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June 30, 1961

CLARK KENNEDY
ALVIN LARSON

Mr. Justin Herman  
Director  
Arizona Highway Commission  
Phoenix, Arizona

Re: Award of Contract - Budget Item No. 306  
Contract No. NONS 427 (61) A, AFE 3641

Dear Mr. Herman:

The question has been asked of our office as to whether or not Title 34 and specifically Sec. 34-241 (B), commonly called the 5% preferential statute, is applicable to the Highway Department. This request is made in order to allow the Commission to determine whether or not it should award the above referenced contract to the Schmidt Construction Company, Inc, for a total amount of \$524,460 or to Peter Kiewit Sons' Co. for a total amount of \$548,644. For the purposes of this letter, we are assuming that Peter Kiewit Sons' can qualify for the 5% preference under Sec. 34-241 (B) and that as a result, he would qualify for the bid if the preferential statute applies.

The difference in expenditures to the state would be an increase of \$27,432.20 if the preferential statute applies.

This general subject of the applicability of the preferential statutes and the contracting statutes is now the subject of litigation in civil suit, Arizona Subcontractors Conference vs. Board of Regents, and as a result the Attorney General cannot and will not issue an opinion thereon since the matter is before the courts.

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However, to guide the Commission in its determination and to aid it, we recommend by this letter that the Commission do not acknowledge the 5% statute and award the bid to the lowest money bidder, to wit: Schmidt Construction Company, Inc. Our reasons for this are as follows:

Section 18-113 and the entire Title 18 control the construction of highways and is a specific statute. Title 34 is a general statute which has been construed in Schrey vs. Allison Stell Mfg. Co., 78 Ariz. 282 as being restrictive of the special statutes and may result in Title 34 being applicable to the Highway Department. However, since the inception of the Highway Department and the Highway Code, the Highway Commission has not, under its administrative practice, and in reliance upon statements in two prior Attorney General opinions, No. 58-90 and No. 57-138, considered itself compelled to acknowledge the 5% preferential statutes. The statements in these Attorney General opinions which purport to limit Title 34 to public buildings and to exclude therefrom the Highway Department, are not on point and the opinions did not deal with the questions and we do not believe the Commission can or should rely wholly on these statements. We do think, however, that the Commission's administrative practice and the rule laid down in Long vs. Dick, 87 Ariz. 25, 347 P. 2d. 581, to wit: that where the operation of a statute has been repeatedly made known to members of the Legislature as in this case and its administrative interpretation had not resulted in any change of material or substantial nature, that although the administrative interpretation does not bind upon the Supreme Court, that the Supreme Court in case of serious doubt would not adopt a different construction, is substantial reason for our office thinking that the Supreme Court would very likely hold that the Highway Commission duties under Sec. 18-113, A.R.S., to let a contract to the lowest responsible bidder, would control over the 5% preferential statute.

If the Commission at this time were to adopt and recognize the 5% preferential statute, it would be out \$27,432.20 in public funds without any reasonable assurance that this expenditure could or would be supported and the Commission may very likely render itself liable in a taxpayer's suit for this increased expenditure of funds.

We, therefore, recommend to the Commission that they award the contract to the lowest money bidder, leaving the matter of the 5% statute and the next lowest bidder's preferential rights to be determined in a judicial proceeding, should the same be instituted. This course of action will be consistent with the past conduct of the Commission and we think the Commission should be so guided. We, therefore, recommend that the contract be issued to Schmidt Construction Company, Inc.

Cordially,

ROBERT W. PICKRELL  
The Attorney General

WILLIAM CLARK KENNEDY  
Chief Assistant Attorney General

WCK:bh  
cc: Joseph B. Mertz  
Div of Contracts & Specifications