

**OPINION
63-145**

July 10, 1963 (OPINION)

HIGHWAY DEPARTMENT

RE: Commissioner's Authority - Rules and Regulations

This is in reply to your letter of July tenth, 1963, concerning chapter 43-07 of the N.D.C.C., as amended by S.L. 1963, Ch. 304, Sec. 5, where you asked the question: Are contractors bidding on or performing work on federal aid projects bound by 43-07, as amended, or may the Highway Commissioner promulgate rules and regulations for licensing, qualification and prequalification and utilize different procedures from those in 43-07, amended?

Chapter 43-07 N.D.C.C. was amended in great detail by the Thirty-eighth Legislative Assembly and one of the amendments changed 43-07-08 N.D.C.C. completely.

Prior to the amendments, that statute exempted contractors from the provisions of the chapter on projects financed in whole or in part by the Bureau of Public Roads. After the amendment, federal aid projects were not within the exceptions enumerated in 43-07-08.1/ showing at first blush that contractors bidding on federal aid projects let by the Highway Department would have to comply with the provisions of the chapter. One of the provisions to be complied with is 43-07-12, part of which reads "(a) contractor must be the holder of a license at least ten days prior to the date set for receiving bids, to be a qualified bidder."

23 Code Federal Regulations Sec. 1.16 2/ reads in part: "(no contractor shall be required by law, regulation or practice to obtain a license before he may submit a bid or before his bid may be considered for award of the contract." 3/ 43-07-12 N.D.C.C. and 23 Code Federal Regulations Sec. 1.16 are directly opposite. Both of the conflicting sovereigns, supreme in their own sphere, and, here irreconcilable, can be appeased.

24-02-01 N.D.C.C. 4/ authorizes and empowers the commissioner "to make all the contracts and to do all things necessary to cooperate with the United States government in the construction of roads under the provisions of this Act (P.L. 156) or other acts of Congress that may be enacted . . ." (Emphasis supplied).

While this statute specifically points to P.L. 156 5/ that law, while amended, continues to the present time. The laws relating to highways were revised, codified and reenacted by Sec. 1 of the Act approved August twenty-seventh, 1958 (72 Stat. 885) as Title 23, U.S. Code, "Highways" and for the purposes of this title, the three federal aid systems, the primary and secondary systems and the interstate system, are continued pursuant to the provisions of Title 23. 6/ By a process of maturation, P.L. 156 grew unbroken into the present Title 23. The *raison d'etre* for enacting in 24-04-01 seems to be that the legislature was desirous of getting the federal aid that North Dakota is entitled to. This being true, the commissioner

shall "do all things necessary to cooperate with the United States government in the construction of roads."

The authority to cooperate with the United States government is the authority to conform to the federal laws and rules under which participation is made in the construction and repair costs of federal aid highways because failure to conform to the federal laws precludes participation, and the authority to cooperate is the authority not to be bound by conflicting laws of this state which would bar the state of North Dakota from its just moneys in federal aid.

There is no disparity between any other laws of either sovereign, but this one instance, and in this one instance, the federal government is adamant.

The commissioner having the authority to cooperate with the federal government may, when faced with irreconcilable conflict between state and federal laws and regulations act according to federal law, if acting under state law would result in a termination of federal aid.

We understand, of course, that upon or subsequent to the award of the contract the successful bidder must obtain a license before commencing work on the contract.

1/ S.L. 1963, Ch. 304, Sec. 5.

2/ See 72 Stat. 915, 23 USC 315.

3/ The whole of Sec. 1.16 reads: "With respect to federal aid projects, no person, no procedure or requirement for prequalification, qualification or licensing of contractors shall be approved which, in judgment of the administrator, may operate to restrict competition, to prevent submission of a bid by, or to prohibit the consideration of a bid submitted by, any responsible contractor, by the resident or nonresident of the state wherein the work is to be performed. No contractor shall be required by law, regulation or practice to obtain a license before he may submit a bid or before his bid may be considered for award of a contract. This, however, is not intended to preclude requirements for the licensing of a contractor upon or subsequent to the award of the contract if such requirements are consistent with competitive bidding. Prequalification of contractors may be required as a condition for submission of a bid or award of contract only if the period between the date of issuing a call for bids and the date of opening the bids affords sufficient time to enable a bidder to obtain the required prequalification rating. Requirements for the prequalification, qualification or licensing of contractors, that operate to govern the amount of work that may be bid upon by or may be awarded to a contractor, shall be approved only if based upon a full and appropriate evaluation of the contractor's experience, personnel, equipment, financial resources, and performance record."

4/ S.L. 1953, Ch. 177, Sec. 22.

5/ Act, July 11, 1916 c. 241.39 Stat. 355.

6/ 23, USC 103.

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