

July 9, 2010

Mr. Gary Mathews
Custer County Commission
1010 Main Street
Miles City, MT 59103

Re: City Contracts for Fire Services

Dear Mr. Mathews:

You have requested an opinion from the Attorney General on the question of whether Miles City, a city with general government powers, has the power to enter into fire protection service contracts for the protection of land and structures located outside the city limits. From the materials submitted it appears that the city has entered into contracts to provide fire protection services on property located outside the city limits. It appears that at least some of the contracts relate to property contiguous to the city limits. Since the question is controlled by an existing opinion of this office, it has been determined that this letter of advice rather than a formal opinion is the appropriate response.

In 42 Op. Att’y Gen. No. 80 (1988), Attorney General Greely held that a city with general government powers had the power to enter into contracts with private persons or entities under which the city would provide fire protection service on property located outside the city limits. The opinion found first that cities have certain specific powers with respect to control of fires, including the power to establish and operate a fire department and prescribe its duties, Mont. Code Ann. § 7-33-4201, and to make contracts in furtherance of that power, Mont. Code Ann. § 7-5-4301. It noted further that a city may contract to provide fire service for a fee with fire districts, which by definition cannot include property within the boundaries of a first or second-class city, Mont. Code Ann. §§ 7-33-2101(1), 7-33-2104(1), 7-33- 2107; see also Mont. Code Ann. § 7-33-2109(1) (authorizing tax levy to, among other things, “[pay] to a city [or] town . . . the consideration provided for in any contract with the council of the city [or] town . . . for furnishing fire protection service to property within the district.”). The opinion concluded that the ability to enter into contracts to provide fire service outside city limits

“is essential in order to execute the power actually conferred in the above-mentioned statutes.” 42 Op. Att’y Gen. at 316.

The opinion next found support in case law for the proposition that a city is in at least some cases authorized to provide services outside the city boundary. You correctly point out that the two Montana cases cited, Crawford v. City of Billings, 130 Mont. 158, 297 P.2d 292 (1957) and City of Billings v. P.S.C., 193 Mont. 358, 631 P.2d 1295 (1981), both involved provision of water service outside a city limits pursuant to the express authorization of a statute, making the cases less useful in resolving the question of whether Miles City can fight fires outside the city limits in the absence of such authorization. Case law can be found from other jurisdictions in support of both positions. Compare Miller v. City of St. Joseph, 485 S.W. 2d 688 (Mo. App. 1972) and City of Pueblo v. Flanders, 122 Colo. 571 225 P.2d 832 (1950) (power exists) with Jefferson Co. Fisc. Ct. v. Jefferson Co. ex rel. Grauman, 278 Ky. 785, 793, 129 S.W. 2d 554, 558 (1939) (dicta) (power absent). In this situation it cannot be said that the opinion’s assessment of the case law was clearly erroneous.

The approach taken in our earlier opinion is consistent with the provisions of Montana law regarding the powers of local governments. Under the Constitution, local government powers are to be liberally construed. Mont. Const. art. XI, § 4 (“The powers of incorporated cities and towns and counties shall be liberally construed.”). Cities have broad police powers to protect public health, safety, and welfare, Mont. Code Ann. § 7-1-4123(1), (2) (municipalities’ legislative power extends to all ordinances necessary to “secure freedom from dangerous or noxious activities” and “promote the general; public health and welfare.”). See State ex rel. Brooks v. Cook, 84 Mont. 478, 484, 276 P. 958, 960 (1929) (“Measures for the protection of life and property against fire hazards fall within the police power of the state, which power may either be exercised by the state through proper machinery or delegated for local administration to cities or towns.”).

Cities have the specific legislative authority to enter into contracts, Mont. Code Ann. § 7-1-4124(4). The legislature has further implemented the constitutional provision with specific reference to the power of cities to enter into contracts, stating: “[I]t is within a local government's contract authority to enter into any contract necessary for the exercise of its power. . . .”

The memorandum submitted with your letter asserts that “ a municipality has no powers except such as are conferred upon it by legislative grant, either directly or by necessary implication,” and “where there is a fair and reasonable doubt as to the existence of a particular power, it must be resolved against the municipality and the power denied.” All of the cases cited in support of these assertions predate the 1972 Constitution, and the

Montana Supreme Court has held that these assertions are “not the law under Montana's 1972 Constitution and statutes enacted thereunder.” Tipco Corp. v. City of Billings, 197 Mont. 339, 344, 642 P.2d 1074, 1077 (1982).

Your memorandum further argues that the city lacks any statutory immunity when responding to fire calls outside the city limits because its regulatory authority stops at the city boundary. The question of liability protection is a factor that the municipal government should consider when deciding whether to enter into service contracts outside the municipal boundaries. Miles City has informed us that its insurance carrier has accepted liability for claims against the city resulting from acts or omissions of city personnel in providing fire protection under a private service contract.

Counties have broad powers to deal with fire suppression in rural areas, Mont. Code Ann. tit. 7, ch. 33, pts. 21-24, but nothing in the statutes requires the conclusion that the county has *exclusive* authority in that area. For example, no credible argument could be made that a person in rural Custer County could not contract with a private company for fire protection. The city's power must be construed liberally. As the prior opinion found, it is not unreasonable to conclude that an offer by the city of fire protection services on a contract basis for property outside the city limits would advance the city's interests by, for example, preventing the spread of fire from properties outside the city to property inside its limits.

Nothing has changed significantly since the prior opinion was issued. No statutory amendments or pertinent case law has intervened to suggest that the reasoning of the prior opinion is unsound. Your communications do not identify any specific instances in which a city's provision of the kind of fire services in issue has caused conflict or difficulty, nor have you suggested that problems with the practice have been brought to the legislature for its consideration. Under these circumstances, respect for precedent compels the conclusion that the prior opinion should not be disturbed.

It is clearly preferable for local governments to cooperate in the provision of services, especially crucial services such as fire protection, by entering into some form of interlocal agreement. Such an agreement would certainly be helpful in the area of fire protection. I note, for example, that while the City can enter a contract with a private landowner for fire protection services on the landowner's land, the City's authority under the contract would end at the landowner's boundary. Since a fire does not respect property lines, jurisdictional conflicts can be foreseen when a fire on city-contracted property moves off that landowner's land. The City has no authority to control traffic on rural roads that surround property on which it has contracted to fight a fire. By law, that authority lies with the County. An interlocal agreement can clearly spell out the

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respective powers and responsibilities in this area. Eliminating the uncertainty that exists in the present situation would obviously benefit the public interest.

This office encourages Custer County and the City of Miles City to take advantage of the statutes dealing with interlocal agreements and mutual assistance to ensure that fire protection services are supplied as swiftly, efficiently, and effectively as possible. Given the clear requirements for interlocal cooperation in Mont. Code Ann. tit. 10, ch. 3, pts. 2, 4, and 9, such cooperation would seem to be a practical necessity. Should you be unable to resolve the issues locally, of course, this question can be brought to the Legislature for its consideration.

I hope you find this information helpful. This letter of advice may not be construed as a formal opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN
Chief Civil Counsel

cdt/jym