

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date January 10, 1968

To Allan L. Robbins, Warden

Dept. Maine State Prison

From Phillip M. Kilmister, Assistant

Dept. Attorney General

Subject Design and construction job by same company.

FACTS:

In your memorandum submitted to this office under date of January 3, 1968 you state that you would like to consummate a contract for both the design and construction of a boiler house and emergency power plant for the prison with X company. Although both you and the Bureau of Public Improvements are in agreement that the X company is a highly reputable firm, the Bureau does not wish to sanction the employment of X company to do both the designing and construction of the proposed facility. You have asked in effect the following question:

QUESTION:

May you as Warden of the State Prison enter into a contract with a contractor for the design and construction of a public improvement project provided that an independent inspector is employed to check all aspects of the work?

ANSWER:

No.

OPINION:

The fact that one particular engineering firm may be best qualified to perform certain public construction work does not justify the consummation of a design and construction contract with said firm contrary to the provisions of law governing the award of public contracts. As you are probably well aware, the legislature, pursuant to the terms of 5 M.R.S.A. § 1742, has empowered the Department of Finance and Administration, through the Bureau of Public Improvements, to approve the selection of qualified practicing Maine registered architects and engineers for the planning and supervision of construction and public improvements.

Any contract for a public improvement involving a total cost of more than \$3,000, except contracts for professional, architectural and engineering services, must be awarded by a system of competitive bidding. (see 5 M.R.S.A. § 1743 et seq.) In this regard the legislature has clearly posited within the Department of Finance and Administration, through the Bureau of Public Improvements, the power of approval of all proposals, plans, specifications and contracts for public improvements which require their submission to the Governor and Council for their final approval and acceptance. (5 M.R.S.A. § 1742 sub-sec. 7)

Without discussing the many reasons therefor, it is sufficient to conclude that the state does not enjoy the wide latitude of freedom of contract which private industry enjoys. In regard to state contracts, statutory guidelines governing execution of same must be adhered to.

It is widely held among engineers and architects that ethically a conflict of interests exists when a contractor performs the simultaneous exercise of the function of contractor and engineer. We believe that a court of law would likewise look with disfavor upon a public contract being awarded to a party who designs, constructs, and inspects its own work. However, we do not hold by this opinion that such a contract is illegal per se. By the same token neither do we hold by this opinion that the employment of an independent inspector to check all aspects of the work performed by a party who designs and constructs a public improvement is necessarily legal. Questions as to whom should be employed, who should be responsible for payment, and who should chose the independent inspector, would all be relevant questions to be answered by the administrative agency of the state empowered to approve any particular public improvement contract before we would feel compelled to render an opinion as to the legality of such a contract.

We answer the question posed in your memo simply by stating that the legislature has expressly, and we think wisely, empowered the Bureau of Public Improvements with the administrative discretion to determine the best methods by which the state should enter into public improvement construction contracts.

In regard to the contract for the design and construction of the boiler house and emergency power plant at the prison we can only reiterate our position that the Bureau of Public Improvements may lawfully exercise its administrative discretion by refusing to sanction or approve of a contract whereby a firm is given the power to design and construct the above-designated facility, even if an independent inspector were to be employed to supervise the project. The question of legality of such a contract is prematurely raised at this time and we respectfully decline to determine the legality of such a contract until such time as a request for same is sought by the Bureau itself.

In summary, it is properly within the power of the Bureau to refuse to approve of such a contract. Should this office rule that such a contract is illegal per se, it would simply mean that the refusal to approve or sanction said contract by the Bureau would be mandatory rather than permissive.

Phillip M. Kilmister
Phillip M. Kilmister
Assistant Attorney General

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