

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STATE OF NEW JERSEY, by the :
COMMISSIONER OF TRANSPORTATION, :
 :
Plaintiff, : Civil Action No.
 :
v. :
 :
NORMAN Y. MINETA, SECRETARY OF :
TRANSPORTATION, UNITED STATES OF :
AMERICA, MARY E. PETERS, :
ADMINISTRATOR, FEDERAL HIGHWAY :
ADMINISTRATION, :
 :
Defendants. :

BRIEF OF PLAINTIFF, STATE OF NEW JERSEY,
DEPARTMENT OF TRANSPORTATION IN SUPPORT OF
ITS REQUEST FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

_____The plaintiff, State of New Jersey, Department of Transportation (hereinafter, "NJDOT" or "State") seeks a preliminary injunction and declaratory judgment against the Federal Highway Administration (hereinafter, "FHWA") as a result of the determination by the FHWA that Executive Order 134, issued on September 22, 2004, by Governor James E. McGreevey (hereinafter "EO 134" or "Executive Order"), is in conflict with federal statutes and regulations and may not be included in contracts that are federally funded. EO 134 establishes limitations on certain political contributions by firms seeking to do business with the State of New Jersey and bars the award of a contract to a firm exceeding the limitations set by the Executive Order. The purpose of the Executive Order is to preserve the integrity of the procurement process by insuring that political contributions do not influence the award of such contracts. Certification of W. Dennis Keck, dated January 11, 2005, Paragraph 3, Exhibit 1 (hereinafter, "Keck Certif., ¶ __ ,Ex. ____").

EO 134 became effective on October 15, 2004. Since that time, the NJDOT has been unable to award any federal aid contracts due to the FHWA's position that the Executive Order conflicts with federal law. As a result, over \$260 million worth of State construction and professional service contracts have been stalled,

important projects necessary for the safety of the traveling public have been delayed, and jobs for an estimated 10,000 to 15,000 people remain on hold. The NJDOT lacks the resources to progress these projects without federal financial assistance. The serious impacts of FHWA's position on public safety, jobs and the economic well-being of thousands of people are causing irreparable harm which can only be addressed through injunctive relief. This harm outweighs the FHWA's abstract concerns regarding the impact of EO 134 on the award of contracts.

The position of the FHWA that precludes the State from progressing important highway projects is legally incorrect as the Executive Order is not inconsistent with the requirements of federal law. The FHWA's stance also represents a clear invasion of rights reserved to the State pursuant to the Tenth Amendment of the United States Constitution. Thus, the NJDOT is likely to succeed on the merits in this matter and the granting of a preliminary injunction is warranted. _____

STATEMENT OF FACTS

On September 22, 2004, Governor James E. McGreevey issued EO 134, effective October 15, 2004, which established limitations on political contributions by firms seeking to do business with the State of New Jersey. The purpose of the Executive Order is to protect the integrity of the contracting process by insuring that decisions regarding the award of state contracts are based upon merit and not influenced by major contributions to a candidate or holder of the public office of Governor. The Executive Order was issued because:

when a person or business interest makes or solicits major contributions to obtain a contract awarded by a government agency or independent authority, this constitutes a violation of the public's trust in government and raises legitimate public concerns about whether the contract has been awarded on the basis merit. Keck, Certif., ¶3, Ex.1.

The Executive Order further indicated that "the growing infusion of funds donated by business entities into the political process at all levels of government has generated widespread cynicism among the public that special interest groups are "buying" favors from elected officeholders." Keck Certif., ¶3, Ex.1.

The Executive Order bars the award of a State contract in excess of \$17,500 to a firm that has contributed during certain specified time periods more than \$300 to a candidate committee, election fund, or State or County political party committee of a

candidate for Governor or the current holder of the Office of Governor. Keck Certif., ¶3, Ex.1. The Executive Order also requires firms seeking State contracts to report all contributions made during the preceding four years to any political organization organized under section 527 of the Internal Revenue Code that also meets the definition of a continuing political committee within the meaning of N.J.S.A. 19:44a-3(n) and N.J.A.C. 19:25-1.7, and permits the State Treasurer to disqualify a firm from bidding on or receiving a contract if he determines that such contributions constitute a conflict of interest. Keck Certif., ¶3, Ex.1.

The NJDOT is the principal department of State government responsible for the construction and maintenance of State highways. Keck Certif., ¶4. The NJDOT annually receives approximately \$750 to \$800 million from the FHWA for the design, construction and maintenance of highways in New Jersey. Keck Certif., ¶5. Pursuant to 23 U.S.C. §112, and its implementing regulations, the FHWA must approve the plans, specifications and method of procurement for NJDOT contracts that are federally funded.

On October 29, 2004, the NJDOT sent a letter to FHWA advising that it had been delaying receipt of bids for federal-aid projects pending FHWA's position on the inclusion of EO 134 requirements in the contracts for such projects. Keck Certif., ¶7, Ex.2. On November 3, 2004, the FHWA sent a letter to the NJDOT advising that the requirements of the Executive Order conflicted

with federal regulations and that provisions requiring bidders to comply with the Executive Order could not be included in federal-aid contracts. Keck Certif., ¶8, Ex.3.

NJDOT has not awarded a federally-aided contract since October 15, 2004, nor received the FHWA authorization on any new construction projects since December, 2004. Keck Certif., ¶9. On January 5, 2005, NJDOT Commissioner Jack Lettiere sent a letter to FHWA requesting an explanation for the withholding of authorization for funding on federal-aid projects submitted by NJDOT. Keck Certif., ¶10, Ex.4. On January 6, 2005, FHWA sent a letter to NJDOT advising that the requirements of the Executive Order conflict with federal regulations and that FHWA could not authorize federal funds on any project which included provisions requiring compliance with the Executive Order. Keck Certif., ¶11, Ex.5.

As of this date, NJDOT has submitted four projects to FHWA which have not been authorized for advertisement. Keck Certif., ¶12. An additional fifteen projects have been advertised and are pending federal authorization to award. Keck Certif. ¶12. All of these projects are subject to the requirements of the Executive Order and will be denied federal funding authorization. Because the NJDOT has no other funding source for these projects, the contracts cannot be awarded.

The nineteen projects which have already been delayed for lack of federal funding total \$250.85 million. Keck Certif., ¶13,

Ex.6. It is anticipated that an additional ten projects, totaling an additional \$96.20 million, will be submitted by NJDOT to the FHWA for federal funding authorization in January, 2005. Keck Certif., ¶13, Ex.6. If federal funding is not obtained for these projects, the NJDOT will not have the financial resources to proceed with any of this work. The State lacks sufficient funds to undertake these projects without federal assistance. Keck Certif., ¶14. Consequently, the FHWA's view of the Executive Order denies the NJDOT the ability to undertake important construction projects necessary to protect the safety and well-being of its own citizens and of the citizens of other states traveling by motor vehicle in New Jersey.

The threat to public safety and convenience due to the delay in these projects cannot be overemphasized. For example, included among the delayed projects are two contracts (Maintenance Median Crossover South and Maintenance Median Crossover North) that consist of the installation of a total of approximately 14 miles of cable guide rail needed to prevent vehicles from crossing the median and causing crashes. Keck Certif., ¶14. Another contract is the Route 73 median closure project that will significantly enhance safety along this heavily utilized roadway in Camden and Burlington Counties by closing 9 median openings and reconstructing turning lanes at 8 other locations. Keck Certif., ¶14.

Also, the failure to authorize federal-aid has frozen the

award of 13 NJDOT consultant contracts valued at approximately \$16 million. Keck Certif., ¶16. These contracts support engineering of future safety, traffic operations, infrastructure repair and traffic improvement projects.

In addition to these significant safety concerns, the loss of federal funding will have an economic impact. Jobs will be lost because projects cannot proceed without the federal funds. The U.S. Department of Transportation's report on "Highway Infrastructure Investment and Job Generation: A look at the Positive Employment Impacts of Highway Investment (1996)" (hereinafter the "Federal Report") has considered the employment impacts of federal-aid highway investment. Keck Certif., ¶15, Ex. G. The report notes that for every \$1 billion of investment, the federal-aid highway program supports approximately 42,100 full-time equivalent jobs. Keck Certif., ¶15, Ex. G. Of this total, 27,600 jobs are in highway construction and related industries. Keck Certif., ¶15, Ex. G. This same \$1 billion of Federal-aid also supports about 14,500 jobs in other industries throughout the economy. Keck Certif., ¶15, Ex. G. Using the findings of the Federal Report, and given the \$250 to \$350 million in New Jersey projects currently on hold, it can be estimated that between 10,000 to 15,000 jobs are being affected by the FHWA's erroneous identification of a conflict between the Executive Order and federal law. Keck Certif., ¶15, Ex. G.

ARGUMENT

PLAINTIFF MEETS THE STANDARD FOR PRELIMINARY INJUNCTION AS IT HAS DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS, IRREPARABLE HARM AND THAT THE BALANCE OF EQUITIES FAVORS AN INJUNCTION

"[T]he grant of injunctive relief is an extraordinary remedy, which should be granted only in limited circumstances." Frank's GMC Truck Center, Inc. v. General Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988), citing United States v. City of Philadelphia, 644 F.2d 187, 191 n.1 (3d Cir. 1980)). In deciding a motion for injunctive relief:

The court must consider the moving party's likelihood of success on the merits, the probability of irreparable injury to the moving party in the absence of relief, the potential harm to the non-moving party and, if applicable, the public interest. [Fletcher v. HMW Indus. Inc., 879 F.2d 204, 211 (2d Cir. 1982)].

"The injunction should issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief." AT&T Co. v. Winback and Conserve Program, Inc. 42 F.3d 1421, 1427 (3d Cir. 1994), cert. denied 115 S.Ct. 1838 (citing Opticians Ass'n v. Independent Opticians, 920 F.2d 187, 192 (3d Cir. 1990)). All of the requirements for injunctive relief are clearly present in this case.

1. **THE PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS BECAUSE IT IS FULLY COMPLYING WITH ALL APPLICABLE FEDERAL STATUTES AND REGULATIONS AND BECAUSE THE POSITION OF THE FHWA INTERFERES WITH THE CONTRACTING AUTHORITY RESERVED TO THE STATE UNDER THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

The position of the FHWA that EO 134 is in conflict with federal law and regulations, that it cannot be included in federal aid contracts and that contracts including EO 134 requirements cannot be federally funded is clearly in error since there is nothing in the Executive Order that prevents the NJDOT from fully complying with the provisions of applicable federal statutes and regulations. EO 134 merely sets certain limits on contributions to political candidates, parties and committees in order to prevent such contributions from being used to influence the award of contracts and affect the integrity of the procurement process. It makes adherence to those limits a criterion for determining who is a responsible bidder. The concept of bidder responsibility is fully recognized and accepted by the applicable federal statute and regulations.

- (i) **Federal statutes and regulations recognize that only responsible bidders should be allowed to compete for federally funded highway construction contracts.**

Federal law requires that federally funded construction contracts be awarded by competitive bidding, unless a state transportation department can demonstrate that some other method of procurement is more cost effective or an emergency exists. 23 U.S.C.§ 112(a)and(b). That statute also specifically requires, in pertinent part that:

Contracts for 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.
[23 U.S.C.§ 112(b) (1).]

New Jersey law also obligates the NJDOT to advertise its construction contracts and to award the contract to the lowest responsible bidder. The Commissioner must "advertise for bids on the work and materials covered by the plans and specifications for each project...." N.J.S.A.27:7-29. Additionally, the State Highway Engineer must "prepare a list of the bids, including any rejected and the cause therefore, and the commissioner shall award the contract to the lowest responsible bidder." N.J.S.A.27:7-30. Contracts advertised and awarded by the NJDOT pursuant to these

state statutes have been recognized for numerous years by the FHWA as complying with federal law.

There is nothing whatsoever in the language of EO 134 that alters or amends the bidding or contract award requirements of New Jersey law that have long been viewed as consistent with federal law by the FHWA. The NJDOT must place the requirements of EO 134 in the advertised specifications for all of the contracts involved in this dispute. N.J.S.A.27:7-29. The NJDOT will continue to award contracts to responsible bidders submitting the lowest responsive bid. Thus, the position of the FHWA that contracts containing the EO 134 requirements conflict with federal law is clearly in error.

The Plaintiff recognizes that courts have found that Congress may attach conditions to the receipt of federal funds and may further broad policy objectives by conditioning the receipt of federal money upon compliance by the recipient with federal statutory and administrative directives. South Dakota v Dole, 483 U.S. 203, 206 (1987). Thus, the United States Supreme Court has upheld the conditioning of the receipt of federal funds on a state's adoption of a minimum drinking age. Ibid. Additionally, it has been found that federal money provided to the states pursuant to legislation enacted under the spending power of Congress is much in the nature of a contract, wherein the states voluntarily agree to comply with federally imposed conditions. Pennhurst State School

and Hospital v. Haldeman, 451 U.S. 1, 17 (1981). Unlike these other cases, however, the NJDOT is not seeking to be relieved of its obligation to comply with federal conditions. Rather, the NJDOT asserts that compliance with federal conditions does not preclude compliance with EO 134. Since EO 134 does not affect the NJDOT's obligation to award each contract after advertising to the responsible bidder submitting the lowest responsive bid, implementation of the Executive Order will not violate federal requirements.

Federal regulations governing the award of construction contracts stress the importance of competition in the procurement process. 23 CFR § 635.110. These regulations, in pertinent part, provide:

No 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, to prevent submission of a bid by, or to prohibit consideration of a bid submitted by, any responsible contractor, whether resident or non-resident of the State wherein the work is to be performed.
[23 CFR § 635.110(b).]

This federal regulation, with its emphasis on competition recognizes the concept of bidder responsibility. Even though restrictions on competition are generally disapproved, nothing prevents a transportation agency from denying a contract to a contractor that lacks the level of responsibility deemed necessary by the agency. New Jersey law similarly mandates competition among

responsible bidders. The requirements of EO 134 are simply an attempt to prevent bidders from using political contributions to obtain undue influence in State contracting, to preserve open competition based solely upon the content of the bid submitted and to characterize those bidders who exceed the contribution limit of the Executive Order as non-responsible bidders.

It is clear from case law that the concepts embodied in EO 134 are indicia of bidder responsibility. Courts have determined that, in the context of public contracts, the term " 'Responsible' means the ability to meet obligations. It involves accountability, i.e., answerable." Peluso v. Commissioners of City of Hoboken, 98 N.J.L. 706, 706 (Sup. Ct. 1923). It has been consistently recognized that the requirement of bidder responsibility involves not only the experience, financial ability and necessary facilities to perform the contract, but also the moral integrity of the bidder. Arthur Venneri Company v. Housing Authority of City of Paterson, 29 N.J. 392, 403 (1959). The relevancy of moral responsibility is evident because it eliminates the risk of collusive bidding, assures honest performance and meets the expectations of citizens that the government will do business only with persons of integrity. Trap Rock Industries v. Kohl, 59 N.J. 471, 482 (1971). This concept of integrity is so fundamental to the bidding process that courts have prohibited bidding practices that are capable of being used to further corrupt ends even though it

was evident that, in fact, there was no corruption or any actual adverse affect on the bidding process. Terminal Construction Corporation v. Atlantic County Sewage Authority, 67 N.J. 403, 410 (1975). It is precisely the integrity of the procurement process which is embodied in the concept of a responsible bidder that is addressed by EO 134.

Federal law and regulations clearly recognize bidder responsibility as necessary to a determination as to who can bid a project. It is a lawful condition precedent to award, recognized as appropriate pursuant to 23 U.S.C. § 112(b)(1). EO 134 merely adds to the definition of a "responsible bidder" adherence to certain political contribution limits. Thus, the Executive Order fully complies with the applicable federal statute and regulations and any determination by the FHWA that it conflicts with federal law and regulations is in error.

(ii) The establishment of criteria for determining who is a responsible contractor is a matter of contract law reserved to the states under the Tenth Amendment of the United States Constitution.

Executive Order 134 establishes additional standards for firms that want to do business with the State of New Jersey. Specifically, EO 134 adds to the definition of a responsible bidder adherence to specific limits on certain campaign contributions. This criterion of responsibility, as with all other

conditions of responsibility (e.g., experience, financial capacity and moral integrity) is established by the state acting as a market participant. It represents the exercise of the fundamental state power to enter into contracts.

The Tenth Amendment to the United State Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to it respectively, or to the people." U.S. Const. amend. X. The power to contract is one of these reserved powers. A necessary part of a state's contracting power must be the ability to determine with whom it will contract. This is accomplished by establishing criteria for contractor responsibility, consistent with state law.

A state's authority to establish the baseline qualities of those entities with which it chooses to contract, however, is not unfettered. It is a determination that must be made consistent with State law and that recognizes the importance of preserving the integrity of the procurement process, avoiding even the appearance of impropriety and at the same time securing for the public the benefits of competition. Terminal Construction Corporation, 67 N.J. at 409, 410. The requirements of EO 134 relate to the moral integrity of the contractor, and moral integrity has been recognized as a valid component of contractor responsibility in New Jersey. Trap Rock Industries v Kohl, 59 N.J. at 482. Thus, any

action of the FHWA that bars the application of EO 134 to federally funded construction contracts based on its own view of bidder responsibility infringes upon the reserved power of the State and is in violation of the Tenth Amendment of the United States Constitution.

Finally, there is nothing in any federal statute or regulation applicable to this dispute to indicate that in return for accepting federal highway construction funds, the NJDOT agreed to surrender its right to determine who is a responsible contractor. The federal statute involved, 23 U.S.C. §112, does not define contractor responsibility. The federal regulation at issue mandates that responsible contractors be able to bid, but does not define the term "responsible bidder". 23 CFR §635.110(b). There is no reason for the NJDOT or anyone to believe that the term would not be construed under New Jersey law.

The Supreme Court of the United States has recognized that, although Congress may set conditions for the receipt of federal funds under its spending power, the spending power of Congress is not unlimited. South Dakota v Dole, 483 U.S.203, 207 (1987). Thus, while upholding the authority of Congress to condition the receipt of federal highway funds on the passage by a state of a minimum drinking age the Court noted:

we have required that if Congress desires to condition the States receipt of federal funds, it" must do so

unambiguously..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."Pennhurst State School and Hospital v. Haldeman, supra, at 17, 101 S.Ct., at 1540. Id at 207. South Dakota v. Dole, 483 U.S.at 207 (alteration in original.

Clearly, there has been no voluntary and knowing acceptance by the State of a grant condition which binds it to accept a federal determination of responsibility, since there is nothing whatsoever in the applicable statute and regulations to indicate that the FHWA has the authority to impose such a condition. There can be no knowing acceptance of a term or condition if a State is unaware of a condition or unable to ascertain what is expected of it. Pennhurst State School and Hospital v Haldeman, 451 U.S at 17.

Therefore, the FHWA may not withhold federal funds from contracts which require compliance with EO 134.

**(iii) NJDOT professional service contracts
comply with all applicable federal
laws and regulations.**

The NJDOT contracts for many other types of services in connection with its highway construction program that are not governed by the competitive bidding requirements of N.J.S.A. 27:7-29 and 30. These include contracts for program management, construction management, feasibility studies, preliminary

engineering, design, engineering, surveying, mapping and architectural services (hereinafter referred to as professional services contracts). The requirements of EO 134 are applicable to these contracts.

The NJDOT awards professional service contracts pursuant to standards established by N.J.S.A. 52:34-9.1, and approved by the FHWA. These standards require that professional services contracts be advertised and that an award be made after competition to the most qualified firm meeting the criteria set forth in the advertisement. After the most qualified firm is determined, a price is negotiated with that firm for the work.

Pursuant to 23 U.S.C. §112(b)(2), and its implementing regulations, 23 CFR §172.5(a)(1), the FHWA also requires that federally funded professional service contracts be awarded after advertisement and competition based upon a quality-based selection process and the subsequent negotiation of a fee or price with the most qualified firm. The procedures currently followed by the NJDOT meet these criteria and have been approved by the FHWA.

This procedure has not been altered by EO 134. There is nothing in the specific language of EO 134 that alters the quality based selection process already approved by the FHWA. The campaign contribution limits set forth in EO 134 merely seek to insure that campaign contributions do not improperly influence the selection of the most qualified firm or the negotiation of the price to be paid

for the services. EO 134 merely seeks to carry out the federal mandate that all qualified firms compete and be judged on the basis of their submissions to the NJDOT and that no firm gain undue influence in the procurement process by violating the contribution limits set forth in the Executive Order. The finding by the FHWA that EO 134 conflicts with federal law and, thus, may not be included in professional service contracts is clearly in error.

Thus, for all of the above reasons, there is a strong likelihood that the NJDOT will succeed on the merits.

2. THE NJDOT, THE TRAVELING PUBLIC, AND WORKERS IN JOBS SUPPORTING THE CONSTRUCTION INDUSTRY ARE SUFFERING IRREPARABLE HARM SINCE IMPORTANT HIGHWAY SAFETY IMPROVEMENTS ARE BEING DELAYED AND JOBS SUPPORTING THE HIGHWAY CONSTRUCTION PROGRAM ARE NEGATIVELY IMPACTED.

Since October 15, 2004, the NJDOT has been unable to award any highway planning, design, engineering or construction contracts requiring federal funding due to the FHWA's refusal to approve the award and funding of such contracts, if those contracts complied with EO 134. Keck Certif., ¶¶9,12,13. Thus, the FHWA has forced the NJDOT to postpone significant highway safety projects because the NJDOT must comply with state law and lacks the financial resources to construct these projects without federal financial assistance. Keck Certif., ¶14. Additionally, the FHWA's refusal to fund these projects is causing severe economic hardship

to the construction industry and those citizens employed by that industry. These significant and severe impacts, which are the result of the FHWA's misinterpretation of the Executive Order are causing irreparable harm requiring the immediate imposition of injunctive relief. It is important that construction projects needed to improve the safety of the highway system be commenced and that the economic effects of the current stalemate be minimized.

The seriousness and magnitude of the dispute involved in this matter become readily apparent when one considers the dollars and jobs at stake. Nineteen construction contracts totaling over \$250.85 million are already delayed because the FHWA will not authorize funding if the contracts require compliance with EO 134. Keck Certif., ¶13, Ex.6. The NJDOT also anticipates requesting federal funding for ten more construction projects, totaling \$96.2 million, in January, 2005. Keck Certif., ¶13, Ex.6. Additionally, \$16 million in consultant contracts for the engineering of safety, traffic operations and transportation infrastructure improvements and repairs cannot be awarded because FHWA has refused funding for these projects. Keck Certif., ¶14. Finally, using the findings of a U.S. Department of Transportation Report regarding the employment impacts of highway infrastructure investment, it is estimated that between 10,000 and 15,000 jobs are being affected by the FHWA's denial to the NJDOT of the funds required for these highway projects. Keck Certif., ¶15, Ex. G. The economic impact of this

continued job loss is causing irreparable harm to the economy of the state and region.

The public safety concerns raised by the postponement of these highway projects also requires immediate resolution through injunctive relief so that important safety initiatives can go forward. The risk to the traveling public when important infrastructure improvements are delayed is incalculable. Two of the projects being delayed by the lack of federal funding involve the installation of approximately 14 miles of cable guide rail to prevent vehicles from crossing a highway and causing accidents. Keck Certif., ¶14. Another project would close nine median openings and reconstruct and improve turning lanes to help improve safety. Keck Certif., ¶14. The importance of a quick resolution of this matter so that these and other public safety concerns can be addressed cannot be overemphasized.

Thus, the delay in these important highway projects is causing irreparable harm to the economy and to the safety of the traveling public and state highway system which requires the immediate attention of the court and which can only be remedied and minimized by the granting of injunctive relief.

3. THE BALANCE OF EQUITIES FAVORS AN INJUNCTION SINCE THE FHWA POSITION IS IN FACT DELAYING IMPORTANT HIGHWAY PROJECTS AND AFFECTING PEOPLES' SAFETY AND WELL-BEING, WHILE THE HARM TO THE FHWA OF GRANTING INJUNCTIVE RELIEF IS PURELY SPECULATIVE SINCE THERE IS NO EVIDENCE THAT EO 134 LESSENS COMPETITION FOR HIGHWAY CONTRACTS OR HAS ANY NEGATIVE EFFECT UPON THE FHWA.

The impact of the FHWA's position that denies federal funding of highway contracts that contain the requirements of EO 134 is real and substantial. FHWA's position is causing important highway safety infrastructure projects to be postponed and affecting the jobs of tens of thousands of people. This is a real and concrete impact as shown by the fact that over \$260 million of highway construction projects are stalled. Keck Certif. ¶13,14., Ex. F. Additionally, an estimated 10,000 to 15,000 jobs related to highway construction remain on hold because the NJDOT lacks non-federal resources to pay for these highway improvement projects that create jobs throughout the region. Keck Certif., ¶15, Ex. G. Thus, there are demonstrable detrimental effects on the public safety, jobs and well-being directly attributable to the FHWA'S interpretation of EO 134.

The FHWA has offered neither evidence nor an explanation of any negative impact on that agency that would be caused by the implementation of EO 134 on federally funded contracts. Contracts will continue to be advertised and awarded to the responsible

bidder submitting the lowest responsive bid. Professional service contracts will still be awarded after advertisement and a determination of the most qualified firm. It is pure speculation that EO134 will in any way reduce competition or increase the price to be paid for highway projects. These speculative effects are in sharp contrast to the very real impact on public safety and jobs that has resulted from the FHWA's decision. Thus, the balancing of equities and public interest clearly favor the issuance of injunctive relief to bar the FHWA from denying federal funding to contracts requiring compliance with EO 134.

CONCLUSION

For all of the above reasons, the court should grant the request of the NJDOT for temporary restraints and a preliminary injunction prohibiting the FHWA from denying federal funding of NJDOT contracts that include the EO 134 requirements.

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