

OPINION
69-88

May 28, 1969 (OPINION)

Mr. Eugene A. Kruger

State's Attorney

Cass County

RE: Counties - Buildings - Contracts - Bidder's Bond

This is in response to your letter in which you make reference to Sections 11-11-26 and 11-11-28, and to Sections 48-02-02 and 48-02-04 of the North Dakota Century Code. You then observe that upon a casual examination there appears to be a conflict between Sections 11-11-26 and 11-11-28, and 48-02-02 and 48-02-04. You also inquire if a cashier's check may be used in lieu of a certified check.

As is pertinent here, Section 11-11-26, in substance, provides that when the county proposes to erect a county building exceeding \$1000.00 the county commissioners shall advertise for bids and cause same to be published at least once each week for two consecutive weeks in the official newspaper. In conjunction therewith, Section 11-11-28 requires that the bid be accompanied by a certified or cashier's check made payable to the Chairman of the county commissioners in a sum equal to 5 percent of the amount of the bid or a bidder's bond in a sum equal to 20 percent of the full amount of the bid.

Section 48-02-02, in substance, provides that whenever a county, city, park district, village, school district, or other political subdivision of the state repairs or makes improvements on any building belonging to or appertaining to any of the public institutions of the state where the amount for such work exceeds \$12,000.00, the plans and specifications shall be procured from a licensed architect, except in the case of buildings used by the North Dakota agricultural experiment station in connection with farm or agricultural research operations, at which time such plans and specifications may be procured from a registered professional engineer if he is in regular employment of the agricultural experiment station, with the approval of the Board of Higher Education.

Section 48-02-04, as is material to the question, provides that each bid shall be accompanied by a certified check on a solvent North Dakota bank in an amount equal to 5 percent of the bid or a bidder's bond in a sum equal to 10 percent to the full amount of the bid.

For purpose of convenience in referring to the two sets of sections, we will refer hereinafter to Chapter 11-11 as one set and to Chapter 40-02 as the other set.

As you have indicated, on a casual reading there appears to be a conflict, but upon further examination the provisions of Chapter 48-02 and Chapter 11-11 can be reconciled. It is further observed

that Chapter 48-02 concerns itself primarily with the construction and improvement of public buildings when the cost is over \$12,000.00, and is a complete treatment of the subject relating to the construction or repair of public buildings. In this respect it is a special provision of law relating only to one subject, whereas Chapter 11-11, specifically Section 11-11-26, pertains to erection of county buildings, purchase of fuel, election ballots and supplies. In examining the provisions of the two chapters involved, it becomes clear that the Legislature intended that the provisions of Chapter 48-02 apply to all buildings, or the repair of buildings, when the cost of same exceeds \$12,000.00.

It is, therefore, our opinion that Chapter 11-11 applies to the construction of buildings for counties when the cost of construction exceeds \$1,000.00 but is not more than \$12,000.00. It is our further opinion that where the construction, repair, or improvement of a county building or other public building exceeds the sum of \$12,000.00, the provisions of Chapter 48-02 would apply in all aspects.

As to whether or not a cashier's check may be used in lieu of a certified check under the provisions of Chapter 48-02, we must observe that Section 48-02-04 specifically states a certified check must accompany the bid, whereas Section 11-11-28 states that a certified or cashier's check must accompany the bid. This would indicate that the Legislature was fully aware of the difference between a cashier's check and a certified check. A certified check is one in which the necessary funds have been set apart for the satisfaction of the check and will be available when the check is good and will continue to be good. (See *Merchant's Bank v. State National Bank*, 19 L.ed. 1008, 77 U.S. 604.) A cashier's check is a check drawn on the bank's own account and the bank merely promises to pay but no funds have been set aside to meet the demands of the check when presented for payment. It is a bill of exchange drawn by the bank on itself. It was judicially determined in *Beecher v. Morris*, 282 N.W. 226 that a cashier's check is not the same as a certified check.

On May 2, 1950, we issued an opinion to the Honorable R. H. Sherman, Chairman of the Board of Administration, holding that the provisions of Section 48-02-04, which requires a certified check to accompany the bid, cannot be waived. It was recognized then that the language is specific and leaves no room for construction. The section in this respect has not been changed, consequently the opinion remains the same.

If it is deemed desirable to use a cashier's check in lieu of a certified check, the Legislature could employ the same language which has been employed in Section 11-11-28, as amended.

HELGI JOHANNESON

Attorney General