

ADMINISTRATION, DEPARTMENT OF - Statutory grant of supervision over procurement contracts does not authorize the Department of Administration to supervise federally funded grants awarded by the Board of Crime Control to nongovernmental agencies;

CRIME CONTROL, BOARD OF - Procurement Act does not apply to federally funded grants to nongovernmental agencies;

CRIME CONTROL, BOARD OF - Statutory grant of supervision over procurement contracts does not authorize the Department of Administration to supervise federally funded grants awarded by the Board of Crime Control to nongovernmental agencies;

GRANTS - Procurement Act does not apply to federally funded grants to nongovernmental agencies;

STATUTORY CONSTRUCTION - Maxim of statutory construction that express mention implies exclusion of things not mentioned is not an inflexible rule but a guideline that gives way where other factors dictate differing interpretation;

CODE OF FEDERAL REGULATIONS - 28 C.F.R. § 90.11, 28 C.F.R. § 90.12, 28 C.F.R. § 90.16, 28 C.F.R. § 90.18, 28 C.F.R. § 90.19, 28 C.F.R. § 90.23, 28 C.F.R. § 90.24;

MONTANA CODE ANNOTATED - Title 18, chapter 4; sections 2-15-2006, 18-4-123, (12)(a), -132, (1), (a), (b), (c), (2), (3), (a), -221, -223, (3), -242(1), 44-4-301(1), 77-2-364;

MONTANA CONSTITUTION OF 1972 - Article X, section 4;

MONTANA LAWS OF 1983 - Chapter 519;

UNITED STATES CONSTITUTION - Amendment XI.

HELD: The Montana Procurement Act does not apply to grants awarded by the Montana Board of Crime Control to nongovernmental agencies to fund community projects.

March 25, 2008

Mr. Roland M. Mena
Executive Director
Montana Board of Crime Control
P.O. Box 201408
Helena, MT 59620-1408

Dear Mr. Mena:

[P1] You have requested my opinion on the following question:

Does the Montana Procurement Act, Mont. Code Ann. tit. 18, ch. 4, apply to the awarding of sub-grants by the Montana Board of Crime Control to nongovernmental agencies to fund community projects?

[P2] The Montana Board of Crime Control is an eighteen member board attached for administrative purposes to the Montana Department of Justice. Mont. Code Ann. § 2-15-2006. Among other functions, the Board serves as the “state planning agency” under the Omnibus Crime Control and Safe Streets Act of 1968. Mont. Code Ann. § 44-4-301(1). As its name implies, the Omnibus Crime Control and Safe Streets Act, with its frequent subsequent amendments, is a multifaceted federal effort to attack the problem of crime in America. Its provisions, and those of other federal statutes, include statutes that provide federal grants to states for certain purposes related to enforcement of criminal laws.

[P3] The Omnibus Act and other federal statutes authorize the States to “sub-grant” certain federal funds to local governments and, in some cases, to nongovernmental agencies within the states. See, e.g., 28 C.F.R. § 90.11 (authorizing state grants under the Violence Against Women Act to local governments and “nonprofit, nongovernmental victim services programs for the purpose of developing and strengthening effective law enforcement and prosecution strategies to combat violent crimes against women, and to develop and strengthen victim services”) The grants in question under your request involve the pass-through of federal funding to local nongovernmental agencies that in turn provide services in their communities. Your request involves the proper procedures for sub-grants to such nongovernmental agencies that then use the grants to provide services within the community to persons or entities that are not agencies of the State.

[P4] Your question requires an analysis of the scope of the Montana Procurement Act (“the Act”), which was adopted in 1983 based on the American Bar Association Model Procurement Act. The Act contains definitions that are pertinent:

In this chapter, unless the context clearly requires otherwise or a different meaning is prescribed for a particular section, the following definitions apply:

.....

(3) "Contract" means all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies or services.

....

(15) (a) "Procurement" means acquisition with or without cost, buying, purchasing, renting, leasing, or otherwise acquiring any supplies or services. The term includes all functions that pertain to the obtaining of any supply or service, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

(b) Procurement does not include the acquiring of supplies or services by gift.

....

Mont. Code Ann. § 18-4-123.

[P5] The coverage of the Act is generally defined in Mont. Code Ann. § 18-4-132:

(1) This chapter applies to:

(a) the expenditure of public funds irrespective of their source, including federal assistance money, by this state acting through a governmental body under any contract, except a contract exempted from this chapter by this section or by another statute;

(b) a procurement of supplies or services that is at no cost to the state and from which income may be derived by the vendor and to a procurement of supplies or services from which income or a more advantageous business position may be derived by the state; and

(c) the disposal of state supplies.

(2) This chapter or rules adopted pursuant to this chapter do not prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

(3) This chapter does not apply to:

(a) either grants or contracts between the state and its political subdivisions or other governments, except as provided in part 4;

....

[P6] The Act confers broad powers on the Department of Administration to regulate the contracts to which the Act applies, including the authority “to consider and decide matters of policy within the provisions of [the Act],” and to adopt rules. Mont. Code Ann. §§ 18-4-221, -223.

[P7] In my opinion, application of the Act to the grants in question is inappropriate for several reasons.

[P8] First, parsing the language of the act leads to the conclusion that it does not apply. Pursuant to Mont. Code Ann. § 18-4-132(1)(a), the Act applies to “expenditure of funds . . . under any contract.” “Contract” is defined to include only “state agreements . . . for the procurement or disposal of supplies or services.” Mont. Code Ann. § 18-4-123(3). “Disposal” is not pertinent to your request, since the term refers to “disposal of supplies.” Mont. Code Ann. § 18-4-132(1)(c). “‘Procurement’ means acquisition with or without cost, buying, purchasing, renting, leasing, or otherwise acquiring any supplies or services.” Thus by its terms the Act applies only to contracts for “procurement” which in turn is limited to contracts under which the State “acquires” supplies or services.

[P9] The legislative history supports this reading. The Act was adopted as 1983 Mont. Laws, ch. 519. The title of the Bill included the following description: “An Act to Generally revise the laws governing procurement of supplies and services *for state agencies.*”

[P10] Montana Code Annotated § 18-4-123 requires that the Act’s definitions be applied with an eye to context, and there may be situations in which it would be appropriate to apply the Act to contracts under which the State contracts for supplies or services for an entity that is not a state agency. That is clearly not the case with respect to the sub-grants at issue here.

[P11] The policies served by these sub-grants are federal. The sub-grants provide services to individuals in communities throughout Montana that the State does not provide and is not obligated by law to provide. The federal granting programs typically include non-supplantation provisions in their regulations to ensure that the federal money does not displace funding for state programs already in place. See, e.g., 28 C.F.R. § 90.18 (“Federal funds received under this part shall be used to supplement, not supplant non-Federal funds that would otherwise be available for expenditure on activities described in this part.”)

[P12] Federal law dictates that the sub-grants be administered by the Board pursuant to a plan whose contents must comply with federal regulations. See, e.g., 28 C.F.R. §§ 90.19, 90.23. This requirement obviously clashes with the Act's delegation to the Department of Administration of policy-making authority over procurement. Federal law dictates the purposes for which grant funds may be used and creates preferences for the allocation of grant funds. See, e.g., 28 C.F.R. § 90.12, 90.16. Most tellingly, the Act cannot provide the "exclusive remedies for unlawful . . . contract awards" with respect to these sub-grants. Mont. Code Ann. § 18-4-242(1). Federal law provides for federal oversight of State granting activities and provides sanctions for improper allocation of grant funds. See, e.g., 28 C.F.R. § 90.24. The Act itself recognizes that its provisions are subservient to requirements imposed by federal programs. Mont. Code Ann. § 18-4-132(2).

[P13] The Department of Administration has suggested that the inclusive language of Mont. Code Ann. § 18-4-132(1)(a) leads to the conclusion that the Act applies. I respectfully disagree. The relevant language provides that the Act "applies to . . . the expenditure of public funds irrespective of their source, including federal assistance money, by this state acting through a governmental body under any contract, except a contract exempted from this chapter by this section or by another statute." This language applies only to an agreement that meets the definition of "contract" found in the act, i.e., an agreement for the procurement of goods and services to be used by the State or its agencies. As noted above, this limiting language is probably enough by itself to exclude the sub-grant contracts at issue here.

[P14] A reading of the statute that ignores this limitation could produce absurd results. There are instances in which the State or its agencies enter into contracts for the expenditure of state money that are not expressly excepted from the coverage of the Act but nevertheless do not fall under its rules. For example, Mont. Code Ann. § 77-2-364 authorizes the Board of Land Commissioners to enter into contracts for the purchase of land. Nothing in the applicable statutes explicitly provides an exemption for these contracts from the broad provision in Mont. Code Ann. § 18-4-132(1)(a) applying the Act to "the expenditure of public funds . . . by this state acting through a governmental body under any contract." It has never been suggested, however, that the Department of Administration, rather than the Board of Land Commissioners, has the authority to administer these purchases. Cf. Mont. Const. Art. X, § 4.

[P15] The Department has also argued that the specific exclusion of "grants or contracts between the state and its political subdivisions or other governments" in Mont. Code Ann. § 18-4-123(12)(a) implies the inclusion of grants to nongovernmental organizations. I find this argument unpersuasive.

[P16] The maxim on which the Department relies is a guideline for interpretation, not an inflexible rule. State v. Driscoll, 101 Mont. 348, 359, 54 P.2d 571, 576 (1936). The specific reference to a subject in a statute could mean that the legislature intended to exclude all items not mentioned. See, e.g. In re M.P.M., 1999 MT 78, ¶ 23, 294 Mont. 87, 93, 976 P.2d 988, 992. However, the enacting body sometimes carves out exclusions simply to confirm by a specific reference a general principle or assumption that is embedded in the enactment in all of its applications. The Eleventh Amendment to the United States Constitution is perhaps the best known example of this practice. Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) (Amendment's exclusion of federal court jurisdiction over actions "against a state by the citizens of another state" does not imply that actions by the citizens of the defendant state are permitted; the Amendment confirms the underlying assumption of the Constitution that states are not subject to suit in federal court.) It is certainly plausible to think that by excluding intergovernmental grants the framers of the Model Act, and by extension the legislature, intended to confirm that grants of the kinds at issue here are not procurement contracts.

THEREFORE IT IS MY OPINION:

The Montana Procurement Act does not apply to grants awarded by the Montana Board of Crime Control to nongovernmental agencies to fund community projects.

Very truly yours,

MIKE McGRATH
Attorney General

mm/cdt/jym