



U.S. Department
of Transportation

**Federal Highway
Administration**

Memorandum

Washington, D.C. 20590

Subject Anti-Apartheid Provisions

Date NOV 15 1985

From Director, Office of Highway Operations

Reply to
Attn of HHO-32

To: Regional Federal Highway Administrators
Regions 1-10

This is to advise that the Region 1 Office of Engineering and Operations has recently withheld approval for inclusion in Federal-aid contracts a New York City contract provision which would require the lowest responsible bidder to certify that he/she had not received or provided services or supplies to and would neither receive nor provide future services or supplies to apartheid governments in South Africa. In the absence of the low bidder's certification, the contract would be awarded to the next lowest responsible bidder whose bid was within 5 percent of the low bid and who had made such a certification.

We concur with the Region's position. It is our determination that such provisions violate basic Federal-aid policy which holds that States may not impose requirements which are discriminatory against contractors, because of their residency (23 CFR 635.108) or because of whom they elect to do business with (23 CFR 635.409), whether the situation involves other States or foreign countries.

Further, regarding regulations impacting foreign relationships such as the subject matter, the Federal Constitution reserves the conduct of foreign relations and the regulation of foreign commerce to the Federal Government. Congress may delegate certain of this power, by law, to the government of a State, such as under "Buy America." However, Congress has not authorized any State thus far to discriminate against contractors in Federal-aid projects because of their relationships (either directly or indirectly) with the Republic of South Africa or for that matter any other foreign country nor has DOT enunciated such a policy.


for David S. Gendell