CHRISTOPHER J. CHRISTIE
United States Attorney
DANIEL J. GIBBONS
Assistant U.S. Attorney Deputy Chief, Civil Division
970 Broad Street, Suite 700
Newark, NJ 07102
973 645-2828
djg-5722

*UNITED STATES DISTRICT COURT*
*DISTRICT OF NEW JERSEY*

| STATE OF NEW JERSEY,<br><br>*Plaintiff(s),*<br><br>v.<br><br>NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION, UNITED STATES OF AMERICA, MARY E. PETERS, ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION,<br><br>*Defendant(s).* | Hon. Stanley R. Chesler<br><br>*Civil Action No.* 05-228<br><br>Certification of<br>Daniel J. Gibbons |
|---|---|

DANIEL J. GIBBONS deposes and says:

1. I am an Assistant U.S. Attorney assigned to the captioned matter, and make the following certification in opposition to the application of the plaintiff State of New Jersey for a temporary restraining order.

2. The following documents numbered Exhibits 1 through 10 were provided to me by facsimile from the Federal Highway Administration.

3. Exhibit 1 is a copy of three emails sent October 4, 2004, October 7, 2004 and October 13, 2004, between the State of New Jersey Department of Transportation (NJDOT) and the Federal Highway Administration (FHWA).

4. Exhibit 2 is a letter dated October 29, 2004, from the NJDOT to the FHWA.

5. Exhibit 3 is a letter dated November 3, 2004, from the FHWA to the NJDOT.

6. Exhibit 4 is a letter dated November 11, 2004, from the NJDOT to the FHWA.

7. Exhibit 5 is a copy of an email dated November 16, 2004, with an attachment.

8. Exhibit 6 is a copy of an email dated November 23, 2004, with an attachment, identified as a draft opinion memorandum.

9. Exhibit 7 is a letter dated January 5, 2005, from NJDOT to the FHWA.

10. Exhibit 8 is a letter dated January 6, 2005, from the FHWA to the NJDOT.

11. Exhibit 9 is a copy of an email dated January 13, 2005.

12. Exhibit 10 is a cover-letter dated January 14, 2005, from the FHWA to the NJDOT, forwarding the attached final opinion memorandum.

13. Exhibit 11 is a copy of an opinion entitled *Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding*

*Requirements,* 10 U.S. Op. Off. Legal Counsel 101 (June 30, 1986), obtained from Westlaw.

I certify under penalty of perjury that the foregoing is true and correct. Executed on January 19, 2005.

s/ Daniel J. Gibbons

Daniel J. Gibbons
Assistant U.S. Attorney

**Hawk, David**

**From:** Primitivo Cruz [Primitivo.Cruz@dot.state.nj.us]
**Sent:** Wednesday, October 13, 2004 5:06 PM
**To:** Hawk, David
**Cc:** Anthony Genovese; Merida, Dennis; harcaric@law.dol.lps.state.nj.us
**Subject:** RE: "Pay to Play"

Dave, thanks for the heads up. I am copying DAG Rich Harcar to let him know what is coming.

>>> "Hawk, David" <David.Hawk@fhwa.dot.gov> 10/13/2004 4:58:17 PM >>>
Prim,

I just wanted to give you a heads up. As I stated in my previous email our legal counsel was doing some additional research on this topic. I spoke with legal counsel on the phone today, and they indicated that for a couple of reasons our position will most likely be that the Executive Order would be contrary to 23 U.S.C./23 CFR. I am expecting more information within the next day or two, but I just wanted to brief on what information I have received so far.

If you have any questions, please contact me. Thanks!

1

-----Original Message-----
From: Primitivo Cruz [mailto:Primitivo.Cruz@dot.state.nj.us]
Sent: Thursday, October 07, 2004 9:44 AM
To: Hawk, David
Subject: RE: "Pay to Play"

Thanks, Dave.

>>> "Hawk, David" <David.Hawk@fhwa.dot.gov> 10/7/2004 7:55:04 AM >>>
Prim,

The Executive Order (EO) has been reviewed by our legal counsel. The EO does not appear to conflict with the Federal-aid Highway act. However, we feel that we should caution the Department that some Federal
or State constitutional issues may arise from the enactment of this EO.

On the basis that the EO will become effective on October 15, 2004, we will not prohibit its inclusion into Federal-aid contracts at this time.
However, we have asked for further research to be conducted by legal counsel on this issue. Therefore, we reserve our right to revisit this issue on the basis of any future legal guidance.

If you have any questions, please contact me. Thanks!

David C. Hawk, PE
Program Operations Director
Federal Highway Administration
New Jersey Division
Phone: 609-637-4235
Fax: 609-538-4913
Email: david.hawk@fhwa.dot.gov

-----Original Message-----
From: Primitivo Cruz [mailto:Primitivo.Cruz@dot.state.nj.us]
Sent: Monday, October 04, 2004 11:03 AM
To: Hawk, David
Cc: Anthony Genovese; Deb Stevenson; Merida, Dennis
Subject: "Pay to Play"

Hi Dave,
Attached is the copy of the Executive Order in relation to "pay to play" requirements to take effect on 10/15/04. Contractors and consultants will be required for contracts in excess of $17,500 to submit with their proposal a certification that they have not made no contributions prohibited by Executive Order 134. Failure to submit the
certification shall be a cause for rejection of proposal. Prior to award
of contract, the business entity shall report all contributions made in
excess of $400.00 if any and will report on a continuing basis contributions made during the term of the contract. This is a certification we will add to the conditions & provisions of the proposal
just like the Affirmative Action clause, Non-collusive affidavit and the Buy America clause. The Department of Treasury is drafting the regulation, cerification language & the forms to implement this Executive Order. Please have your legal section review this Executive Order if it is contrary to the Federal regulations & guidelines. Thank you.
Prim

NOV 03 2004

# State of New Jersey

DEPARTMENT OF TRANSPORTATION
P.O. BOX 600
TRENTON, NJ 08625-0600

JAMES E. MCGREEVEY
*Governor*

JACK LETTIERE
*Commissioner*

October 29, 2004

2

Dennis Merida, Division Administrator
Federal Highway Administration
New Jersey Division Office
840 Bear Tavern Road, Suite 310
West Trenton, New Jersey 08628-1019

Re: NJDOT Capital Program
Executive Order #134

Dear Mr. Merida:

Since the enactment of the subject NJ Executive Order, the Department has been delaying receipt of bids for Federal-aid contracts, pending a federal position regarding its inclusion. It is our understanding based on discussions and correspondence with members of your staff that your position is largely formulated, though still informal.

The Department is therefore requesting official confirmation of your position as of this time. This would allow us to move forward and avoid further delays to the delivery of our Capital Program, while legal reviews on this matter continue. Currently there are already six Federal-aid authorized construction contracts valued at more than $70 million that are impacted by this issue, with many more to follow.

I would very much appreciate an expeditious response. Should you have any questions or comments, please feel free to contact me at 609-530-5704.

Sincerely,

F. Howard Zahn
Assistant Commissioner
Capital Program Management

**U.S. DEPARTMENT OF TRANSPORTATION**
**FEDERAL HIGHWAY ADMINISTRATION**

**New Jersey Division Office**
**840 Bear Tavern Road, Suite 310**
**West Trenton, New Jersey 08628-1019**

November 3, 2004

IN REPLY REFER TO:
HPO-NJ

3

Mr. John F. Lettiere, Jr.
Commissioner
New Jersey Department of Transportation
1035 Parkway Avenue, P.O. Box 600
Trenton, NJ 08625-0600

Dear Commissioner Lettiere:

We are receipt of Mr. F. Howard Zahn's letter, dated October 29, 2004, requesting our position on Executive Order (EO) #134. We have provided the EO to our legal counsel for an official opinion regarding any conflicts between the EO and any Federal Regulations. Based on our discussions with legal counsel, it has been determined that the EO is in conflict with Federal Regulations. Therefore, this requirement may not be included in Federal-aid contracts. Our legal counsel is preparing an official opinion documenting our position. We will provide you with further detail once this document is received.

If you have any questions, please contact Mr. David Hawk at (609) 637-4213 or me at (609) 637-4200.

Sincerely yours,

Dennis L. Merida, P.E.
Division Administrator

BC: F. Zahn, NJDOT CPM
A. Genovese, NJDOT Procurement
P. Cruz, NJDOT Procurement
V. Lemmie, ELS - Assistant Counsel
DLM, DCH, Siddiqi, RF

DCH/. (PHAWK\LETTER\EO-PAY TO PLAY.DOC)

4

State of New Jersey

DEPARTMENT OF TRANSPORTATION
1035 PARKWAY AVENUE
P.O. Box 600
Trenton, NJ 08625-0600

JAMES E. MCGREEVEY
*Governor*

JACK LETTIERE
Commissioner

November 11, 2004

Dennis L. Merida, P.E.
Division Administrator
Federal Highway Administration
840 Bear Tavern Road, Suite 310
West Trenton, New Jersey 08628-1019

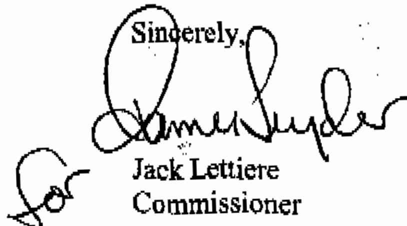
Dear Mr. Merida,

SUBJECT: EXECUTIVE ORDER 134

We previously asked for your position on Executive Order (EO) #134 as it affects DOT contracts using Federal funds. You indicated in your November 3, 2004 response to us that EO #134 is in conflict with Federal Regulations. We have since reexamined this issue and determined that EO #134 was not intended to apply to Federal contracts. Accordingly, the New Jersey Department of Transportation will not require EO #134 certifications from vendors on any projects using Federal funds. You can advise your staff that we no longer require a formal legal opinion or other detail supporting your position.

I very much appreciate your efforts, and the efforts of your staff, in providing us with prompt evaluation of this regulation. If you have any questions, please do not hesitate to contact me.

Sincerely,



for Jack Lettiere
Commissioner

## Jorgenson, Russell

**From:** Hawk, David
**Sent:** Tuesday, November 16, 2004 11:56 AM
**To:** Weiss, Michael
**Cc:** Merida, Dennis; Jorgenson, Russell; Hecox, Doug; Shaw, Alla
**Subject:** NJ Executive Order #134 - "Pay to Play"

Mike:

I just spoke to Bob Helen of Senator Corzine's Office in DC. Back in September, former NJ Governor James McGreevey signed an Executive Order (EO) requiring that the State shall not enter into an agreement with any business entity that has solicited or made contributions to a candidate committee and/or election fund of any candidate or holder of the public office of Governor, or to any State or county political party committee. The NJDOT requested our position on the EO on October 29, 2004. Based on discussions with legal counsel, we responded to the NJDOT that the EO was in conflict with Federal Regulations, and that further detail would be provided once the official opinion was received. We are still awaiting a memo from counsel.

At a hearing in the NJ Legislature yesterday, the press received our letter. Bob Helen contacted me in regards to a newspaper article on the issue printed today (please see link below). I advised him of the contents of our letter (attached), and informed him that we were still awaiting the official opinion of legal counsel for the details regarding the conflict. He asked me to fax him the letter and is very interested in the basis for our position.

John Fuller of Senator Lautenberg's office has also contacted me, and requested a copy of our letter.

I have also contacted Doug Hecox of Public Affairs since a couple of newspapers have also inquired about our position.

EO - Pay to Play.doc

The following is a link to a newspaper article in the Asbury Park Press:

http://www.app.com/app/story/0,21625,1113981,00.html

If you have any questions or need any additional information, please contact me. Thanks!

David C. Hawk, PE
Program Operations Director
Federal Highway Administration
New Jersey Division
Phone: 609-637-4235
Fax: 609-538-4913
Email: david.hawk@fhwa.dot.gov

5

CLASSIFIEDS CARS JOBS HOMES APARTMENTS
SUBSCRIBE PRESSPIX DATING SHOPPING SHORE

ASBURY PARK PRESS
THE JERSEY SHORE'S LARGEST NEWS SOURCE

Learn the facts... Horizo

BACK ISSUES »
CUST. SERVICE »
WEB EXTRAS »
STORY SEARCH »
HOME
MONMOUTH
OCEAN
STATE
SPORTS
NATION/WORLD
POLITICS
OPINION
BUSINESS
ENTERTAINMENT
JERSEY LIFE
TRAVEL
FISHING
TECHNOLOGY
SHORE
COMMUNITY
TROUBLE SHOOTER
DAY IN THE LIFE
PHOTOGRAPHY
OBITUARIES
CORRECTIONS
CONTACT US
SITE MAP

find the perfect place to eat
Properties
Reader REWARDS
CONTESTS
• Win a Grand

# Feds take issue with N.J. pay-to-play legislation

**Published in the Asbury Park Press 11/16/04**

By JONATHAN TAMARI
GANNETT STATE BUREAU

TRENTON -- A bill that would severely limit campaign contributions from state contractors narrowly passed in a Senate committee yesterday, but a letter from a federal agency raised questions about whether the proposed law complies with federal regulations.

Another bill, which would allow municipalities to enact even tougher pay-to-play legislation, also passed out of the Senate committee. The full Assembly passed that bill last evening, 75 to 2, with little debate, after adding it to its agenda late in the day.

The more controversial bill would bar any business which donates to gubernatorial candidates or state or county parties from receiving a state contract worth more than $17,500.

A Nov. 3 letter from the U.S. Department of Transportation to the state DOT said the proposed rules are "in conflict with federal regulations" and therefore cannot be applied to contracts paid wholly or in part with federal aid.

Republican lawmakers said the letter raises too many questions to move forward with the legislation, but acting Gov. Codey vowed to take the matter to court.

"There is absolutely no way I'm going to let the federal government block our efforts to ban pay-to-play in New Jersey," Codey said in a statement. "New Jersey is going to get ethics reform on my watch."

The proposed law aims to limit pay-to-play, under which companies making campaign donations are rewarded with government contracts. The longtime practice has been criticized for making government projects more costly to taxpayers.

Despite questions raised by the letter from the U.S. Department of Transportation, the proposal was passed by the Senate State Government committee yesterday. It has already passed in the Assembly and now goes to the full Senate.

The letter was sent in response to state DOT questions about former Gov. James E. McGreevey's executive order limiting pay-to-play. The order, which nonpartisan lawyers for the Legislature said may be unconstitutional because it usurped the Legislature's authority, is the basis for the bill.

Common Cause approves

Harry S. Pozycki, chairman of the good-government organization Common Cause New Jersey, called the bill a "significant move forward."

ADVERTISEMENT

Want this space?

click here for advertising info.

"(The executive order) set a foundation on which state-level public contracting reform can be built," Pozycki said. "This codification puts the foundation in cement."

But Sen. Nicholas V. Asselta, R-Cumberland, and Sen. Leonard T. Connors Jr., R-Ocean, said the bill leaves too many loopholes and unanswered questions.

"A foundation should not have a crack in it," Asselta said, "or I wouldn't buy the building."

Asselta and Connors both cited the letter from the federal government, questioning how many other departments and contracts it may apply to.

Of the $2.5 billion the state allocated for transportation funding in the 2004-05 budget, nearly $1.3 billion comes from the federal government.

Codey asked the Attorney General's Office to look into the federal concerns to see if other aid from Washington would be affected, said Codey's spokeswoman, Kelley Heck.

But Connors said any questions should be addressed now.

"What's on the front burner today will be on the back burner tomorrow," Connors said.

Asselta also criticized the bill for failing to limit "wheeling," under which county political parties circumvent fund-raising limits by funneling donations to other parts of the state.

He and Connors both abstained from the vote on restricting donations by contractors, but Democrats Nicholas P. Scutari, D-Union, Joseph S. Coniglio, D-Bergen, and Byron M. Baer, D-Bergen, voted to move it out of committee.

Copyright © 1997-2005 IN Jersey.
Use of this site signifies your agreement to the Terms of Service (updated 01/01/03).
Site design by IN Jersey / Contact us.

**Hawk, David**

| | |
|---|---|
| **From:** | Kussy, Edward |
| **Sent:** | Tuesday, November 23, 2004 5:04 PM |
| **To:** | 'kris.kolluri@dot.state.nj.us'; 'richard.harcar@dol.lps.state.nj.us' |
| **Cc:** | Gribbin, DJ; Hawk, David; Merida, Dennis; Lemmie, Vanessa |
| **Subject:** | New Jersey E.O. #134/Consistency with competition requirements of title 23, USC |

Mr. Kolluri/Mr. Harcar

Attached is the draft opinion on New Jersey Executive Order #134 and its interaction with title 23, United States Code, that we discussed last week. As we discussed, this is a draft and we providing it to you as a courtesy. Thus, we would appreciate you treating it confidentially at present.

Edward V.A. Kussy
Deputy Chief Counsel
Federal Highway Administration
202-366-0740

Revised Memo-New Jersey E.O. #...

6

DRAFT/Nov. 23, 2004 PLEASE DO NOT RELEASE

U.S. Department of Transportation
Federal Highway Administration

# Memorandum

Subject: New Jersey E.O. #134

November 18, 2004

From: Vanessa Lemmie
Senior Attorney

In Reply Refer To:
ELS-4

To: Dennis Merida, P.E.
Division Administrator

## I. Introduction

This memorandum responds to your request for an opinion as to whether New Jersey Executive Order #134 is compatible with Federal-aid highway requirements relating to competition in contracting.

## II. Issue

The specific issue raised by your office is whether the inclusion of a certification requirement that bans political campaign contributions in excess of $400 by vendors that do business with state agencies is appropriate for inclusion on Federal-aid highway projects funded pursuant to title 23, U.S.C.

## III. Background

New Jersey Executive Order #134 became effective on October 15, 2004. Executive Order #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."

## IV. Answer

Section 112 of title 23 U.S.C. mandates that competitive bidding exist for Federal-aid construction contracts. There are two exceptions that apply to the competitive bidding requirement: 1) cost-effectiveness or 2) emergency circumstances. The New Jersey Department of Transportation has not shown that it is more cost-effective to impose a certification requirement banning campaign contributions in excess of $400 by vendors that do business with state agencies on Federal-aid projects. Moreover, it has not been shown that an emergency situation exits to necessitate the implementation of the certification requirements set forth in New Jersey Executive Order #134. Since neither exception applies, New Jersey Executive Order

#134 does not comply with the requirements of 23 U.S.C. § 112 that contracts funded under title 23, U.S.C. be awarded through a competitive process.

## V. Analysis

### A. Congress has the authority to determine the terms on which it shall disburse federal money.

Congress, pursuant to its taxing and spending powers under Article I, § 8, cl.1 of the Constitution, is authorized to disburse federal funds to the states for particular programs and to "fix the terms on which it shall disburse federal money." Legislation enacted pursuant to the spending power is much in the nature of a contract. In return for federal funds the states agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power rests on whether the State voluntarily and knowingly accepts the terms of the "contract." Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981).

In Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127 (1947), the Supreme Court upheld a federal denial of highway funds to Oklahoma because of the State's failure to observe the requirements of the Hatch Act. Congress had conditioned States' receipt of federal highway funds on compliance with the Act. The Court stated: "While the United States is not concerned with, and has no power to regulate, local political activities of state officials, it does have the power to fix the terms upon which its money allotments to states shall be disbursed." Id. at 143.

### B. Competitive bidding is a basic fundamental principle of federal procurement law.

Competition is a fundamental principle of procurement law and Federal grantees must comply with this fundamental principle, the essence of which is represented by the competitive bidding system. In re: Matter of Concrete Construction Co., 1979 WL 12469 (Comp. Gen.) (1979), B-194, 077, 79-1, CPD P 405. Basic federal principles of competitive bidding are intended to produce rational decisions and fair treatment. "To the extent that a grantee's procurement decision (and the concurrence in that decision by the grantor agency) is not rationally founded, it may be considered as conflicting with a fundamental federal norm. The decision will in all likelihood, also be considered inconsistent with fundamental concepts inherent in any system of competitive bidding." Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237.

### C. Section 112 of title 23 U.S.C. requires that construction contracts must be awarded through a competitive bidding process.

The same basic fundamental principles of federal procurement law also apply to Federal-aid highway procurements. The Secretary of Transportation must withhold approval for contracts for locally administered highway construction projects funded in whole or in part by the federal government unless the contracts are awarded through competitive bidding. Section 112 of title 23 U.S.C. states that, "construction of each project ...shall be performed by a 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." This statutory requirement has been implemented through the Federal Highway Administration (FHWA) regulations at 23 C.F.R. Part 635, Subpart A.

The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition. 23 U.S.C. § 112. Detailed construction contracting procedures are contained in 23 C.F.R. Part 635, Subpart A." These regulations expressly prohibit many kinds of requirements that undermine the competitive contracting requirements 23 U.S.C. § 112. Thus, the licensing and qualification of contractors that effectively act as a barrier to competition are not permitted, nor may licensing requirements be imposed prior to the submission of bids. 23 C.F.R. § 635.110(b). Provisions that limit the amount of work that a contractor may bid upon are permitted only if they relate to the capability of the contractor to do the work. 23 C.F.R. § 635.110(c). A State may not impose geographic preferences limiting who may compete for work. 23 C.F.R. § 110(f). Local or State hiring preferences are not permitted. 23 C.F.R, § 635.117(b). All licensing and qualification requirements must be approved by FHWA. 23 C.F.R. § 635.110(a). Any such requirements that limit competition must be disapproved. 23 C.F.R. § 635.110(b). Moreover, "federal aid contracts shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting the criteria of responsibility as may have been established by the [State transportation department] in accordance with § 635.110." 23 C.F.R § 635.114(a).

Thus, it is clear that FHWA does not allow any State or local requirements that limit competition except those related directly to qualifications of contractors to the work in a competent and responsible manner. Conditions imposed by a State or local grant recipient must be examined to determine their impact on competition. Conditions that do not meet these requirements and possibly limit competition must be rejected, however laudable their purpose may be. In considering such conditions, FHWA is not limited to the express prohibitions set forth in its regulations, but must evaluate any such conditions with the purpose of effectuating the purposes of 23 U.S.C.§ 112 and its implementing regulations.

For example, FHWA has consistently disallowed grantee imposed pre-hire or project labor agreements that have the effect of limiting competition, even apart from Executive Order 13202, as amended, generally prohibiting such arrangements. See FHWA's ruling on a request by the State of Maryland to add a project labor agreement to the Woodrow Wilson Bridge project. The ruling is available on line at *http://www.fhwa.dot.gov/pressroom/fhwa0143.htm*. Additional information about the Executive Order is available at the following FHWA web sites: *http://www.fhwa.dot.gov/programadmin/contracts/pla13202.htm* and *http://www.fhwa.dot.gov/programadmin/contracts/071902.htm* .

In the early 1980s, New York City passed Local Law 19, which imposed certain disadvantages in the bidding process for city contracts on bidders who failed to sign an anti-apartheid certificate stating that they had not within the previous twelve months, and for the term of the impending contract, done business with, or bought or sold goods to certain agencies of the government of the Republic of South Africa or Namibia. The Office of Legal Counsel, United States Department of Justice, in a 1986 Legal Memorandum for FHWA, opined, "By imposing disadvantages on a certain class of responsible contract bidders, Local Law 19 discourages responsible contractors from bidding and undermines the competitive bidding process. This departure from competitive bidding procedures was not justified by considerations of cost-effectiveness as required by the Act." 10 U.S. Op. Off. Legal Counsel, 104-105.

The Office of Legal Counsel concluded that, "the application of Local Law 19 to federally funded highway projects administered by New York City would violate 23 U.S.C. § 112. 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. Accordingly, the Department of Transportation is obligated to withhold funding for highway construction contracts subject to local law 19." Id. at 103.

Disclosure of political contributions has long been accepted as a part of the campaign process. Thus, it is unlikely that mere disclosure would have a chilling effect on competition. In fact, in 1998, the Department of Transportation determined that for a Federal Aviation Administration contract, the disclosure of lobbying and political contribution efforts for the year preceding a contract bid is a reasonable means to meet the DOT's Common Rule requirement that the city assure that its contract award system performs without conflicts of interest. This is distinct from a provision that actually excludes those making otherwise legal contributions from competing for a contract.

***1. The State has made no showing that the cost–effectiveness exception to the competitive bidding requirements is applicable.***

The Surface Transportation Assistance Act of 1982, Pub. L. 97-424, 96 Stat. 2106 (1983), strengthened the competitive bidding requirement by eliminating the public interest exception and imposing the current requirement that departures from competitive bidding be justified by a demonstration by the local highway department that the alternative is more cost-effective. The legislative report accompanying the amendment reflects the concern of Congress that cost-effectiveness be the only criterion by which to award contracts to responsible bidders for highway products funded by the federal government. See H.R. Rep. No 555, 97th Cong., 2d Sess.11 (1982).

"The 1982 amendments make it clear that the efficient use of federal funds is the touchstone by which the legality of state procurement rules for federally funded highway projects is tested". Office of Legal Counsel, U.S. Department of Justice, Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements, 10 U.S. Op. Off. Legal Counsel 101, 104 (June 30, 1986). The Department of Justice stated that, "only a process, which strictly adheres to the competitive bidding requirement, comports with Congress' overriding objective of cost-effectiveness by maximizing the number of contractors who will be let for the lowest possible price". Id. at 106-07. (Anti-apartheid certificate)

The State has failed to offer any evidence that would invoke an analysis as to why FHWA should depart from the Federal-aid highway competitive bidding requirements and apply the cost-effectiveness exception as set forth above. There is absolutely no evidence as to why it is more cost-effective to impose a certification requirement banning campaign contributions by vendors that do business with state agencies on Federal-aid projects. It should be noted that FHWA takes its responsibility to weigh the potential impact of any restrictions on the competitive bidding process seriously. Thus, in the case of the project labor agreements being considered for the Woodrow Wilson Bridge project mentioned above, FHWA engaged in

extensive fact finding and significant analysis before determining that Maryland had failed to show the proposed requirement was not anti-competitive. The burden of proof was on the State of Maryland, as it sought to impose the restrictive requirement. See the web sites referenced above.

***2. The State has made no showing that the emergency circumstances exception to the competitive bidding process is applicable.***

Federal statues except government purchases of and contracts for supplies or services from the requirement of competitive bidding when the public exigencies require immediate delivery of an article or performance of a service. 41 U.S.C.A. § 5. War, for example, creates a "public exigency" within the meaning of such exceptions. See American Smelting & Refining Co. v. U.S. 259 U.S.75, 42 S. Ct 420 (1922). The term "emergency" in this connection signifies a situation that has suddenly and unexpectedly arisen and that requires speedy action. Id. at 78. Many provisions requiring competitive bidding for public contracts and the letting of such contracts to low bidders contain express exemptions where an emergency requires speedy action or prompt performance of a contract, or the contract is "for actual emergency work." Id. See also, Safford v. City of Lowell, 255 Mass. 220, 151 N.E. 111 (1926).

The State has failed to make a showing that an emergency circumstance exists which would warrant FHWA's departure from the Federal-aid highway competitive bidding requirements. The State has not offered evidence that speedy or prompt performance of a contract is needed for any reason.

**D. New Jersey Executive Order #134 does not comply with Federal-aid highway procurement requirements.**

We understand that the intent of the language of Executive Order #134 is to protect the integrity of governmental contractual decisions and improve the public's confidence in government. As set forth in the preceding sections of this Memorandum the intent behind ensuring integrity in contractual decisions is supported by federal law and regulations. However, when that intent, no matter how laudable, undermines the competitive bidding process, the provision must fall in the face of the overriding Federal requirements that protect the competitive process.

Executive Order #134 states 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". This requirement, in particular, is troublesome because it thwarts efforts to ensure that a competitive bidding process occurs. There is absolutely no assurance that, with the designated pool of applicants removed as proposed by the New Jersey Department of Transportation, that the Federal Highway Administration will obtain services at the lowest possible cost. Congress has expressed an interest in the government obtaining services at the lowest possible cost. See Hazardous Waste Treatment Council v. U.S. EPA, 861 F. 2d 277, 283 (1988).

In evaluating a certification requirement as it relates to the Federal-aid highway competitive bidding requirements, FHWA evaluates the nature of the restriction and the impact of the conditions. For example, FHWA evaluated whether the State's proposed exclusions were based on an illegal activity or some other illegal action by the contractor. We agree that 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. As indicated above, State requirements that by their own terms do not exclude participation in the competitive bidding process may also be allowed. That is why we suggested that a mere disclosure requirement of political contribution would not be, in this instance, considered a violation 23 U.S.C. § 112.

As it stands, the New Jersey Department of Transportation has not shown that it is a more cost-effective alternative to impose a certification requirement banning campaign contributions by vendors that do business with state agencies on Federal-aid projects. Moreover, in the instant case, there has not been a declaration of emergency that would dispense of competitive bidding requirements.

**VI. Conclusion**

Executive Order #134 does not comply with Federal-aid highway procurement law in general and specifically with title 23 U.S.C. §112's requirement that all contracts be awarded through a competitive bidding process.

JAN 0 5 2005

RICHARD J. CODEY
ACTING GOVERNOR

JACK LETTIERE
COMMISSIONER

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION
1035 PARKWAY AVENUE
P.O. BOX 601
TRENTON, N.J. 08625-0601
609-530-3535

January 5, 2005

7

Dennis L. Merida, P.E.
Division Administrator
Federal Highway Administration
840 Bear Tavern Road, Suite 310
West Trenton, NJ 08628-1019

Dear Administrator Merida:

Since December, 2004, the New Jersey Department of Transportation has not received federal authorization for any new construction projects. I respectfully request an explanation for the withholding of authorization for these projects.

Sincerely,

Jack Lettiere
Commissioner

**U.S. DEPARTMENT OF TRANSPORTATION**
**FEDERAL HIGHWAY ADMINISTRATION**

**New Jersey Division Office**
**840 Bear Tavern Road, Suite 310**
**West Trenton, New Jersey 08628-1019**

January 6, 2005

IN REPLY REFER TO:
HDA-NJ

8

Mr. John F. Lettiere, Jr.
Commissioner
New Jersey Department of Transportation
1035 Parkway Avenue, P.O. Box 600
Trenton, New Jersey 08625-0600

Dear Commissioner Lettiere:

Your January 5 letter requested an explanation as to why no projects have been authorized for Federal funding since December.

As I advised you in my November 2 letter, Executive Order # 134 conflicts with Federal regulations and may not be included in Federal-aid contracts. Federal Highway Administration's Chief Counsel has confirmed this position. Unless this provision is removed from Federal projects, we cannot authorize Federal funds.

If you need any additional information, please give me a call at 609-637-4200.

Sincerely yours,

DENNIS L. MERIDA

Dennis L. Merida, P.E.
Division Administrator

cc: Merida, Jorgenson, Hawk w/incoming letter

(LTR-JACK LETTIERE – EO-PAY TO PLAY-010605.DOC)

## Hawk, David

**From:** Hawk, David
**Sent:** Thursday, January 13, 2005 4:42 PM
**To:** 'James.Snyder@dot.state.nj.us'
**Cc:** Merida, Dennis; Jorgenson, Russell; Henry, Patricia
**Subject:** FW: N.J. E.O #134

Jim:

Please find, attached below, a Memorandum from legal counsel regarding New Jersey Executive Order #134. An official letter transmitting this document will follow. As referenced in Dennis's January 6 letter, this memo verifies our position.

If you have any questions, please contact either Dennis, Russ, or me.

Thanks!

-----Original Message-----
**From:** Thomas, Lavinia
**Sent:** Thursday, January 13, 2005 3:35 PM
**To:** Merida, Dennis; Jorgenson, Russell; Hawk, David
**Cc:** Lemmie, Vanessa
**Subject:** N.J. E.O #134

9

Please click on the attachment to retrieve a Memorandum on N.J. E.O. #134.

Final Version E.O. #134.pdf

**U.S. DEPARTMENT OF TRANSPORTATION**
FEDERAL HIGHWAY ADMINISTRATION

**New Jersey Division Office**
**840 Bear Tavern Road, Suite 310**
**West Trenton, New Jersey 08628-1019**

January 14, 2005

IN REPLY REFER TO:
HEC-NJ

10

Mr. John F. Lettiere, Jr.
Commissioner
New Jersey Department of Transportation
1035 Parkway Avenue, P.O. Box 600
Trenton, NJ 08625-0600

Dear Commissioner Lettiere:

Please find, attached, a memorandum from Legal Counsel regarding New Jersey Executive Order (EO) #134. This memorandum confirms our position as stated in our letter dated January 6, 2005. Unless this provision is removed from Federal projects, we cannot authorize Federal funds.

If you need any additional information, please give me a call at 609-637-4200.

Sincerely yours,

Russell L. Jorgenson, P.E.
Assistant Division Administrator

CC: Merida, Jorgenson, Hawk w/ memo

DCH\ (P:\HAWK\LETTERS\EO – PAY TO PLAY LEGAL OP.DOC)

# Memorandum

Subject: New Jersey E.O. #134

January 7, 2005

From: Senior Attorney
Eastern Legal Services

In Reply Refer To:
ELS-4

To: Dennis Merida, P.E.
Division Administrator

## I. Introduction

This memorandum responds to your request for an opinion as to whether New Jersey Executive Order #134 is compatible with Federal-aid highway requirements relating to competition in contracting.

## II. Issue

The specific issue raised by your office is whether the inclusion of a certification requirement that bans political campaign contributions by vendors that do business exceeding a contract or transaction amount of $17,500 with New Jersey state agencies is appropriate for inclusion on Federal-aid highway projects funded pursuant to title 23, U.S.C.

## III. Background

New Jersey Executive Order #134 became effective on October 15, 2004. Executive Order #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." [1] The Executive Order also states that, "The State or any of

[1] New Jersey Senate Bill No. 2 of 2004 became P.L. 2004, c.19 on June 16, 2004. This law will become effective on January 1, 2006. It articulates New Jersey's public policy with regard to the relationship between State contracts and political contributions by contracting parties commonly known as "pay to play." P.L. 2004, c.19 provides that a state agency in an Executive Branch will not enter into a contract having an anticipated value in excess of $17,500 with a business entity, except a contract that is awarded pursuant to a fair and open process, if during the preceding one-year period that business entity has made a contribution reportable under "The New Jersey Campaign Contributions and Expenditures Reporting Act," N.J.S.A. 19:44A-1 et seq., to the State committee of the political party of which the Governor, serving when the contract is awarded, is a member or to any candidate committee of that Governor. Both Executive Order #134 and P.L. 2004, c.19 address State contracts in excess of $17,500, provide that contracting entities may not make certain political contributions during the term of a contract, and offer a process by which a contracting entity can return a prohibited contribution in order to become eligible for a contract. Executive Order #134 goes further because it expands the range of State contracts affected, from contracts not awarded pursuant to a fair and open process, to all State contracts and the Executive Order increases the time

its purchasing agents or agencies or those of its independent authorities, as the case may be, shall not enter into an agreement or otherwise contract 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…"

IV. Answer

Section 112 of title 23 U.S.C. mandates that competitive bidding exist for Federal-aid construction contracts. This means that potential bidders may not be excluded from the competitive process for reasons not directly related to their responsibility. The Secretary may allow exceptions from this competitive bidding requirement only if a State can demonstrate that (1) some other method is more cost-effective or (2) an emergency exists. As is discussed further below, however well motivated, the certification requirement banning campaign contributions as defined as a contribution reportable by the recipient under "The New Jersey Campaign Contributions and Expenditures Reporting Act," P.L. 1973, c.83 (C.19:44A-1 et seq.) by vendors that do business with state agencies on Federal-aid projects is not directly related to the responsibility of the bidders. Thus, in order for us to be able to allow this requirement on Federal-aid highway contracts, the New Jersey Department of Transportation must show it is more cost-effective or that an emergency situation exits that necessitates the implementation of the certification requirements set forth in New Jersey Executive Order #134. To date, no such showing has been made.

V. Analysis

**A. Congress has the authority to determine the terms on which it shall disburse federal money.**

Congress, pursuant to its taxing and spending powers under Article I, § 8, cl.1 of the Constitution, is authorized to disburse federal funds to the states for particular programs and to "fix the terms on which it shall disburse federal money." Legislation enacted pursuant to the spending power is much in the nature of a contract. In return for federal funds the states agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power rests on whether the State voluntarily and knowingly accepts the terms of the "contract." Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981).

In Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127 (1947), the Supreme Court upheld a federal denial of highway funds to Oklahoma because of the State's failure to observe the requirements of the Hatch Act. Congress had conditioned States' receipt of federal highway funds on compliance with the Act. The Court stated: "While the United States is not concerned with, and has no power to regulate, local political activities of state officials, it does have the power to fix the terms upon which its money allotments to states shall be disbursed." Id.

---

period during which contributions are prohibited. The potential number of business entities affected by Executive Order #134 is significantly larger than those entities affected by P.L. 2004, c.19.

at 143. See also, South Dakota v. Dole, 483 U.S. 203 (1987), upholding the validity of a grant condition requiring the States to adopt a 21 minimum age drinking requirement.

**B. Competition is a basic fundamental principle of federal procurement law that also applies to recipients of federal grants.**

Competition is a fundamental principle of procurement law and Federal grantees must comply with this fundamental principle, the essence of which is represented by the competitive bidding system. In re: Matter of Concrete Construction Co., 1979 WL 12469 (Comp. Gen.) (1979), B-194, 077, 79-1, CPD P 405. Basic federal principles of competitive bidding are intended to produce rational decisions and fair treatment. "To the extent that a grantee's procurement decision (and the concurrence in that decision by the grantor agency) is not rationally founded, it may be considered as conflicting with a fundamental federal norm. The decision will in all likelihood also be considered inconsistent with fundamental concepts inherent in any system of competitive bidding." Copeland Systems, Inc., 55 Comp. Gen. 390 (1975). 75-2 CPD 237.

The Brooks Act, P.L. 92-582, 92nd Congress, H.R. 12807, (October 27, 1972) amends the Federal Property and Administrative Services Act of 1949, U.S.C. 471 et seq. The Brooks Act establishes federal policy concerning the selection of firms and individuals to perform architectural, engineering and related services for the Federal Government. Title IX addresses the selection of architects and engineers and such other professional services of an architectural or engineering nature performed by contract and associated with areas including, but not limited to, research, planning, development, design, studies, investigations, surveying, tests, evaluations, consultations, and engineering. Section 902 states that, "The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices." The intent of the Brooks Act is to develop a wide pool of potential service providers for the selection process.

**C. Section 112 of title 23 U.S.C. requires that construction related contracts must be awarded through a competitive process.**

The fundamental principles to ensure fair and open competition apply even more strongly to Federal-aid highway procurements. The Secretary of Transportation must withhold approval for contracts for locally administered highway construction projects funded in whole or in part by the federal government unless the contracts are awarded through competitive bidding. Section 112 of title 23 U.S.C. states that, "construction of each project ...shall be performed by a 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." This statutory requirement has been implemented through the Federal Highway Administration (FHWA) regulations at 23 C.F.R. Part 635, Subpart A.

The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition. 23 U.S.C. § 112. Detailed construction contracting procedures are contained in 23 C.F.R. Part 635, Subpart A." FHWA's regulations expressly prohibit many kinds of requirements that undermine the competitive contracting requirements 23

U.S.C. § 112. Thus, the licensing and qualification of contractors that effectively act as a barrier to competition are not permitted, nor may licensing requirements be imposed prior to the submission of bids. 23 C.F.R. § 635.110(b). Provisions that limit the amount of work that a contractor may bid upon are permitted only if they relate to the capability of the contractor to do the work. 23 C.F.R. § 635.110(c). A State may not impose geographic preferences limiting who may compete for work. 23 C.F.R. § 110(f). Local or State hiring preferences are not permitted. 23 C.F.R. § 635.117(b). All licensing and qualification requirements must be approved by FHWA. 23 C.F.R. § 635.110(a). Any such requirements that limit competition must be disapproved. 23 C.F.R. § 635.110(b). Moreover, "federal -aid contracts shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting the criteria of responsibility as may have been established by the [State transportation department] in accordance with § 635.110." 23 C.F.R § 635.114(a).

The Brooks Act applies to contracting for engineering and design services. 23 U.S.C. § 112(b)(2). FHWA regulations implementing this provision also include strong competition principles. Selection should be made on the basis of qualifications related to the ability of the contractors to do the work at a fair and reasonable price. 23 C.F.R. § 172.5.

The Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 49 C.F.R. § 18.36 (DOT's Common Rule Requirements) provides that when procuring property and services under a grant the State will ensure that every contract include any clauses required by Federal statutes. Specifically, § 18.36 (c)(1) states that, "All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 18.36." Some of the situations considered to be restrictive of competition include but are not limited to: (i) placing unreasonable requirements on firms in order for them to qualify to do business, or (vii) any other arbitrary action in the procurement process.

The guiding principle of these regulations is that the competitive process should not be undermined by state-imposed conditions unrelated to the contract itself that limit those who can bid or provide advantages to certain classes of potential bidders. FHWA does not allow any State or local requirements that limit competition except those related directly to qualifications of contractors to do the work in a competent and responsible manner. This has been a consistent and longstanding construction of the statute. Conditions imposed by a State or local grant recipient must be examined to determine their impact on competition. The burden of showing that a particular condition is not anticompetitive is on the State seeking to impose the condition, and, as noted below, this burden can be quite onerous. Conditions that do not meet these requirements and possibly limit competition must be rejected, however laudable their purpose may be. In considering such conditions, FHWA is not limited to the express prohibitions set forth in its regulations, but must evaluate any such conditions with the purpose of effectuating the purposes of 23 U.S.C.§ 112 and its implementing regulations.

For example, FHWA has consistently disallowed grantee imposed pre-hire or project labor agreements that have the effect of limiting competition, even apart from Executive Order 13202, as amended, generally prohibiting such arrangements. See FHWA's ruling on a request by the State of Maryland to add a project labor agreement to the Woodrow Wilson Bridge project. The ruling is available on line at *http://www.fhwa.dot.gov/pressroom/fhwa0143.htm*. Additional information about the Executive Order is available at the following FHWA web sites:

*http://www.fhwa.dot.gov/programadmin/contracts/pla13202.htm* and
*http://www.fhwa.dot.gov/programadmin/contracts/071902.htm*.

In the early 1980s, New York City passed Local Law 19, which imposed certain disadvantages in the bidding process for city contracts on bidders who failed to sign an anti-apartheid certificate stating that they had not within the previous twelve months, and for the term of the impending contract, done business with, or bought or sold goods to certain agencies of the government of the Republic of South Africa or Namibia. The Office of Legal Counsel, United States Department of Justice, in a 1986 Legal Memorandum for FHWA, opined, "By imposing disadvantages on a certain class of responsible contract bidders, Local Law 19 discourages responsible contractors from bidding and undermines the competitive bidding process. This departure from competitive bidding procedures was not justified by considerations of cost-effectiveness as required by the Act." 10 U.S. Op. Off. Legal Counsel. 104-105.

The Office of Legal Counsel concluded that, "the application of Local Law 19 to federally funded highway projects administered by New York City would violate 23 U.S.C. § 112. 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. Accordingly, the Department of Transportation is obligated to withhold funding for highway construction contracts subject to local law 19." Id. at 103.

*1. The State must show that the any departure from the competitive bidding requirements is more cost-effective.*

The State has the affirmative responsibility to demonstrate that any condition or modification it may wish to impose that raises potential barriers to competition or potentially reduces the number of competitors is more cost effective than the general applicable requirements of the law and implementing regulations. More specifically, New Jersey must provide evidence as to why it is more cost-effective to impose a certification requirement banning campaign contributions by vendors that do business with state agencies on federal-aid projects.

The strength of this requirement of the law is clear. This was emphasized in 1982, when the Surface Transportation Assistance Act of 1982, Pub. L. 97-424, 96 Stat. 2106 (1983), strengthened the competitive bidding requirement by eliminating the public interest exception and imposing the current requirement that departures from competitive bidding be justified by a demonstration by the local highway department that the alternative is more cost-effective. The legislative report accompanying the amendment reflects the concern of Congress that cost-effectiveness be the only criterion by which to award contracts to responsible bidders for highway products funded by the federal government. See H.R. Rep. No 555, 97th Cong., 2d Sess.11 (1982).

"The 1982 amendments make it clear that the efficient use of federal funds is the touchstone by which the legality of state procurement rules for federally funded highway projects is tested". Office of Legal Counsel, U.S. Department of Justice, Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements, 10 U.S. Op. Off. Legal Counsel 101, 104 (June 30, 1986). The Department of Justice stated that, "only a process, which strictly adheres to the competitive bidding requirement, comports with Congress' overriding objective of cost-effectiveness by maximizing the number of contractors who will be let for the lowest possible price". Id. at 106-07. (Anti-apartheid certificate)

FHWA takes this charge seriously, and the burden of showing that a particular provision is, in fact, more cost effective can be significant. For example, in the case of the project labor agreements being considered for the Woodrow Wilson Bridge project mentioned above, FHWA engaged in extensive fact finding and significant analysis before determining that Maryland had failed to show the proposed requirement was not anti-competitive. The burden of proof was on the State of Maryland, as it sought to impose the restrictive requirement. In spite of extensive study, Maryland was ultimately unable to make its case. See the web sites referenced above.

It should be noted that FHWA does examine provisions carefully to assess their impact on competition. Conditions that do not bar competitors or that are found to be reasonable under the circumstances can be allowed. For example, the New Jersey Executive Order #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." New Jersey might consider a less onerous requirement. For example, if the State chose to implement a disclosure requirement instead of the requirements set forth in Executive Order #134 the State could still address its conflict of interest and contractor integrity concerns. A mere disclosure would not have a chilling effect on competition. In fact, in 1998, the Department of Transportation determined that for a Federal Aviation Administration contract, the disclosure of lobbying and political contribution efforts for the year preceding a contract bid is a reasonable means to meet the DOT's Common Rule requirement that the city assure that its contract award system performs without conflicts of interest. This is distinct from a provision that actually excludes those making otherwise legal contributions from competing for a contract.

*2. Alternatively, the State must show that the emergency circumstances exception to the competitive bidding process is applicable.*

Federal statues except government purchases of and contracts for supplies or services from the requirement of competitive bidding when the public exigencies require immediate delivery of an article or performance of a service. 41 U.S.C.A. § 5. War, for example, creates a "public exigency" within the meaning of such exceptions. See American Smelting & Refining Co. v. U.S. 259 U.S. 75, 42 S. Ct 420 (1922). The term "emergency" in this connection signifies a situation that has suddenly and unexpectedly arisen and that requires speedy action. Id. at 78. Many provisions requiring competitive bidding for public contracts and the letting of such contracts to low bidders contain express exemptions where an emergency requires speedy action or prompt performance of a contract, or the contract is "for actual emergency work." Id. See also, Safford v. City of Lowell, 255 Mass. 220, 151 N.E. 111 (1926).

A State wishing to make use of this exception must show that an emergency circumstance exists which would warrant FHWA's departure from the Federal-aid highway competitive

bidding requirements. The State must offer evidence that speedy or prompt performance of a contract is needed.

VI. Conclusion

We understand that the intent of the language of Executive Order #134 is to protect the integrity of governmental contractual decisions and improve the public's confidence in government. As set forth in the preceding sections of this Memorandum the intent behind ensuring integrity in contractual decisions is supported by federal law and regulations. However, when that intent, no matter how laudable, undermines the competitive bidding process, the provision must fall in the face of the overriding Federal requirements that protect the competitive process.

As mentioned earlier, Executive Order #134 states 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". This requirement, in particular, is troublesome because it thwarts efforts to ensure that a competitive bidding process occurs. There is absolutely no assurance that, with the designated pool of applicants removed as proposed by the New Jersey Department of Transportation, that the Federal Highway Administration will obtain services at the lowest possible cost. Congress has expressed an interest in the government obtaining services at the lowest possible cost. See Hazardous Waste Treatment Council v. U.S. EPA, 861 F. 2d 277, 283 (1988).

In evaluating a certification requirement as it relates to the Federal-aid highway competitive bidding requirements, FHWA evaluates the nature of the restriction and the impact of the conditions. For example, FHWA evaluated whether the State's proposed exclusions were based on an illegal activity or some other illegal action by the contractor. We agree that 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. As indicated above, State requirements that by their own terms do not exclude participation in the competitive bidding process may also be allowed. That is why we suggested that a mere disclosure requirement of political contribution would not be, in this instance, considered a violation of 23 U.S.C. § 112.

As it stands, the New Jersey Department of Transportation has not shown that it is a more cost-effective alternative to impose a certification requirement banning campaign contributions by vendors that do business with state agencies on Federal-aid projects. New Jersey has not made any assertion, let alone a showing, that the certification is based on an emergency.

Vanessa Lemmie

:itation Found Document Rank 1 of 1 Database
.0 U.S. Op. OLC 101 USAG
.0 U.S. Op. Off. Legal Counsel 101, 1986 WL 213242 (O.L.C.)
**(Cite as: 10 U.S. Op. Off. Legal Counsel 101)**

11

Office of Legal Counsel
U.S. Department of Justice
COMPATIBILITY OF NEW YORK CITY LOCAL LAW 19 WITH FEDERAL HIGHWAY ACT
COMPETITIVE BIDDING REQUIREMENTS
June 30, 1986

***101** New York City Local Law 19, which allows bidders who do not make the lowest bid to be awarded contracts in cases where the lowest bidder has not signed an anti-apartheid certificate, is incompatible with s 112 of the Federal Aid Highway Act, which requires that contracts for federally funded highway projects be awarded on the basis of competitive bidding. The Department of Transportation is therefore obligated to withhold funding for such contracts awarded subject to Local Law 19.

When Congress elects to distribute federal funds to states it may attach conditions to their distribution and, so long as those conditions are valid and clearly expressed, a state has no sovereign right to obtain or retain those federal funds without complying with the stated conditions. The Act's conditioning of federal highway construction grants on compliance with competitive bidding requirements is valid and clearly expressed.

By imposing disadvantages on a class of responsible contract bidders, Local Law 19 discourages responsible contractors from bidding and undermines the competitive bidding process. This departure from competitive bidding procedures was not justified by considerations of cost-effectiveness, as required by the Act.

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF TRANSPORTATION

I. Introduction and Summary

This memorandum responds to your request for the opinion of the Attorney General on the question whether the Secretary of Transportation must withhold approval for payments under the Federal Aid Highway Act (Act) for any contract which has been awarded pursuant to a bidding process subject to New York City Local Laww 19 (Local Law 19). [FN1] Section 112 of the Federal Aid Highway Act of 1958, as amended, 23 U.S.C. s 112, requires the Secretary to withhold approval for contracts for locally administered highway construction projects funded in whole or in part by the federal government unless the contracts are awarded through competitive bidding.

The provisions of Local Law 19 impose certain disadvantages in the bidding process for city contracts on bidders who fail to sign an anti-apartheid certificate stating that they have not, within the previous twelve months and for the ***102** term of the impending contract, done business with, and have neither bought from nor sold goods to certain agencies of the government of the Republic of South Africa or Namibia. Moreover, in the case of a contract to supply goods, the City requires the contractor to certify that none of the goods to be supplied to the City originated in South Africa or Namibia. 13 N.Y.C. Code s 343.11.0(a). [FN2] These certification conditions are not required by any federal law or executive order. [FN3]

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Section 343.11.0(b) provides that if a bidder complying with the anti-apartheid certification makes a bid no more than five percent higher than a low bid submitted by a non-complying contractor, both bids are to be passed on to the New York Board of Estimate which "may determine that it is in the public interest that the contract shall be awarded to other than the lowest responsible bidder." [FN4] New York City has declared that it will apply Local Law 19 to federally funded projects.

***103** We conclude that application of Local Law 19 to federally funded highway projects administered by New York City would violate 23 U.S.C. s 112. 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. Accordingly, the Department of Transportation is obligated to withhold funding for highway construction contracts subject to Local Law 19. [FN5]

II. Analysis

Under the Supremacy Clause, [FN6] state or local action must give way to federal legislation passed pursuant to one of Congress' enumerated powers where the "act of Congress fairly interpreted is in actual conflict with the law of the State" or state subdivision. Florida Lime & Avocado, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). It is well- settled that Congress, pursuant to its taxing and spending powers under Article I, s 8 of the Constitution, is authorized to disburse federal funds to the states for particular programs and to "fix the terms on which it shall disburse federal money." Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). Accordingly, when Congress elects to distribute federal funds to states, it may attach conditions to their distribution. So long as the conditions are valid and clearly expressed, id., "requiring States to honor their obligations voluntarily assumed as a condition of federal funding . . . simply does not intrude on their sovereignty." Bell v. New Jersey, 461 U.S. 773, 790 (1983). "If the conditions are valid, the State has no sovereign right to retain federal funds without complying with those conditions." Id. at 791.

***104** The Supreme Court has specifically upheld Congress' attachment of conditions to the distribution of federal highway funds. In Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127 (1947), the Court upheld a federal denial of highway funds to Oklahoma because of the state's failure to observe the requirements of the Hatch Act. Congress had conditioned states' receipt of federal highway funds on compliance with that Act. The Court stated: "While the United States is not concerned with, and has no power to regulate, local political activities of state officials, it does have the power to fix the terms upon which its money allotments to states shall be disbursed." Id. at 143.

New York City does not dispute that the competitive bidding conditions imposed by s 112 of the Federal Aid Highway Act are valid exercises of the congressional spending power and conditions which DOT is therefore obligated to enforce.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Careful examination reveals that Local Law 19 is in clear conflict with these conditions. [FN7]

Section 112 applies to all highway projects using federal funds "where construction is to be performed by the State highway department or under its supervision." 23 U.S.C. s 112(b). [FN8] The first two sentences of s 112(b) provide:

> Construction of each project . . . shall be performed by contract awarded by competitive bidding, unless the State highway department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective. 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. [FN9]

A version of this provision has governed the process for awarding highway contracts since 1954, when the Senate insisted on amending the Federal Aid ***105** Highway Act of 1954 to require competitive bidding "unless the Secretary finds some other method is in the public interest." Pub. L. No. 83-350, s 17, 68 Stat. 71 (1954). [FN10]

The Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2106 (1983), strengthened the competitive bidding requirement by eliminating the public interest exception and imposing the current requirement that departures from competitive bidding be justified by a demonstration by the local highway department that the alternative is more cost-effective. The legislative report accompanying the amendment reflects the concern of Congress that cost-effectiveness be the only criterion by which to award contracts to responsible bidders for highway projects funded by the federal government. See H.R. Rep. No. 555, 97th Cong., 2d Sess. 11 (1982). The 1982 amendments therefore make clear that the efficient use of federal funds is the touchstone by which the legality of state procurement rules for federally funded highway projects is to be tested.

Local Law 19 contravenes the clear requirement of s 112 that all contracts be awarded through a process of competitive bidding to the responsible bidder who submits the lowest bid; the local ordinance frustrates the manifest congressional mandate reflected in the statute and its legislative history to make the most cost-effective use of federal highway funds. [FN11] By imposing disadvantages on a certain class of contractors, New York City discourages responsible contractors from bidding and undermines the competitive bidding process. [FN12] New York City has failed to justify, as required by the statute, its departure from competitive bidding procedures by considerations of cost- effectiveness. [FN13]

***106** New York City has attempted to defend the legality of its ordinance by observing that all contractors that have bid for its contracts have furnished the anti-apartheid certificate and that there is no evidence that any potential bidder would not be able to comply with the requirement. Thus, the City argues that its anti-apartheid certification requirement has not been shown to affect adversely the efficient use of federal funds. This argument is unavailing, however, because it attempts to reverse the burden of proof that s 112 requires to justify departures from competitive bidding. In order to satisfy this burden, New York City must demonstrate that its procedures lead to a more cost-effective use of federal funds; it cannot shift the burden to the Secretary of

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Transportation to demonstrate that the City's procedures detract from cost-effectiveness. [FN14]

Second, New York City argues that its ordinance does not violate s 112 because it is not an absolute bar to the award of contracts to contractors who submit the lowest bid for a project but fail to provide an anti-apartheid certificate. According to the provisions of Local Law 19, a non-complying bidder is awarded the contract unless a complying bidder is within five percent of the low bid. Moreover, New York City emphasizes that even when there is less than a five percent differential between a complying and non- complying bidder, the Board of Estimate must still vote by a two-thirds majority to award the contract to the complying bidder rather than the non-complying bidder. The short answer to this argument is that s 112 requires that the contracts be awarded through a process of competitive bidding, not simply that contracts be awarded by a process that may lead to the award of the contract to the lowest bidder. This distinction is important, because the knowledge that a contract will be awarded through a strict process of competitive bidding in itself contributes to the cost- effective use of federal funds by encouraging the submission of bids by contractors who might not otherwise participate. Conversely, a contractor's knowledge that he may submit the low bid and yet not win the contract would deter him from entering the bidding process and incurring bid preparation costs. [FN15] Only a process which strictly adheres to the competitive bidding requirement comports with Congress' overriding objective of cost- effectiveness ***107** by maximizing the number of contractors who will bid for the contract and increasing the likelihood that the contract will be let for the lowest possible price. [FN16]

Since the provisions of Local Law 19 conflict with the requirement of competitive bidding contained in s 112(b), it is clear that 23 U.S.C. s 112(d) requires the Secretary to withhold approval for contracts let subject to the provisions of Local Law 19.

For the foregoing reasons, we believe that the Secretary of Transportation is obligated to withhold federal funds under the Federal Aid Highway Act for the payment of contracts whose award is subject to the procurement provisions of Local Law 19.

Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

FN1 The Attorney General has delegated his responsibility for rendering opinions to government agencies to the Assistant Attorney General, Office of Legal Counsel. 28 C.F.R. s 0.25.

FN2 Section 343.11.0(a) provides:

With respect to contracts described in subdivision b and c of this section, and in accordance with such provisions, no city agency shall contract for the supply of goods or services with any person who does not agree to stipulate to the following as material conditions of the contract if there is another person who will contract to supply goods or services of comparable quality at the comparable price:

(1) that the contractor and its substantially owned subsidiaries have not within the twelve months prior to the award of such contact sold or agreed to sell, and shall not during the term of such contract sell or agree to sell, goods

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

or services other than food or medical supplies directly to the following agencies of the South African government or directly to a corporation owned or controlled by such government and established expressly for the purpose of procuring such goods and services for such specific agencies: (a) the police, (b) the military, (c) the prison system, or (d) the department of cooperation and development; and

(2) in the case of a contract to supply goods, that none of the goods to be supplied to the city originated in the Republic of South Africa or Namibia.

Although the term "comparable price" in this section is not defined, s 343.11.0(b) makes clear that an agency must refer any contract in which a complying bid is within five percent of a non-contract bid to the Board of Estimate, which will make the final decision as to its award.

FN3 Executive Order No. 12532 forbids government agencies from providing export aid to corporations doing business in South Africa unless they certify that they are adhering to certain principles of nondiscrimination with respect to their employees. The order also forbids the supply of computers to certain South African agencies but contains no general prohibition against contracting with these agencies. See 21 Weekly Comp. Pres. Doc. at 1051-54 (Sept. 9, 1985).

FN4 Section 343.11.0(b) provides:

In the case of contracts subject to public letting under sealed bids pursuant to section 343 of the charter, whenever the lowest responsible bidder has not agreed to stipulate to the conditions set forth in subdivision a of this section and another bidder who has agreed to stipulate to such conditions has submitted a bid within five percent of the lowest responsible bid for a contract to supply goods or services of comparable quality, the contracting agency shall refer such bids to the board of estimate which, pursuant to such rules as it may adopt, and in accordance with subdivision b of section 343 of the charter, may determine that it is in the public interest that the contract shall be awarded to other than the lowest responsible bidder.

Section 343 of the N.Y.C. Charter requires a two- thirds vote and the approval of the corporation counsel and the comptroller before any such decision is made. New York City observes that s 343 of the charter applies to all contracts for goods and services exceeding $5,000 and thus allows the Board of Estimate to award contracts to contractors other than the low bidder regardless of the applicability of Local Law 19. Therefore, New York City argues, Local Law 19 cannot be deemed to violate s 112, because it does no more than refer certain contracts for consideration under a standing procedure to which the Secretary of Transportation has not heretofore objected. The short answer to this argument is that the Secretary is not disabled from challenging the application of a provision to federal contracts which has not been brought to her attention previously. While the issue of the legality of s 343, considered by itself, is not directly before us, we believe that its application to federally funded highway projects would raise many of the same issues as does application of Local Law 19. We note, however, that Local Law 19 is different from s 343 in that it singles out a specific group of contractors and declares that, in certain circumstances, their low bids must be referred to the Board of Estimate for potential disapproval. Therefore, the Secretary is wholly justified in being more concerned about Local Law 19 than s 343, because the latter does not single out a

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

particular class of contracts for mandatory reference to the Board of Estimate.

FN5 This Office has been informed that legislation is being considered by Congress that would direct the Secretary to approve payments under the Federal Aid Highway Act for contracts entered by New York City before October 1, 1986, regardless of the application of Local Law 19. The stated purpose of this legislation is to provide time for the Department of Justice to render an opinion on the issue of thee legality of the application of Local Law 19 to federal programs. Our opinion, of course, considers the legality of Local Law 19 under existing federal law and does not purport to evaluate the effect of pending legislation on the Secretary's obligation or authority to withhold approval for New York City highway construction projects using federal funds.

FN6 U.S. Const. art. VI, s 2.

FN7 Because our opinion rests on the actual conflict between Local Law 19 and 23 U.S.C. s 112, we need not reach the question whether application of Local Law 19 to federally funded projects impermissibly burdens foreign commerce or intrudes into a field of foreign affairs which is uniquely the concern of the federal government.

FN8 Section 112(d) makes clear that the phrase "under the supervision of the State highway department" in s 112(a) is intended to make that section apply to local subdivisions, such as New York City, as well as to State highway departments. Section 112(d) provides:

No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State highway department or local subdivision of the State without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof.

(Emphasis added.)

FN9 The last sentence of s 112(b) provides:

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 for a project, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

This sentence was added to the Federal Highway Act of 1968, Pub. L. No. 90-495, 82 Stat. 830 (1968), in order to assure that the federal requirements of equal employment opportunity mandated by Executive Order No. 11246 be advertised before the bidding so that contractors would know what was expected of them. See S. Rep. No. 1340, 90th Cong., 2d Sess. 16-18 (1968). The provision is manifestly not a carte blanche for the state to impose additional requirements of its own choosing unrelated to cost- effective use of federal funds. By the terms of this provision, any state requirement must be "otherwise lawful" and therefore cannot interfere with the competitive bidding requirement established by the first two sentences of the section.

FN10 The Senate proposed the amendment requiring competitive bidding. See S. Rep. No. 1093, 83d Cong., 2d Sess. 14 (1954) (stating that the requirement is designed to prevent "collusion or any other action in restraint of free competitive bidding"). After the House acceded to the Senate amendments, one Senator hailed the bidding provision as one of the most important achievements of

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

the entire bill. 100 Cong. Rec. 5124 (1954) (remarks of Sen. Gore).

FN11 New York City argues that this congressional mandate is somehow undercut by 23 U.S.C. s 145, which states:

The authorization of the appropriation of Federal funds or their availability under this chapter will in no way infringe on the sovereign rights of the States to determine which projects will be financed. The provisions of this chapter provide for a federally- assisted State program.

A provision permitting states to choose their own projects obviously has no bearing on the issue of whether Congress has restricted the permissible procurement procedures for such projects in the interest of the cost-effective use of federal funds.

FN12 There can be no doubt that an otherwise qualified contractor who fails to furnish an anti- apartheid certificate is still a "responsible" bidder. Local Law 19 itself acknowledges that the requirements of the anti-apartheid statute are not criteria of responsibility, because s 343.11.0(b) refers to "the lowest responsible bidder who has not agreed to (the anti- apartheid certificate)." (Emphasis added.)

FN13 Indeed, because the primary purpose of the anti-apartheid certification requirement is "to send a message to the government of the Republic of South Africa and to encourage those who do business there to support change," see New York City Local Law 19, s 2, Local Law 19 is not designed to promote cost efficiency, but to express a well-justified abhorrence of apartheid. To be sure, the ordinance states that it "also seeks to protect the financial interest of the city by limiting the number of city contracts which may depend for their satisfaction on the internal security of South Africa, where relentless oppression has led to increasing civil disturbances, making sabotage of business interests and even revolution possible." Under certain circumstances, such considerations may very well affect the cost-effectiveness of a given contractual arrangement. New York City has not, however, provided the Secretary with any evidence for the proposition that a particular company's contractual agreement with an agency in South Africa will endanger an unrelated contractual agreement to be performed in New York City on a highway construction project.

FN14 We do not read 28 C.F.R. s 635.108 as a decision by the Secretary through regulation to shoulder the burden of proof on the issue of cost-effectiveness. Section 635.108 provides:

No procedure or requirement for prequalification or licensing of contractors will be approved which, in the judgment of the Federal Highway Administration, may operate to restrict competition, to prevent submission of a bid by, or to prohibit the consideration of a bid submitted by, any responsible contractor whether resident or nonresident of the state wherein the work is to be performed. (Emphasis added.)

Because the administrator must still disapprove the procedure if the procedure may restrict competition (i.e., has the potential to restrict competition), the burden of showing that the procedure does not restrict competition still rests with the locality.

FN15 The contractor who does not sign the anti- apartheid certificate knows that in the event of a complying bid that is within five percent of his bid, he will have to persuade the Board of Estimate to award the contract to him,

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

notwithstanding his refusal to comply. The rational bidder would therefore revise his price to reflect the costs associated with lobbying the Board of Estimate on this issue. Thus, even if the contract is awarded to the non-complying bidder, it is reasonable to expect that his bid would be higher than it would be without the application of Local Law 19.

FN16 New York City's argument that the Secretary of Transportation may not disapprove contracts awarded under Local Law 19 until New York City actually withholds a contract from a low bidder under that ordinance merits a similar response. The Secretary is obligated to act when New York City's procurement procedures depart from the process of competitive bidding required by federal law, rather than when New York City declines to accept a low bid.

10 U.S. Op. Off. Legal Counsel 101, 1986 WL 213242 (O.L.C.)

END OF DOCUMENT

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.