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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STATE OF NEW JERSEY,

Plaintiff(s),

v.

NORMAN Y. MINETA, SECRETARY
OF TRANSPORTATION, UNITED
STATES OF AMERICA, MARY E.
PETERS, ADMINISTRATOR,
FEDERAL HIGHWAY
ADMINISTRATION,

Defendant(s).

Hon. Stanley R. Chesler

Civil Action No. 05-228

RESPONSE OF THE SECRETARY OF TRANSPORTATION
TO PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINTS

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On the Brief:

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Preliminary Statement

The following memorandum of law is submitted in opposition to the application by the State of New Jersey for temporary restraints. The State's application should fail because it is clear that Executive Order 134 unduly restricts the potential bidding pool for Federally funded State Highway Projects, and thus violates Title 23, United States Code, Section 112.

Furthermore, the State has not cited to any authority supporting its right to bring a private action to compel the Federal Highway Administration to approve construction proposals that violate Section 112.

STATEMENT OF FACTS

New Jersey Executive Order #134 (EO 134) was signed by former Governor McGreevey on September 22, 2004. EO 134 states in part that, "...it is a compelling interest of the State to prohibit awarding government contracts to business entities which are also contributors to candidates, political parties and holders of public office." The Executive Order also states that,

The State or any of its purchasing agents or agencies or those of its independent authorities, as the case may be, to procure from any business entity services or any material, supplies or equipment, or to acquire, sell, or lease any land or building, where the value of the transaction exceeds \$17,500, if that business entity has solicited or made any contributions of money, or pledge of contribution, including in-kind contributions to a candidate committee and/or election fund of any candidate or holder of the public office of Governor to any State or county political party committee...

Certification of Dennis Keck, Exh. 1 ("Keck Cert.").

On October 4, 2004, personnel from the New Jersey Department of Transportation ("NJDOT") requested that the Federal Highway Administration ("FHWA") review EO 134. Certification of Daniel J. Gibbons, Exh. 1 ("Gibbons Cert."). On October 13, 2004, the FHWA informed NJDOT that EO 134 would likely violate federal statutes and regulations. Gibbons Cert. Exh. 1. FHWA followed up with similar warnings on November 3, 2004. Gibbons Cert. Exh. 3; Keck Cert. Exh. C.

On November 11, 2004, the NJDOT informed the FHWA that it would not enforce EO 134 with respect to projects involving Federal funds. Gibbons Cert.

Exh. 4. Despite that concession, the State continued to object about the applicability of EO 134 to Federally funded projects. Gibbons Cert. Exh. 5.

FHWA's draft legal opinion was provided to NJDOT on November 23, 2004. Gibbons Cert. Exh. 6. The final legal opinion, contained in a memorandum authored by Senior Attorney Vanessa Lemmie, was emailed to the NJDOT on January 13, 2005, and sent by mail on January 14, 2005. Gibbons Cert. Exh. 9 and 10 ("Lemmie Memorandum"). That final legal opinion is substantially the same as the draft legal opinion, and concludes that EO 134 unduly restricts competitive bidding and therefore violates 23 U.S.C. § 112. Cf. Gibbons Cert. Exh. 6 and 10.

ARGUMENT

THE STATE IS NOT LIKELY TO PREVAIL ON THE MERITS

The United States will not repeat at length the legal analysis contained in the Lemmie Memorandum, and adopts all of the arguments and authorities referred to therein. Rather, the United States will attempt to summarize the FHWA's position for the Court to demonstrate that the State's application for temporary restraints should be denied.

- A. The State correctly cites the standard for a grant of injunctive relief, and fails to meet that standard.

The State is correct that the relief it presently seeks “is an extraordinary remedy, which should be granted only in limited circumstances.” *State’s Brief* at p. 8. The State is also correct that it bears the burden of proof that it meets every element of the test for preliminary relief. The State fails to establish that it is likely to prevail upon the merits because EO 134 imposes undue restraint upon the free competitive bidding required by Federal law.

- B. EO 134 imposes an undue restraint upon free competitive bidding in the award of contracts paid for with Federal highway funds.

Title 23, United States Code, Section 112, “Letting of Contracts” provides:

(a) In all cases where the construction is to be performed by the State transportation department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary [of Transportation]. *The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.*

(b) Bidding requirements.--

(1) In general.—Subject to paragraphs (2) and (3), construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by *contract awarded by competitive bidding*, unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is *more cost effective* or that an *emergency* exists. *Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility.* No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary’s concurrence in the award of a contract to such bidder, *unless such requirement or*

obligation is otherwise lawful and is specifically set forth in the advertised specifications.

(emphasis added).

Under the statute the Secretary of Transportation has the final authority to establish the methods of bidding for contracts supported by Federal funds. The statute requires that the contracts be awarded by “competitive bidding.” There are only two exceptions to that requirement, and they are 1) when the State “demonstrates, to the satisfaction of the Secretary” that its proposed alternative is either “more cost effective” or 2) that an “emergency” exists that requires the State to do away with competitive bidding.¹ *Id.*

Federal highway funds regulations regarding the Licensing and qualification of contractors further require that “[n]o procedure or requirement for bonding, insurance, prequalification, qualification or licensing of contractors shall be approved which, in the judgment of the Division Administrator, may operate to restrict competition... 23 C.F.R. § 635.110(b).

Even cursory review of the statute and regulation reveals that EO 134 restricts competition and interferes with the competitive bidding process by

¹ To the extent the State argues that it is seeking APA review of the FHWA’s decision, it is clear that the State has failed to exhaust administrative remedies, because it has failed to provide the FHWA with any data to support its contention that EO 134 is more cost effective than free competitive bidding, or that an emergency exists. Furthermore, the State has not identified any statute granting the District Court jurisdiction to adjudicate their claims. *See, Town of Secaucus v. USDOT*, 889 F.Supp. 779, 788 (D.N.J. 1995) (no private right of action under federal highway statutes).

disqualifying or dissuading potential bidders from submitting bids on a basis other than the qualifications of those bidders to complete the work at the lowest cost. Nothing about a bidder's history in contributing, or not contributing, to political causes or elective contests impacts in any way the ability of that contractor to provide quality work at an efficient price.

The closest reported decision on this issue is *Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements*, 10 U.S. Op. Off. Legal Counsel 101 (1986) (copy appended as Gibbons Cert. Exh. 11). In *Local Law 19* the General Counsel for the United States Department of Transportation asked the Office of Legal Counsel, United States Department of Justice, for a legal opinion whether New York City's Local Law requiring contractors to certify whether they had done business with entities related to the Governments of South Africa and Namibia, and if so, permitted the city to award the contract to another bidder even though that bidder was not the lowest responsible bidder.

The Office of Legal Counsel concluded without reservation that "Local Law 19 ... is incompatible with [23 U.S.C.] § 112." *Id.* p. 101. In reaching that conclusion, the Office of Legal Counsel found that

Section 112 clearly reflects a congressional judgment that the efficient use of federal funds afforded by competitive bidding is to be the overriding objective of all procurement rules for federally funded highway projects, superseding any local interest in using federal funds to advance a local objective, however laudable, at the expense of efficiency. By imposing disadvantages on a class of responsible bidders, Local Law 19 distorts the

process of competitive bidding in order to advance a local objective unrelated to the cost-effective use of federal funds.

Id. at 103.

EO 134 similarly imposes disadvantages on a class of responsible bidders, those bidders who choose to support political candidates. The State's claim that "EO 134 does not affect the NJDOT's obligation to award each contract after advertising to the responsible bidder submitting the lowest responsive bid," *State's Brief* at 12, is, frankly, ludicrous. EO 134, by its very terms, "ORDER[s] and DIRECT[s]" that the State or her agencies "shall not enter into an agreement or otherwise contract" with any entity that makes certain defined political contributions or engages in certain defined political conduct. EO 134 ¶ 1, Keck Cert. Exh. 1. It further provides that "[n]o business entity which agrees to any contract or agreement with" the State or her agencies may make certain enumerated political contributions or engage in certain enumerated political activity. *Id.* ¶ 2. The definition of "business entity" is exceedingly broad, encompassing individuals not directly engaged in business with the State. *Id.* ¶ 5. The clear effect, in fact intent, of EO 134 is to deter entities that exercise their right to financially support political activities from bidding on State contracts, and to prohibit the State and her agencies from awarding contracts to those entities, even if they are the lowest bidder.

The State's attempt to compare contractors who support political campaigns to contractors who are accused of bribery and assault, and therefore

question their “moral integrity,” is especially pernicious. *State’s Brief* at 13-15. As the Lemmie Memorandum observes, “a State may validly refuse to do business with an entity convicted of a crime related to business integrity. That is the purpose of suspension, debarment and similar provisions. “ *Gibbons Cert. Exh. 10*, p. 7. But in the arena of public contracting, it is the corrupt public official, not the provider of a lawful political contribution, who is deserving of moral rebuke. In that respect, EO 134 is a crude tool for addressing the problem of corrupt public officials, because it does not proscribe their corrupt activities while it substantially interferes with lawful political activities of potential bidders on public contracts.

The State has several alternatives that would ensure that all responsible bidders would participate in the bidding process, including disclosure and certification requirements. Lemmie Memorandum, p. 6. Alternatively, the State could restrict EO 134 to those contracts involving only State funds, or could forego entirely its reliance upon Federal funding. However, as the record now stands, the FHWA acted properly in refusing to authorize the advertising of bids involving the use of Federal funds where the State insists in enforcing the anti-competitive provisions of EO 134.

CONCLUSION

Accordingly, it is respectfully submitted that the State has failed to demonstrate a likelihood of success on the merits, and therefore its application for a temporary restraining order should be denied.

Respectfully submitted,

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s/ Daniel J. Gibbons

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