

**OPINION
71-268**

September 21, 1971 (OPINION)

Mr. John O. Garaas

States Attorney

Fargo, ND 58102

RE: Public Bids - Certified Check - Cashier's Check

This is in response to your letter of September 16, 1971, wherein you request an opinion of this office regarding section 11-11-28 of the North Dakota Century Code, as amended. You submit the following in your letter:

"I am requesting an opinion from your office as to section 11-11-28 of the North Dakota Century Code as amended in 1971. The advertisement for bids was made subsequent to July 1, 1971, and specified that bids must be accompanied by a bidder's bond in a sum equal to five percent of the full amount of the bid. The County of Cass received two bids, one for (stated amount) which had the bidder's bond accompanying it. Another bid for (stated amount) was received, however, instead of a bidder's bond, it had a cashier's check in the amount of five percent of the bid.

"At the time, I told the County Commissioners that the cash would be in lieu of the bidder's bond, that the County of Cass was protected, and that a bidder's bond is no better protection than the cash itself.

"At the present time, neither bid has accepted, however, the attorneys for the highest bidder have assured us that if the lower bid is accepted, an injunction proceeding would be commenced against the County of Cass.

"My question is simply this, could the County Commissioners in its discretion accept a bid which has the cash in the proper amount rather than the bidder's bond? In other words, must we follow rigidly the wording of the statute even though the two are exactly the same and as a matter of fact, the cash is even better than the bidder's bond. It is imperative that I know what your opinion is prior to the Wednesday, September 22 meeting. In the event that you are unable to give a written opinion before the time, perhaps you could call me at the above number."

In the first instance, we would note that the advertisement for bids was subsequent to July 1, 1971, the effective date of the amendment to said section 11-11-28 of the North Dakota Century Code, for which reason it would clearly appear that the subject bid letting and advertisement are subject to the provisions of the statute as amended rather than the previous provisions of that statute.

With regard to the main issue presented by your inquiry, we would first note that section 11-11-28 of the North Dakota Century Code, prior to the amendment, provided as follows:

"BID MUST BE ACCOMPANIED BY CERTIFIED CHECK. A bid shall be accompanied by a certified check made payable to the chairman of the board of county commissioners in a sum equal to five percent of the amount of the bid as a guaranty that the bidder will enter into the contract if it is awarded to him and that he will furnish the necessary bond."

In essence, it appears that the only effect of the amendment was to substitute the requirement of bidder's bond to the original requirement of certified check. We can only assume that the legislature intended specifically to require a bidder's bond in lieu of a certified check. With regard to a cashier's check, as referred to in your letter and which is the subject substitute in the instance case, the same was not referred to in either the statute prior to the amendment or in the amendment itself. In that regard, we would refer you to an opinion of this office issued May 28, 1969, addressed to Mr. Eugene A. Kruger, State's Attorney, Cass County, Fargo, North Dakota, wherein we find the following discussion the the distinction between a certified check and a cashier's check:

"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 presented for payment. It is a guarantee that 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."

In other words it becomes clear that a cashier's check is not a guarantee that the same will continue to be good, the same being subject to such things as stop payment orders, dishonor, etc., while a certified check is not subject to such orders and is a guarantee that the funds are and will remain available for payment of the same.

We would also note that in the second paragraph of your letter of inquiry you have referred to "cash" rather than "cashier's check". As we understand the facts related in your letter generally, however, it would appear that the inquiry addresses itself to "cashier's check" rather than "cash". Clearly the terms are not interchangeable as one contemplates payment while the other is actual payment in legal tender.

In that connection, we went on to say as follows:

"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."

The question then narrows to the issue of the similarity or difference between a cashier's check and a bidder's bond. We first recognize that the legislature specifically made this change. We cannot assume that the legislature did an idle act nor intended anything other than the obvious specific change which was thereby affected. They required a bidder's bond rather than a certified check. This leaves very little room for construction or substitution of terminology.

Again, considering the unique components of a "cashier's check" and the mentioned infirmities, we must consider the nature of a bidder's bond, which simply is a guarantee by the principal and a surety that performance will be made or the amount specified will be available for payment. In other words, the guarantee exists that the principal, or in the event of failure, the surety, will make payment good and such payment will remain good, quite like a certified check. There is one difference, however, which may have prompted the legislature in adopting the amended version of the statute. In the instance of a bidder's bond, the surety, whether private or corporate, before executing a bond whereby the liability is created, will make investigation of the principal to ascertain whether indemnification of such individual or company is advisable. In the case of a certified check, no such investigation is necessary. For this reason, it would appear that the requirement of a bidder's bond goes beyond the actual monetary consideration and assures that the principal bidder is of such stability and reputation that he is worthy of indemnification by a surety.

In view of the foregoing matters, the clear and specific wording and requirement of the statute, and the obvious differences in bidder's bond, certified check and cashier's check, we are of the opinion that section 11-11-28 of the North Dakota Century Code, as amended by the 1971 legislature, which requires a bidder's bond to accompany the bid, cannot be waived and that a substitution thereof a cashier's check is improper and cannot be properly accepted.

We are herewith enclosing a copy of the opinion referred to herein dated May 28, 1969, for your interest.

We trust that the foregoing will adequately reflect the opinion of this office in regard to the matter presented.

HELGI JOHANNESON

Attorney General