OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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Jim Ryan
ATTORNEY GENERAL

FILE NO. 96-026

HIGHWAYS:
Toll Highway Authority - Replacement of
Microwave Communications System

Mr. Ralph C. Wehner
Executive Director
Illinois State Toll Highway Authority
One Authority Drive
Downers Grove, Illinois 60515

Dear Mr. Wehner:

I have your letter wherein you inquire whether the Illinois State Toll Highway Authority (hereinafter "Authority") must solicit public bids for the replacement of its microwave communications system following Federal Communications Commission (hereinafter "FCC") spectrum auctions which will force the relocation of the Authority's system to another frequency. In the unique circumstances of this transaction, it is my opinion that negotiations for a replacement communications system conducted in accordance with the pertinent Federal procedures will satisfy the competitive bidding requirements which are generally applicable to purchases by the Authority.

According to the information you have provided, the Authority currently operates a microwave communications system in certain broadband frequencies under a license granted by the FCC. The FCC has been planning for and recently began implementing the relocation of existing microwave licensees to clear those frequencies for private use by emerging technology groups. Two sets of Chicago area broadband frequency licenses, including that of the Authority, were auctioned off by the FCC in March, 1995, for use by personal communication services licensees (hereinafter "PCS Licensees"). PCS is a mobile telecommunications technology involving wireless mobile communication devices which allow voice and data transmission from a single telephone number. AT & T Wireless Services, Inc. ("AT & T") and PrimeCo Personal Communications, L.L.P. ("PrimeCo") were the successful bidders for these licenses.

After the FCC auction, the Authority became the "incumbent" and retains primary status on the frequencies for a specified period of time, during which the PCS Licensees have a lesser status on the frequencies. While technically the Authority and the PCS Licensees could operate simultaneously, the PCS Licensees can only do so if their use does not interrupt the Authority's use. In practicality, service disruptions would apparently be too great for the PCS Licensees to operate prior to the relocation of the Authority's microwave system. (59 Fed. Reg. 65502

(1994).) The PCS Licensees, having invested significant sums in acquiring the licenses (over $350,000,000 each), are anxious to have the Authority relocate to facilities using different frequencies as soon as possible.

The FCC has enacted extensive regulations governing the relocation of incumbents such as the Authority. (See, e.g., 57 Fed. Reg. 49020 (1992); 58 Fed. Reg. 46547 (1993); 59 Fed. Reg. 19642 (1994); 59 Fed. Reg. 65501 (1994); 61 Fed. Reg. 26670 (1996) and 61 Fed. Reg. 29679 (1996), to be codified at 47 C.F.R. § 101.69.) The FCC regulations organize incumbent relocation over periods of time and varying levels of negotiation. (61 Fed. Reg. 29679, 29693 (1996), to be codified at 47 C.F.R. § 101.69(b), 101.71 and 101.73.) Public safety incumbents such as the Authority are subject to a three year voluntary negotiation period. During the voluntary negotiation period, the incumbents and PCS Licensees are authorized to negotiate any and all terms of relocation. (61 Fed. Reg. 29679, 29694 (1996), to be codified at 47 C.F.R. § 101.71.) To hasten the relocation of incumbents, PCS Licensees can offer the incumbents "premiums", such as replacing an outdated analog system with a technically advanced digital system or relocating the incumbent's entire system rather than just the interfering links. (See, e.g., 61 Fed. Reg. 29679 (1996).) If no resolution is reached by the end of the three years, a mandatory two year negotiation period begins. The

mandatory negotiations must be conducted in "good faith", which will be evaluated by the FCC on a case by case basis using contract law principles and other factors. (61 Fed. Reg. 29679, 29694 (1996), to be codified at 47 C.F.R. § 101.73.) If all negotiations fail, the PCS Licensee can thereafter commence involuntary relocation procedures. (61 Fed. Reg. 29679 (1996).)

Involuntary relocation requires the PCS Licensees to pay all of the incumbent's actual costs of relocation of the interfering links, including engineering, equipment costs and other reasonable costs. (61 Fed. Reg. 29679, 29694 (1996), to be codified at 47 C.F.R. § 101.75(a)(1).) All necessary activities, including engineering and frequency coordinating, must be completed prior to relocation, and the new communications system must be built and tested prior to relocation. (61 Fed. Reg. 29679, 29694 (1996), to be codified at 47 C.F.R. § 101.75(a)(2), and (3).) Moreover, a public safety incumbent may relocate back to the original facilities within one year, or force PCS Licensees to remedy defects, if the new facilities prove not to be comparable. (61 Fed. Reg. 29679, 29694 (1996), to be codified at 47 C.F.R. § 101.75(d).)

AT & T and PrimeCo have been negotiating with the Authority to relocate its system in accordance with the Federal regulations. Under the latest proposal from PrimeCo, the PCS Licensee would be responsible for installing, building and

testing a replacement digital microwave communications system for the Authority, in return for which the Authority would contribute approximately $18,500,000. Based upon bids solicited by the Authority in 1992 and 1994, the cost to the Authority under the PrimeCo proposal would be significantly less than the cost of purchasing a comparable system on the open market, a cost estimated at $30,000,000 today. PrimeCo is apparently able to furnish the system at the reduced cost because of savings in equipment costs generated through its purchasing power in the technology market, as well as its willingness to underwrite part of the cost of system upgrades as an incentive to clear the Authority's current system from the desired frequencies.

The form the negotiations have taken, however, has raised questions concerning compliance with applicable competitive bidding requirements. The Toll Highway Act generally requires that construction work and contracts for services or supplies in excess of certain amounts be awarded to the lowest responsible bidder after competitive bidding. (605 ILCS 10/16, 10/16.1 (West 1994).) Subsection 16.1(A) of the Toll Highway Act (605 ILCS 10/16.1(A) (West 1994)) provides, in part, as follows:

> "(A) All contracts for services or supplies required from time to time by the Authority in the maintenance and operation of any toll highway or part thereof under the provisions of this Act or all direct contracts for supplies to be used in the construction of any toll highway or part thereof to be awarded under this Section, rather than

> as a part of a contract pursuant to Section 16 of this Act, when the amount of any such supplies or services is in excess of the sum of $7,500 shall be let to the lowest responsible bidder or bidders, on open, competitive bidding after public advertisement * * *.
>
> * * * "

The ultimate issue is whether, and how, these requirements can be satisfied in the unique circumstances created by the forced relocation of the Authority's communications system pursuant to Federal law and regulations.

It is my opinion that the negotiations undertaken by the Authority and the PCS Licensees satisfy section 16.1 of the Toll Highway Act. The circumstances attendant upon the forced relocation of this system have practically limited the potential market for furnishing a replacement system to the two PCS Licensees which acquired rights to the Authority's operating frequencies through the spectrum auctions. The PCS Licensees' ultimate obligation to pay the costs of relocating the Authority's system or to furnish a comparable system, coupled with the value of the early relocation to the licensees' business, permits underwriting of the costs of a replacement system to an extent that no other entity could justify. Therefore, the limited class of potential bidders has been fully represented in these negotiations.

As was stated in Konica Business Machines v. Regents of the University of California (Cal. App. 1988), 253 Cal. Rptr. 591, 595:

" * * *

> The purpose of requiring governmental entities to open the contracts process to public bidding is to eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous marketplace competition. * * *

* * * "

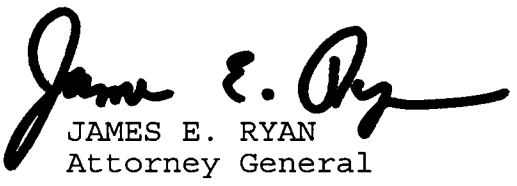
Exceptions to strict compliance with competitive bidding requirements have been recognized. See Los Angeles Dredging Company v. City of Long Beach (Cal. 1930), 291 P.839, 842.

Here, there are but two entities which could economically compete for the replacement of the Authority's communications system; both entities have been given an opportunity to negotiate proposals for the replacement of the system. Moreover, it is clear from the Authority's previous solicitation of bids for replacement of the system that the proposal advanced by PrimeCo, if accepted, will save the Authority (and hence its public users and toll payers) a significant amount of money which might otherwise have to be diverted from the tolls collected. Consequently, there is no question but that the negotiation of a proposal between the two potential providers in accordance with the Federal procedures has resulted in competition advantageous to the Authority, one of the

primary goals of the competitive bidding requirements. No suggestion has been made that negotiating the relocation in accordance with the Federal regulations in these circumstances will result in fraud or the misuse of public funds.

It is axiomatic that the intention of the lawmakers is the law (Kloss v. Suburban Cook County Sanitarium (1949), 404 Ill. 87, 96) and that when a literal reading of a statute would produce a result not intended, the literal meaning may be altered to effectuate the true legislative purpose. (Mitee Racers v. Carnival-Amusement Safety Board (1987), 152 Ill. App. 3d 812, 821.) Therefore, it is my opinion that in negotiating for the replacement of the Authority's microwave communications system in accordance with the FCC regulations concerning forced relocation of public service frequency licensees, the Authority has satisfied the requirements of section 16.1 of the Toll Highway Act. In these circumstances, strict compliance with bidding format would not further, but would hinder, the goals to be promoted and, therefore, should not be required.

Sincerely,



JAMES E. RYAN
Attorney General