language of the statute are present.

First, the contract is between a person and a public agency. Second, the value of the contract exceeds the sum of one thousand dollars. Third, the contract contemplates construction.

The series of contracts which characterize the turnkey method involve the construction of units which pass upon settlement into public ownership and which, although privately financed during construction, involve a series of enforceable governmental commitments of one hundred percent funding upon which private lenders rely.

While, as previously noted, the final agreement is denominated a contract of sale, the fact that what is sold in the agreement must first be constructed according to rigid guidelines leads to the unavoidable conclusion that this is a public construction contract within the meaning of the public contractors taxing statute.

Two opinions of the Supreme Court of Montana and amendments to this legislation throughout its history shed considerable light on the legislative intent. See Peter Kiewit Sons Co. v. State Board of Equalization, 161 Mont. 140, 505 P.2d 102 (1973); State ex rel. Schultz-Lindsay v. State Board of Equalization, 145 Mont. 380, 403 P.2d 635 (1965).

In Peter Kiewet, supra, the court described the recent legislative history of Title 15, chapter 50, as follows:

In March 1965, in an attempt to ensure the payment of state and local taxes by contractors working in the state, Chapter 277, Laws 1965, was passed by the legislature. The problem arose because some contractors working in the state did not report all of their equipment to county tax assessors, who were attempting to impose county property tax on those contractors. Also, some contractors working in the state would not file corporate personal income tax returns which would have fairly reflected their business profits from within the state. 161 Mont. at 143.

The 1965 tax applied only to non-resident contractors and therefore was declared unconstitutional on equal protection and other grounds in State ex rel. Schultz-Lindsay, supra.

In 1967 the Montana Legislature made an attempt, deemed successful by the Supreme Court in Peter Kiewit Sons, supra, to cure the constitutional deficiencies of the 1965 enactment. The statute, which presently continues substantially unchanged was characterized by the court as:

[A] revenue enforcing measure designed to operate hand in hand with Montana's long standing personal property tax and income tax, to ensure more effective tax collection and reduce tax avoidance.
161 Mont. at 144.

Based upon this legislative intent, it is manifest that a construction of the statute to exclude the turnkey method of production of public housing units would frustrate the legislative goal. Such a construction would mean that by changing contract language any contractor could avoid the tax on projects it was intended to include.

THEREFORE, IT IS MY OPINION:

The turnkey method of production of new public housing units is a public contract subject to the public contractor's licensing tax.

Very truly yours,

MIKE GREELY
Attorney General