

# MAINE STATE LEGISLATURE

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Note: R. A. Foley, Ass't Att'y Gen' requested that this be placed in opinion book for informational purposes. ✓

July 10, 1961.

To:

Norman B. Gardner, Chairman  
School District No. 11  
64 Central Street  
Gardiner, Maine

OPINION REGARDING AWARD OF CONTRACT BY SAD No. 11 for  
CONSTRUCTION OF CENTRAL HIGH SCHOOL

FACTS:

Sealed bid proposals were submitted to the School Directors by ten contractors and said bids were opened at a scheduled meeting of the Directors on June 22, 1961. Bids ranged from a low of \$1,237,000 submitted by Cote Construction Co. of Caribou to a high of \$1,365,400. Camillo Profenno of Portland submitted a bid in the amount of \$1,245,900 which was the second lowest. SAD No. 11, in the notice to bidders, utilized the phrase, "The owner reserves the right to waive any and all formalities and to reject any and all bids." (The underline is mine.)

The Building Committee of SAD No. 11 is comprised of five School Directors and this Committee conducted an extensive inquiry into the background of Cote Construction Co. and Cammilo Profenno Company. It then submitted a unanimous recommendation to the full Board of School Directors. This recommendation was that SAD No. 11 reject all bids except the Profenno bid at the base of \$1,245,900.

Several of the reasons for this recommendation, among many assigned for the decision to award the contract to the second lowest bidder rather than to the lowest bidder were:

(1) Profenno Company's office is located fifty miles from the job site whereas Cote is nearly 250 miles from the job site and the difference in distance and the accessibility of the main office during the period of construction and the guarantee period render it more practical to utilize Profenno Company.

(2) Engineer has more knowledge of Profenno Company than of Cote Construction Co. as it has never had occasion to work with Cote Construction Co.

Norman B. Gardner, Chairman

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(3) Information received from sub-contractors indicated that much better relations exist with Profenno than with Cote Construction Co.

(4) Profenno has had considerably more experience on construction involving larger sums than has Cote Construction Co. The average contract for Cote is in the vicinity of \$360,000 as compared to \$520,000 for Profenno.

(5) Cote Construction Co. representative at the bid opening made on extremely poor impression by raising questions pertaining to the \$100.00 penalty for each day of delay beyond the specified completion date and also interjected a formal motion during the regular meeting of the Directors.

(6) Profenno Company checked out with exceptionally high recommendations as compared to conflicting reports on Cote Construction Co.

On June 30, 1961, SAD No. 11 Directors unanimously voted to accept the recommendation of the Building Committee and on that same evening communicated their decision to Donato Profenno, Treasurer of Camillo Profenno Company. A special meeting was then scheduled for July 6, 1961 for the purpose of executing a formal contract.

On July 6, 1961, Noel Cote, owner of Cote Construction Co., appeared at the Directors' meeting with counsel and through counsel for SAD No. 11, objected to award of the contract to Profenno for the reason that the Profenno bid was \$8900 higher than the Cote bid. Cote contended that its bid must be accepted unless valid reasons could be assigned for its rejection.

Questions of Law:

The facts raise two fundamental questions:

1. What is the legal status of the award of contract to Profenno as voted by SAD No. 11 on June 30, 1961?

2. Is the Board of Directors of SAD No. 11 compelled to accept the lowest bid as submitted by Cote Construction Co.?

Norman B. Gardner, Chairman

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OPINION:

In reply to Question No. 1, it is my opinion that an enforceable contract between Profenno Company and SAD No. 11 was created at the time the District communicated its vote to the Profenno Company and the Profenno Company, through its Treasurer, acknowledged the communication. The fact that the formal contract had not been executed prior to objection of the award being raised by the Cote Construction Co. does not alter the fact that a binding contract has already been affected.

Question No. 2 raises a somewhat more complicated issue than does Question No. 1. In view of the fact that the Revised Statutes of Maine do not prescribe any procedure for the award of contracts by school administrative districts or even for award of contracts in performance of public works by any public agency, the language in the notice to bidders becomes subject to interpretation. The reservation "to reject any and all bids" is therefore a controlling factor in arriving at a decision. This particular reservation does not appear to be standard phraseology throughout the United States in notices to bidders on public contracts. The terms commonly used are that the award shall be to the "lowest responsible bidder"; "lowest and best bidder", etc., but even where this more restrictive terminology is employed, the Court seldom interferes with the decision of a public board provided that the board's decision is founded upon an honest exercise of discretion. This has been held to be true even in instances where the Court has felt that the board erroneously exercised its discretion. Thus, the test in the instant case is whether SAD No. 11 exceeded its power by disregarding the interest of the public; acted in bad faith; engaged in fraud, collusion, corruption; or palpably abused its discretion. In my opinion there is no scintilla of evidence which would warrant such a finding by the Court. To the contrary, it is my opinion that SAD No. 11 exercised sound and real discretion based upon facts reasonably tending to support its decision in awarding the contract to Profenno Company.

RECOMMENDATION:

It is my recommendation that SAD No. 11 complete the formality of signing the contract with Profenno Company and immediately proceed with construction of the Central High School.

Respectfully submitted,

Ralph W. Farris, Jr.

RWF/m