



OFFICE OF
THE ADMINISTRATOR

DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
WASHINGTON, D.C. 20590

April 30, 1985

IN REPLY REFER TO:

HHQ-30

SUBJECT: DEVIATION FROM COMPETITIVE BIDDING REQUIREMENTS

TO: Chief Executive Officers
State Highway Agencies

Regional Federal Highway Administrators
Regions 1 - 10
Direct Federal Program Administrator

Recently, several member State agencies of the American Association of State Highway and Transportation Officials have asked us to consider changing our requirements on competitive bidding to allow negotiation of construction contracts with apparent low bidders. The States indicate that this change would be in the public interest because it would lead to lower prices and reduce the potential for bid rigging. In view of this interest, we have reviewed Federal law covering competitive bidding as well as the Federal Highway Administration's policy in this area.

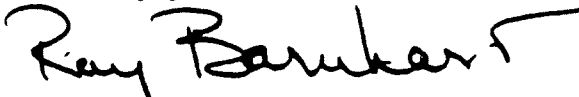
As a result of this review, we have concluded that the legal requirements of Section 112 of Title 23, United States Code, do not permit negotiation of prices with apparent low bidders. Under Section 112 and the regulations we issued to implement it, one of the most basic requirements is that the State highway agency must maintain nondiscriminatory procedures for inviting bids. These procedures should be free of requirements restricting competitive bidding on construction contracts. Bids must be opened publicly and the results announced. After tabulation and examination of the bids for errors, irregularities, responsibility, and responsiveness, the State highway agency must either accept or reject the bid.

The State highway agencies do not have the authority under any circumstances to negotiate with a bidder or bidders before an award to reduce the price of a construction contract. Such negotiations with the apparent low bidder are essentially bid rigging in reverse. They subvert the fair and open competitive bidding process, under which qualified firms are entitled to an equal opportunity to compete for contracts, and invite favoritism and collusion as well as legal difficulties with unsuccessful bidders. In short, we do not believe negotiations with the apparent low bidder promote the public interest. We remain a strong advocate of open and competitive bidding, which traditionally has produced quality construction at a fair and reasonable cost.

We recognize that the interest in negotiation may be a result of the desire to hold down prices. Although we cannot permit negotiation, we certainly share the States' desire to keep prices as low as possible. We believe the States have other ways of influencing price, such as trying to increase competition

among bidders, remaining on the lookout for collusion or other anticompetitive practices, improvements in design and specifications, alternative bidding, etc. I encourage you to continue working in these and other ways to achieve the lower prices we all desire.

Sincerely yours,

A handwritten signature in black ink that reads "Ray Barahart". The signature is written in a cursive style with a long horizontal flourish extending to the right.

R. A. Barahart
Federal Highway Administrator

cc:

Mr. Francis B. Francois
Executive Director, American
Association of State Highway
and Transportation Officials
Washington, D.C. 20001