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80-8

January 17, 1980

Commissioner David W. Bustin
Department of Manpower Affairs
P.O. Box 309
Augusta, Maine 04330

Dear Commissioner Bustin:

You have requested an opinion from this office as to whether, under present law, the State may take action to ensure that no State agencies purchase any goods or supplies from a manufacturer that is an historic and continuing violator of the federal labor laws until such time as that manufacturer ceases and desists from such activity. It is our understanding that your request arises from the question of whether the State may cease doing business with a specific manufacturer, namely J. P. Stevens Co., Inc. Our response should be construed as applicable only to that company and others with substantially similar labor relations histories. Related questions concerning the authority of the State to exclude other companies from bidding for state contracts for reasons other than those considered in this opinion must be addressed on a case-by-case basis.

An examination of the State's authority to purchase goods and supplies for its own use indicates that the State, subject to certain statutory conditions, has the power to determine with whom and under what conditions it will enter into contracts.

It is well settled that when the State enters into contracts to purchase services, goods, and materials required by it, it is exercising its proprietary or business power. Atkin v. Kansas, 191 U.S. 207 (1903); Heim v. McCall, 239 U.S. 175 (1915). In exercising its proprietary function, the State "has the unrestricted power to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." U.S. v. New Orleans Public Service, Inc.; 553 F. 2d 459 (5th Cir. 1977).

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Therefore, as there is no right to contract with the government, there can be no claim of deprivation of property within the meaning of the 14th Amendment when an individual or corporation is not awarded a public contract. Furthermore; the due process clause guarantees a person only the right to notice and an opportunity to be heard before the State deprives him of his property. Ohio Inns Inc. v. Nye, 542 F. 2d 673 (6th Cir. 1973).

In American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla. 1972) (3-judge) aff'd without opinion 409 U.S. 904 (1972), a manufacturer of school yearbooks brought an action challenging the constitutionality of Florida statutes and regulations which required that all public printing be done in the State. In upholding the constitutionality of the statutes and regulations, the court held that a state performs a proprietary function when establishing the specifications for its printing work. In its decision, the court stated:

" ... in framing specifications for its printing work, the state performs a proprietary function and stands in the shoes of a private party who is entitled in most instances to choose where and by whom his printing will be done. In that posture, the State is like a trustee; the citizens are the beneficiaries."

The purchase of all goods, materials and supplies for the use of any department or agency of State government is controlled by the Department of Finance and Administration through the Bureau of Purchases (5 M.R.S.A. § 1811). In carrying out its contracting authority, the Bureau of Purchases must follow the procedures and guidelines set forth in Title 5 M.R.S.A., Chapter 155, Section 1811, et seq. Section 1816 provides that all bids, awards, and contracts shall be made pursuant to competitive bidding. "Competitive bidding" is defined in Section 1816(3) as follows:

"Competitive bidding shall mean the transmission of a written or oral proposal or invitation to bid to at least 3 responsible suppliers to be replied to at a stated time."

Section 1816(7) further provides that all orders awarded or contracts made by the State "shall be awarded to the lowest responsible bidder." (emphasis added.)

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Statutes governing the competitive bidding process for public contracts generally fall into three categories. These statutes require that a bid be awarded to either the low bidder, the lowest and best bidder, or the lowest responsible bidder. The term "lowest responsible bidder" requires that a bid be awarded to the contractor who is responsible and the lowest in price.

"The term 'responsible' as thus used is not limited in its meaning to financial resources and ability. What the public desires is a well-constructed work, for which a lawsuit even against a responsible defendant is a poor substitute; and authorizations of this kind are held to invest public authorities with discretionary power to pass upon the honesty and integrity of the bidder necessary to a faithful performance of the contract." 64 Am. Jur. 2d, Public Works and Contracts § 70.

It is well settled that officials charged with awarding contracts to the lowest responsible bidder are afforded broad discretion in their actions and, in the absence of fraud or gross abuse, their actions will not be disturbed. Hanson v. Mosser, 427 P.2d 97 (Ore. 1967); Inge v. Board of Public Works of Mobile, 33 So. 678 (Ala. 1902). This rule was well stated by the court in State ex rel. Rorer J. Au & Son, Inc. v. Studebaker, 201 N.E.2d 230 (Ohio, 1963):

"There is but little dissent from the general rule that in determining who is such lowest responsible bidder, etc., public boards and officials are vested with wide discretion, and their decision, when based upon an honest exercise of the discretion thus vested in them, will not be interfered with by the courts, even if erroneous."

An examination of those cases in which the standard of lowest responsible bidder has been reviewed, indicates that whether or not a particular bidder is responsible must be determined on a case-by-case basis. Those cases further indicate that there is a wide range of reasons as to why particular bidders have been determined not to be responsible.

Allegations of criminal activity on the part of a contractor have been held to warrant a determination that the contractor is not a responsible bidder. In Trap Rock Industries, Inc. v. Kohl, 284 A.2d 161 (N.J. 1961), a contractor was prevented from bidding on state contracts because the principal owner of the corporation had been charged with assault and battery and attempted bribery of a police officer. The alleged criminal activities did not occur in the course of corporate business. In upholding the State's suspension of the contractor's right to bid on state contracts, the court stated:

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"It is settled that the legislative mandate that a bidder be 'responsible' embraces moral integrity just as surely as it embraces a capacity to supply labor and materials. The relevancy of moral responsibility is evident. It heads off the risk of collusive bidding. It assumes honest performance. It meets the citizen's expectation that his government will do business only with men of integrity. The question then is whether under the circumstances of these cases, the Commissioner could reasonably believe that it was not in the best interest of government to deal with these contractors until the criminal allegations were resolved in some manner." e.g., Venneri Co. v. Paterson Housing Authority, 149 A. 2d 228 (N.J. 1959); Mal-Bros. Contracting Co. v. Kohl, 273 A.2d 357 (N.J., 1971); Zara Construction Corp. v. Morris, 225 N.Y.S.2d 507 (1952).

Failure to comply with anti-discrimination statutes has been held to warrant a determination of non-responsibility. In Dalton v. Kunde, 286 N.E.2d 483 (Ohio 1972), a bidder failed to give assurances that it would comply with affirmative action guidelines in the performance of a contract. In finding that the bid was rightfully rejected, the court stated:

"Capacity to assure a performance which complies with antidiscrimination laws is reasonably a part of the standard of a best or responsible bidder on a contract involving the expenditure of public funds."

Furthermore, J. P. Stevens Co., Inc., the manufacturer which is subject of this opinion, has been declared an unacceptable contractor by several public agencies because of its labor relations practices.

In June 1977, the city of Atlanta issued an executive order declaring that it was not in the best economic, business and social interests of the city to contract with the J. P. Stevens Co. in light of the numerous findings of unfair labor practices by the National Labor Relations Board against the company, the proceedings against the company for contempt for failure to comply with the orders of the NLRB and the

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discriminatory employment practices of the company.¹ The company challenged the Executive Order in the matter of J.P. Stevens Co. v. Maynard Jackson and ACTWU, No. 77-1087(A), U.S. Dis. Ct. N.D., Ga., July 26, 1978, 20 Lab Rel. Rptr. 2827. The court upheld the right of the city to issue such an order and found that the city had established a reasonable condition precedent to city contracting. The court also found that the authority for imposing conditions precedent is implied in the language of the state statute; municipal contracts are to be awarded to the lowest and best bidder.

¹The following provides a summary of J. P. Stevens Co.'s adverse history before the NLRB and appellate courts: J.P. Stevens & Co. (Stevens I), 157 NLRB 869, enf'd with modification, 380 F. 2d 292 (2d Cir.), cert. denied, 389 U.S. 1005 (1967); J. P. Stevens & Co. (Stevens II), 163 NLRB 217, enf'd with modifications, 388 F. 2d 896 (2nd Cir. 1967), cert. denied, 393 U.S. 836 (1968); J. P. Stevens & Co. (Stevens III), 167 NLRB 266, enf'd. with modifications, 406 F. 2d 1017 (4th Cir. 1968); J. P. Stevens & Co., (Stevens IV), 167 NLRB 258, enf'd with modifications, 406 F. 2d 1017 (4th Cir. 1968); J. P. Stevens & Co. (Dublin-Nathaniel Plants) (Stevens V), 171 NLRB 1202, enf'd. 417 F. 2d 533 (5th Cir. 1969); J. P. Stevens & Co. (Gulistan Division) (Stevens VII), 179 NLRB 254 enf'd., 441 F. 2d 514 (5th Cir.), cert. denied, 404 U.S. 830 (1971); J. P. Stevens & Co. (Stevens IX), 183 NLRB 25 (1970), enf'd, 461 F. 2d 490 (4th Cir. 1972); The Black Hawk Corp. (Stevens X), 183 NLRB 267 (1970); J. P. Stevens & Co. (Gulistan Division) (Stevens XI), 186 NLRB 180 (1970), enf'd., 455 F. 2d 607 (5th Cir. 1971); J. P. Stevens & Co., Inc. (Stevens XII), 190 NLRB 751 (1971), remanded on other grounds, 475 F. 2d 973 (D. C. Cir. 1973), on remand, 205 NLRB 1032 (1973); NLRB v. J. P. Stevens & Co. (Stevens XIII), 464 F. 2d 1326 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973) (on contempt), remedial order at 81 LRRM 2285; J. P. Stevens & Co. (Stevens XIV), 217 NLRB 90 (1975), enf'd., 547 F. 2d 792 (4th Cir. 1976); J. P. Stevens & Co. (Stevens XV), 219 NLRB 850, enf'd., 547 F. 2d 792 (4th Cir. 1976); J. P. Stevens & Co. (Stevens XVI), 220 NLRB 34 (1975); NLRB v. J. P. Stevens & Co. (Stevens XVII), 538 F. 2d 1152 (5th Cir. 1976) (on contempt); NLRB v. J. P. Stevens & Co. (Stevens XVIII), 563 F. 2d 8 (2d Cir. 1977) (on contempt).

J. P. Stevens' recent history of adverse Title VII, Equal Employment Act, 42 U.S.C. § 2000e, et seq., decisions include: Sherrill v. J. P. Stevens & Co., 410 F. Supp. 770 (W.D. N.C. 1975), aff'd No. 761064 (4th Cir. Jan. 24, 1977) (unpublished); Sledge (Harrison) v. J. P. Stevens & Co., 10 Empl. Prac. Dec. ¶10,585 and 12 Empl. Prac. Dec. ¶¶ 11,248 and 11,047 (E.D. N.C. 1976), stayed pending appeal, 12 Empl. Prac. Dec. ¶11,252 (4th Cir. 1976).

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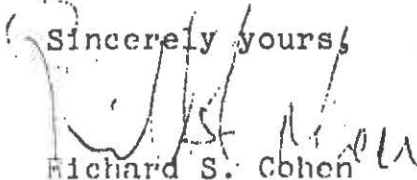
The State Purchasing Agent, with the approval of the Commissioner of Finance and Administration, is authorized to promulgate such rules and regulations as may be necessary to implement the competitive bidding system (5 M.R.S.A. § 1813). It is clear, therefore, that the State Purchasing Agent has the authority to promulgate regulations establishing under what circumstances a vendor would not be considered a responsible bidder.

Therefore, if the State wishes to adopt and implement a policy against contracting with those individuals or corporations who are historic and continuing violators of the federal labor laws, through the promulgation of a regulation pursuant to the competitive bidding statutes, such action would be within the purview of the statutory scheme and not deprive those individuals or corporations of any constitutionally protected rights. As the Maine Administrative Procedure Act requires that notice and an opportunity for a public hearing be given prior to the promulgation of any regulation, all parties who would be interested in or affected by such a regulation would have an opportunity to express their positions.

In reaching the conclusion expressed in this opinion, we are strongly influenced by the fact that the criterion to be used for excluding manufacturers from bidding on State contracts requires a finding of unlawful conduct by a court or other tribunal. We believe the practice would be far more suspect if the criteria for excluding a company were grounded in policy or philosophical considerations rather than on actual violations of law.

Finally, although we have not specifically addressed this issue, we should note that before any company may be excluded from bidding for State contracts certain due process requirements, such as notice and opportunity for hearing, may be required.

Sincerely yours,


Richard S. Cohen
Attorney General

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