

# MAINE STATE LEGISLATURE

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June 1, 1965

David H. Stevens, Chairman  
State Highway Commission  
State Office Building  
Augusta, Maine

Dear Mr. Stevens:

You have requested my opinion as to what action, if any, the State Highway Commission should take in regard to the acceptance of bids for Hornbrook, Inc., and as to whether said firm or its president, Harold Hornbrook, should be authorized or permitted to work in any capacity in the future on contracts awarded by the Commission.

Your question is prompted by the trial in the United States District Court in Portland, Maine, concluding April 27, 1965, identified as "U. S. vs. The Bridge Construction Corporation, et al., Criminal No. 64-28," on the docket of said court. In this trial the defendants were generally charged with violating the United States Code by combining to rig bids on Federal Aid Highway projects in this state contrary to the federal antitrust laws, and by engaging in a conspiracy to defraud the federal government thereby. The principal government witnesses were Harold Hornbrook and his wife, both officers of Hornbrook, Inc., a corporation engaged in highway construction which has been awarded contracts in the past by the Commission and which, presumably, in the light of your question, is expected to submit bids to the Commission for future work.

In your memorandum you quote section 102-12 of the Commission's standard specifications for highways and bridges. Pertinent provisions of section 102-12 provide as follows:

"102-12. Disqualification of bidders. Any one or more of the following causes may be considered as sufficient for the disqualification of bidder and the

rejection of his bid or bids:

" (b) Evidence of collusion among bidders. Participants in such collusion may receive no recognition as bidders for any future work."

You then cite, as relevant to section 102-12 (b), section 17 (b) of the Federal Aid Highway Act of 1954 (presently section 112 (c) of Title 23, U.S.C.A.) which requires the filing of an affidavit by anyone bidding on contracts for Federal Aid Highway projects stating in substance that he has not participated in any collusion or taken any action in restraint of competitive bidding in connection with such contract.

I point out that section 112 (e) of Title 23, U.S.C.A., provides that the affidavit required as above stated is dispensed with in those states where the Secretary of Commerce has entered into agreements with the state relating to the Federal Aid Secondary System in accordance with U.S.C.A. Title 23, section 117. It does not appear whether Maine has such an agreement, but for purposes of this opinion it is assumed that we do not, and that the affidavit required by section 112 (c) was a condition precedent to the award of construction contracts on the projects involved in the trial of Bridge Construction Corporation, et al.

I have reviewed the transcripts of the evidence of this trial. As you indicated in your memo, Harold Hornbrook, corporate officer of Hornbrook, Inc., testified that on several occasions the non-collusion affidavits filed with your Commission in connection with bids for highway construction were false, and that in fact he had conspired and colluded with Bridge Construction Corporation, its officers, Chester G. Bridge and David Bridge, as well as with other contractors bidding on contracts to be awarded by the Commission.

The United States District Court jury which deliberated on this case found both defendants, Bridge Construction Corporation and Chester G. Bridge, not guilty. Both counsel for the United States and for the defendants argued, as appears by the transcript, that the entire case rested on the credibility of the officers of Hornbrook, Inc. who testified; namely, Mr. and Mrs. Harold Hornbrook. The United States District Judge, Justice Gignoux, instructed the jury as follows, per page 817 of the transcript:

"I do not believe, however, that I am oversimplifying the issue when I state to you that your conclusion as to the guilt or innocence of these defendants under both of the

counts will depend almost entirely upon the extent to which you believe the testimony of Mr. and Mrs. Harold Hornbrook as to Mr. Hornbrook's dealings with the defendants.

"If, in the light of all the testimony and other evidence which has been presented to you, you are satisfied beyond a reasonable doubt as to the truth of the material parts of Mr. and Mrs. Hornbrook's testimony, you should return verdicts of guilty.

"On the other hand, if in the light of all the testimony and other evidence which has been presented to you, you are not satisfied beyond a reasonable doubt as to the truth of the testimony, you should return verdicts of not guilty."

Thus, we are faced with the inescapable conclusion that, in rendering its verdict of not guilty, the jury disbelieved Hornbrook's admissions of collusion and conspiracy. While it is a generally accepted principle of criminal law that one co-conspirator can be convicted despite the lack of conviction of the other, the record in this situation now is that no one stands convicted or charged with collusion, despite Hornbrook's testimony.

The United States Code provides criminal penalties for filing of false affidavits contrary to the requirements of section 112 (d) cited above. As evidenced by the Bridge trial, it provides penalties for violations of the antitrust laws and for criminal conspiracy. Neither the U. S. Code nor the statutes of this state contain any prohibition against the submission of bids for highway construction by persons, firms or corporations charged with, or admitting a violation of these statutory provisions.

It is true that the provisions of the standard specifications quoted in your memorandum, namely 102-12 (b), provide that the Commission may consider evidence of collusion among bidders as sufficient for the rejection of bids and may further refuse to grant participants in such collusion consideration for future work. It thus becomes important to consider the nature of these specifications. Maine Revised Statutes, 1964, Title 23, section 51, places the responsibility for the administration of the State's Highway Department and its programs upon the Highway Commission. It further authorizes the Commission to make rules and regulations relating to the construction of highways and the administration of its office. I am unable to find that the so-called "Standard Specifications" have been issued or promulgated by the Commission as its rules and

regulations having the force of law. It would appear that they are contractual conditions typical in the construction contract field which become an integral part of all contracts awarded by the Commission, except as they may be modified, amended, altered or added to by other contractual conditions on specific projects. ~~It~~ such, they provide an administrative tool to the State Highway Commission in the awarding of construction contracts and in establishing desired qualifications, ethical, financial, and otherwise for contractors. They do not, however, have the force of law. They do give the Commission a contractual basis for the acceptance or rejection of bids, and for the administrative determination of what bidders it shall consider competent.

I, therefore, conclude that it is not the function of this department to advise you as to what course of action should be taken with reference to the acceptance of future bids from Hornbrook, Inc. or Harold Hornbrook individually in the light of the reference trial in the U. S. District Court. In my opinion, there are no legal impediments to such acceptances, and the decision is an administrative one.

For whatever assistance it may be to your decision, I point out the following:

(1) While it was held by Judge Gignoux during the course of trial that actions of corporate officers in this field would be criminally binding on a corporation, quaere whether the testimony of a corporate officer witness in a trial wherein neither the officer nor the corporation was a defendant would be sufficient to bind the corporation.

(2) U.S.C.A. Title 15, section 32, provides that no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify in any antitrust proceeding. This provision of federal law grants immunity to any government witness who testified in a case of the type of U. S. vs. Bridge. While I do not share the opinion, the attorneys for the antitrust division of the U. S. Department of Justice have expressed to me the strong belief that this section of the U. S. Code prohibits the state from penalizing a cooperating government witness in antitrust cases by denying him the right to future contracts. They have further strongly stated to me their opinion that Hornbrook, Inc. or Harold Hornbrook should not be disqualified and that this opinion would be communicated to the Bureau of Public Roads.

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(3) In the course of preparing this opinion, I consulted with general counsel for the Bureau of Public Roads who stated the Bureau's policy in matters of this kind is that bidders should not be considered unacceptable if no criminal conviction of the bidder was outstanding.

(4) Your specifications state that evidence of collusion among bidders may result in refusing recognition to participants therein for any future work. The only evidence of such collusion is Hornbrook's testimony. The jury disbelieved it, according to its verdict. If believed, however, would it not constitute evidence not only against Hornbrook, but against the several other contractors he testified he colluded with not only including Bridge Construction Corporation, but several others?

Yours very truly,

Richard J. Dubord  
Attorney General

RJD:R