

H B

62

Original sponsors: Lindauer and  
Grussendorf

1 IN THE HOUSE

BY THE LABOR AND  
COMMERCE COMMITTEE

2 SENATE CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 62 (L&C)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the use of public money for the  
7 payment of nonresident individuals or businesses."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. USE OF PUBLIC FUNDS TO PAY NONRESIDENTS. (a) The state  
10 may not spend public money to employ or contract with a nonresident person  
11 to provide expertise or <sup>PROFESSIONAL</sup> services to the state unless a written report is  
12 filed with the Department of Administration. The report shall include a  
13 brief description of the work to be done by the nonresident person, the  
14 reasons why the state failed to identify an Alaskan person and the effort  
15 made to locate a qualified Alaskan person. The legislative audit division  
16 shall prepare the forms necessary to comply with this section.

17 (b) In this section "state" includes any state department, state  
18 agency, and state university.

19 \* Sec. 2. Contracts that are exempt from the provisions of AS 36.98 as  
20 provided in AS 36.98.010(1), are exempt from the provisions of sec. 1 of  
21 this Act.

22 \* Sec. 3. Section 1 of this Act is repealed July 1, 1985.  
23  
24  
25  
26  
27  
28  
29

STATE OF ALASKA 1984 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: \_\_\_\_\_

I. REQUEST

Bill/Resolution No.: SCSSHB 62  
 Title: Nonresident Contractual Services  
 Sponsor: Lindaur and Grussendorf  
 Requestor: Senate Labor and Commerce  
 Date of Request: \_\_\_\_\_

II. FISCAL DETAIL

Agency Affected: Administration  
 Program Category Affected: General Gov't.  
 BRU, Program of Subprogram(s) Affected: \_\_\_\_\_

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	F	FY 89
OPERATING						
100 PERSONAL SERVICES	-0-					
200 TRAVEL						
300 CONTRACTUAL	-0-		0.0			
400 COMMODITIES	-0-					
500 EQUIPMENT	.5					
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	.5		50.0			
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	.5		50.0			
FEDERAL FUNDS						
OTHER (Specify Source)						
TOTAL	.5		50.0			

POSITIONS:

FULL-TIME	-0-		-0-			
PART-TIME						
TEMPORARY						
TOTAL	-0-		-0-			

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Bob Link *Bob Link* Phone: 465-2250  
 Division: General Services & Supply Date: November 15, 1983

Approved by Commissioner: Lisa Rudd *Lisa Rudd* Date: 12/21/83  
 Department: ADMINISTRATION

Distribution:

- Original to Legislative Finance
- Copy to Office of Management and Budget (for Legislature introduced bills)
- Copy to Department (for Governor introduced bills)
- Copy to Sponsor
- Copy to Requestor (if different from Sponsor)

9/14/83

IV. ANALYSIS:

House Bill SCSSHB 62  
November 15, 1983

The bill only applies to those professional services defined in AS 36.98. This will reduce the annual work load to a maximum of 3,000 forms. The forms would be filed by professional category. During fiscal year 1986, the forms would be reviewed with the intent of identifying and encouraging the development of those professional services and areas of technical expertise lacking in Alaska.

Equipment:

Files and materials	\$ .5
---------------------	-------

Contractual Services:

Review	<u>50.0</u>
Total -	\$ 50.5

I. REQUEST

Bill/Resolution No.: SSHB 62  
 Title: Nonresident Contractual Services  
 Sponsor: Lindauer & Grussendorf  
 Requestor: Senate Labor & Commerce

II. FISCAL DETAIL

Agency Affected: Administration  
 Program Category Affected: General Government  
 BRU, Program of Subprogram(s) Affected: General Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES		81.8				
200 TRAVEL						
300 CONTRACTUAL		139.0				
400 COMMODITIES		3.9				
500 EQUIPMENT		10.5				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		235.2				

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND		235.2				
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME		3.0				
PART-TIME						
TEMPORARY						
		36.0				

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Bob Link *Bl Link*  
 Division: General Services & Supply

Phone: 465-2250  
 Date: 5-24-83

Approved by Commissioner: Lisa Rudd *L. Rudd*  
 Department: ADMINISTRATION

Date: 5/24/83

Distribution:

- Original to Legislative Finance
- Copy to Office of Management and Budget (for Legislature introduced bills)
- Copy to Department (for Governor introduced bills)
- Copy to Sponsor
- Copy to Requestor (if different from Sponsor)

3/8/83

Personal Services

Admin. Asst. II (R14)	\$25,740	
Clerk III (R8)	18,360	
Clerk II (R7)	16,896	
	<u>\$60,996</u>	
Benefits (.2208)	13,468	
Health Ins.	7,033	
Legal Trust	<u>270</u>	\$ 81.8

Contractual Services

Phones	\$ 4.0	
Printing-forms Leg. Audit	5.0	
Terminal rental (2)	10.0	
Legislative Audit Review	20.0	
System Development/Tracking, Matching	<u>100.0</u>	\$139.0

Supplies and Materials

Office Supplies	\$ 3.0	
Filing Cabinets	<u>.9</u>	\$ 3.9

Equipment

Work Stations	\$ 10.5	\$ <u>10.5</u>
		\$235.2

Filing of forms alone does not satisfy the intent of the bill. The forms and the data on them must be compiled and turned into information which will enable the State to develop expertise as described by the bill. This bill applies to all purchases made by any State agency, State university, borough, city, village, school district or other State subdivision. Not included in this fiscal note is the cost of time necessary to fill out all these forms. This version of the bill also requires that the form be filed with the Department of Education and University of Alaska in addition to Office of the Governor and Legislative Audit. The bill further includes non-profit corporations that use State money as well as State agencies, etc. as previously defined.

HOUSE BILL NO. 62

POSITION PAPER

HB 62 would require that a written report be filed with the Office of the Governor and the Division of Legislative Audit where public money is paid to a nonresident individual or business. Information to be provided includes a work description, reasons a nonresident was chosen, efforts made to use residents and recommendations to use residents in the future.

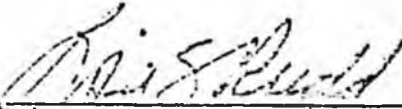
The use of resident contractors is certainly desirable. Our concern is that there are lower cost methods to conduct the information gathering and review function attempted by this bill. The Division of Legislative Audit or other agency could conduct a performance review of employment of nonresident contractors, targeting those areas necessary. They can do this with much greater efficiency and without the cost of additional resources, forms, further bureaucracy, etc.

It is necessary that the bill define "nonresident" so there is no confusion as to which group this bill is to be applied to; also to insure consistency with any other legal rulings as to the definition of residency.

Prepared by:

  
\_\_\_\_\_  
Anselm Staack, Deputy Commissioner

3/28/83  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Lisa Rudd, Commissioner

3/23/83  
\_\_\_\_\_  
Date

(3/28/83)

## I. REQUEST

Bill/Resolution No.: HB 62  
 Title: Nonresident Contractual Services  
 Sponsor: Lindauer  
 Requestor: House Finance Committee

## II. FISCAL DETAIL

Agency Affected: Administration  
 Program Category Affected: General Government  
 BRU, Program of Subprogram(s) Affected: General Services

## EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES		81.8				
200 TRAVEL						
300 CONTRACTUAL		139.0				
400 COMMODITIES		3.9				
500 EQUIPMENT		10.5				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		235.2				
CAPITAL						
REVENUE						

## FUNDING: (Thousands of Dollars)

GENERAL FUND		235.2				
FEDERAL FUNDS						
OTHER (Specify Source)						

## POSITIONS:

FULL-TIME		3.0				
PART-TIME						
TEMPORARY						
		36.0				

## III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

## IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Bob Link *Bob Link*  
 Division: General Services & Supply

*A. Smith*  
 Phone: 465-2250  
 Date: May 6, 1983

Approved by Commissioner: Lisa Rudd *Lisa Rudd*  
 Department: ADMINISTRATION

Date: 6/1/83

## Distribution:

Original to Legislative Finance  
 Copy to Office of Management and Budget (for Legislature introduced bills)  
 Copy to Department (for Governor introduced bills)  
 Copy to Sponsor  
 Copy to Requestor (if different from Sponsor)

3/8/83

Personal Services

Admin. Asst. II (R14)	\$25,740	
Clerk III (R8)	18,360	
Clerk II (R7)	16,896	
	<u>\$60,996</u>	
Benefits (.2208)	13,468	
Health Ins.	7,033	
Legal Trust	<u>270</u>	\$ 81.8

Contractual Services

Phones	\$ 4.0	
Printing-forms & Leg. Audit Review	5.0	
Terminal rental (2)	10.0	
Legislative Audit Review	20.0	
System Development	<u>100.0</u>	\$139.0

Supplies and Materials

Office Supplies	\$ 3.0	
Filing Cabinets	<u>.9</u>	\$ 3.9

Equipment

Work Stations	\$ 10.5	\$ <u>10.5</u>
		\$235.2

Filing of forms alone does not satisfy the intent of the bill. The forms and the data on them must be compiled and turned into information which will enable the State to develop expertise as described by the bill.

THE LEGISLATURE OF THE STATE OF ALASKA  
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST SSHB 62  
 Bill/Resolution No. \_\_\_\_\_  
 Title An Act relating to the use of public money for the payment of non-  
 Requested by Reps. Lindauer and Grussendorf Date \_\_\_\_\_

(+) resident individuals or businesses.

II. FISCAL DETAIL Legislative Audit Division  
 Agency Affected \_\_\_\_\_  
 Program Category Affected \_\_\_\_\_  
 BRU, Program, or Subprogram(s) Affected \_\_\_\_\_  
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES	1.0	1.0	1.0			
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						

TOTAL

FUNDING (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
GENERAL FUND	1.0	1.0	1.0			
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

Form design and printing costs

IV. DATE March 7, 1983 PREPARED BY Gerald L. Wilkerson  
 AGENCY Division of Legislative Audit  
 PHONE 465-3830

Original: Legislative Finance  
 cc: OMB  
 Prime Sponsor (First Legislator Named)



Sofo  
6/15/83 ✓

*At Lindauer's Request*

Original sponsors: Lindauer and  
Grussendorf

*Remember  
accordingly  
6/20/83*

BY THE LABOR AND  
COMMERCE COMMITTEE

1 IN THE HOUSE

2 SENATE CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 62 (L&C)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the use of public money for the  
7 payment of nonresident individuals or businesses."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. FINDINGS AND PURPOSE. The legislature finds that the  
10 state often employs nonresident consultants, advisors, and businesses to  
11 provide expertise and professional services to the state. In some in-  
12 stances this practice results in qualified Alaska individuals and busi-  
13 nesses being overlooked. In other instances, where there may be no qual-  
14 ified Alaska individual or business, the legislature further finds that the  
15 practice of employing nonresidents addresses only a specific problem or  
16 need without necessarily encouraging the development of needed expertise or  
17 services within the state. The purpose of this Act is to assist the state  
18 in identifying and encouraging the development of those services and areas  
19 of technical expertise that are lacking in Alaska.

20 \* Sec. 2. USE OF PUBLIC FUNDS TO PAY NONRESIDENTS. (a) The state may  
21 not spend public money to employ or contract with a nonresident person to  
22 provide expertise <sup>or</sup> ~~professional~~ services to the state unless a written  
23 report is filed with the Department of Administration. The report shall  
24 include a brief description of the work to be done by the nonresident  
25 person, the reasons why the state failed to identify an Alaskan person and  
26 the effort made to locate a qualified Alaskan person. The legislative  
27 audit division shall prepare the forms necessary to comply with this  
28 section.

29 (b) In this section "state" includes any state department, state

1 agency, and state university.

2 \* Sec. 3. Contracts that are exempt from the provisions of AS 36.98 as  
3 provided in AS 36.98.010(1) are exempt from the provisions of sec. 2 of  
4 this Act.

5 \* Sec. 4. Section 2 of this Act is repealed July 1, 1985.  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Sofa  
5/26/83

OLD

Original sponsors: Lindauer and  
Grussendorf

1 IN THE HOUSE

BY THE LABOR AND  
COMMERCE COMMITTEE

2 SENATE CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 62 (L&C)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the use of public money for the  
7 payment of nonresident individuals or businesses."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. FINDINGS AND PURPOSE. The legislature finds that the  
10 state often employs nonresident consultants, advisors, and businesses to  
11 provide expertise and professional services to the state. In some in-  
12 stances this practice results in qualified Alaska individuals and busi-  
13 nesses being overlooked. In other instances, where there may be no qual-  
14 ified Alaska individual or business, the legislature further finds that the  
15 practice of employing nonresidents addresses only a specific problem or  
16 need without necessarily encouraging the development of needed expertise or  
17 services within the state. The purpose of this Act is to assist the state  
18 in identifying and encouraging the development of those services and areas  
19 of technical expertise that are lacking in Alaska.

20 \* Sec. 2. <sup>AS 37.10 is amended by adding a new section to read:</sup> USE OF PUBLIC FUNDS TO PAY NONRESIDENTS. (a) The state may  
21 not spend public money to employ or contract with a nonresident person to  
22 provide expertise or professional services to the state unless a written  
23 report is filed with the Department of Administration. The report shall  
24 include a brief description of the work to be done by the nonresident  
25 person, the reasons why the state failed to identify an Alaskan person, <sup>and</sup> the  
26 effort made to locate a qualified Alaskan person, [and a recommendation for  
27 the development of qualified Alaskan persons to satisfy projected future  
28 needs of the state.] The legislative audit division shall prepare the forms  
29 necessary to comply with this section.

1 (b) In this section "state" includes any state department, state  
2 agency, and state university.

3 \* Sec. 3. Contracts that are exempt from the provisions of AS 36.98 as  
4 provided in AS 36.98.010(1) are exempt from the provisions of sec. 2 of  
5 this Act.

6 \* Sec. 4. Section 2 of this Act is repealed July 1, 1985.  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

# DRAFT

STATE OF ALASKA  
FISCAL NOTE

Revision Date: June 1, 1983

## I. REQUEST

Bill/Resolution No.: SCSSSHB 62  
Title: Nonresident Contractual Services  
Sponsor: Lindauer & Grussendorf  
Requestor: Senate Labor & Commerce

## II. FISCAL DETAIL

Agency Affected: Administration  
Program Category Affected: General Government  
BRU, Program of Subprogram(s) Affected: General Services

## EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES		-0-				
200 TRAVEL						
300 CONTRACTUAL		-0-		50.0		
400 COMMODITIES		-0-				
500 EQUIPMENT		.5				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		.5		50.0		
CAPITAL						
REVENUE						

## FUNDING: (Thousands of Dollars)

GENERAL FUND		.5		50.0		
FEDERAL FUNDS						
OTHER (Specify Source)						

## POSITIONS:

FULL-TIME		-0-		-0-		
PART-TIME						
TEMPORARY		-0-		-0-		

## III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

## IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Bob Link *Bob Link*  
Division: General Services & Supply

Phone: 465-2250  
Date: \_\_\_\_\_

Approved by Commissioner: Lisa Rudd *L. Rudd*  
Department: ADMINISTRATION

Date: 6/9/83

## Distribution:

- Original to Legislative Finance
- Copy to Office of Management and Budget (for Legislature introduced bills)
- Copy to Department (for Governor introduced bills)
- Copy to Sponsor
- Copy to Requestor (if different from Sponsor)

3/8/83

# DRAFT

FISCAL NOTE SCSSSHB 62

Assumptions

This note differs from the previous one due to revised assumptions based on the changes in the Committee Substitute. It is now clear that the bill only applies to those professional services defined in AS 36.98. This will reduce the annual workload to a maximum of 3,000 forms. The forms would be filed by professional service category. During fiscal year 1986 the forms would be reviewed with the intent of identifying and encouraging the development of those professional services and areas of technical expertise lacking in Alaska.

Equipment

Filing cabinets and materials	.5
-------------------------------	----

Contractual services

Final review	<u>50.0</u>
--------------	-------------

Total -	\$ 50.5
---------	---------

Sofa  
5/24/83

Original sponsors: Lindauer and  
Grussendorf

BY THE LABOR AND  
COMMERCE COMMITTEE

1 IN THE HOUSE

2 SENATE CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 62 (L&C)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the use of public money for the  
7 payment of nonresident individuals or businesses."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. FINDINGS AND PURPOSE. The legislature finds that the  
10 state often employs nonresident consultants, advisors, and businesses to  
11 provide expertise and services to the state. In some instances this prac-  
12 tice results in qualified Alaska individuals and businesses being over-  
13 looked. In other instances, where there may be no qualified Alaska indi-  
14 vidual or business, the legislature further finds that the practice of  
15 employing nonresidents addresses only a specific problem or need without  
16 necessarily encouraging the development of needed expertise or services  
17 within the state. The purpose of this Act is to assist the state in iden-  
18 tifying and encouraging the development of those services and areas of  
19 technical expertise that are lacking in Alaska.

20 \* Sec. 2. USE OF PUBLIC FUNDS TO PAY NONRESIDENTS. (a) The state and  
21 ~~a nonprofit corporation~~ may not spend public money to employ or contract  
22 with a nonresident person to provide expertise or services to the state  
23 unless a written report is filed with the Department of Administration.  
24 The report shall include a brief description of the work to be done by the  
25 nonresident person, the reasons why the state ~~or the nonprofit corporation~~  
26 ~~spending public money~~ failed to identify an Alaskan person, the effort made  
27 to locate a qualified Alaskan person, and a recommendation for the develop-  
28 ment of qualified Alaskan persons to satisfy projected future needs of the  
29 state. The legislative audit division shall prepare the forms necessary to

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

comply with this section.

(b) In this section "state" includes any state department, state agency, and state university.

\* Sec. 3. Section 2 of this Act is repealed July 1, 1984.

Alaska State Legislature

Representative John Lindauer  
District 10-A  
3933 Geneva Place  
Anchorage, AK 99508



While in Juneau  
Pouch V  
Juneau, AK 99811  
465-3709

House of Representatives

TO: Senator Eliason  
Chairman  
Senate Labor & Commerce

FROM: Representative John Lindauer

RE: HB 62

This committee substitute is just fine.

John

Sofo  
6/20/83✓

Original sponsors: Lindauer and  
Grussendorf

1 IN THE HOUSE

BY THE LABOR AND  
COMMERCE COMMITTEE

2 SENATE CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 62 (L&C)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the use of public money for the  
7 payment of nonresident individuals or businesses."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. USE OF PUBLIC FUNDS TO PAY NONRESIDENTS. (a) The state  
10 ~~may~~ not spend public money to employ or contract with a nonresident person  
11 to provide expertise or services to the state unless a written report is  
12 filed with the Department of Administration. The report shall include a  
13 brief description of the work to be done by the nonresident person, the  
14 reasons why the state failed to identify an Alaskan person and the effort  
15 made to locate a qualified Alaskan person. The legislative audit division  
16 shall prepare the forms necessary to comply with this section.

17 (b) In this section "state" includes any state department, state  
18 agency, and state university.

19 \* Sec. 2. Contracts that are exempt from the provisions of AS 36.98 as  
20 provided in AS 36.98.010(1) are exempt from the provisions of sec. 1 of  
21 this Act.

22 \* Sec. 3. Section 1 of this Act is repealed July 1, 1985.  
23  
24  
25  
26  
27  
28  
29

I. REQUEST

Bill/Resolution No.: HB 62  
 Title: Nonresident Contractual Services  
 Sponsor: Lindauer  
 Requestor: House Finance Committee

II. FISCAL DETAIL

Agency Affected: Administration  
 Program Category Affected: General Government  
 BRU, Program of Subprogram(s) Affected: General Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES		81.8				
200 TRAVEL						
300 CONTRACTUAL		139.0				
400 COMMODITIES		3.9				
500 EQUIPMENT		10.5				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		235.2				
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		235.2				
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME		3.0				
PART-TIME						
TEMPORARY						
		36.0				

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Bob Link *Bob Link*  
 Division: General Services & Supply

*A. Link*  
 Phone: 465-2250  
 Date: May 6, 1983

Approved by Commissioner: Lisa Rudd *Lisa Rudd*  
 Department: ADMINISTRATION

Date: 5/11/83

Distribution:

- Original to Legislative Finance
- Copy to Office of Management and Budget (for Legislature introduced bills)
- Copy to Department (for Governor introduced bills)
- Copy to Sponsor
- Copy to Requestor (if different from Sponsor)

3/8/83

Personal Services

Admin. Asst. II (R14)	\$25,740	
Clerk III (R8)	18,360	
Clerk II (R7)	16,896	
	<u>\$60,996</u>	
Benefits (.2208)	13,468	
Health Ins.	7,033	
Legal Trust	<u>270</u>	\$ 81.8

Contractual Services

Phones	\$ 4.0	
Printing-forms & Leg. Audit Review	5.0	
Terminal rental (2)	10.0	
Legislative Audit Review	20.0	
System Development	<u>100.0</u>	\$139.0

Supplies and Materials

Office Supplies	\$ 3.0	
Filing Cabinets	<u>.9</u>	\$ 3.9

Equipment

Work Stations	\$ 10.5	\$ <u>10.5</u>
		\$235.2

Filing of forms alone does not satisfy the intent of the bill. The forms and the data on them must be compiled and turned into information which will enable the State to develop expertise as described by the bill.

THE LEGISLATURE OF THE STATE OF ALASKA  
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST SSHB 62  
 Bill/Resolution No. SSHB 62  
 Title An Act relating to the use of public money for the payment of non-  
 Requested by Reps. Lindauer and Grussendorf Date \_\_\_\_\_

(+) resident individuals or businesses.

II. FISCAL DETAIL  
 Agency Affected Legislative Audit Division  
 Program Category Affected \_\_\_\_\_  
 BRU, Program, or Subprogram(s) Affected \_\_\_\_\_  
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES	1.0	1.0	1.0			
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						

TOTAL

FUNDING (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
GENERAL FUND	1.0	1.0	1.0			
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

Form design and printing costs

IV. DATE March 7, 1983 PREPARED BY Gerald L. Wilkerson  
 AGENCY Division of Legislative Audit  
 PHONE 465-3830  
 Original: Legislative Finance  
 cc: OMB  
 Prime Sponsor (First Legislator Named)

# STATE OF ALASKA

## DEPARTMENT OF ADMINISTRATION

DIVISION OF GENERAL SERVICES AND SUPPLY

Bill Sheffield, Governor

POUCH C (MS 0210)  
JUNEAU, ALASKA 99811

(907) 465-2150

March 8, 1982

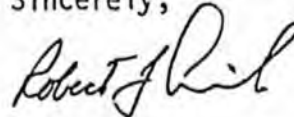
Honorable John Lindauer  
Alaska State Legislature  
House of Representatives  
Pouch V (MS 3100)  
Juneau, AK 99811

Dear Representative Lindauer:

Re: HB 62

After discussion with you and further thought I find that I agree with your points regarding HB 62. Though it would be easier to apply if "resident" and "expertise or services" were defined, it would not be impossible to implement the bill as is.

Sincerely,



Robert Link  
Acting Director

RL/dlr  
6/0308-01/6GSS2  
cc: Commissioner Lisa Rudd  
Department of Administration

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y - STATE CAPITOL  
JUNEAU, ALASKA 99811  
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 17, 1983

SUBJECT: Use of public monies  
(SSHB 62)

TO: Senator Richard I. Eliason  
Chairman, Senate Labor and  
Commerce Committee

FROM: Thomas A. Sofo <sup>AS</sup>  
Legislative Counsel

You have asked this office for an opinion concerning the constitutionality of SSHB 62. SSHB 62 is arguably constitutional, however, there is a possibility that a court would find the statute unconstitutional in some of its application. The state has a legitimate concern in employment of its residents and the development of expertise and services locally within the state. Since there is no durational residency requirement, it can be argued that the statute is constitutional. Nevertheless, there is authority that any discrimination in favor of residents versus nonresidents is unconstitutional when there is no reason for the discrimination beyond the mere fact that the nonresidents are citizens of other states has been held by our United States Supreme Court. Hicklin v. Orbeck, 437 U.S. 518, 57 L.Ed.2d 397, 98 S.Ct. 2482 (1978). This bill does not reach into the private sector, and only addresses the expenditure of public money. This distinction may take the statute out from under the full effect of the Hicklin v. Orbeck, supra. In addition the bill does not unconditionally prohibit employment of nonresidents but rather requires a report to be filed in those cases where a nonresident is to be hired.

However, whether the state has a sufficient proprietary interest in the subject matter of each possible contract or hiring under this bill is debatable. A recent Washington case evidences the reluctance of a state court to find a sufficient proprietary interest in a public works (sewer) project because the statute in question affected private employers who had no direct dealings with the state.

Senator Richard I. Eliason  
Page 2  
May 17, 1983

Laborers Local Union No. 374 v. Felton Construction,  
654 P.2d 67 (Wash 1982). There was a strong dissent to that  
opinion and the case represents a good survey of the rele-  
vant arguments. I have attached a copy for your convenience.

The recent (February 28, 1983) decision of the United States  
Supreme Court in White v. Massachusetts Council of Construction  
Employees, Inc. may add strength to arguments supporting the  
constitutionality of SSHB 62. I have attached a copy of the  
slip decision in that case for your review.

The case certainly seems to stand for the proposition that  
the state, as a market participant rather than regulator,  
may prefer its own residents without a violation of the  
Commerce Clause. The Court did not decide whether there is  
a Privileges and Immunities Clause violation. Inasmuch as  
SSHB 62 involves the use of the state's own money in providing  
services to the state, the parallel to the White case may  
support a defense to a constitutional challenge to the bill.

TAS:ljb

Enclosures  
20/010

MAR 0 1983

AS 7:3,9,10,11,12,13,14,15

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

WHITE, MAYOR OF BOSTON, ET AL. *v.* MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., ET AL.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 81-1003. Argued November 1, 1982—Decided February 23, 1983

Petitioner Mayor of Boston, Mass., issued an executive order requiring all construction projects funded in whole or in part by city funds or funds that the city had authority to administer to be performed by a work force at least half of which are bona fide residents of the city. The Massachusetts Supreme Judicial Court held the order unconstitutional under the Commerce Clause.

*Held:* The Commerce Clause does not prevent the city from giving effect to the Mayor's executive order. Pp. 2-11.

(a) When a state or local government enters the market as a participant, it is not subject to the restraints of the Commerce Clause. *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794; *Reeves, Inc. v. Stake*, 447 U. S. 429. In a case like the instant one, the only inquiry is whether the challenged program constituted direct state or local participation in the market. Pp. 2-4.

(b) Insofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant and entitled to be treated as such under the rule of *Alexandria Scrap Corp.* Even if implementation of the Mayor's order might have a significant impact on specialized construction firms employing out-of-state residents, this is not relevant to the inquiry of whether the city is participating in the marketplace when it provides funds for construction. Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause. And, even if the Mayor's order is characterized as sweeping too broadly, such

II WHITE v. MASS. COUNCIL OF CONSTR. EMPLOYERS

Syllabus

characterization is relevant only if the Commerce Clause imposes restraints on the city's activity and is no help in deciding whether those restraints apply. Pp. 5-7.

(c) Insofar as the Mayor's order was applied to projects funded in part with funds obtained from certain federal programs, the order was affirmatively sanctioned by the pertinent regulations of those programs. Where the restrictions imposed by the city on construction projects financed in part by federal funds are directed by Congress, then no dormant Commerce Clause issue is presented. Pp. 7-9.

384 Mass. 466, 425 N. E. 2d 346, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which WHITE, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 81-1003

KEVIN H. WHITE, ETC., ET AL., PETITIONERS *v.*  
MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT  
OF MASSACHUSETTS

[February 28, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

In 1979 the mayor of Boston, Massachusetts, issued an executive order<sup>1</sup> which required that all construction projects funded in whole or in part by city funds, or funds which the city had the authority to administer, should be performed by a work force consisting of at least half *bona fide* residents of Boston.<sup>2</sup> The Supreme Judicial Court of Massachusetts decided that the order was unconstitutional, observing that

---

<sup>1</sup>The executive order provides:

"On any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft-by-craft basis shall be performed, in accordance with the contract documents established herewith, as follows:

- a. at least 50% by *bona fide* Boston residents;
- b. at least 25% by minorities;
- c. at least 10% by women."

Only the residency requirement is being challenged.

<sup>2</sup>In 1980, of approximately \$482 million expended on construction in the City of Boston, some \$54 million, or 11%, was spent on projects to which the executive order applied. Of this latter amount, approximately \$34 million represented projects being funded in part through federal Urban Development Action Grants (UDAGs).

## 2 WHITE v. MASS. COUNCIL OF CONSTR. EMPLOYERS

the Commerce Clause "presents a clear obstacle to the city's order." 384 Mass. 446, 425 N. E. 2d 346 (1981). We granted certiorari to decide whether the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, prevents the city from giving effect to the mayor's order. 455 U. S. 919 (1982). We now conclude that it does not and reverse.

## I

We were first asked in *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794 (1976), to decide whether state and local governments are restrained by the Commerce Clause when they seek to effect commercial transactions not as "regulators" but as "market participants." In that case, the Maryland legislature, in an attempt to encourage the recycling of abandoned automobiles, offered a bounty for every Maryland-titled automobile converted into scrap if the scrap processor supplied documentation of ownership. An amendment to the Maryland statute imposed more exacting documentation requirements on out-of-state than in-state processors, who in turn demanded more exacting documentation from those who sold the junked automobiles for scrap. As a result, it became easier for those in possession of the automobiles to sell to in-state processors. "The practical effect was substantially the same as if Maryland had withdrawn altogether the availability of bounties on hulks delivered by unlicensed suppliers to licensed non-Maryland processors." 426 U. S., at 803, n. 13. In upholding the Maryland statute in the face of a Commerce Clause challenge, we said that "[n]othing in the purpose animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.*, at 810 (footnotes omitted). Because Maryland was participating in the market, rather than acting as a market regulator, we concluded that the Commerce Clause was not "intended to require independent justification," *id.*, at 809, for the statutory bounty.

We faced the question again in *Reeves, Inc. v. Stake*, 447 U. S. 429 (1980), when confronted with a South Dakota policy to confine the sale of cement by a state operated cement plant to residents of South Dakota. We underscored the holding of *Hughes v. Alexandria Scrap Corp.*, saying:

"The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. [Citation omitted]. There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." 447 U. S., at 436-437.<sup>1</sup>

We concluded that South Dakota, "as a seller of cement, unquestionably fits the 'market participant' label" and applied the "general rule of *Alexandria Scrap*." *Id.*, at 440.

*Alexandria Scrap* and *Reeves*, therefore, stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause. As we said in *Reeves*, in this kind of case there is "a single inquiry: whether the challenged 'pro-

---

<sup>1</sup>We also noted the policy in support of this limitation on the Commerce Clause:

★ "Restraint in this area is also counseled by considerations of state sovereignty, the role of each State 'as guardian and trustee for its people,' *Heim v. McCall*, 239 U. S. 175, 191 (1915), quoting *Atkin v. Kansas*, 191 U. S. 207, 222-223 (1903), and 'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' *United States v. Colgate & Co.*, 250 U. S. 300, 307 (1919). Moreover, state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." 447 U. S., at 438-439 (footnotes omitted).

## 4 WHITE v. MASS. COUNCIL OF CONSTR. EMPLOYERS

gram constituted direct state participation in the market.” *Id.*, at 436, n. 7. We reaffirm that principle now.

The Supreme Judicial Court of Massachusetts concluded that the City of Boston is not participating in the market in the sense described in *Alexandria Scrap Corp.* and *Reeves* because the order applies where the city is acting in a nonproprietary capacity, has a significant impact on interstate commerce, is more sweeping than necessary to achieve its objectives, and applies to funds the city receives from federal grants. 384 Mass., at —, 425 N. E. 2d, at 354–355. For the same reasons the court found that the city is not a market participant, it concluded that the executive order violated the substantive restraints of the Commerce Clause.<sup>4</sup> *Ibid.*

## II

Petitioners and respondents both, to a greater or lesser extent, seek to have us decide questions not presented by the record in this case. In support of the Massachusetts court’s finding that the city is acting in a nonproprietary capacity, respondents urge that much of the construction subject to the mayor’s order involved nonpublic projects that were financed largely through private funds. While the mayor’s order by its terms would appear to apply to such construction, there is simply nothing in the record before us to support the conclusion that city funds were used for these types of construction projects. Respondents, had they wished to raise this question, were obligated to offer some evidence that city funds and private funds were used jointly to finance construction of some of the projects which were in fact subjected to the provisions of the mayor’s order; nothing in the record supports such a conclusion.<sup>5</sup> The only issues before us, then, are the ★

<sup>4</sup> Respondents made several other challenges to the order, none of which are before us. Respondents also directed challenges to resident preferences contained in other state and local laws. None of these provisions is before us.

<sup>5</sup> The case was submitted below on an agreed statement of facts. The

propriety of applying the mayor's executive order to projects funded wholly with city funds and projects funded in part with federal funds. We address first the application of the order to city funded projects.

The Supreme Judicial Court of Massachusetts expressed reservations as to the application of the "market participation" principle to the city here, reasoning that "the implementation of the mayor's order will have a significant impact on those firms which engage in specialized areas of construction and employ permanent works crews composed of out-of-State residents." 384 Mass., at —, 425 N. E. 2d, at 354. Even if this conclusion is factually correct,<sup>6</sup> it is not relevant

---

only reference in that statement to the funds affected by the order provides:

"The approximate dollar value of construction, both private and public, within the City of Boston in 1980 was \$482,886,000; of that amount approximately 54,421,040 represented construction projects 'funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract' to which the Executive Order, by its terms, was applicable. Of that \$54,421,040 approximately \$34,000,000 represented projects involving Urban Development Action Grants." Agreed Statement of Facts, at A42.

"The record does not readily support a finding of "significant impact" on firms employing out-of-state residents. The parties stipulated that a "small number of plaintiff contractors are out-of-state contractors who have regular and permanent work crews comprised entirely of out-of-state residents. These contractors for the most part are those who perform specialty work. . . ." Agreed Statement of Facts, at A41 (emphasis added). Although the parties also stipulated that some out-of-state workers who would otherwise have been employed on the projects would be unemployed and that some out-of-state contractors would be discouraged from bidding on public construction work, Agreed Statement of Facts, at A-37, the record does not reveal that any significant number of out-of-state workers or contractors has withdrawn from the construction market because of the order. Furthermore, the data in the record does not show that the increased employment of city residents in publicly funded construction projects has been accompanied by a decline in the percentage of

## 6 WHITE v. MASS. COUNCIL OF CONSTR. EMPLOYERS

to the inquiry of whether the city is participating in the marketplace when it provides city funds for building construction. If the city is a market participant, then the Commerce Clause establishes no barrier to conditions such as these which the city demands for its participation. Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause.

The same may be said of the Massachusetts court's finding that the executive order sweeps too broadly, creating more burden than is necessary to accomplish its stated objectives. *Id.*, at —, 425 N. E. 2d, at 355. While relevant if the Commerce Clause imposes restraints on the city's activity, this characterization is of no help in deciding whether those restraints apply. The Massachusetts court relied in part on our decision in *Hicklin v. Orbeck*, 437 U. S. 518 (1978), saying that "as in *Hicklin*, *supra*, there is a broadly drawn statute which sweeps far wider than merely favoring unemployed or underemployed local residents." *Ibid.*

In *Hicklin* we considered an Alaska statute which required employment in all work connected with oil and gas leases to which the State was a party to be offered first to "qualified" Alaska residents in preference to nonresidents. The State sought to justify the "Alaska Hire" law on the ground that the underlying oil and gas were owned by the State itself. Analyzing the case under the Privileges and Immunities Clause of Art. IV, § 2, cl. 1, we held that mere ownership of a natural resource did not in all circumstances render a state regulation such as the "Alaska Hire" law immune from attack under that clause. We summarized our view of the Alaska statute in these words:

---

out-of-state residents. See Agreed Statement of Facts, at Appendix E.

WHITE v. MASS. COUNCIL OF CONSTR. EMPLOYERS 7

"In sum, the Act is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents." 437 U. S., at 531.

Even though respondents no longer press the Privileges and Immunities Clause holding of *Hicklin* in support of their Commerce Clause argument, we note that on the record before us the application of the mayor's executive order to contracts involving only city funds does not represent the sort of "attempt to force virtually all businesses that benefit in some way from the economic ripple effect" of the city's decision to enter into contracts for construction projects "to bias their employment practices in favor of the [city's] residents."

The Supreme Judicial Court of Massachusetts also observed that "a significant percentage of the funds affected by the order are received from Federal sources." 384 Mass., at —, 425 N. E. 2d, at 354. The record does indicate that of approximately \$54 million expended on projects affected by the mayor's executive order, some \$34 million represented projects being funded in part through Urban Development

<sup>1</sup>JUSTICE BLACKMUN's opinion dissenting in part, *post*, argues that the mayor's order goes beyond market participation because it regulates employment contracts between public contractors and their employees. We agree with JUSTICE BLACKMUN that there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business. Cf. *Hicklin v. Orbeck*, 437 U. S. 518, 529-531 (1978). We find it unnecessary in this case to define those limits with precision, except to say that we think the Commerce Clause does not require the city to stop at the boundary of formal privity of contract. In this case, the mayor's executive order covers a discrete, identifiable class of economic activity in which the city is a major participant. Everyone affected by the order is, in a substantial if informal sense, "working for the city." Wherever the limits of the market participation exception may lie, we conclude that the executive order in this case falls well within the scope of *Alexandria Scrap and Reeves*.

my belief they  
are this agreement

limits on govt  
action

## 8 WHITE v. MASS. COUNCIL OF CONSTR. EMPLOYERS

Action Grants (UDAGs).<sup>8</sup> While the record assigns specific dollar amounts only for UDAGs, the parties also have stipulated that the executive order applies to Community Development Block Grants (CDBGs) and Economic Development Administration Grants (EDAGs).<sup>9</sup>

But all of this proves too much. The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body. See *American Power & Light Co. v.*

---

<sup>8</sup> Not all UDAG projects in Boston have been subjected to the executive order. HUD publications indicate that in 1980 Boston received \$23,600,000 through UDAGs and that this money was to be spent on projects costing a total of \$397,000,000. UDAG Project Approval List, Region I, Department of Housing and Urban Development, at 1 (Boston, Mass., Feb. 9, 1982). While we do not know what percentage of the \$34,000,000 spent on projects affected by the executive order was in fact UDAG money, we do know that overall UDAG funds comprised 7% of the total costs of projects they were expended on.

<sup>9</sup> UDAGs are administered by the Department of Housing and Urban Development pursuant to the Housing and Community Development Act of 1977, 42 U. S. C. § 5318 (Supp. IV 1980). The HUD regulations governing the program are found at 24 CFR Part 570, Subpart G (1982). CDBGs are administered by HUD pursuant to the Housing and Community Development Act of 1974, 42 U. S. C. § 5301 et seq. (1976 & Supp. IV 1980), and the implementing regulations at 24 CFR Part 570 (1982). EDAGs are administered by the Department of Commerce in accordance with the Public Works and Economic Development Act of 1965, 42 U. S. C. § 3131 et seq. (1976 and Supp. IV 1980), and the implementing regulations at 13 CFR Part 305 (1982).

Respondents have asserted in this Court that the executive order also applies to funds the city receives from the Department of Transportation. In the Agreed Statement of Facts the parties stipulated that a resident preference in a state statute challenged below applied to DOT funds. Agreed Statement of Facts, at A45. There is, however, nothing in the record to indicate that DOT funds are affected by the order. In fact, the parties stipulate that the affected federal funds come from UDAGs, CDBGs, and EDAGs. Agreed Statement of Facts, at A43-A44. Without support in the record for a contrary conclusion, we decide this case as though DOT funds are not involved. See *Ramsey v. UMW*, 401 U. S. 302, 312 (1971); *Tyrrell v. District of Columbia*, 243 U. S. 1, 4-6 (1917).

SEC, 329 U. S. 90 (1946); *Gibbons v. Ogden*, 9 Wheat. 1 (1824). Congress, unlike a state legislature authorizing similar expenditures, is not limited by any negative implications of the Commerce Clause in the exercise of its spending power. Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce. *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 769 (1945). Thus, if the restrictions imposed by the city on construction projects financed in part by federal funds are directed by Congress then no dormant Commerce Clause issue is presented.

An examination of the applicable statutes reveals that these federal programs were intended to encourage economic revitalization, including improved opportunities for the poor, minorities, and unemployed.<sup>10</sup> Examination of the regulations set forth in the margin indicates that the mayor's executive order sounds a harmonious note; the federal regulations for each program affirmatively permit the type of parochial favoritism expressed in the order.<sup>11</sup>

---

<sup>10</sup>See 42 U. S. C. § 5318 (Supp. IV 1980) (UDAGs); 42 U. S. C. § 5301 (1976 and Supp. IV 1980) (CDBGs); 42 U. S. C. 3131 (1976) (EDAGs).

<sup>11</sup>In issuing implementing regulations to carry out its authority under the UDAG program, HUD requires that a city certify that its project would not be undertaken by the private sector without public funds and that the project will alleviate economic distress by helping the poor, minorities, and unemployed. 24 CFR § 570.458(c) (1982). The regulations further provide that the city must "comply with . . . Section 3 of the Housing and Urban Development Act of 1968, as amended, and implementing regulations at 24 CFR Part 135." 24 CFR § 570.458(c)(14)(ix)(D) (1982). The regulations implementing that Act provide that "to the greatest extent feasible opportunities for training and employment arising in connection with the planning and carrying out of any project assisted under any such program be given to lower income persons residing in the area of such project. . . ." 24 CFR § 135.1(a)(2)(i) (1982) (emphasis added).

Similarly, CDBG regulations provide that a recipient of funds must "comply with section 3 of the Housing and Urban Development Act of 1968,

## III

We hold that on the record before us the application of the mayor's executive order to the contracts in question did not violate the Commerce Clause of the United States Constitution.<sup>12</sup> Insofar as the city expended only its own funds in en-

---

as amended, requiring that to the greatest extent feasible *opportunities for training and employment be given to lower-income residents of the project area* and contracts for work in connection with the project be awarded to eligible business concerns which are located in, or owned in substantial part by, persons residing in the area of the project." 24 CFR § 570.307(m) (1982) (emphasis added).

EDAG regulations provide that

"[t]he maximum feasible employment of local labor shall be made in the construction of public works and development facility projects receiving direct grants and loans. Accordingly, every contractor and subcontractor undertaking to do work on any such project which is or reasonably may be done as on-site work, shall be required to employ in carrying out such contract work, qualified persons who regularly reside in the designated area where such project is to be located, or in the case of economic development centers, qualified persons who regularly reside in the center or in the adjacent or nearby redevelopment areas within the economic development district. . . ." 13 CFR § 305.54(a) (1982) (emphasis added).

<sup>12</sup> Respondents ask us to decide whether the executive order offends the Privileges and Immunities Clause of Art. IV, § 2, cl. 1, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in several States." In addressing this issue, the Massachusetts court said:

"The preference is for inhabitants of the city, and its 'negative' effect is felt in significant part by other citizens of the Commonwealth, as well as by residents of other States. In such circumstances it may be more difficult to find a violation of the privileges and immunities clause because the discrimination adversely affects citizens of the Commonwealth as well." 384 Mass., at —, 425 N. E. 2d, at 354.

Because of its disposition under the Commerce Clause, however, the court did not resolve this issue.

This question has not been, to any great extent, briefed or argued in this Court. We did not grant certiorari on the issue and remand without passing on its merits. See *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 177-178 (1938).

## WHITE v. MASS. COUNCIL OF CONSTR. EMPLOYERS 11

tering into construction contracts for public projects, it was a market participant and entitled to be treated as such under the rule of *Hughes v. Alexandria Scrap Corp.*, *supra*. Insofar as the mayor's executive order was applied to projects funded in part with funds obtained from the federal programs described above, the order was affirmatively sanctioned by the pertinent regulations of these programs. The judgment of the Supreme Judicial Court of Massachusetts is therefore reversed, and the case is remanded to that court for proceedings not inconsistent with this opinion.

*It is so ordered.*

SUPREME COURT OF THE UNITED STATES

No. 81-1003

KEVIN H. WHITE, ETC., ET AL., PETITIONERS *v.*  
MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT  
OF MASSACHUSETTS

[February 28, 1983]

JUSTICE BLACKMUN, with whom JUSTICE WHITE joins,  
concurring in part and dissenting in part.

I agree with the Court that this case presents two issues: (1) the validity of the mayor's executive order as applied to projects funded entirely by the city of Boston with its own revenues, and (2) the validity of the order as applied to projects funded in part with federal revenues pursuant to certain congressionally created grant programs.

I

Respecting the second issue, I am in agreement with the Court's conclusion that Congress, in creating the grant programs in question, specifically authorized "the type of parochial favoritism expressed in the order." *Ante*, at 9. As the Court holds, Congress unquestionably has the power to authorize state or local discrimination against interstate commerce that otherwise would violate the dormant aspect of the Commerce Clause. *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408, 418-427 (1946).<sup>1</sup>

<sup>1</sup> Because the Court does not pass on the possible invalidity of the executive order under the Privileges and Immunities Clause, U. S. Const., Art. IV, §2, cl. 1, it has no occasion to determine whether Congress may authorize, through affirmative legislation, what otherwise would be a violation of that Clause. This question may present considerations different from those presented by the dormant Commerce Clause. See L. Tribe, *American Constitutional Law* § 6-31, at 403, n. 18 (1978). For the reasons

## II

I do not agree, however, with the Court's holding that the executive order is immune from Commerce Clause scrutiny insofar as it applies to city activities undertaken without specific congressional authorization.

The Court rejects certain arguments advanced by the Supreme Judicial Court of Massachusetts as relevant only if the order were "regulation of," rather than "participation in," the market. *Ante*, at 6-7. The Court holds that the order is the latter rather than the former because, in the Court's view, it "falls well within the scope," *ante*, at 7, n. 7, of the Court's decisions in *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794 (1976), and *Reeves, Inc. v. Stake*, 447 U. S. 429 (1980). With due respect, this plainly is not so.

In *Alexandria Scrap*, the effect of the Maryland statute was to offer a subsidy only to scrap processors located within the State. See 426 U. S., at 803, n. 13. The Court held that a State, free from Commerce Clause scrutiny, may enter "the market as a purchaser, in effect, of a potential article of interstate commerce" and "restrict[its] trade to its own citizens or businesses within the State." *Id.*, at 808. *Alexandria Scrap* thus permits a State to prefer its residents as direct recipients of certain subsidies. See *Reeves*, 447 U. S., at 440, n. 14 (discussing *Alexandria Scrap*).

In *Reeves*, South Dakota refused to sell cement to out-of-state consumers until the orders of all in-state customers were filled. The Court held that the Commerce Clause is not implicated when a State prefers its own residents as direct purchasers of state-produced goods. Neither *Reeves* nor *Alexandria Scrap*, however, went beyond ensuring that the States enjoy "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with

---

given by the Court, *ante*, at 10, n. 12, I also decline to reach this issue.

whom he will deal.'" *Reeves*, 447 U. S., at 438-439, quoting *United States v. Colgate & Co.*, 250 U. S. 300, 307 (1919).

Boston's executive order goes much further. The city has not attempted merely to choose the "parties with whom [it] will deal."<sup>2</sup> Instead, it has imposed as a condition of obtaining a public construction contract the requirement that *private firms* hire only Boston residents for 50% of specified jobs.<sup>3</sup> Thus, the order directly restricts the ability of private employers to hire nonresidents, and thereby curtails nonresidents' access to jobs with private employers. I had thought it well established that, under the Commerce Clause, States and localities cannot impose restrictions granting their own residents either the exclusive right, or a priority, to private sector economic opportunities. See *H.P. Hood & Sons v. Du Mond*, 336 U. S. 525 (1949); *Pennsylvania v. West Virginia*, 262 U. S. 553 (1923); cf. *Hicklin v. Orbeck*, 437 U. S. 518 (1978) (decided under the Privileges and Immunities Clause).

Such restrictions are not immune from attack under the Commerce Clause solely because the city has imposed them as conditions to its contracts with private employers. In *Reeves*, the Court, I thought, carefully explored reasons the policy there at issue might not have been entitled to the market participant exemption, notwithstanding the policy's essentially proprietary nature. 447 U. S., at 440-447. The Court also observed that the line between "market participant" and "market regulator" is not always bright: "South Dakota, as a seller of cement, unquestionably fits the 'market

---

<sup>2</sup> Had the city decided to limit its *own* hiring to Boston residents, its decision would almost certainly have been permissible under *McCarthy v. Philadelphia Civil Service Comm'n*, 424 U. S. 645 (1976), as well as *Reeves* and *Alexandria Scrap*.

<sup>3</sup> That the order limits the preference to 50% of the covered jobs is, of course, not relevant to the applicability of the market participant exemption. If such preferences do not implicate the dormant Commerce Clause, they are immune even if they apply to 100% of a contractor's jobs.

## 4 WHITE v. MASS. COUNCIL OF CONSTR. EMPLOYERS

participant' label more comfortably than a State acting to subsidize local scrap processors." *Id.*, at 440. See *id.*, at 440, n. 14 ("We have no occasion here to inquire whether subsidy programs unlike that involved in *Alexandria Scrap* warrant characterization as proprietary, rather than regulatory, activity").

The line between regulation and market participation, for purposes of the Commerce Clause, should be drawn with reference to the constitutional values giving rise to the market participant exemption itself. As the Court recognized in *Reeves*, the most important of these is that historically the "Commerce Clause responds principally to state taxes and regulatory measures impeding private trade in the national marketplace"; it was not designed "to limit the ability of the States themselves to operate freely in the free market." *Reeves*, 447 U. S., at 437 (emphasis added). The Court also observed that the distinction between participation and regulation rests on core notions of state sovereignty, coupled with the traditional right of private traders to determine the identities of their bargaining partners free from governmental interference. *Id.*, at 438-439. The legitimacy of a claim to the market participant exemption thus should turn primarily on whether a particular state action more closely resembles an attempt to impede trade among private parties, or an attempt, analogous to the accustomed right of merchants in the private sector, to govern the State's own economic conduct and to determine the parties with whom it will deal.

The simple unilateral refusals to deal the Court encountered in *Reeves* and *Alexandria Scrap* were relatively pure examples of a seller's or purchaser's simply choosing its bargaining partners, "long recognized" as the right of traders in our free enterprise system. The executive order in this case, in notable contrast, by its terms is a direct attempt to govern private economic relationships. The power to dictate to another those with whom *he* may deal is viewed with suspicion and closely limited in the context of purely private eco-

conomic relations.<sup>4</sup> When exercised by government, such a power is the essence of regulation.

Attempts directly to constrict private economic choices through contractual conditions are particularly akin to regulation because, unlike simple refusals to deal but like conven-

---

<sup>4</sup>Compare *United States v. Colgate & Co.*, 250 U. S. 300, 307 (1919) (unquestioned right of trader unilaterally to refuse to deal with those retailers who do not adhere to retail price schedule), relied upon in *Reeves*, 447 U. S., at 439, with *United States v. Parke, Davis & Co.*, 362 U. S. 29, 45-46 (1960) (trader violates Sherman Act by inducing wholesalers to refuse to deal with retailers who will not adhere to price schedule), and *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365, 382 (1967) ("[o]nce the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred" violates the Sherman Act), and *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U. S. 36, 49 (1977) (overruling *Schwinn* in part; nonprice vertical market restrictions are not *per se* unlawful, but should be judged individually under the "rule of reason" to determine whether they "should be prohibited as imposing an unreasonable restraint on competition").

Conditioning a willingness to deal with potential bargaining partners on their derivative refusals to deal with others is particularly suspect where those whom the trader attempts to isolate are its competitors. See *Lorain Journal Co. v. United States*, 342 U. S. 143, 154-155 (1951). Here, the citizens of Boston, through their mayor, have sought to do just this by requiring those wishing to deal with their city government to refuse to hire nonresidents competing with citizens for jobs. This anticompetitive and suspect goal will be present whenever a unit of state or local government requires recipients of public contracts or government subsidies to deal only with that government's constituents.

Congress, in § 8(e) of the National Labor Relations Act, has expressly prohibited labor organizations from requiring employers to agree "to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person," and has declared any such agreement to be void. 29 U. S. C. 158(e). On the other hand, permitting labor unions to refuse to deal with the primary employer is the staple of federal labor policy, and nothing prevents an employer from refusing unilaterally to deal with others for any lawful reason. To be sure, in the construction industry, at issue in the executive order, collective bargaining agreements are ex-

## 6 WHITE v. MASS. COUNCIL OF CONSTR. EMPLOYERS

tional market regulation, they threaten to extend their regulatory impact well beyond the transaction in which the State has an interest. A requirement that firms wishing to deal with the State hire a certain percentage of their workforce from among state residents in practice may constrict the opportunities of nonresidents to work on projects with no connection whatever with the governmental entity imposing the condition. A firm that relies to any significant degree on a permanent workforce will be compelled to favor local residents for these positions. An analogous requirement that such firms purchase only from in-state suppliers the goods used in state projects also might constrict interstate trade wholly unrelated to government business. If economic considerations counsel in favor of stable relationships with suppliers, a firm wishing to deal with the State will be compelled to favor local firms across the board. The effect of such "conditions" on the ability of nonresidents to deal with affected firms would be virtually identical to the effect of a conventional market regulation requiring such practices.

In *Reeves*, the Court cited "considerations of state sovereignty" as another factor counseling restraint in applying the Commerce Clause to "proprietary" activity. The States have a sovereign interest in some freedom from federal interference when hiring state employees. It might be argued that because the city could have chosen to build the projects covered by the order itself and, free from dormant Commerce Clause restraint, could have hired local residents, the

---

pressly exempted from this proscription of "hot cargo" clauses. *Ibid.*; see *Woelke & Romero Framing, Inc. v. NLRB*, — U. S. —, — (1982). That Congress has chosen, however, for reasons peculiar to labor policy and the history and nature of collective bargaining in the construction industry, *id.*, at —, to exclude collective agreements in that industry from this restriction does not detract from my basic point: there is a world of difference between the kind of "proprietary" activity at issue here and the kind exempted from dormant Commerce Clause scrutiny in *Reeves* and *Alexandria Scrap*.

city may contract to have the work done by private firms on the condition that the firms hire local residents.<sup>3</sup> But the Court never has suggested that the State's special sovereign interest in determining whom it will hire, and in setting the terms and conditions of public employment, extends to dictating whom private parties with which it contracts will hire, or the terms and conditions of private employment. In my view, the State's interest in managing its relations with its employees is fully safeguarded by its power to do the work itself if it so chooses, with such immunity from the Commerce Clause as attaches in that situation. The Court's observation in *Reeves*, 447 U. S., at 438-439, tying concerns for state sovereignty to a merchant's customary power to exercise his independent discretion as to the parties with whom he will deal, is fully consistent with this view. But when a State attempts to arrogate unto itself the "independent discretion" of others to deal with whom they please, it exercises regulatory power that must be consistent with the requirements of the Commerce Clause. See generally Varat, State "Citizenship" and Interstate Equality, 48 U. Chi. L. Rev. 487, 560-564 (1981).

This approach fully safeguards the power of the State to limit to state residents the direct benefits of subsidy programs supported with state funds. It permits a State to prefer local businesses as providers of the goods it purchases in the marketplace, and to prefer local residents as direct purchasers or recipients of state-created bounty. But it does not permit a State to impose clear market regulations as a condition of a contract or of a subsidy, using the tremendous power of the state treasury directly to impede the free flow of private trade in interstate commerce, or, what may be worse, to discriminate against such commerce. South Dakota should not be immune from the Commerce Clause if, for

---

<sup>3</sup> Indeed, the Court appears to rely on this argument. See *ante*, at 7, n. 7.

example, it imposes as a condition on the sale of state-owned cement that purchasers employ only South Dakota residents, or resell the cement only to South Dakota customers. Cf. *Reeves*, 447 U. S., at 444, n. 17 ("Nor has South Dakota cut off access to its own cement altogether, for the policy does not bar resale of South Dakota cement to out-of-state purchasers"). Similarly, Maryland should not be free of Commerce Clause scrutiny if it imposes as a condition of receiving a bounty, like that at issue in *Alexandria Scrap*, that scrap processors employ only Maryland residents, or resell the processed scrap only in-state. In my view such conditions, like the condition at issue here, directly intrude upon the historic Commerce Clause concern with "measures impeding free private trade in the national marketplace." *Reeves*, 447 U. S., at 437.

I do not intend to suggest that the Court necessarily would decide these variations of *Alexandria Scrap* and *Reeves* as it has decided this case; evidently, the Court acknowledges that "restrictions that reach beyond the immediate parties with which the government transacts business" pose Commerce Clause questions more profound than did the restrictions at issue in *Alexandria Scrap* and *Reeves*. *Ante*, at 7, n. 7. The Court indicates that it upholds the executive order on the understanding that, with the exception of the federal grant programs, it is applied solely to construction projects funded entirely by the city. *Ante*, at 4-5. Because many construction contractors hire a substantially different work crew for each project they undertake, applied to such projects the mayor's order is arguably limited, as the Court says, to a "discrete, identifiable class of economic activity in which the city is a major participant." *Ante*, at 7, n. 7.<sup>6</sup>

---

<sup>6</sup>See S. Rep. No. 187, 86th Cong., 1st Sess., 27 (1959) ("The occasional nature of the employment relationship makes [the construction] industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon

This unique aspect of employment in the construction industry—and of public works construction projects—must also underlie the Court's related justification that "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" *Ibid.*

I am not persuaded, however, that even the comparatively limited terms of the executive order constitute "market participation" rather than "market regulation." The "sense" in which those affected by the mayor's order "work for the city" is so "informal," in my view, as to lack substance altogether. The city does not hire them, fire them, negotiate with them or their representative about the terms of their employment, or pay their wages. In the case of the employees of subcontractors regulated by the order, the city does not even pay, or contract directly with, their employers. In short, the economic choices the city restricts in favor of its residents are the choices of private entities engaged in interstate commerce. Thus, the executive order directly impedes "free private trade in the national marketplace," and for that reason I would not hold it immune from Commerce Clause scrutiny. I therefore reach the question whether the order imposes an impermissible burden on interstate commerce.

### III

As the Court recognizes, the order constitutes "parochial favoritism" of Boston residents over nonresidents of Boston and Massachusetts for access to private sector jobs. *Ante*, at 9. Thus, the order is a "protectionist measure" subject to the rule of virtually *per se* invalidity established by many of this Court's cases. See, e. g., *Philadelphia v. New Jersey*, 437 U. S. 617, 624 (1978).<sup>7</sup>

various stages of construction"). It is noteworthy, however, that in this case the parties have stipulated that the order affects some "contractors who have regular and permanent work crews." Agreed Statement of Facts, in App. to Pet. for Cert. A41.

<sup>7</sup> I reject the suggestion that the record does not establish a cognizable burden on interstate commerce. See *ante*, at 5, & n. 6. The city has stip-

## 10 WHITE v. MASS. COUNCIL OF CONSTR. EMPLOYERS

That the order burdens Massachusetts residents living outside Boston to the same extent as residents of other States does not save the order from this rule. First, the order derives in part from a state statute encouraging *all* Massachusetts communities to institute similar measures. Mass. Gen. Laws Ann. ch. 149, §26 (West 1982).<sup>9</sup> That statute is clearly designed to benefit all Massachusetts residents at the expense of all residents of other States. In carrying out this statutory mandate, Boston, a creature of the Commonwealth, is tainted by participation in the Commonwealth's larger and clearly discriminatory scheme.

Second, and more significant, the order would be improper under *Dean Milk Co. v. Madison*, 340 U. S. 349 (1951), even absent the state statute. In *Dean Milk*, this Court held that a Madison, Wis., city ordinance "plainly discriminate[d] against interstate commerce," even though "Wisconsin milk from outside the Madison area [was] subjected to the same proscription as that moving in interstate commerce." *Id.*, at 354, & n. 4. This was so because the ordinance "erect[ed] an economic barrier protecting a major local industry against

---

ulated that, as a result of this order, some construction workers who are nonresidents of Massachusetts will be unemployed; contractors from outside Massachusetts will be discouraged from bidding on affected projects; and the costs of construction on affected projects will increase. Agreed Statement of Facts, App. to Pet. for Cert. A37.

<sup>9</sup>The mayor's executive order itself states that one of its purposes is to satisfy the city's "statutory obligation to give preference to its residents in hiring for public[ly] funded construction projects pursuant to [Massachusetts] G.L. c. 149, §26." App. to Pet. for Cert. A19. The statute to which the order refers provided: "Each county, town or district in the construction of public works, or persons contracting or subcontracting for such works, shall give preference (in hiring) to veterans and citizens who are residents of such county, town or district." Mass. Gen. Laws Ann., ch. 149, §26 (West 1982). In its decision holding the city order unconstitutional, the Supreme Judicial Court of Massachusetts also struck down this statute. — Mass. —, —, 425 N. E.2d 346, 352-353 (1981). The Commonwealth has not appealed that ruling.

competition from without the State." *Id.*, at 354. The Court held that the ordinance was invalid because "reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, [were] available." *Ibid.*

Boston has at its disposal reasonable alternatives to accomplish its central goal—the alleviation of unemployment among Boston residents. It can create training programs for its unemployed residents or establish aggressive referral practices aimed at promoting employment for its residents at *all* construction projects in the city without implicating Commerce Clause concerns. It also can undertake some of the construction projects itself, and hire Boston residents to work on them, without imposing discriminatory restraints on the private market.

Moreover, as in *Hicklin v. Orbeck*, 437 U. S. 518 (1978), the order is ill-suited to eliminating unemployment because it applies the preference to all Boston residents, not just the underemployed or undertrained. See *id.*, at 527–528. Finally, since *Dean Milk*, the Court has indicated that a discrimination against interstate commerce is unjustified unless there is a legitimate reason, apart from their out-of-state origin, to treat differently articles of commerce or individuals engaging in commerce originating outside the State. *Philadelphia v. New Jersey*, 437 U. S., at 626–627. No such reason has been shown in this case.

Insofar as the Massachusetts court held Boston's executive order violative of the Commerce Clause as applied outside the context of federal grant programs, I would affirm its judgment. To this extent, therefore, I respectfully dissent.

public right and justice" and not performing acts of service to his employer. *State v. Kurtz*, 78 Ariz. 8, 278 P.2d 406, 408 (1954). The activities transcended his duties as city guard; thus, I concur in the opinion that the trial judge erred by dismissing the aggravated assault charge filed under A.R.S. § 13-1204(A)(5).

The majority opinion does not distinguish between law enforcement and unrelated activities and therefore presumes that the same would apply even though a peace officer might be engaged in some function unrelated to law enforcement purposes. Because we need not decide whether the same applies regardless of the peace officer's activities, I would limit the holding to the standard enunciated by the Supreme Court in *Kurtz*—"were the activities in vindication of public right or were they merely performing services to their private employer?"



On appeal defendant has not contested efficiency of Officer Worley's verbal citation of himself to her in the parking

LABORERS LOCAL UNION NO. 374, a labor organization, Paul Hamilton, and Phil Cameron, Appellants,

v.

FELTON CONSTRUCTION COMPANY, and City of Aberdeen, a municipal corporation, Respondents.

No. 47681-1.

Supreme Court of Washington,  
En Banc.

Nov. 24, 1982.

Action was brought based on alleged violation of statute requiring that contractors and subcontractors on public works projects have Washington residents as 90% to 95% of their employees, depending upon the number of persons employed. The Superior Court, Grays Harbor County, John W. Schumacher, J., entered judgment in favor of construction company in city, and plaintiffs appealed. The Supreme Court, Utter, J., held that the statute violated the privileges and immunities clause.

Affirmed.

Dore, J., dissented and filed an opinion in which Dimmick, Rosellini, and Pearson, JJ., concurred.

#### 1. Constitutional Law ⇌207(1)

Purpose of privileges and immunities clause is to place citizens of each state upon same footing with citizens of other states so far as advantages resulting from citizenship in those states are concerned. U.S.C.A. Const. Art. 4, § 2, cl. 1.

#### 2. Constitutional Law ⇌207(1)

Threshold inquiry in case of challenge based on privileges and immunities clause is whether interest subject to state legislation is a privilege or immunity within meaning of the clause. U.S.C.A. Const. Art. 4, § 2, cl. 1.

#### 3. Constitutional Law ⇌207(1)

If particular legislation deals with a privilege or immunity, state must demon-

strate valid independent reason for discriminating against nonresidents by showing something to indicate that noncitizens constitute a peculiar source of evil at which the statute is aimed and that there is a reasonable relationship between the danger represented by noncitizens as a class and discrimination practiced upon them. U.S.C.A. Const. Art. 4, § 2, cl. 1.

#### 4. Constitutional Law ⇌207(1)

Fundamental interests which are protected by the privileges and immunities clause are those interests basic to the maintenance or well-being of the union. U.S.C.A. Const. Art. 4, § 2, cl. 1.

#### 5. Constitutional Law ⇌207(2)

Statute requiring that contractors or subcontractors working on public works employ a certain percentage of Washington residents regulated a fundamental interest protected by the privileges and immunities clause. U.S.C.A. Const. Art. 4, § 2, cl. 1; West's RCWA 39.16.005.

#### 6. Constitutional Law ⇌207(2)

##### Public Contracts ⇌2

There was no showing that nonresidents of Washington presented particular evil with respect to employment by contractors working on public projects or that statute requiring that 90% to 95% of the employees of a contractor or subcontractor on a public works project be Washington residents was closely tailored to achieving some legitimate state purpose and statute thus violated privileges and immunities clause. U.S.C.A. Const. Art. 4, § 2, cl. 1; West's RCWA 39.16.005.

#### 7. Constitutional Law ⇌207(1)

Fact that legislation involves a state in its proprietary capacity does not justify discrimination against nonresidents which is prohibited by the privileges and immunities clause. U.S.C.A. Const. Art. 4, § 2, cl. 1.

#### 8. Commerce ⇌3, 12

Commerce clause focuses on undue burdens on interstate commerce and it is an affirmative grant of power to Congress and an implied restriction on the power of states. U.S.C.A. Const. Art. 1, § 8, cl. 3.

Felton and the City denied appellate allegations. The City admitted the project was a public work. Felton moved to dismiss the complaint for failure to state a claim. The City sought a declaratory judgment on the constitutionality of RCW 39.16.005. Appellate granted a cross motion for an order adding the statute to be constitutional. Appellate hearing arguments on the motions, the court declined to dismiss the action for failure to state a claim, but ruled that RCW 39.16.005 "is void because it violates the Privileges and Immunities Clause of the United States Constitution." We accepted

## I

The Privileges and Immunities clause of Article IV, § 2 states:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

The purpose of the Privileges and Immunities clause is "to place the citizens of one state upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those states are concerned." *Paul v. Virginia*, 75 Wall. 168, 180, 19 L.Ed. 357 (1869). The history of the clause reflects a concern among framers for keeping the newly independent states from adopting highly protective economic policies. The Articles of Confederation provide, "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States . . . shall be entitled to all Privileges and Immunities of free Citizens in the several States . . ." 9 *Journals of the Continental Congress 1774-1789*, at 100 (Ford ed. 1907).

The concerns expressed in the Articles of Confederation did not dissipate with the ratification of the Articles, but were reiterated with renewed (if briefer) force in the ratification of the constitution. The Privileges and Immunities clause "implicates not only the dual's right to nondiscriminatory treatment but also, perhaps more so, the

structural balance essential to the concept of federalism." *Austin v. New Hampshire*, 420 U.S. 656, 662, 95 S.Ct. 1191, 1195, 43 L.Ed.2d 530 (1975).

## II

[2] With these purposes in mind, the United States Supreme Court fashioned a test for determining if state legislation violates the Privileges and Immunities clause. The threshold inquiry is whether the interest subject to state legislation is a privilege or immunity within the meaning of the clause. In *Baldwin v. Fish & Game Commission*, 436 U.S. 371, 383, 98 S.Ct. 1852, 1860, 56 L.Ed.2d 354 (1978), the court stated:

Only with respect to those "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity must the State treat all citizens resident and nonresident, equally.

The *Baldwin* court referred to such interests as "fundamental".

[3] Once within the ambit of the clause, a state must demonstrate a "valid independent" reason for discriminating against nonresidents by showing:

(1) "something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed". *Hicklin v. Orbeck*, 437 U.S. 518, 526, 98 S.Ct. 2482, 2487, 57 L.Ed.2d 397 (1978), quoting from *Toomer v. Witsell*, 334 U.S. 385, 398, 68 S.Ct. 1156, 1163, 92 L.Ed. 1460 (1948); and

(2) "there must be a 'reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them.'" *Hicklin*, at 526 98 S.Ct., at 2487, quoting from *Toomer*, at 399, 68 S.Ct., at 1163. The *Hicklin* court also stated the discrimination must "bear a substantial relationship" *Hicklin*, at 527, 98 S.Ct., at 2488, and must be "closely tailored", *Hicklin*, at 528, 98 S.Ct., at 2488, to the particular evil nonresidents present.

We will refer to this 2-part test as the *Toomer/Hicklin* test.

[4] A. Addressing *Baldwin's* threshold question, we must first clarify the meaning of the term "fundamental". By using the term the *Baldwin* court revived the somewhat anachronistic discussion of the Privileges and Immunities clause by Justice Washington in *Corfield v. Coryell*, 6 F.Cas. 546 (C.C.E.D.Pa.1823) (No. 3,230). In its use of the term, the Court did not mean to embrace the analytical structure for identifying fundamental rights requiring strict scrutiny under the equal protection clause. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). To the extent the term "fundamental" is helpful, it points to those interests "basic to the maintenance or well-being of the Union." *Baldwin*, at 388, 98 S.Ct., at 1862.

From the very beginning, "the right to ply one's trade in any State in the Nation was at the heart of the clause's guarantees." *Salla v. County of Monroe*, 48 N.Y.2d 514, 522, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979) cert. denied sub nom. *Abrams v. Salla*, 446 U.S. 909, 100 S.Ct. 1836, 64 L.Ed.2d 262 (1980). See *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 20 L.Ed. 449 (1871).

[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State. (Italics ours.) *Toomer v. Witsell*, supra at 396, 68 S.Ct., at 1162 (citing *Ward v. Maryland*, supra). See *Hicklin*, supra. *Baldwin* itself affirmed this principle in stating the "right to pursue a livelihood in a State other than his own [is] a right that is protected by the Privileges and Immunities Clause." *Baldwin*, at 386, 98 S.Ct., at 1861 (citing *Toomer v. Witsell*, supra); see also *Northwest Gillnetters Ass'n v. Sandison*, 95 Wash.2d 638, 647-48, 628 P.2d 800 (1981) (sport fishing is not a privilege or immunity, but commercial fishing is protected).

[5] Appellants claim RCW 39.16 does not regulate a fundamental interest, but their arguments in this regard are misplaced. They argue first that inasmuch as

## 9. Constitutional Law ⇒ 297(1)

Privileges and immunities clause is a direct limitation on states and explicitly secures privileges and immunities for individuals who move from one state to another. U.S.C.A. Const. Art. 4, § 2, cl. 1.

Hafer, Cassidy & Price, Richard H. Roblee, Seattle, for appellants.

Perkins, Coie, Stone, Olsen & Williams, Russell Perisho, Seattle, David Foscoe, Asst. City Atty., Aberdeen, for respondents.

UTTER, Justice.

The trial court declared RCW 39.16 violated U.S. Const. art. 4, § 2, the privileges and immunities clause. The matter is on direct review to this court. We affirm.

RCW 39.16.005 provides in pertinent part:

In all contracts let by the state . . . or any county, city . . . for the erection, construction, alteration, demolition, or repair of any public building . . . or any other kind of public work or improvement, the contractor or subcontractor shall employ ninety-five percent or more bona fide Washington residents as employees where more than forty persons are employed, and ninety percent or more bona fide Washington residents as employees where forty or less persons are employed . . .

Failure to comply with these provisions results in a criminal sanction. RCW 39.16.040.

In the spring of 1980, the City of Aberdeen awarded a sanitary sewer project to the lowest bidder, the Felton Construction Company, a Montana corporation. The project was funded by 25 percent state and local monies and 75 percent federal monies. After work commenced, appellants, Laborers Local Union 374 and two of its unemployed members, sued Felton and the City for a writ of mandamus and for injunctive relief. They alleged Felton had not employed the statutorily required percentage of Washington residents on the sewer project.

Both Felton and the City denied appellants' allegations. The City admitted the sewer project was a public work. Felton did not. Felton moved to dismiss the complaint for failure to state a claim. The City moved for a declaratory judgment on the constitutionality of RCW 39.16.005. Appellants filed a cross motion for an order adjudging the statute to be constitutional.

After hearing arguments on the motions, the trial court declined to dismiss the action for failure to state a claim, but ruled that RCW 39.16.005 "is void because it violates the Privileges and Immunities Clause of the United States Constitution." We accepted review.

## I

The privileges and immunities clause of U.S. Const. art. 4, § 2 states:

The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

[1] The purpose of the privileges and immunities clause is "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180, 19 L.Ed. 357 (1869). The history of the clause reflects a concern by the framers for keeping the newly independent states from adopting highly protectionist economic policies. The Articles of Confederation provide, "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several states . . ." 9 *Journals of the Continental Congress 1774-1789*, at 908 (C. Ford ed. 1907).

The concerns expressed in the Articles of Confederation did not dissipate with the demise of the Articles, but were reiterated with equal (if briefer) force in the comity article of the constitution. The privileges and immunities clause "implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the

might justify an otherwise illegitimate legislative purpose of seeking to foster economic welfare. See *Hughes v. Virginia Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 88, 49 L.Ed.2d 220 (1976). We are assuming the legitimacy of the purpose of RCW 39.16.005 for purposes of analyzing the statute under the *Toomer/Hicklin*

looking to the first part of the *Hicklin* test, the "peculiar evil" nonresidents represent is indicated by the fact only by implication. By producing secondary economic activity and maximizing the return of tax dollars to the state, RCW 39.16.005's restrictions on contracting for public works benefit the state's economy.

Eliminating the statute, we assume, would undermine the secondary economic activity and reduce maximizing of state tax dollars by diverting it from the state.

Neither appellants nor the State provides evidence that hiring out-of-state workers would constitute a peculiar evil by diverting tax dollars out of the state. No proof is offered regarding the extent to which hiring out-of-state contractors or subcontractors would diverting their employees to the jobsite would prevent them from hiring locally (which is not an issue in our practice with respect to nonunion employees). Nor do appellants provide any evidence regarding the extent to which wages would be diverted out of the state. Undoubtedly, out-of-state contractors purchase supplies and equipment in the state and some wages are spent here. In the absence of secondary economic activity created only by having out-of-state workers with their additional requirements for food and shelter. Finally, even if we assume some wages would be diverted out of state, we have been provided no evidence by which to compare how wages would compare with the advantage of lower bids on public works by out-of-state contractors.

Under the *Toomer/Hicklin* test, we will be forced to reject the purpose of the statute as invalid.

In essence, we are presented with a bare allegation that the state benefits from RCW 39.16 and that nonresidents are the peculiar evil that would eliminate that benefit. The State seems to acknowledge its paucity of evidence in stating if the statute were struck down, nonresidents "might otherwise drain the economy." Brief of Amicus Curiae, at 12. Neither appellants nor the State has shown "something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Toomer*, at 398, 68 S.Ct., at 1163. RCW 39.16.005's discrimination against nonresidents is not justified by any "substantial reason . . . beyond the mere fact that they are citizens of other States." *Toomer*, at 396, 68 S.Ct., at 1162.

D. Absent an identified "peculiar evil", it is difficult to determine if the statute is closely related to eliminating the alleged evil nonresidents present. Needless to say, if the evil is not identified, legislation can hardly be closely related to eliminating it. We have no way of ascertaining if the statute is closely tailored to serving the purpose of benefiting the state economy. We have not been told the magnitude of the economic gain to the state the statute provides by its employment restrictions or the loss it occasions by discouraging competitive bids.

[6] Neither appellants nor amicus has demonstrated that nonresidents are a peculiar evil, nor has either shown how the statute is "closely tailored" to achieving a legitimate state purpose.

[7] E. Appellants and amicus nevertheless argue that since the legislation involves the state in its proprietary capacity, it may with justification discriminate against nonresidents. Addressing a similar proprietary interest argument in *Hicklin*, the Court refused to establish an exception under the privileges and immunities clause, stating:

Rather than placing a statute completely beyond the Clause, a State's ownership of the property with which the statute is concerned is a factor—although often the crucial factor—to be considered in evalu-

ating whether the statute's discrimination against noncitizens violates the Clause. Dispositive though this factor may be in many cases in which a State discriminates against nonresidents, it is not dispositive here.

437 U.S. at 529, 98 S.Ct. at 2489. The *Hicklin* Court concluded Alaska had "little or no proprietary interest in much of the activity swept within the ambit" of the statute. *Id.*

As a public work involving state tax dollars, the Aberdeen sewer project is one to which the State may claim some proprietary interest. No one questions that the sewer project will enure to the benefit of the City of Aberdeen or that if the City had desired to, it could have built the system itself. The statute is not limited to the ownership rights of the State, however. It specifically places limitations on private contractors and their subcontractors. While the economic impact of RCW 39.16 on the private sector is not as far ranging as the Alaska Hire Statute, it nevertheless affects private employers who have no direct dealings with the State. See *Hicklin*, at 532, 98 S.Ct., at 2490.

Furthermore, while the *Hicklin* court did not dispute Alaska's ownership of its oil and gas, we have good reason to question the extent of the state's ownership here. State and local tax dollars were used for Aberdeen's sewer project, but 75 percent of the funding came from the federal government. This public works project is not solely a state endeavor, and its funding is an example of the principle embodied in the constitution that "the peoples of the several states must sink or swim together". *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523, 55 S.Ct. 497, 500, 79 L.Ed. 1032 (1935) (Cardozo, J.).

[8, 9] The interdependent nature of the funding for public works projects makes this case distinguishable from the commerce clause cases appellants cite in support of their proprietary interest argument. First, it must be remembered that while the commerce clause and privileges and immunities

RCW 39.16.005 applies only to contractors and subcontractors engaged in public works, such livelihood interests are not fundamental. The capacity to pursue work is fundamental whether in a public or private context. Appellants also argue that since RCW 39.16.005 sweeps much less broadly than the Alaska statute at issue in *Hicklin*, the interest affected is not fundamental. This point may be relevant to evaluating the statute under the *Toomer/Hicklin* test, but it does not make the interest any less fundamental. The State, in its amicus brief, concedes that RCW 39.16 operates to discriminate against nonresident workers in a limited context of public works construction. The *Toomer/Hicklin* test must therefore be applied.

B. The State suggests the purpose of RCW 39.16.005 is to strengthen the economic welfare of state and local economies. We must first question the validity of such a legislative motive for purposes of privileges and immunities analysis. In *Hicklin*, at page 526, 98 S.Ct., at 2487, the Court questioned as "at least dubious" the validity of the Alaska Hire Statute's purpose of alleviating state unemployment. Here, the State has suggested no "evil" that nonresidents present. It has only suggested that by keeping within the state wages from public works projects, local economies will be strengthened. This is an example of the highly protectionist economic policies the privileges and immunities clause was designed to protect against. The State argues that since state tax dollars are being used on public works projects, the economic purposes of the statute "reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State." *Reeves, Inc. v. Stake*, 447 U.S. 429, 442, 100 S.Ct. 2271, 2280, 65 L.Ed.2d 244 (1980). The State thus seeks to justify the statute's purpose based on its proprietary role with respect to public works projects. While the State's proprietary role would not exempt it from privileges and immunities scrutiny (see discussion *infra* at

71), it might justify an otherwise illegitimate legislative purpose of seeking to foster state economic welfare. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 93 S.Ct. 2488, 49 L.Ed.2d 220 (1976). We assume arguendo the legitimacy of the purpose of RCW 39.16.005 for purposes of analyzing the statute under the *Toomer/Hicklin* test.<sup>1</sup>

C. Looking to the first part of the *Toomer/Hicklin* test, the "peculiar evil" that nonresidents represent is indicated by the State only by implication. By producing secondary economic activity and maximizing the return of tax dollars to the state, RCW 39.16.005's restrictions on contracting for public works benefit the state's economy. Eliminating the statute, we should assume, would undermine the secondary economic activity and reduce maximal use of state tax dollars by diverting wages out of the state.

Neither appellants nor the State provides any evidence that hiring out-of-state workers would constitute a peculiar evil by diverting wages out of the state. No proof is presented regarding the extent to which out-of-state contractors or subcontractors would bring their employees to the jobsite rather than hire locally (which is not an unfamiliar practice with respect to non-supervisory employees). Nor do appellants provide any evidence regarding the extent to which wages would be diverted out of state. Undoubtedly, out-of-state contractors purchase supplies and equipment in the state and some wages are spent here. In addition, some secondary economic activity is generated only by having out-of-state workers with their additional requirements of food and shelter. Finally, even if we were to assume some wages would be diverted out of state, we have been provided no information by which to compare how that "loss" would compare with the advantage of lower bids on public works by out-of-state contractors.

1. Notwithstanding this assumption, to the extent our discussion reveals the State's proprietary interest argument does not satisfy the re-

quirements of the *Toomer/Hicklin* test, we will also be forced to reject the purpose of the statute as invalid.

level of scrutiny under equal protection analysis. See L. Tribe, *American Constitutional Law* 411 (1978).

The statute before us specifically requires nonresidents in their pursuit of a job and the State's ownership interest does not obviate the need for scrutiny of the privileges and immunities clause.

The court in *Toomer* stated: "The 'whole owners' theory, in fact, is generally regarded as but a fiction. It is a device in legal shorthand of the imagination to its people that a State has the right to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between the economic policy consideration and the constitutional command that the State exercise that power, like its other powers, without discriminating against nonresidents of other States."

(omitted.) 334 U.S. at 402, 68 S.Ct. 165.

The State's proprietary interest, represented by its tax dollars, is too attenuated to justify RCW 39.16.005's discrimination against nonresidents. Our conclusion is consistent with a trio of decisions by the Supreme Court which have struck down similar statutes under the privileges and immunities clause. *Neshaminy Falls, Inc. v. Krause*, 181 N.J.Super. 100, 40 N.J.2d 733 (1981); *Massachusetts Constr. Employees, Inc. v. Mayor of Boston*, 400 U.S. 1, 39 S.Ct. 101, 20 L.Ed.2d 514, 399 N.E.2d 909, 423 S.Ct. 1018 (1979) cert. denied sub nom. *Massachusetts Constr. Employees, Inc. v. Mayor of Boston*, 446 U.S. 909, 100 S.Ct. 1262, 64 L.Ed.2d 262 (1980). We do not believe the State is proscribed from discriminating against nonresidents in resources it creates to its own benefit. Such a case is not before us. The State's proprietary interest in the water supply is insubstantial. RCW 39.16.005's discrimination against nonresidents violates the provisions of the privileges and immunities clause.

ROBERT S. BACH, C.J., and STAFFORD J. LIVER and WILLIAM H. LEE, J., concur.

DORE, Justice, dissenting.

I would have held that RCW 39.16 was constitutional and not in violation of the privileges and immunities clause of the United States Constitution because RCW 39.16 does not apply to projects supported by public money but only to those organized by private persons and organizations, or by private employers who bid for state purchase contracts.

### I

#### States May Discriminate Constitutionally on the Basis of Residency When Acting in a Sovereign or Proprietary Capacity

The Washington statute applies only to those with whom the state or local government contracts to build a public work. By definition, money raised from residents finances the project. The State is, therefore, acting in a proprietary capacity when discriminating against nonresidents under RCW 39.16.

The mutually reinforcing relationship between the privileges and immunities clause and the commerce clause stems from their common origin in the fourth article of the Articles of Confederation and their shared vision of federalism. *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371, 379, 98 S.Ct. 1852, 1858, 56 L.Ed.2d 354 (1978). This unique relationship renders analogy to recent commerce clause proprietary cases particularly appropriate.

The United States Supreme Court recently found permissible under the commerce clause a state policy which limited the sale of a state-owned resource to state residents. *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980). At stake in *Reeves* was the distribution policy of a cement plant owned and operated by the State of South Dakota. During a period of cement shortage, the State refused to supply cement to out-of-state customers. A Wyoming customer alleged that South Dakota's residents-only policy violated the commerce clause. Placing its support of the residents-only policy squarely on the rights of South Dakota when acting as a

proprietor, the Supreme Court found no constitutional deficiency. Following the earlier case of *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976), the court found that the commerce clause did not restrict a state when acting as a proprietor from favoring its own citizens over others. As a "general rule", states, when acting as market participants or as proprietors, were not engaged in "the kind of action with which the Commerce Clause is concerned". *Hughes*, at 805, 96 S.Ct., at 2495.

*Reeves* was grounded on three identifiable principles. First, states in their proprietary capacity should be free to set the terms of their own contracts. "[W]hen acting as proprietors, States should similarly [to private market participants] share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Reeves*, at 439, 100 S.Ct., at 2278 (Italics mine). See also *Reeves*, at 438 n. 10, 100 S.Ct., at 2278 n. 10 ("States may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal").

Second, the favoring of residents comports with the very purpose of a state. The Wyoming customer had argued that the residents-only policy was "protectionist" and not an appropriate government objective. The court disagreed, emphasizing the right of a state to limit state benefits to those it serves and by which it is funded.

Third, the court was influenced by "considerations of state sovereignty" and its related role as "guardian and trustee for its people". *Reeves*, at 438, 100 S.Ct., at 2278. Earlier authority held that Congress could not interfere with certain employment relations with state workers affecting integral state operations "in areas of traditional governmental functions". *Reeves*, at 438 n. 10, 100 S.Ct., at 2278 n. 10, quoting *National League of Cities v. Usery*, 426 U.S. 833, 852, 96 S.Ct. 2465, 2474, 49 L.Ed.2d 245 (1976) (Congress under the commerce clause could not apply Fair Labor Standards Act to state governments).

clause have a "mutually reinforcing relationship", *Hicklin*, at 531, 98 S.Ct., at 2490, the two clauses are not coextensive. Analogy to commerce clause cases here is simply that. The commerce clause focuses on undue burdens on interstate commerce. It is an affirmative grant of power to Congress and an implied restriction on the power of states. The privileges and immunities clause is a direct limitation on states and explicitly secures privileges and immunities for individuals who move from state A to state B. *Toomer*, at 395, 68 S.Ct., at 1161.

In *Reeves, Inc. v. Stake*, *supra*, South Dakota had by itself initiated cement production, and the court felt it was entitled to benefit from its "foresight, risk, and industry". 447 U.S. at 446. In *Hughes v. Alexandria Scrap Corp.*, *supra*, Maryland used only its own funds for bounties on junk cars to clean up the state's landscape and protect the state's environment. *Cf. Baldwin v. Fish & Game Comm'n*, *supra* (where the Court's reason for upholding a game-licensing statute reflected its appreciation of Montana's protection of its environment).

Even under the commerce clause, the United States Supreme Court has declined to permit states to pursue "simple economic protectionism" where the state's ownership of the resource protected is attenuated. *See New England Power Co. v. New Hampshire*, — U.S. —, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982).

Also, appellants' citation to *Equitable Shipyards, Inc. v. State*, 93 Wash.2d 465, 611 P.2d 396 (1980) in support of its proprietary interest argument is inappropriate. *Equitable Shipyards*, a case upholding a statutory preference for in-state shipbuilders, concerned the equal protection clause. Since residency is not a suspect category, the statute in *Equitable Shipyards* was subject only to a minimum rationality test. By contrast, the *Toomer/Hicklin* test establishes a standard at least comparable to the intermediate level of scrutiny, *Massachusetts Council of Constr. Employees, Inc. v. Mayor of Boston*, — Mass. —, 425 N.E.2d 346, 352 n. 7 (1981) (U.S. appeal pending), and possibly consonant with the

strict level of scrutiny under equal protection analysis. *See* L. Tribe, *American Constitutional Law* 411 (1978).

F. The statute before us specifically restricts nonresidents in their pursuit of a livelihood and the State's ownership interest here does not obviate the need for scrutiny under the privileges and immunities clause.

As the court in *Toomer* stated:

The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

(Footnote omitted.) 334 U.S. at 402, 68 S.Ct. at 1165.

The state's proprietary interest, represented by its tax dollars, is too attenuated to justify RCW 39.16.005's discrimination against nonresidents. Our conclusion is entirely consistent with a trio of decisions by other state courts which have struck down remarkably similar statutes under the privileges and immunities clause. *Neshaminy Constructors, Inc. v. Krause*, 181 N.J.Super. 376, 437 A.2d 733 (1981); *Massachusetts Council of Constr. Employees, Inc. v. Mayor of Boston*, *supra*; *Salla v. County of Monroe*, 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979) *cert. denied sub nom. Abrams v. Salla*, 446 U.S. 909, 160 S.Ct. 1836, 64 L.Ed.2d 262 (1980). We do not hold that the State is proscribed from distributing resources it creates to its own citizens, but such a case is not before us. The state's proprietary interest is insubstantial and RCW 39.16.005's discrimination against nonresidents violates the provisions of the privileges and immunities clause.

BRACHTENBACH, C.J., and STAFFORD, DOLLIVER and WILLIAM H. WILLIAMS, JJ., concur.

those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127, 60 S.Ct. 869, 876, 84 L.Ed. 1108 (1940). See also *Heim v. McCall*, 239 U.S. 175, 191, 36 S.Ct. 78, 83, 60 L.Ed. 206 (1915).

The State asserts that equal protection guaranties are not applicable when the state acts in its proprietary capacity as a purchaser of goods. Relying on *Heim*, other state courts have upheld statutory in-state purchasing preferences against both equal protection and commerce clause challenges. See, e.g., *City and County of Denver v. Bossie*, 83 Colo. 329, 266 P. 214 (1928) ("the state may buy of whom it will"); *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 76 So. 258 (1917) (rejecting equal protection challenge to a statute prohibiting state contracting with nonresident bidders).

In this case, we need not go so far as to hold that because a contract is public and requires expenditure of public funds the legislature may, without reasonable basis, grant a preference. Here, as later discussed, a reasonable basis exists for the preference sufficient to withstand constitutional attack.

We conclude the preference statute is most closely allied with economic legislation requiring only rational basis scrutiny.

From reading *Equitable* it is clear that, without the six percent preference, the contract undoubtedly would have been awarded to *Equitable*. However, by its decision, the court, in effect, held that it was a legitimate state purpose to favor in-state corporations and contractors.

All three principles relied upon by *Reeves* and other courts recognize the unique constitutional status of states when they distribute state benefits rather than regular private activity. Each principle respects states, as members of a federal form of

government, where states practice primary state purposes. The Washington statute is justified by these doctrines.

The privileges and immunities clause guarantees to nonresidents those rights of residents which properly belong to everyone. As *Baldwin* summarized, rights uniquely linked to residency such as suffrage, candidacy, and access to state services are not rights to which the privileges and immunities clause is directed. Distinctions favoring residents in these cases "merely reflect the fact that this is a Nation composed of individual States, and are permitted". *Baldwin*, at 383, 98 S.Ct., at 1860.

II

The majority's reliance upon the rationale and precedent of *Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978) is misplaced. The "Alaska Hire" law in *Hicklin* created an employment preference favoring Alaska residents for "all employment which is a result of oil and gas leases" and other legal arrangements to which the State of Alaska was lessor. Alaska Stat. Ann. § 38.40.050(a) (1977). The Supreme Court emphasized the broad reach of the Alaska law in *Hicklin*, at 530-31, 98 S.Ct., at 2489-90:

Under this provision, Alaska Hire extends to employers who have no connection whatsoever with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State. The Act goes so far as to reach suppliers who provide goods or services to subcontractors who, in turn, perform work for contractors despite the fact that none of these employers may themselves have direct dealings with the State's oil and gas or ever set foot on state land. . . . In sum, the Act is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents.

(Footnote omitted.)

In *Hicklin*, the court stated the purpose of the statute at 526-28, 98 S.Ct., at 2487-88:

Alaska Hire was enacted to remedy, namely, Alaska's "uniquely high unemployment." Alaska Stat. Ann. § 38.40.050 (1977). What evidence the record contains indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents—especially the unemployed Eskimo and Indian residents—were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities; and that the employment of nonresidents threatened to deny jobs to Alaska residents only to the extent that jobs for which untrained residents were being prepared might be filled by nonresidents before the residents' training was completed.

. . . Alaska Hire simply grants all Alaskans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the Act. A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job-training program. If Alaska is to attempt to ease its unemployment problem by forcing employers within the State to discriminate against nonresidents—again, a policy which may present serious constitutional questions—the means by which it does so must be more closely tailored to aid the unemployed. If the Act is intended to benefit Eskimos, a statute granting an employment preference to unemployed residents or to residents enrolled in job-training programs might be permissible, Alaska Hire's across-the-board grant of a job preference to all Alaskan residents clearly is not.

(Footnote omitted.)

*Hicklin* concluded at 533-34, 98 S.Ct. at 2491-92:

Even when public welfare laws were regularly stricken, the Supreme Court allowed states to place beneficial labor conditions on public works contracts. *Atkin v. Kansas*, 191 U.S. 207, 24 S.Ct. 124, 48 L.Ed. 148 (1903). The *Atkin* court could not imagine a possible ground limiting the right of a state to set 8-hour workdays on public works projects. The court concluded this right "belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities". *Atkin*, at 222-23, 24 S.Ct., at 127-28. See also *Equitable Shipyards, Inc. v. State*, 93 Wash.2d 465, 611 P.2d 396 (1980), quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127, 60 S.Ct. 869, 876, 84 L.Ed. 1108 (1940). Under the same theory, states may require state printing to be done by in-state companies. *American Yearbook Co. v. Askew*, 339 F.Supp. 719, 721-22 (M.D. Fla.), *aff'd*, 409 U.S. 904, 93 S.Ct. 230, 34 L.Ed.2d 168 (1972).

In 1980, this court upheld the constitutionality of a statute granting a bidding preference to in-state companies for ferry construction contracts. *Equitable Shipyards, Inc. v. State*, *supra*. The statute was challenged only under the equal protection clause. However, the court found that the purpose of the state preference passed "constitutional muster" in part because "construction of ferries within the state strengthens state and local economies". *Equitable*, at 479, 611 P.2d 396. We stated at 476-78, 611 P.2d 396:

We have held the federal equal protection clause and the state privileges and immunities clause (Const. art. 1, § 12) are substantially identical. *Olsen v. Delmore*, 48 Wash.2d 545, 295 P.2d 324 (1956). While the State objects to considering the equal protection claim as not raised by *Equitable* in the trial court, we believe the issue should be addressed.

In other contexts, the United States Supreme Court has stated that government, like private individuals and businesses, "enjoys the unrestricted power to produce its own supplies, to determine

those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127, 60 S.Ct. 869, 876, 84 L.Ed. 1108 (1940). See also *Heim v. McCall*, 239 U.S. 175, 191, 36 S.Ct. 78, 83, 60 L.Ed. 206 (1915).

The State asserts that equal protection guaranties are not applicable when the state acts in its proprietary capacity as a purchaser of goods. Relying on *Heim*, other state courts have upheld statutory in-state purchasing preferences against both equal protection and commerce clause challenges. See, e.g., *City and County of Denver v. Bossie*, 83 Colo. 329, 266 P. 214 (1928) ("the state may buy of whom it will"); *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 76 So. 258 (1917) (rejecting equal protection challenge to a statute prohibiting state contracting with nonresident bidders).

In this case, we need not go so far as to hold that because a contract is public and requires expenditure of public funds the legislature may, without reasonable basis, grant a preference. Here, as later discussed, a reasonable basis exists for the preference sufficient to withstand constitutional attack.

We conclude the preference statute is most closely allied with economic legislation requiring only rational basis scrutiny.

From reading *Equitable* it is clear that, without the six percent preference, the contract undoubtedly would have been awarded to *Equitable*. However, by its decision, the court, in effect, held that it was a legitimate state purpose to favor in-state corporations and contractors.

All three principles relied upon by *Reeves* and other courts recognize the unique constitutional status of states when they distribute state benefits rather than regular private activity. Each principle respects states, as members of a federal form of

Although the fact that a state-owned resource is destined for interstate commerce does not, of itself, disable the State from preferring its own citizens in the utilization of that resource, it does inform analysis under the Privileges and Immunities Clause as to the permissibility of the discrimination the State visits upon nonresidents based on its ownership of the resource. Here, the oil and gas upon which Alaska hinges its discrimination against nonresidents are of profound national importance. On the other hand, the breadth of the discrimination mandated by Alaska Hire goes far beyond the degree of resident bias Alaska's ownership of the oil and gas can justifiably support. The confluence of these realities points to but one conclusion: Alaska Hire cannot withstand constitutional scrutiny.

(Footnote omitted.)

The Washington statute has no such reach. Unlike Alaska Hire, (1) it is limited to projects to which state or local governments are direct contracting parties; (2) it applies only to those private employers who themselves contract with government and those employees who work directly on public jobs; and (3) the Washington statute regulates only those who receive direct economic benefit from public-funded government projects.

#### CONCLUSION

RCW 39.16 assures that state residents enjoy the benefits of state spending. The limiting of benefits to those who fund the state treasury and for whom the State was created to serve affects the essential and patently unobjectionable purpose of State government—to serve the citizens of the state.

Moreover, the State should be deemed free to deal with its own residents when it builds public works. It is the "owner" of the job creating the employment. If it built the sewer system itself, the City of Aberdeen would not violate any "right to travel" by requiring its employees to be residents. Since that right is accepted, the

City should be permitted to put the same condition on work it contracts out.

The statute does not interfere with a nonresident's right to ply his or her trade within Washington state. General restrictions on private employment unconnected with state funds or projects are invalid. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 20 L.Ed. 449 (1871). RCW 39.16 has no effect on the private labor market since it applies to work created by public agencies. As noted, unlike the Alaska Hire statute in *Hicklin* it does not expend public money to seek to control private employment. Nonresidents are precluded only from public works.

The Washington statute is confined to the reach justified by its interest as sovereign and owner of the project. *Hicklin* extensively distinguished Alaska Hire from such a narrow law. As later explained in *Reeves*, the public works employment statute affects interests which the privileges and immunities clause reserves to state control. Had Equitable Shipyards known that this court would declare RCW 39.16 unconstitutional, it could have arranged to go into right-to-work states and secure personnel to construct the job, underbidding the local company or contractor who is required to hire union employees. In the future, local contractors and subcontractors bidding on public works will be at an extreme disadvantage when competing with out-of-state corporations which can base their bids on nonunion labor and substantially undercut the bids of Washington contractors. At last report, Grays Harbor had an unemployment rate in excess of 30 percent. Such communities, when they own the public works project themselves, should be able to require that the work be done by unemployed union workers who are residents of the community. Even worse, at a time when statewide unemployment has hit an all-time high of over 12 percent, the majority precludes the Legislature from enacting legislation establishing proprietary public works projects for unemployed residents as a partial solution for our state's unemployment problem. Such a narrow interpretation of our constitution is not justified.

City should be permitted to set condition on work it contracts on.

The statute does not interfere with nonresident's right to ply his or her trade within Washington state. General provisions on private employment contracts with state funds or projects. *Ward v. Maryland*, 79 U.S. (12 Wall.) 67, 25 L.Ed. 449 (1871). RCW 89.16 has no effect on the private labor market since it does not work created by public agencies. As noted, unlike the Alaska Hire Statute in *Hicklin* it does not expend public money to seek to control private employment. Nonresidents are precluded only from public works.

The Washington statute is confined to the reach justified by its interest as sovereign and owner of the project. It is extensively distinguished Alaska Hire from such a narrow law. As later explained in *Reeves*, the public works employment statute affects interests which the privilege and immunities clause reserves to state control. Had *Equitable Shipyards* known this court would declare RCW 89.16 unconstitutional, it could have arranged to hire into right-to-work states and secure personnel to construct the job, underbidding the local company or contractor who is required to hire union employees. In the future, local contractors and subcontractors bidding on public works will be at an extreme disadvantage when competing with out-of-state corporations which can base their bids on nonunion labor and substantially undercut the bids of Washington contractors. As last report, Grays Harbor had an unemployment rate in excess of 30 percent. In communities, when they own the public works project themselves, should be able to require that the work be done by unemployed union workers who are residents of the community. Even worse, at a low-time high of over 12 percent, the majority precludes the Legislature from enacting legislation establishing proprietary public works projects for unemployed residents as a partial solution for our state's unemployment problem. Such a narrow interpretation of our constitution is not justified.

STATE v. PARRIS

225 P.2d 77

to uphold the constitutionality of the statute and reverse the judgment of the court.

ROSELLINI and PEARSON,



STATE of Washington, Respondent,

v.

John PARRIS, Petitioner.

No. 43180-6.

Court of Washington, In Banc.

Nov. 24, 1982.

Petitioner was convicted in the Superior Court, Thurston County, Gerry L. Alexander of unlawful delivery of a controlled substance and the Court of Appeals, 208 App. 268, 633 P.2d 914, affirmed. Petitioner's petition for review was granted. The Supreme Court, Rosellini, J., held that out-of-court statements made by a co-defendant during the course of the drug transaction are admissible as statements against penal interest.

Affirmed as modified.

William H. Williams, J., filed a dissenting opinion in which Cunningham, J. pro tempore and Utter, J., joined.

Criminal Law 662(1)

Main and essential purpose of confrontation is to secure for opponent the opportunity of cross-examination and purpose of confrontation is to test perception, memory and credibility of witnesses and it serves purpose of testing witnesses' narrative power.

2. Criminal Law 662(1)

Where witness is unavailable to testify, right of confrontation may be violated if other witnesses testify to substance of his statements, but on the other hand, constitutional right to confrontation does not invariably exclude hearsay implicating the accused.

3. Criminal Law 662(1)

It is only when out-of-court statement is offered for truth of its content that confrontation problems arise.

4. Criminal Law 419(1)

Guidelines in determining trustworthiness of extrajudicial statements are: whether there is apparent motive to lie; general character of declarant; whether more than one person heard statements; whether statements were made spontaneously; and timing of declaration and relationship between declarant and witness.

5. Criminal Law 417(15)

Out-of-court statements against penal interest are admissible only if they are corroborated, both where they are offered to inculcate and exculpate accused. ER 804(b)(3).

6. Criminal Law 417(15)

In order to qualify as statement against penal interest, declaration need not have been clear and unequivocal admission of criminal conduct. ER 804(b)(3).

7. Criminal Law 417(15)

While it is not fact that declaration is against penal interest but declarant's awareness of fact which gives statement against penal interest significance, it may be assumed that reasonable man would be aware of disserving nature of his remarks even when they are made to supposed friend. ER 804(b)(3).

8. Criminal Law 417(15)

In prosecution of accomplice for unlawful delivery of controlled substance, out-of-court statements made by principal offender to police informant during course of drug deal were admissible as statements against penal interest, since statements were made

62 TITLE & SPONSOR SUMMARY 14:58 6/04/84 PAGE 1 OF 3

ENDED TITLE: SCS SSMB 62(L&C)(FLD 5)  
ACT RELATING TO THE USE OF PUBLIC MONEY FOR THE PAYMENT  
NONRESIDENT INDIVIDUALS OR BUSINESSES

GENERAL DOLLARS: 1236,200 (F. NOTE)

THE SPONSOR: LINDAUER.

OTHER DOLLARS: 40

CO-SPONSORS: GROSSEDDORF.

CURRENT STATUS: 6/26/83 FAILED (S)

62 HOUSE ACTION 14:58 6/04/84 PAGE 2 OF 3

DATE	SEQ	PAGE	LEGISLATIVE ACTION
5/28/83	01	1033	FIRST READING -- COMMITTEE REPORTS
5/26/83	02	1034	S.A. -- DP02, DNP01, PR03, OTHER01
5/26/83	03	1034	S.A. F/NOTE HSE SUPPL #46
5/09/83	04	1034	FIN -- DP04, NR01, OTHER01
5/09/83	05	1034	FIN F/NOTE HSE SUPPL #57
5/11/83	06	1203	SECOND READING
5/11/83	07	1203	ADVANCED TO 3RD READING BY UNAN CONSENT
5/11/83	08	1203	THIRD READING
5/11/83	09	1204	PASSED BY DIV 27-12-01
5/11/83	10	1204	NOTICE OF RECONSIDERATION GIVEN
5/12/83	11	1320	RECONSIDERATION NOT TAKEN UP
***	**	**	*** **

62 SENATE ACTION 14:58 6/04/84 PAGE 3 OF 3

DATE	SEQ	PAGE	LEGISLATIVE ACTION
5/13/83	12	0973	FIRST READING -- COMMITTEE REPORTS
5/22/83	13	1435	L&C -- DNP01, CS01, NR02
5/24/83	14	1494	MOVED FROM FIN TO RLS BY UNAN CONSENT
5/26/83	15	1529	RLS -- TAKEN UP IMMEDIATELY
5/26/83	16	1532	SECOND READING
5/26/83	17	1532	L&C CS ADOPTED BY UNAN CONSENT
5/26/83	18	1532	ADVANCED TO 3RD READING BY UNAN CONSENT
5/26/83	19	1532	THIRD READING
5/26/83	20	1532	FAILED BY DIV 02-14-01
***	**	**	*** **

# COMMITTEE REPORT

## SENATE

FURTHER:

FINANCE

5/13/63

Date:

6-21-63

Mr. President:

The Committee on

LABOR & DOMESTIC

has had

SS SB 62

Use of public money for the payment of nonresident individuals or businesses.

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

do pass

do not pass

do pass with attached amendments(s)

replace with CS for

CS SS HB 62

same title  
 new title

and recommends

AND attaches a "Letter of Intent"

New Fiscal Note

reports it back without recommendation

referred to the

Committee

MEMBERS SIGNING  
DO PASS

MEMBERS HAVING  
OTHER RECOMMENDATIONS:

11

11

CHAIRMAN







# STATE OF ALASKA

AUDIT DIVISION  
POUCH W  
JUNEAU, ALASKA 99811

## THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

May 23, 1983

TO: Senator Edward Eliason  
Chairman Labor & Commerce Committee

FROM: Gerald Wilkerson, CPA *GLW*  
Legislative Auditor  
Division of Legislative Audit

SUBJECT: Sponsor Substitute for House Bill No. 62

At your request the following comments are provided on SSHB 62:

1. Line 23 through 27 requires that a written report be filed with the Office of the Governor, the Department of Education, the University of Alaska, and the Legislative Audit Division.

Unless this requirement is intended to be a "paper deterrent" from doing business with non-residents, the filing requirements appear excessive. The requirement of filing one copy with the Department of Administration, the State's record-keeping agency, would be adequate, in my opinion.

2. If filed with the Department of Administration, the records could be readily reviewed and accessible to the Legislative Audit Division.
3. Your committee may consider adding a "sunset" provision which would mandate legislative oversight in future years to determine if this law was effective or still needed.

If you would like to further discuss these comments, please contact me at 465-3830.

# Alaska State Legislature

Representative John Lindauer  
District 10-A  
3933 Geneva Place  
Anchorage, AK 99508



While in Juneau  
Pouch V  
Juneau, AK 99811  
465-3709

## House of Representatives

May 26, 1983

To: Senate Labor and Commerce Committee  
From: Representative John Lindauer *J.L.*  
Re: Fiscal note attached to SSHB 62

I have just seen the fiscal note to SSHB 62 received by the Senate. It is totally inappropriate. The bill does not require any filing or compilation of forms. It is not the intent of the sponsor or co-sponsor that forms be filed and compiled and turned into information at state expense.

This appears to be a gimmick of the Department of Administration to get more money into their budget and discourage the adoption of the bill.

These efforts to discourage the bill strongly suggest that DOA is, in fact, engaging in the kinds of practices that this bill is attempting to discourage. I suggest that the State of Alaska can no longer afford to have the Department of Administration channel money outside under circumstances which they are too embarrassed to have revealed to the press and to the public.

cc: Commissioner Lisa Rudd

# STATE OF ALASKA

## DEPARTMENT OF ADMINISTRATION

DIVISION OF GENERAL SERVICES AND SUPPLY

Bill Sheffield, Governor

POUCH C (MS 0210)  
JUNEAU, ALASKA 99811

(907) 465-2150

March 8, 1982

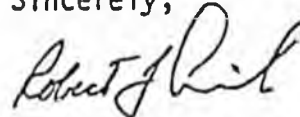
Honorable John Lindauer  
Alaska State Legislature  
House of Representatives  
Pouch V (MS 3100)  
Juneau, AK 99811

Dear Representative Lindauer:

Re: HB 62

After discussion with you and further thought I find that I agree with your points regarding HB 62. Though it would be easier to apply if "resident" and "expertise or services" were defined, it would not be impossible to implement the bill as is.

Sincerely,



Robert Link  
Acting Director

RL/dlr  
6/0308-01/6GSS2  
cc: Commissioner Lisa Rudd  
Department of Administration

# Alaska State Legislature

Representative John Lindauer  
District 10-A  
3933 Geneva Place  
Anchorage, AK 99508



While in Juneau  
Pouch V  
Juneau, AK 99811  
465-3709

## House of Representatives

June 16, 1983

### MEMORANDUM

To: Senator Dick Eliason

From: Representative John Lindauer *J. L.*

Re: HB 62 -- relating to the use of public money for the payment of nonresident individuals or businesses

I appreciate your interest and analysis. The problem, as I see it, is that the Department of Administration is trying to maintain its ability to hire outsiders instead of Alaskans, despite Governor Sheffield's commitment to provide jobs for Alaskans.

Specifically:

- 1) HB 62 is not aimed merely at professional services as defined in AS 36.98.080. The inclusion of the word professional, as requested by DOA, substantially limits the bill's scope and application in terms of giving Alaskans first crack at state jobs.
- 2) The definition of an Alaskan resident should be left, as it would be left automatically, to regulation in order that it remain legally acceptable in an ever-changing world.

I suggest that the word "professional" be deleted on line 21 and that section 1 be deleted in its entirety and the subsequent sections renumbered.



OFFICIAL BUSINESS

# ALASKA STATE LEGISLATURE - SENATE

## COMMITTEE ON LABOR AND COMMERCE

SENATOR RICHARD I. ELIASON  
CHAIRMAN

POUCH V • JUNEAU, ALASKA 99811  
(907) 463-3844

### MEMORANDUM

TO: Rep. John Lindauer

FROM: Sen. Dick Eliason *DE*

DATE: June 16, 1983

RE: HB 62---relating to the use of public money for the payment of nonresident individuals or businesses

The Senate Labor and Commerce Committee hearing on June 14, 1983, included HB 62 on the agenda, and the proposed Senate Labor and Commerce Committee substitute was discussed. Attached is the revised draft of the proposed committee substitute.

At the hearing you raised the question of why the proposed draft was limited to "professional services" (see attached draft, page 1, line 11 and line 22). Senate Labor and Commerce Committee staff contacted Bob Link, Director of the Department of Administration's Division of General Services and Supply to discuss this language. A definition of "professional services" appears in AS 36.98.080 (2). This chapter has been attached for your convenience. According to this section, "professional services" means professional, technical, or consultant's services that are predominantly intellectual in character and that (A) include analysis, evaluation, prediction, planning, or recommendation; and (B) result in the production of a report or the completion of a task. From this definition it may be construed that professional services are those which are not product-oriented, and in practice the definition excludes such contract services as janitorial, leasing, security, court reporting, and even the laundry done for the ferry system in Seattle. The inclusion in the proposed substitute of the word "professional" to describe the services affected by HB 62 would seem consistent with the findings and purpose section of the original bill, which states "the state often employs nonresident consultants, advisors, and businesses to provide expertise and services...".

Also, as a definition of "resident" is not provided in this bill, how is "Alaska resident" presumed to be defined for the purposes of this legislation? I would appreciate a response from you on this so that we can resolve this question as soon as possible.

# Alaska State Legislature

Representative John Lindauer  
District 10-A  
3933 Geneva Place  
Anchorage, AK 99508



While in Juneau  
Pouch V  
Juneau, AK 99811  
465-3709

## House of Representatives

May 26, 1983

To: Senate Labor and Commerce Committee  
From: Representative John Lindauer *JL.*  
Re: Fiscal note attached to SSHB 62

I have just seen the fiscal note to SSHB 62 received by the Senate. It is totally inappropriate. The bill does not require any filing or compilation of forms. It is not the intent of the sponsor or co-sponsor that forms be filed and compiled and turned into information at state expense.

This appears to be a gimmick of the Department of Administration to get more money into their budget and discourage the adoption of the bill.

These efforts to discourage the bill strongly suggest that DOA is, in fact, engaging in the kinds of practices that this bill is attempting to discourage. I suggest that the State of Alaska can no longer afford to have the Department of Administration channel money outside under circumstances which they are too embarrassed to have revealed to the press and to the public.

cc: Commissioner Lisa Rudd

*Alaska*  
**MUNICIPAL**  
*League*

TELEPHONES  
(907) 586-1325  
586-6526

204 N. FRANKLIN ST.  
JUNEAU, ALASKA 99801

May 24, 1983

To: Senate Labor and Commerce Committee  
From: Ginny Chitwood, AML Executive Director  
Re: HB 62 - Nonresident Individuals and Businesses

The Alaska Municipal League lauds the purpose of SSHB 62, but does not believe it will be accomplished by the proposed legislation. It appears that the main result of the bill would be a lot of paper handling.

We ask your consideration of an amendment to the definition of "state", starting on line 6 of page 2 to delete everything after university. Local officials should have control over the employment of consultants, advisors, and businesses on the local level.

The Alaska Municipal League supports local hire and Alaska preference, but believes the approach taken in SSSB 174 and the "joint venture" bills, HB 415 and SB 293, will prove more effective than this bill.

# Alaska State Legislature

Representative John Lindauer  
District 10-A  
3933 Geneva Place  
Anchorage, AK 99508



While in Juneau  
Pouch V  
Juneau, AK 99811  
465-3709

## House of Representatives

May 19, 1983

TO: Senate Labor and Commerce Committee

FROM: Representative John Lindauer *JL*

RE: Sponsor Substitute for House Bill #62: "An Act relating to the use of public money for the payment of nonresident individuals or businesses."

The purpose of this bill is to assist the state and its educational institutions in the identification of the career opportunities and educational needs of the youth of Alaska.

It is the state's policy to encourage our youth to stay in Alaska. For that reason, we have for some years forgiven a portion of our student loans in the event that student borrowers reside in Alaska after graduation.

The retention of Alaska's youth requires that we provide them with an educational system which trains them for the jobs which exist in the Alaskan economy. This requires that the state identify those areas for which there are not enough trained Alaskans. This bill will identify the occupational areas and training where our scarce educational dollars can be best concentrated.

SECTIONAL ANALYSIS OF SPONSOR SUBSTITUTE OF HB 62

Section 1 of SSHB 62 states the legislative findings and purpose of the proposed legislation.

Section 2 of SSHB 62 amends AS 37.05 to add a new section:

Sec. 37.10.110.

- a) Public monies may not be spent to employ or contract with a non-resident person unless a written report is filed with the Governor's office, the Department of Education, the University of Alaska, and the legislative audit division. The report shall include:
  - 1) a brief description of the work to be done;
  - 2) reasons for failing to identify an Alaskan person to perform service;
  - 3) efforts made to locate qualified Alaskan person;
  - 4) recommendation for development of qualified Alaskan persons to satisfy projected future needs.
- b) Defines 'state' in this section to include any state department, state agency, state university, borough, city, village, school district or other state subdivision.

# STATE OF ALASKA

AUDIT DIVISION  
POUCH W  
JUNEAU, ALASKA 99811

## THE LEGISLATURE BUDGET AND AUDIT COMMITTEE

May 23, 1983

TO: Senator Richard Eliason  
Chairman, Labor & Commerce Committee

FROM: Gerald L. Wilkerson, CPA *GLW*  
Legislative Auditor  
Division of Legislative Audit

SUBJECT: Sponsor Substitute for House Bill No. 62

At your request the following comments are provided on SSHB 62:

1. Line 23 through 27 requires that a written report be filed with the Office of the Governor, the Department of Education, the University of Alaska, and the Legislative Audit Division.

Unless this requirement is intended to be a "paper deterrent" from doing business with non-residents, the filing requirements appear excessive. The requirement of filing one copy with the Department of Administration, the State's record-keeping agency, would be adequate, in my opinion.

2. If filed with the Department of Administration, the records could be readily reviewed and accessible to the Legislative Audit Division.
3. Your committee may consider adding a "sunset" provision which would mandate legislative oversight in future years to determine if this law was effective or still needed.

If you would like to further discuss these comments, please contact me at 465-3830.

# Alaska State Legislature

Representative John Lindauer  
District 10-A  
3933 Geneva Place  
Anchorage, AK 99508



While in Juneau  
Pouch V  
Juneau, AK 99811  
465-3709

## House of Representatives

May 19, 1983

TO: Senate Labor and Commerce Committee

FROM: Representative John Lindauer *JL*

RE: Sponsor Substitute for House Bill #62: "An Act relating to the use of public money for the payment of nonresident individuals or businesses."

The purpose of this bill is to assist the state and its educational institutions in the identification of the career opportunities and educational needs of the youth of Alaska.

It is the state's policy to encourage our youth to stay in Alaska. For that reason, we have for some years forgiven a portion of our student loans in the event that student borrowers reside in Alaska after graduation.

The retention of Alaska's youth requires that we provide them with an educational system which trains them for the jobs which exist in the Alaskan economy. This requires that the state identify those areas for which there are not enough trained Alaskans. This bill will identify the occupational areas and training where our scarce educational dollars can be best concentrated.

SECTIONAL ANALYSIS OF SPONSOR SUBSTITUTE OF HB 62

Section 1 of SSHB 62 states the legislative findings and purpose of the proposed legislation.

Section 2 of SSHB 62 amends AS 37.05 to add a new section:

Sec. 37.10.110.

- a) Public monies may not be spent to employ or contract with a non-resident person unless a written report is filed with the Governor's office, the Department of Education, the University of Alaska, and the legislative audit division. The report shall include:
  - 1) a brief description of the work to be done;
  - 2) reasons for failing to identify an Alaskan person to perform service;
  - 3) efforts made to locate qualified Alaskan person;
  - 4) recommendation for development of qualified Alaskan persons to satisfy projected future needs.
  
- b) Defines 'state' in this section to include any state department, state agency, state university, borough, city, village, school district or other state subdivision.