

CONFLICT OF INTEREST - Public contracts, local officials and employees;
CONTRACTS - Conflict of interest, public contracts, local officials and employees;
COUNTIES - Public contracts, conflict of interest, county commissioners, county officers and employees;
COUNTY COMMISSIONERS - Public contracts, conflict of interest;
COUNTY OFFICERS AND EMPLOYEES - Public contracts, conflict of interest;
EMPLOYEES, PUBLIC - Local officials and employees, conflict of interest, public contracts;
MUNICIPAL GOVERNMENT - Public contracts, conflict of interest, municipal officers and employees;
PUBLIC OFFICERS - Local officials and employees, conflict of interest, public contracts;
MONTANA CODE ANNOTATED - Sections 1-2-202, 2-2-102(5), 2-2-121, 2-2-125, 2-2-131, 2-2-201, 7-3-4256, 7-3-4367, 7-5-2106, 7-5-4109;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 104 (1978), 38 Op. Att'y Gen. No. 55 (1979).

- HELD: 1. The definitions of "be interested in" and "contract" contained in section 2-2-201, MCA, are incorporated into sections 7-5-4109 and 7-5-2106, MCA.
2. Disclosure under section 2-2-131, MCA, is purely voluntary and may be done prior to

taking any official action, as defined by section 2-2-102(5), MCA.

3. Even though an interest may be permissible under the exceptions listed in section 2-2-201, MCA, an official who has a substantial interest in the affected business must comply with sections 2-2-125 and 2-2-131, MCA.
4. If the interest is not permissible under the exceptions listed in section 2-2-201, MCA, then the contract is voidable, and abstinence from voting will not exonerate the official.

14 December 1983

Natasha J. Morton
Hardin City Attorney
631 North Center
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James E. Seykora
Big Horn County Attorney
Big Horn County Courthouse
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Dear Ms. Morton and Mr. Seykora:

You have requested my opinion concerning three questions which I have phrased as follows:

1. Do the definitions of "be interested in" and "contract" contained in section 2-2-201, MCA, apply to sections 7-5-4109 and 7-5-2106, MCA, which prohibit conflicts of interest for local officials?
2. Does the voluntary disclosure provided by section 2-2-131, MCA, only apply if a local official is forced to vote to effect a decision?

3. Are the provisions of sections 7-5-4109 and 7-5-2106, MCA, satisfied by the abstinence of the local official from voting on any contract in which he has an interest?

Your first question addresses potential conflict of interest situations where a local official owns a minority interest in a business, where a relative of a city council member owns a majority share of a business, and where a local official owns the only business of its kind in the locality. If the definitions of section 2-2-201, MCA, apply to sections 7-5-4109 and 7-5-2106, MCA, then under certain circumstances the local government may enter into contracts with these businesses. All three of these statutes deal with conflicts of interest for local officials.

Section 7-5-2106, MCA, applies solely to the board of county commissioners and provides:

Control of conflict of interest. No member of the board must be directly or indirectly interested:

(1) in any property purchased for the use of the county;

(2) in any purchase or sale of property belonging to the county; or

(3) in any contract made by the board or other person on behalf of the county for the erection of public buildings, the opening or improvement of roads, the building of bridges, or the purchasing of supplies or for any other purpose.

This section was enacted in 1895 and has never been amended. Section 7-5-4109, MCA, applies to city and town officials and provides:

Control of conflict of interest. The mayor, any member of the council, any city or town officer, or any relative or employee thereof must not be directly or indirectly interested in the profits of any contract entered into by the council while he is or was in office.

This section, enacted in 1887, was amended in 1895 to its present form. Related statutes applicable to alternative forms of municipal government appear in sections 7-3-4256 and 7-3-4367, MCA. The latter two statutes do not mention relatives of officials.

Section 2-2-201, MCA, is codified within a comprehensive chapter on standards of conduct for public officers and employees and provides:

Public officers, employees, and for or employees not to have interest in contract. Members of the legislature, state, county, city, town, or township officers or any deputy or employee thereof must not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees. A former employee may not, within 6 months following the termination of his employment, contract or be employed by an employer who contracts with the state or any of its subdivisions involving matters with which he was directly involved during his employment. In this section the term:

(1) "be interested in" does not include holding a minority interest in a corporation;

(2) "contract" does not include:

(a) contracts awarded to the lowest responsible bidder based on competitive bidding procedures;

(b) merchandise sold to the highest bidder at public auctions;

(c) investments or deposits in financial institutions which are in the business of loaning or receiving money;

(d) a contract with an interested party if, because of geographic restrictions, a local government could not otherwise reasonably afford itself of the subject of the contract. It shall be presumed that a local government could not otherwise reasonably afford itself

of the subject of a contract if the additional cost to the local government is greater than 10% of a contract with an interested party or if the contract is for services that must be performed within a limited time period and no other contractor can provide those services within that time period.

The section as enacted in 1895 consisted of the first sentence. The definitions in subsections (1) and (2)(a) to (2)(c) were added in 1973, and subsection (2)(d) was added in 1981.

The sections in Title 7 appear to conflict with section 2-2-201, MCA, since the former sections appear to be an absolute prohibition of any interest in any contract while the latter section recognizes exceptions to the definitions of "contract" and "interest." In resolving the apparent conflict between the statutes, the intention of the Legislature is to be followed. § 1-2-202, MCA. It is to be presumed that the Legislature does not pass useless or meaningless legislation. Crist v. Segna, 38 St. Rptr. 150, 622 P.2d 1028 (1981); State ex rel. City of Townsend v. D.A. Davidson, Inc., 166 Mont. 104, 531 P.2d 370 (1975); State ex rel. Irvin v. Anderson, 164 Mont. 513, 525 P.2d 564 (1974). Where statutes relate to the same general subject, they should be construed together and harmonized, giving effect to each. Id.; City of Billings v. Smith, 158 Mont. 197, 490 P.2d 221 (1971). Where one statute deals with a subject in general terms and another deals with the same subject in a more minute and detailed way, the latter will prevail over the former to the extent of any inconsistency. City of Billings v. Smith, supra.

In determining the intent of the Legislature, the legislative history may be examined. There were no relevant committee records for the 1973 amendment to section 2-2-201, MCA, which added the definitions. The 1981 amendment adding subsection (2)(d) pertaining to geographical restrictions was discussed by the Local Government Committee of the Senate on March 17, 1981. The minutes of that meeting reflect the following:

Representative Neuman, District No. 33, said this is an act to amend conflicts of interest provisions to allow contracts whenever

geographical restrictions would make a contract otherwise unavailable to a local government. The bill arises from a problem in small communities. As populations decline and businesses close, there is little competition in the towns. Local governments are precluded from obtaining services from businesses owned by people serving on the town council, etc. This bill would allow them--where because of geographical distance it is impractical for the local government to have to contract with an out-of-town business because of this statute--to contract with those local businesses.

....

Representative Neuman, in closing, said if there were two businesses in the same town, the local government would be required to purchase items from the business where there was no conflict of interest.

The legislative history of section 2-2-201(2)(d), MCA, clearly indicates an intent to have the geographical exception apply to local government officials, including county commissioners and city council members.

The Legislature is presumed to enact legislation with existing legislation in mind. Teamsters, etc., Local 45 v. Montana Liquor Control Board, 155 Mont. 300, 471 P.2d 541 (1970). Sections 7-5-4109 and 7-5-2106, MCA, were on the books when the amendments to section 2-2-201, MCA, were passed in 1973 and 1981 to specifically define "interest" and "contract" to exclude certain situations. If sections 7-5-4109 and 7-5-2106, MCA, are interpreted as an absolute prohibition and the definitions of section 2-2-201, MCA, do not apply, then the Legislature would have performed a useless act in amending section 2-2-201, MCA. In order to give life to all of the statutes dealing with conflicts of interest in public contracts, the definitions of section 2-2-201, MCA, must be incorporated into sections 7-5-4109 and 7-5-2106, MCA.

Thus, it is permissible for a local entity to contract with a corporation even though a local official owns a minority interest in that corporation. It is also

permissible for a city or town to award a contract to the lowest responsible bidder in a competitive bidding process, even if the business is owned by a relative of a city or town council member or by the official. As a final example, it is permissible for a local entity to contract with a local business owned by an official if the local entity cannot reasonably afford to procure the contract elsewhere due to geographical restrictions as defined in section 2-2-201(2)(d), MCA.

Your next question concerns the application of the voluntary disclosure provision of section 2-2-131, MCA, which is a part of the Code of Ethics for public officials and employees. Section 2-2-131, MCA, provides for voluntary disclosure of a private interest which may create a conflict or impinge upon the fiduciary duty of public officials or employees. As disclosure is purely voluntary, it may be done at any time by anyone prior to performing an official act as defined by section 2-2-102(5), MCA. However, disclosure does not operate to excuse or to exonerate a potential violation of the Code of Ethics, except as provided in sections 2-2-121(3) and 2-2-125(3), MCA. 37 Op. Att'y Gen. No. 104 at 431 (1978). Thus, as applied to your fact situation, the statutes operate together as follows. A contract may be awarded to the lowest responsible bidder which may be a business in which a local official owns a majority interest. § 2-2-201(2)(a), MCA. The local official who owns the business is prohibited from performing any official action directly and substantially benefiting his business. § 2-2-125(2)(b), MCA. Therefore, the official should not vote or make a recommendation or in any way participate in the award of the contract (§ 2-2-102(5), MCA), unless he is a member of the governing body and his participation is necessary to obtain a quorum or to enable the body to act and he has complied with the disclosure provisions. §§ 2-2-125(3), 2-2-131, MCA. See 38 Op. Att'y Gen. No. 55 at 190 (1979).

Your last question is whether the provisions of sections 7-5-4109 and 7-5-2106, MCA, can be satisfied by the abstinence of the official from voting on any contract in which he has an interest. If the interest in the contract is not permitted by the exceptions listed in section 2-2-201, MCA, as discussed above, then the contract is voidable under section 2-2-203, MCA. Abstinance of the interested official from voting will

not serve to cure a prohibited interest in a contract, since according to section 2-2-201, MCA, officers "must not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees."

THEREFORE, IT IS MY OPINION:

1. The definitions of "be interested in" and "contract" contained in section 2-2-201, MCA, are incorporated into sections 7-5-4109 and 7-5-2106, MCA.
2. Disclosure under section 2-2-131, MCA, is purely voluntary and may be done prior to taking any official action, as defined by section 2-2-102(5), MCA.
3. Even though an interest may be permissible under the exceptions listed in section 2-2-201, MCA, an official who has a substantial interest in the affected business must comply with sections 2-2-125 and 2-2-131, MCA.
4. If the interest is not permissible under the exceptions listed in section 2-2-201, MCA, then the contract is voidable, and abstinence from voting will not exonerate the official.

Very truly yours,

MIKE GREELY
Attorney General