

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT
OF THE
ATTORNEY GENERAL

For the Years
1967 through 1972

ANSWER NO. 4:

Not answered.

OPINION NO. 4:

The subject law places the burden of determining adequacy of local shoreland zoning ordinances upon the two named state agencies. Accordingly, these agencies must internally develop their own methods for determining such adequacy. After such methods have been developed, we will be pleased to review them if you wish.

QUESTION NO. 5:

Is the question of laxity and permissiveness of a local shoreland areas zoning ordinances to be judged by reference to the letter of the ordinance alone, or may the commission consider the record of the municipality's administration and enforcement of the ordinance as well?

ANSWER NO. 5:

Not answered.

OPINION NO. 5:

We again direct your attention to the fact that the subject law leaves the determination of adequacy of local shoreland zoning ordinances upon the named state agencies. The agencies must develop their own criteria for determining adequacy. The municipality's record of administration and enforcement of the ordinance may well be a factor which the Commission might wish to consider in making its determination.

ROBERT G. FULLER, JR.
Assistant Attorney General

August 18, 1971
Bureau of Public Improvements

Richard Batchelder, Supervising Engineer

Construction of Swimming Pool at the Pineland Hospital and Training Center

SYLLABUS:

Absent Special Legislation, the construction of the swimming pool at the Pineland Hospital and Training Center is entirely a State matter controlled by Title 5, M.R.S.A. 1964, Chapter 153; the funds appropriated by the Legislature can not be turned over to the control of any individual or group for the private contracting of pool construction. There is no authority for restricting bidders to contractors having all union employees; the Governor and Council can not accept a gift of funds for construction of the Pineland pool subject to such condition.

FACTS:

By Chapter 30 of the Resolves of 1971 the 105th Legislature appropriated funds in the following language:

“That there is appropriated to the Pineland Hospital and Training Center, Department of Mental Health and Corrections, from the Unappropriated Surplus of the General Fund the sum of \$50,000 to aid in the construction of a swimming pool.”

A Committee comprised of members of a Labor Union, the American Federation of State County and Municipal Employees, AFL-CIO, has been involved in the project of raising funds for the construction of a swimming pool at the Pineland Hospital and Training Center. Several questions have been raised in connection with the appropriate disposition of the appropriation and the assistance of this office has been sought in the resolution of such questions.

QUESTION:

1. Can the State accept a gift of the money raised by a committee with the condition that any contract to be put out be only with a so-called union contractor?
2. Can the \$50,000 appropriation be given to the committee raising the funds who will contract for the building of the swimming pool?
3. Can the State use the \$50,000 to buy certain integral units of the swimming pool as an allowance on a contract to be put out by the committee raising the funds?

ANSWER:

1. No.
2. No.
3. No.

REASON:

1. Title 5 M.R.S.A. 1964, § 1743, as amended, provides as follows:

“Any contract for any public improvement involving a total cost of more than \$10,000, except contracts for professional, architectural and engineering services, shall be awarded by a system of competitive bidding in accordance with chapters 141 to 155 and such other conditions and restrictions as the Governor and Council may from time to time prescribe. Contracts in the amount of \$10,000 or less shall be awarded by a system of competitive bidding. Such contracts shall be awarded by the appropriate department or agency with the prior authorization of the Bureau of Public Improvements.

“No agency of the State shall enter into any contract for a public improvement, nor shall any of its instrumentalities enter into any contract for buildings or public works, with a general contractor unless the contract shall provide that the prime contractor shall not subcontract more than 80% of the total bid price.”

We find in the above quoted language a legislative mandate that in connection with public improvements costing in excess of \$10,000, contracts shall be awarded pursuant to a system of competitive bidding. We have examined Chapters 141 through 155 of Title 5 and find no legislatively authorized exceptions to the competitive bidding

procedure, which would permit the restriction that the only bidders for the contract to construct the Pineland swimming pool be contractors with all union employees.

We find that the Legislature has made provision for the exclusion of certain bidders based on qualifications and financial responsibility grounds in Title 5 M.R.S.A. 1964, §§ 1747, 1748. Under the statutes relating to the Bureau of Purchases we find provision for preferential treatment of Maine bidders in certain instances in Title 5 M.R.S.A. 1964, § 1816, subsec. 8, and under subsec. 2 of that section provision is made for certain waivers in connection with purchases of services and goods. We find no other legislatively authorized conditions or restrictions in connection with the bidding procedure. We construe the legislative mandate that construction contracts, involving in excess of \$10,000, be pursuant to competitive bids without applicable statutory exceptions, to preclude restricting bidders to those having all union employees.

We find no authority vested in the Governor and Council to restrict competitive bidding by permitting only contractors with all union employees to bid. The Legislature has provided for mandatory competitive bidding in accordance with Title 5 M.R.S.A. 1964, Chapters 141 through 155, and has authorized the Governor and Council to prescribe other conditions and restrictions, from time to time, in connection with construction contracts. We take the language of Title 5 M.R.S.A. § 1743 to mean that the Legislature has spoken in Chapters 141-155, in connection with competitive bidding and that it has vested the Governor and Council with authority to prescribe conditions and restrictions only as to contractual matters other than competitive bidding. It, therefore, follows that the Governor and Council could not accept a gift of funds intended for expenditure in the construction of the swimming pool at Pineland subject to a condition that bidding would be restricted to contractors having only union employees.

2. The Legislature, by Resolves, Chapter 30, has appropriated \$50,000 to Pineland Hospital and Training Center to aid in the construction of a swimming pool. The Legislature has not authorized Pineland to give such funds to any private individual or group. The Legislature knew from the Statement of Facts, annexed to L.D. 538, that the proposed cost of the swimming pool construction would exceed \$200,000, and in contemplation of this fact in their appropriation provided that the sum of \$50,000 was to *aid* in construction, upon the assumed understanding that other funds would be forthcoming from other sources. The Legislature could have provided for the turning over of the sum appropriated to a private individual or group and thus, by Special Legislation, could have permitted the construction of the swimming pool in a manner other than that provided for in the General Law; the Legislature made no such provision. We, therefore, look to the General Law and find that construction of public improvements is controlled by Title 5 M.R.S.A. 1964, Chapter 153, from the bidding procedure to the final acceptance of the construction project; the provisions of that Chapter apply. The Bureau of Public Improvements is vested with supervisory authority over all such construction. Absent pertinent Special Legislation we find no basis for placing the \$50,000 sum, in question, in the control of any private individual or group, and outside the control of the General Law and statutory framework relating to the construction of public improvement.

3. Since we have responded to Question 2 by expressing the opinion that the construction of the Pineland pool is entirely a State matter we need not expand upon the reason for our negative response to Question 3. It suffices to say that Question 3 is answered in the negative for reasons set forth above.

In summary, absent Special Legislation, the construction of the swimming pool at the Pineland Hospital and Training Center is entirely a State matter controlled by Title 5

M.R.S.A. 1964, Chapter 153; the funds appropriated by the Legislature can not be turned over to the control of any individual or group for the private contracting of pool construction. There is no authority for restricting bidders to contractors having all union employees; the Governor and Council cannot accept a gift of funds for construction of the Pineland pool subject to such condition.

COURTLAND D. PERRY
Assistant Attorney General

September 1, 1971
Agriculture

Maynard C. Dolloff, Commissioner

P.L. 1971, c. 366; Meaning of "Guarantees" Appearing in Section 1022, sub-§ 2.

SYLLABUS:

The language respecting "guarantees" in P.L. 1971, c. 366 (7 M.R.S.A. § 1022, 2) does not bar a Maine potato grower from guaranteeing his product to point of destination.

FACTS:

The Legislature, at the 1971 Regular Session, enacted licensing provisions regarding the potato industry. *P.L. 1971, c. 366*. The reference legislation contains the following language respecting "guarantees":

"In any sale in which the buyer of such potatoes is a person required to be licensed by this Article and has a place of business in this State except a retailer, any guarantees with regard to grade, size, weight or other specifications, made by the producer shall be deemed satisfied when the grade, size, weight or specifications, as certified by a licensed federal-state potato inspector, or seed potato inspector, after such potatoes have been or while they are being loaded for transit, equals or exceeds the grade, size, weight or other specifications of such potatoes stated in such record. Any producer making such guarantees shall at all time prior to shipment have the option to determine whether or not said potatoes shall be inspected in accordance with this subsection. Any agreement conflicting with the provisions of this subsection is not enforceable by way of action or defense." (*Section 1022, 2 of Title 7*)

It is represented that many potato growers will want to guarantee their product to destination and that many dealers will accept this type of business. For various reasons, a grower may become disgruntled because either his neighbor or some other grower is making such guarantees beyond the Maine shipping point. Such a disgruntled grower may complain to the Commissioner of Agriculture in the form of a verified complaint presented under § 1016 of the reference licensing statute. Because the filing of such a verified complaint calls for an investigation by you as Commissioner (or your duly authorized agent) and the attending possibility of subsequent revocation of license, you have been asked to express your opinion whether an agreement between a grower and a dealer wherein the former guarantees the product to destination outside Maine would be viewed as a violation of the guarantee provision cited above.