

VOLUME NO. 40

OPINION NO. 32

CITY COUNCILMEN - Conflict of interest, public contracts, subcontracts;
CONFLICT OF INTEREST - Public contracts, municipal officials;

CONTRACTS - Conflict of interest, public contracts, municipal officials;
MUNICIPAL GOVERNMENT - Conflict of interest, public contracts, subcontracts;
PUBLIC OFFICERS - Conflict of interest, city councilmen, public contracts, subcontracts;
SUBCONTRACTS - Bidding requirements, city councilmen, conflict of interest, public contracts;
MONTANA CODE ANNOTATED - Sections 2-2-125, 2-2-201, 7-5-4109, 7-5-4302, 45-7-401;
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 28 (1983).

- HELD: 1. A subcontract between a corporation, in which a city councilman is a major shareholder, and a prime contractor on a city project is not a "contract" under section 2-2-201, MCA.
2. A contract awarded to a prime contractor by a city council is not a "contract" under section 2-2-201, MCA, when the prime contractor was selected in compliance with section 7-5-4302, MCA, as the lowest responsible bidder after bid advertisements.
3. A subcontract between a corporation, in which a city councilman is a major shareholder, and a prime contractor on a city project is not a "contract" under section 7-5-4109, MCA.
4. A contract awarded to a prime contractor by a city council is not a "contract" under section 7-5-4109, MCA, when the prime contractor was selected in compliance with section 7-5-4302, MCA, as the lowest responsible bidder after bid advertisements.
5. The provisions of section 7-5-4302, MCA, do not apply to the awarding of a subcontract by a prime contractor on a city project.
6. Section 45-7-401, MCA, is a remedial provision and does not create substantive duties or obligations for public servants.

27 January 1984

D. W. McKenna
City Attorney
P.O. Box 389
Hamilton MT 59840

Dear Mr. McKenna:

You have requested my opinion on a question which I have phrased as follows:

Whether a city councilman violates sections 2-2-201, 7-5-4109, 7-5-4302 and/or 45-7-401, MCA, (1) when a corporation, of which he is a major shareholder, enters into a subcontract with the prime contractor on a city project; and (2) the prime, or principal, contract has been entered into consistent with section 7-5-4302, MCA.

I.

Section 2-2-201, MCA, provides, in part: "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...." (Emphasis added.) Section 2-2-201(2), MCA, defines the term "contract" and excludes from regulation "contracts awarded to the lowest responsible bidder based on competitive bidding procedures." The issue presented under section 2-2-201, MCA, is whether either the subcontract or the prime contract falls within the meaning of the term "contract" in that section.

As used in section 2-2-201, MCA, the term "contract" clearly includes only contracts to which public entities are parties. Conversely, the term does not apply to contractual undertakings, such as construction subcontracts, entered into between nonpublic entities and other persons. Cf. United States v. Mattingly, 344 F. Supp. 459, 460-61 (W.D. Ky. 1972) (the term "contracts" in 40 U.S.C. § 270a refers to contracts between the United States government and prime contractors); J. W. Bateson Company, Inc. v. United States, 434 U.S. 586 (1978) (the term "subcontractor" in 40 U.S.C. § 270a does not include sub-subcontractors).

Thus, the subcontract involved here does not constitute a "contract" under section 2-2-201, MCA.

Section 7-5-4302, MCA, provides a detailed procedure for awarding city contracts to the lowest responsible bidder after advertisement for bids. Because the prime contract here was awarded in compliance with section 7-5-4302, MCA, the requirements of section 2-2-201(2)(a), MCA, have been satisfied. The prime contract does not, therefore, constitute a "contract" under section 2-2-201, MCA. I express no opinion, however, as to whether a city official may, by virtue of a subcontract with a prime contractor, "be interested in" a "contract," as those terms are used in section 2-2-201, MCA, when the principal contract has not been awarded to the lowest responsible bidder based on competitive bidding procedures.

II.

Section 7-5-4109, MCA, provides: "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." I recently concluded that the definition of "contract" in section 2-2-201, MCA, is properly incorporated into section 7-5-4109, MCA. 40 Op. Att'y Gen. No. 28 (1983). Consequently, neither the subcontract nor the prime contract involved here falls within the latter section's prohibition for the reasons set forth in my analysis of section 2-2-201, MCA, above.

III.

Section 7-5-4302, MCA, clearly has application only to contracts which a city council directly enters into. It therefore does not control subcontracts which the prime contractor may subsequently issue.

IV.

Section 45-7-401, MCA, is a remedial provision to be used concerning allegations of official misconduct. See State v. DeGeorge, 173 Mont. 35, 566 P.2d 59 (1977); State v. Cole, 174 Mont. 380, 571 P.2d 87 (1977). It does not establish additional substantive duties or obligations for public servants.

V.

Finally, you did not inquire concerning possible violation of section 2-2-125(2)(a), MCA, and this opinion does not reach the issues which may be presented under that section. See generally 40 Op. Att'y Gen. No. 28 (1983).

THEREFORE, IT IS MY OPINION:

1. A subcontract between a corporation, in which a city councilman is a major shareholder, and a prime contractor on a city project is not a "contract" under section 2-2-201, MCA.
2. A contract awarded to a prime contractor by a city council is not a "contract" under section 2-2-201, MCA, when the prime contractor was selected in compliance with section 7-5-4302, MCA, as the lowest responsible bidder after bid advertisements.
3. A subcontract between a corporation, in which a city councilman is a major shareholder, and a prime contractor on a city project is not a "contract" under section 7-5-4109, MCA.
4. A contract awarded to a prime contractor by a city council is not a "contract" under section 7-5-4109, MCA, when the prime contractor was selected in compliance with section 7-5-4302, MCA, as the lowest responsible bidder after bid advertisements.
5. The provisions of section 7-5-4302, MCA, do not apply to the awarding of a subcontract by a prime contractor on a city project.
6. Section 45-7-401, MCA, is a remedial provision and does not create substantive duties or obligations for public servants.

Very truly yours,

MIKE GREELY
Attorney General