



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

Memorandum

Washington, D.C. 20590

Subject State Economic Regulations

Date SEP 20 1989

From Director, Office of Highway Operations

Reply to
Attn of HHO-32

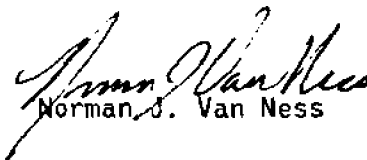
To Mr. Leon N. Larson
Regional Federal Highway Administrator (HRA-04)
Atlanta, Georgia

Your office's June 21, 1989, memorandum to Mr. William A. Weseman provided information on a State of Georgia special bonding requirement for out-of-State contractors.

We have reviewed the information submitted and agree with your assessment that the Georgia Nonresident Contractor Statute violates the competitive bidding requirements of 23 U.S.C. 112(b) and its implementing regulations, 23 CFR 635.107 and 635.108. Attached for your information is an August 22, 1989, memorandum from the Assistant Chief Counsel for General Law concerning the Georgia statute.

Based on our review, we concur with your proposal to notify Georgia, and the other States in your Region with similar requirements, to make appropriate corrections.

Attachment


Norman J. Van Ness



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

Memorandum

Subject: Legal Opinion Regarding Georgia's
Nonresident Contractor Statute

From: Assistant Chief Counsel
for General Law

To: Mr. William A. Weseman
Chief, Construction and Maintenance
Division (HHO-30)

Date: AUG 22 1989

Reply to
Attn of: HCC-50

This is in response to Region 4's request that we review the validity of a special bonding requirement that the State of Georgia imposes on nonresident contractors performing State contracts. After reviewing the Georgia statute and the Federal Highway Administration (FHWA) precedent on this issue, we agree with the Region's conclusion that the bonding requirement violates the competitive bidding requirements and open and free competition objective of 23 U.S.C. § 112(b) and its implementing regulations, 23 CFR § 635.107 and § 635.108.

Georgia's Nonresident Contractor Statute, O.C.G.A. § 48-13-30 et seq., requires all nonresident contractors to register and post a performance bond with the Georgia Department of Revenue as a condition precedent to commencing work on any State contract for more than \$10,000.00. The bond must be for ten percent of the contract price and a contractor who fails to register or to pay the bond cannot "maintain an action to recover payment for performance on the contract in the courts of (Georgia)." O.C.G.A. § 48-13-37.

Although the bond requirement is intended to ensure that nonresident contractors pay unemployment taxes, Gorrell v. Fowler, 248 Ga. 801, 286 S.E.2d 13 (1982), in practice it operates like resident preference statutes which have never been applied to Federal-aid projects. The FHWA has consistently objected to the application of such statutes to Federal-aid projects on the ground that they restrict competition in violation of 23 U.S.C. § 112(b) and its implementing regulations, which require open and competitive bidding on all highway projects.

Thus, the FHWA has disapproved of resident preference statutes in Mississippi (1986 - statute gave preference to resident contractors in bidding, including nonresident contractors with a permanent office in-state for 2 years prior

to January 1, 1986); Louisiana (1984 - Act imposed time delay and additional fee for nonresident contractors to obtain a license); Alabama (1984 - statute imposed registration, filing and payment requirements on nonresident contractors subsequent to contract award); Montana (1982 - Statute gave preference on State contracts to residents whose bids were within 3 percent of the lowest bid); Delaware (1979 - statute gave preference on State contracts to residents whose bids were within 2 percent of the lowest bid); and Arkansas (1965 - Act imposed bond requirements and compensatory tax on nonresident contractors using out-of-state equipment).

The regulations which pertain to bidding on a Federal-aid project provide that "(b)idding procedures on a nondiscriminatory basis shall be afforded to all qualified bidders regardless of State boundaries . . ." 23 C.F.R. § 635.107(e) (emphasis supplied), and that "(n)o procedure or requirement for prequalification, qualification or licensing of contractors shall be approved which, in the judgment of the Administrator, may operate to restrict competition, . . . (of) any responsible contractor, whether resident or nonresident of the State wherein the work is to be performed." 23 C.F.R. § 635.108(a) (emphasis supplied).

The regulations indicate concern that States may prefer residents over nonresidents in State contracts, and are clearly intended to ensure that States do not discriminate against nonresidents in connection with Federal-aid projects. While the regulations do not preclude the imposition of licensing requirements subsequent to a contract award, such requirements must also not discriminate against nonresidents; they must be "consistent with competitive bidding." 23 C.F.R. § 635.108(a).

Georgia's bonding requirement is arguably not consistent with competitive bidding. It imposes a financial burden upon nonresident contractors which is not imposed upon resident contractors performing the same work. Thus, nonresident contractors are at a competitive disadvantage since they must include the cost of the bond in their bid. Indeed, in an amicus brief, the Georgia Commissioner of Revenue describes the bond requirement as "an absolute condition precedent for a nonresident contractor desiring to engage in the business of contracting in Georgia" Amicus Brief of the State Revenue Commissioner

at 10, Carrol Construction Company, Inc. v. Langford Construction Company, 182 Ga. App. 258; 355 S.E.2d 756 (1987) (No. 73017). Therefore, although Georgia's Nonresident Contractor Statute applies subsequent to the contract award, and technically does not effect the actual bidding, it has the effect of favoring resident contractors over nonresident contractors in the bidding process, thereby violating the competitive bidding requirements.

In 1984, the FHWA considered the validity of a similar statute in Alabama which imposed registration, filing and payment requirements on nonresident contractors after the contract award. Like the Georgia statute, the Alabama law was intended to secure the payment of taxes by nonresident contractors. After reviewing a similar law in Arkansas, which we had determined violated § 112(b), the FHWA concluded that the Alabama law imposed financial burdens on nonresident contractors which had the effect of favoring resident contractors, thereby violating the competitive bidding requirements of § 112(b) and its implementing regulations.

The Georgia bonding requirement, however, is not as demanding as the requirements in Alabama and Arkansas. For example, in addition to requiring registration and bonding, Alabama also required that, prior to performing the contract, nonresident contractors pay use and ad valorem taxes on all out-of-state equipment to be used on the contract. Arkansas also required advanced payment of a compensatory tax in addition to bonding requirements.

Nevertheless, although minimal, Georgia's bonding requirement does impose a financial burden solely upon nonresident contractors, and for the reasons outlined above, we can support the Region's opinion that the Georgia Nonresident Contractor Statute restricts competition and violates the competitive bidding requirements of 23 U.S.C. § 112(b) and its implementing regulations, 23 C.F.R. § 635.107 and § 635.108.


Kathleen S. Markman



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

Memorandum

Subject: State Economic Regulations

Date: June 21, 1989

From: Director, Office of Engineering & Operations
Atlanta, Georgia

Reply to
Attn of:

HHO-04

To: Mr. William A. Weseman
Chief, Construction and
Maintenance Division (HHO-30)
Washington, D.C.

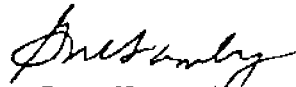
As a result of a December 29, 1988, letter from Mr. James A. Gray of the Alabama Road Builders' Association to Mr. Ronald Heinz, we initiated an inquiry to Region Four States concerning special bonding requirements for out-of-State contractors. We found that there are three States in our Region that require special bonds from out-of-State contractors wishing to bid on projects in their States.

Attached is a package of material from the Georgia Division discussing the requirements imposed by the State of Georgia. The State of South Carolina has a similar requirement although we understand that the cost of the bond is somewhat lower in that State. We have not received the South Carolina response on this issue but we will furnish it upon receipt. The State of Mississippi also has a bonding requirement for out-of-State contractors but it only applies for contracts valued between \$10,000 and \$75,000 (please see attached correspondence from the Mississippi Division).

We have examined the package of material from Georgia and have concluded that this additional bonding requirement is inconsistent with the requirements and intent of 23 CFR 635.107 and .108. We believe that requiring an out-of-State contractor to obtain a special bond before bidding a Federal-aid project is contrary to 23 CFR 635.107 which states that, "Bidding procedures on a nondiscriminatory basis shall be afforded to all qualified bidders regardless of State boundaries..." Furthermore, since out-of-State contractors must bear the additional cost of obtaining special bonds, we believe such requirements could serve to restrict competition which is contrary to the requirements of 23 CFR 635.108. We also believe that this applies to the South Carolina and Mississippi provisions as well.

If you agree with our assessment, we believe that all three States should be notified that they have until the next legislative session to make appropriate corrections.

We would appreciate your review and determination on this issue. Although we cannot furnish material on the South Carolina situation at this time we would appreciate your determination on Georgia as soon as possible. If there are any questions please contact me at FTS 257-4075.


Gary N. Hamby

Attachments

cc:
HDA-GA
HDA-MS
HDA-SC

Archived