

competitive bidding *Rockne*

Memorandum



U.S. Department
of Transportation
**Federal Highway
Administration**

Washington, D.C. 20590

Subject: Bidding Procedures--Negotiations with Bidders

Date: JUN 23 1986

From: Associate Administrator for
Engineering and Program Development

Reply to
Attn. of: HHO-32

To: Mr. Leon N. Larson
HRA-04 Regional Federal Highway Administrator
Atlanta, Georgia

The Georgia proposed special provision furnished with your May 28 memorandum is not acceptable for use on Federal-aid projects. We fully concur with your position that negotiations with bidders as proposed by the State shall not be permitted on Federal-aid contracts.

Contrary to the opinion of the State's Attorney General, 23 U.S.C. 112 does not permit negotiation of bids. The Attorney General errs in stating there are no Federal regulations implementing the competitive bidding requirement of Section 112. Sections 635.104, 635.107, and 635.108 all relate to this issue. More importantly, however, Section 112 must be read as a whole to avoid misperceiving its thrust.

All of subsection (a) of Section 112 requires competitive bidding by advertisement, unless some other method is approved, and ^{such} methods of bidding *as shall be* effective in securing competition. Subsection (b) picks up this thread, and unequivocally requires construction to be performed by contract awarded by competitive bidding, unless the State demonstrates to FHWA satisfaction that some other method is more cost effective. As is shown by § 635.104 of the regulation, FHWA has uninterruptedly construed "some other method" as meaning (consistent with that phrase's legislative history) the use of force account, not negotiation.

The second sentence of subsection 112(b) is an unequivocal prohibition of contract award on a basis other than lowest responsive bid submitted by a bidder meeting established criteria of responsibility. The next sentence, with its "otherwise lawful" language upon which the State's Attorney General relies, is nothing more or less than a prohibition of State attempts to add such criteria, requirements, or obligations to defeat or impair competitive bidding, which is the entire thrust of Section 112. Put another way, the term "otherwise lawful" refers to the foregoing language of the Federal statute in which it is found, and not to some subsequent State statute.

RONALD E. HEINZ (for)

Rex C. Leathers

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