STATE OF MAINE

Competitive Bidding

Inter-Departmental Memorandum Date May 10, 1976

To Fred Bartlett Dept. Bureau of Parks & Recreation

From David T. Flanagan, Assistant Dept. Attorney General

Subject

This memorandum will serve to explain the opinion of the Attorney General with respect to the terms under which agreements contemplating the construction of public improvements by the States' grantees must be entered into.

1. All agreements must require contract for public improvements to be awarded by competitive bid.

The project contemplated by the agreement will be funded to the extent of $25,000 by State money. The Bureau of Parks and Recreation has the authority to enter into agreements for the granting of public funds for boat launching facilities under 38 M.R.S.A. §322. The funds to be provided by the Bureau are generated from fuel tax revenues under 36 M.R.S.A. §2903-A.

5 M.R.S.A. §1743, in turn, requires that:

> "Any contract for any public improvement involving a total cost of more than $25,000, 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 $25,000 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."

Thus, it can be seen on the face of the statute that contracts must awarded by competitive bid whether they are more or less than $25,000.

5 M.R.S.A. 1743 applies to all public improvements funded by the State government or any agency thereof* by the terms of 5 M.R.S.A. 1741.

That statute expressly provides that "Whenever the words 'public improvement'or 'public improvements' shall appear in chapters 141 to 155 they shall be held to mean and include the construction, alteration and repair of buildings or public works . . . constructed, acquired or leased, in whole or in part with state funds . . ." The Legislature has left no room by the use of this particular language for any interpretation other than that public works constructed to any extent with State money are subject to the provisions of Title 5.

2. All agreements must require contracts for less than $25,000 receive the prior authorization of BPI.

As noted above, 5 M.R.S.A. 1743 requires BPI authorization for all cont of less than $25,000. There are no exceptions to this command, either express or implied.

A related provision, 5 M.R.S.A. 1742(7), describes circumstances under which public improvements for more than $25,000 might require prior approv by BPI. However, since the requirement expressed in that statute is limited to approval of "public improvements which the State of Maine or an of its agencies hold in fee or by leasehold interest," it does not apply in the instant case where the Bureau would have no estate in the land upo which the improvement is to be located.

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* There are 3 exceptions to this requirement provided by statute: 5 M.R.S 1741 exempts the Department of Transportation from the operation of thi chapter; 12 M.R.S.A. 1607 exempts the Maine Forestry District; and 5 M. 1742 exempts bona fide emergency repairs undertaken by any agency.

Likewise, the requirement in the final, unnumbered paragraph of 5 M.R.S.A. 1742, that "the head of any agency . . . of the State Government . . . not otherwise exempted by law, who contemplates any public improvemen shall first obtain the approval of the State Director of BPI for such work, does not apply in these circumstances. This conclusion follows from the use of the language "not otherwise exempted by law" in this paragraph. In our view, this exemption applies not only to DOT, Forestry and emergency work, but also to projects in which the state has no fee or leasehold interest, because 5 M.R.S.A. 1742 (7) operates to exclude from the agency's scope of review those contracts where the State does not have an estate. See Martin v. Piscataquis Savings Bank 325 A.2d. 49, 51 (Me., 1974). Only by the inclusory language of § 1743 can a part of that authority be restored.

3. The prior administrative interpretation of the applicability of 5 M.R.S.A. 1743 to grant programs does not control.

It is our understanding that both before and after 5 M.R.S.A. 1743 was amended by P.L. 1967, c. 409, § 2, the Bureau of Public Improvements and other agencies have construed § 1743 as not applying to capital improvement grant programs carried out by State agencies. It is true that in Mottram v State 232 A.2d. 809, 816 (Me. 1967) the Supreme Judicial Court said:

> "The construction which has been placed upon a statute by the officers or governmental department charged with carrying out the provisions of the law is to be accorded due consideration by the courts in construing the statute."

However, in this case there is no opportunity to bring this rule into play, since

> "When the language of a statute is capable of only one meaning, the Legislature must be presumed to have intended what is plainly expressed, and there is consequently no room for construction. It is not allowable to interpret what has no need of interpretation. It has accordingly been distinctly stated from early times down, that 'judges are not to mould the language of the statutes in order to meet an alleged convenience or an alleged equity . . . and are not to alter plain words though the Legislature may not have contemplated the consequences of using them'." Opinion of the Justices 108 Me. 545, 548-9, 82 A.2d.90(1911).

See also, Burrill National Bank v. Edminister 119 Me. 367, 370, 111 A.423 (1920).

In this case there is no opportunity to bring prior administrative interpretations into consideration since the requirements of 5 M.R.S.A. 1741 and 1743 are clear and unambiguous.

4. The Bureau of Parks and Recreation statutes do not preclude operation of 5 M.R.S.A. 1743.

38 M.R.S.A. 325 authorizes the Director of the Bureau of Parks and Recreation to impose conditions on the grants in aid he makes for construction of boat launching facilities. As noted above, 5 M.R.S.A. 1743 authorizes the Governor and Council or BPI, as the case may be, to set additional terms.

A reasonable construction of these two statutes taken together can be accomplished by concluding that both agencies have the power to set conditions, and if those terms conflict, they must work them out between themselv Such a reading would be consistent with the policy expressed in Davis v. State 306 A.2d. 127, 130 (Me., 1967) that

> "the proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and objects of the Legislature."

Moreover, since 5 M.R.S.A. 1741 and 12 M.R.S.A. 1607 specifically exempt some agencies from the operation of chapters 141 to 155 of Title 5, it is reasonable to infer that all other agencies without similar specific exemptions are included. Martin v. Piscataquis Savings Bank, supra.

5. What responsibility must the Bureau of Public Improvements assume pursuant to this opinion.

5 M.R.S.A. 1743 requires that BPI authorize contracts for less than $25,000 prior to their award.

It is our understanding that BPI has developed comprehensive procedures for reviewing and evaluating construction proposals over which they have jurisdiction. These procedures have been developed largely out of administrative practice and not statutory mandate.

There is no legal impediment to BPI modifying its standard review procedure in the case of grants for public improvements when it is satisfied the primary agency has staff, experience and expertise appropria to make evaluations. That is to say, BPI can tailor its review process to reflect the amount of review necessary based on the capabilities of the primary agency in reviewing particular types of public improvements.

6. The responsibility the Governor and Council may assume pursuant t this opinion.

5 M.R.S.A. 1743 authorizes, but does not require, the Governor and Coun to establish general terms and conditions as a prerequisite for award of contracts. By the use of the language "from time to time" it seems eviden the Legislature intended that the Governor and Council establish only rule of general applicability to contracts, rather than requiring their specifi review of each contract. In addition, it appears that the power of th

Governor and Council is limited to establishing terms and conditions relating to the manner in which contracts are awarded, rather than on the merits of any particular contract. It is completely within the discretion of the Governor and Council as to whether they wish to enter into this area at all. In the event they do, neither they nor BPI may take final action as to whether it shall or shall not be let, but merely prescribe conditions relating to the form of the contract.

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