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B-42439 July 8, 1944

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Date: 1944-07-08

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The Honorable, The Secretary of Commerce

My dear Mr. Secretary:

There has been considered your letter of June 1, 1944, as follows:

"Under the Civil Aeronautics Act of 1938, as amended, and prusuant ot various appropriation acts, the Administrator of Civil Aeronautics enters into agreements with state or municipal agencies for the construction of landing areas on land owned by such agencies. In contemplation of such construction projects it has been the policy of the Administrator to have the non-Federal public agnecy execute a resolution (CAA Form AP-4, copy attached) whereby the said agency, amoung other things, certifies that the land made available is held by the agency in fee simple and agrees that: 'The Government shall have the right to determine the exact nature of the improvements to be made under the Project, the manner in which the Project is to be conducted, the amount of Federal funds to be expended, and all other matters relating to the Project.'

"After the resolution has been adopted by the agency, bids are invited on the basis of specifications set up by the Civil Aeronautics Administration. Included therein are specifications for two or more types of paving construction, one of which is of the rigid Portland cement concrete type and the other of one or more flexible base, asphaltic concrete surface types. It has been determined by the Administrator that, except incases of unusual climtic or soil conditions, there is no preference between the rigid or flexible types when considered on the basis of serviceability, either being sutable for the purposes anticipated by the specifications.

"The Administrator now has under consideration the construction of certain landing areas and public airports pursuant to Public Law 216, 78th Congress, approved December 23, 1943, appropriating money for the 'Development of civil landing areas.' No determination has been made that the construction of any landing areas or public airports under this act is necessary for the prosecution of the war and, in view thereof, the Administrator has not exercised the authority conferred on the Civil Aeronautics Administration by Executive Order No. 9001, as amended by Executive Order No. 9116.

"The Administrator is now negotiating with the City of Beatrice, Nebraska, for the construction of a landing area on land owned by that municipality, using funds made available by Public Law 216, supra.

"As we have pointed out, the Administrator would ordinarily issue invitations to bid for the different types of materials and accept the lowest bid. However, the municipality, inasmuch as it is funishing the land and will own, and, at its own expense, operate and maintain the landing area after its construction, desires and has requested that only Portland cement concrete runways be installed thereon.

"Therefore, your opinion is requested on the following questions:

"1. May the Administrator invite and receive bids for only Portland cement concrete for the construction of runways, using funds made available by Public Law 216, and enter into an agreement with the municipality whereby the Government will furnish and pay for Portland cement concrete runways, notwithstanding that the cost of concrete construction may be higher than the other types of paving construction.

"2. Where bids are requested and received for both Portland cement concrete ad asphalt materials and th lowest bid is for asphalt, ad where the municipality is desirous of having concrete construction and agrees to pay the difference between the low bid and the low concrete bid, may a contract be awarded for concrete construction?

"3. If the answer to question 2 is in the affirmative, should the municipality pay the difference in amount direct to the contractor or may the Government accept the amount from the municipality and pay it to the contractor?

"4. If the answer to questions 2 is in the affirmative, and the low bidder refuses to accept a contract for concrete construction at the price of the low bid for concrete, may the Government make the award to the low bidder for concrete?"

While the provision of Executive Order No. 9001 were extended by Executive Orkder No. 9116 to all contracts made or therafter to be made by the Civil Aeronautics Administration, it is noted that it has not been determined that the construction of landing areas pursuant to Public Law 216, 78th Congress, 57 Stat. 611, 621, is necessary for the prosecution of the war. Hence, in th absence of such determination, and since there is nothing in Public Law 216, supra, or the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. 401, et seq., which expressly or by necessary implication repeals, suspends, or modifies the requirements of section 3709, Revised Statutes, the procedure prescribed by the latter statute must be followed in the awarding of contracts in connection with the construction of the landing area in question.

Section 3709, Revised Statutes, requires that all purchases of supplies and contracts for services , except in the case of emergency, be made after advertising for competitive bids. It has been held that the request for bids--through specifications or otherwise--should fairly reflect the Government's need and that the lowest priced article which will answer that need is the article authorized to be purchased at public expense. 16 Comp. Gen. 168; id. 404. The need of the Government is the controlling element, and it is the responsibility of adninstrative officers to determine factually whether the supplies of services offered reasonably will serve such need. But this responsibility must be discharged within the law, and it is well settled that appropriated moneys are available so procure early that which is needed as distinguished from that which may be desired. 13 Comp. Gen. 284; 16 id. 171.

It appears from your letter that under the usual arrangements with municipalities to be benefited under the program the Federal Government has the exclusive right to determine the materials to be used in the construction of landing areas. Also, it appears that the Administrator of Civil Aeronautics has determined that on the basis of serviceability and from the standpoint of suitability for the Federal purposes to be served there is no preference between the two types of paving construction included in the specifications adopted by the Civil Aeronautics Administration, except in cases of unusual climatic or soil conditions, which it is understood, do not exist in the present case. Under those circumstances there appears to be no legal basis for confining the solicitation, receipt, and consideration of bids to those based only on Portland cement concrete construction of runways. This conclusion is required, however, only when the Government, under its agreement with the municipality involved, has the exclusive right to select the materials to be used and is not necessarily a negative answer to the first question presented in your above-quoted letter.

There is noted in your letter the statement that the form of agreement which the Administrator of Civil Aeronautics enters into with state or municipal agencies for the construction of landing areas on land owned by such agencies generally provides that--

"The Government shall have the right to determine the exact nature o fthe improvements to be made unde the Project, the manner in which the Project is to be conducted, the amount of Federal funds to be expended, and all other matters relating to the Project."

I do not find that the inclusion of such provision in the agreements is by virtue of any statutory requirement. Rather, it appears to be based on established administrative policy. It is not, therefore, an absolute requirement of law which may not be waived, modified, or suspended under proper circumstances. In this connection it is noted that a footnote on the form of agreement provides, in part, as follows:

" ***If there is any provision of this form which does not conform or is not applicable to the facts of the particular case, or it is desired to alter the language of this form for any reason, an authorized representative of the appropriate regional office of the Civil Aeronautics Administration should be consulted in an effort to reach an agreement as to a satisfactory revision or modification."

Under the program here involved, a State or municipal agency is not required by law to turn over its land to the Civil Aeronautics Administration for the construction of landing areas and, therefore, however desirous such agency may be of recieving the benefits of the program, it may not be compelled to do so and to accept any and all conditions that the Civil Aeronautics Administration may attach thereto, to the exclusion of its own desires in the matter. The State or municipal agency is entitled to attach conditions to the use of its land which conditions may be accepted by the Civil Aeronautics Administration so long as they do not violate restrictions on the use of the available public funds. No reason appears why the municipality could not require, as a condition to the land and the construction of the runways, that such runways be made of cement concrete; an no reason appears why the Civil Aeronautics Administration could not then advertise for bids on cement concrete construction, only, and accept the lowest responsible bid meeting the advertised specifications. In such event,

the need of the Government would be dictated by the condition attached by the municipality and would be for cement concrete construction, hence, advertising for competitive bids for that need would meet the requirements of section 3709, Revised Statutes.

It is provided in the form of agreement here involved that such agreement is--

" ***to become effective upon the award of any construction contract for any portion of the Project or the inauguration of any portion of the Project under force account, and to continue in full force and effect during the useful life of the improvements made under the Project."

Since it is stated in your letter that the Administrator "is now negotiating" with the municipality, and in view of the questions presented, it is understood that an effective and binding agreement has not yet been made with the city of Beatrice, Nebraska. If that be the situation then, on the basis of the foregoing, if the municipality makes it a condition of the agreement t become effective that cement concrete runways be constructed your first question is answered in the affirmative.

In view of the above answer to question 1 your question nuber 2 will be considered on the basis that an effective and binding agreement already has been entered int withe the municipality under which the Government has exclusive control in the selection of the materials to be used--otherwise the municipality could require the Government to furnish cement concrete construction. On that basis the answer to question number 2 must be in the negative. Section 3709, Revised Statutes, requires acceptance of the lowest responsible bid under such circumstances or the rejection of all bids and a readvertising of the need under proper specifications. The fact that the municipality would be willing to pay the difference between such low bid and the low cement concrete bid would be of no avail since there appears to be no authority of law to accept financial contributions from municipalities, under the landing area program, for the purposes, directly or indirectly, of augmenting the amounts appropriated by the Congress and of circumventing the requirements of section 3709, Revised Statutes.

A negative answer to your question number 2 makes it unnecessary to answer question numbers 3 and 4.

Respectfully,

Comptroller General of the United States.