

MAY 4, 1951.

HON. R. J. ABBOTT,
State Highway Commissioner,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 19.

DEAR COMMISSIONER:

You have requested our opinion as to whether you have the authority, provided the consent of the State House Commission is obtained, to award a contract for repair work on a State highway bridge on the basis of the cost of material, labor and equipment, plus a fixed fee to cover overhead and profit, where it is practically impossible to estimate the amount of the work to be done. You have called our attention to the fact that while an extensive job of removing and replacing the concrete on the bridge in question will probably be required, you cannot properly estimate the extent of the repairs needed until the asphalt block pavement has been removed and the underlying concrete deck has been probed. With these uncertainties, it is difficult to prepare plans and specifications for competitive bidding on the regular contract basis without inviting extraordinarily high quotations from bidders. You have indicated, however, that you would advertise for bids on the fee to be paid for overhead and profit.

In my opinion, you have the authority to proceed as above outlined, subject to the qualification that bids should be invited on labor, material and equipment to whatever extent is practicable, and that the contractor's cost in respect to any item should be a basis of the contract only when competitive bidding on that item is not practicable.

The pertinent provisions of the State Highway Law (R. S. 27:7-25 et seq.) require advertisement for bids, competitive bidding, and award of the contract to the lowest responsible bidder on a fixed price basis. However, section 52:34-5 of the Revised Statutes provides in its second paragraph as follows:

"Nothing in this chapter shall be construed to prohibit the State House Commission, by unanimous vote of all of the members thereof in open public meeting from awarding any contract or authorizing the award of any contract for the doing of any work or the furnishing of any goods, chattels, supplies or materials, without first advertising as herein required, in case of public exigency, or for the purchase of perishable food supplies, or where property has been destroyed by fire or by the elements, and the determination of the State House Commission that a public exigency exists shall not be questioned."

This language is sufficiently broad to cover contracts made by all departments and commissions of the State Government, including the Highway Department. That it should be so interpreted is manifest when the quoted section is read, as it should be, in conjunction with section 52:34-1, which precedes it in the same chapter. Section 52:34-1 requires public advertising for bids on all contracts over \$1,000 made by "any State department or commission" and payable with State funds. Section 52:34-5 evidently pertains to at least as broad a category of contracts as is covered by 52:34-1, and therefore it appears clearly applicable to State highway contracts.

It would seem, furthermore, that one of the purposes of section 52:34-5 is to protect the interest of the State by authorizing a waiver of the usual bidding procedure where, as here, the latter would probably result in excessive quotations from bidders because of the uncertainties involved in the work.

For the foregoing reasons, the State House Commission may grant the authority here sought so far as a public exigency justifies such action. In the circumstances presented, however, the exigency would appear to exist only to the extent that the use of competitive bidding would not operate to the benefit of the State. In respect to items on which competitive bids can appropriately be secured, the regular procedure in the Highway Law should be followed.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By : THOMAS P. COOK,
Deputy Attorney General.

MAY 31, 1951.

HON. FRANK DURAND,
State Auditor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 20.

DEAR SIR:

You have requested an opinion as to whether the State Auditor has the power to conduct post-audits of the transactions and accounts kept by or for the New Jersey Turnpike Authority.

It is our opinion that the State Auditor has not only the *power* but also the *duty* to conduct post-audits of all transactions and accounts kept by or for the New Jersey Turnpike Authority.

Article VII, Section I, paragraph 6, of the Constitution of 1947, provides:

The State Auditor shall be appointed by the Senate and General Assembly in joint meeting for a term of five years and until his successor shall be appointed and qualified. *It shall be his duty to conduct post-audits of all transactions and accounts kept by or for all departments, offices and agencies of the State Government, to report to the Legislature or to any committee thereof as shall be required by law, and to perform such other similar or related duties as shall, from time to time, be required of him by law. (Italics ours.)*

An agency of the State is not essentially an agency of the State Government. In common speech and common apprehension the government of the State and the State itself are usually regarded as identical; the one is often confounded with the other, and often the former is meant when the latter is mentioned. *Poindexter vs.*