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VOLUME NO. 45

OPINION NO. 11

CONTRACTS - Approval by state of contract transfer, assignment or subcontract;
STATUTES - Approval by state of contract transfer, assignment or subcontract;
SURETY - Approval by state of contract transfer, assignment or subcontract;
MONTANA CODE ANNOTATED - Sections 18-4-105, 18-4-141, 28-1-1501, 28-1-1502;

HELD: MCA § 18-4-141(1) does not prevent the state from expressly releasing a party to a contract, or its surety, from its obligations after the state has approved a transfer, assignment, or subcontract to a new party.

August 17, 1993

Mr. Jon Noel
Director
Department of Commerce
1424 Ninth Avenue
Helena, MT 59620-0501

Dear Mr. Noel:

Your predecessor as director of the Department of Commerce asked my opinion on the following question:

Does MCA § 18-4-141(1) prohibit the state from expressly releasing a party to a contract, or its surety, from its obligations after the state has approved a transfer, assignment, or subcontract to a new party?

Mont. Code Ann. § 18-4-141(1) authorizes the state to declare void any transfer, assignment, or subcontract of public contracts made without the express written approval of the state. The statute additionally provides that no approval by the state of a transfer, assignment or subcontract may release the original obligor or his sureties from their obligations. The statute provides in relevant part:

No contract or order or any interest therein may be transferred, assigned, or subcontracted by the party to whom the contract or order is given to any other party without the express written approval of the state, and the state may declare void any unapproved transfer, assignment, or subcontract. *No approval of a transfer, assignment, or subcontract may release the original obligor or his sureties from their obligations to the state under the contract or order.*

(Emphasis added.)

The Department's request for an opinion arises from the state-approved transfer of a contract for electronic gambling services. The parties intended that the transferee would provide its own surety bond to secure performance under the contract, and that the new surety bond would replace the surety bond provided by the original contractor. The transferee desires to have the original surety released since it has replaced the original bond with its own surety bond, and the Department is uncertain whether MCA § 18-4-141(1) prohibits such a release.

Prior to 1983, public contracts could not be transferred, assigned or subcontracted, regardless of approval by the state. MCA § 18-4-105 (1981). In 1983, the Legislature amended MCA § 18-4-105 (now MCA § 18-4-141) to permit the transfer, assignment or subcontract of public contracts if the state expressly grants its approval in writing. 1983 Mont. Laws, ch. 52, § 1. The legislative history reveals that Senate Bill 183 was requested by the Department of Administration because the law in effect at the time appeared to prohibit the transfer, assignment or subcontract of state contracts under any circumstances, and it was suggested that the amendment would make the statute compatible with the Uniform Commercial Code. Minutes, Senate Judiciary Committee, January 25, 1983 (comments by Valencia Lane, Department of Administration).

I conclude that the statute does not prevent the state from expressly releasing a party or its surety from its obligations under a contract. A statute must be construed according to the plain meaning of the language therein. Norfolk Holdings, Inc. v. Montana Dep't of Revenue, 249 Mont. 40, 813 P.2d 460 (1991). If the intent of the Legislature can be determined from the plain meaning of the statutory words, no other means of interpretation should be applied. State ex rel. Neuhausen v. Nachtsheim, 253 Mont. 296, 833 P.2d 201 (1992); Palmer by Diacon v. Montana Ins. Guar. Ass'n, 239 Mont. 78, 779 P.2d 61 (1989). The plain language of MCA § 18-4-141(1) prevents a finding of an implied release of the transferor's obligations. The statute provides that "[n]o approval of a transfer, assignment, or subcontract may release the original obligor or his sureties," which only expresses a reservation of rights regarding assignments. (Emphasis added.)

See Restatement (Second) of Contracts § 329(b)-(c) (the obligor of an assigned right must manifest an intention to retain his rights against the assignor, for his silence may imply assent to a release). This language also comports with the general rule regarding assignments and implied novations. A novation acts to release an obligated party and is defined as "the substitution of a new obligation for an existing one," including the substitution of "a new debtor in place of the old one with the intent to release the latter." MCA §§ 28-1-1501, -1502. In Kenison v. Anderson, 83 Mont. 430, 438, 272 P. 679, 681 (1928), it was held that a novation is the substitution of new debtor for original debtor with intent to release the latter, which may be expressly or impliedly created. I find nothing in MCA § 18-4-141(1) which expresses a legislative intent to prohibit the state from releasing a party or its surety under all circumstances. The statute, therefore, merely prevents the approval of an assignment, transfer or subcontract from operating as an implied novation or release of the assignor; it does not prevent the state from releasing a party or its surety by an express novation or release. In reaching this conclusion, I offer no opinion regarding the release of any particular party or its surety.

THEREFORE, IT IS MY OPINION:

MCA § 18-4-141(1) does not prevent the state from expressly releasing a party to a contract, or its surety, from its obligations after the state has approved a transfer, assignment, or subcontract to a new party.

Sincerely,


JOSEPH P. MAZUREK
Attorney General

jpm/cwc/brf