

HB

106

(d) Votes required to be conducted under (c) of this section may be conducted by teleconference. (§ 1 ch 170 SLA 1980)

Cross references. — For the 1980 special appropriation to the reserve for emergency operating expenses account, see Chapter 171, SLA 1980, in the Temporary and Special Acts binder.

Article 4. Uniform Purchasing.

Section

230. Competitive bids

240. Award of contracts and purchases

Sec. 37.05.230. Competitive bids. In the manner provided in AS 37.05.010 — 37.05.330 and rules and regulations established under it

(1) a contract for construction and repairs, or a purchase of and contract for supplies, materials, equipment, and contractual services must be based on competitive bids; an award shall be made to the lowest responsible bidder after advertising for bids, except that (A) Repealed by § 2 ch 92 SLA 1967; (B) a bid shall be awarded to an Alaska bidder if his bid is not more than five per cent higher than the lowest non-resident bidder's; and (C) competitive bids need not be required (i) for contractual services where no competition exists; (ii) for sales involving fair trade items; (iii) when, in the judgment of the purchasing agent, food, clothing, or medical supplies, or materials for use in laboratory and experimental studies may be purchased otherwise to the best advantage of the state; (iv) where rates are fixed by law or ordinance; (v) for items traded in on like items; or (vi) for professional services;

(2) if the amount of the contractual services, purchase, or sale is estimated to exceed \$5,000, sealed bids shall be solicited, when practicable, by publication in a newspaper calculated to reach prospective bidders and by posting notices in public places within the area where the work is to be performed or material furnished and in addition the department may also designate a trade journal for publication; the department shall also solicit bids by sending notices by mail to all active prospective bidders known to it and all bids shall be sealed when received, and shall be opened in public at the hour stated in the notice; the department may limit the solicitation of bids or negotiate directly if it finds that it is in the best interests of the state;

(3) a contractual service, purchase or sale where the known requirements are estimated to be less than \$5,000 may be made either upon competitive bids in accordance with (2) of this section or in the open market, in the discretion of the department; but, so far as practicable, shall be based on at least three competitive bids and recorded as provided in AS 37.05.240; small purchases of less than \$500 in the discretion of the department may be made on the open market, and may be by cash payment from petty cash accounts set aside for that purpose;

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the department shall determine the amount of the petty cash accounts needed by each state agency, and inspect the petty cash accounts at least once each year to determine that the total plus amounts of receipts for unreplenished disbursements is equal to the fixed sum of cash set aside; shortages in petty cash accounts are a personal liability of the responsible head of the agency to whom the account is set aside; the department shall make all necessary rules and regulations governing use and replenishment of petty cash funds;

(4) the provisions of this section relative to competitive bids do not apply to contracts for the operation of transportation systems for students to and from the schools within the state, as are authorized under AS 14.09.010; and these contracts may be awarded by bid or negotiation and, at the discretion of the Board of Education, may be awarded for periods of three years or less;

(5) an "Alaska bidder," for the purpose of bid awards under (1) (B) of this section, is a person who

(A) holds a current Alaska business license.

(B) submits a bid for goods or services under the name as appearing on his current Alaska business license,

(C) has maintained a place of business within the state for a period of six months immediately preceding the date of his bid;

(6) the competitive bid requirements of this section do not apply to air taxi services used by state employees when no formal contract is executed; the department affected shall pay the air taxi operator the tariff rates as published by him with the Air Transportation Commission for the type of aircraft required; the tariffs need not be uniform throughout the state and may reflect the diverse conditions of various areas of the state; the air taxi service used in each case shall be selected by the state employee who is to fly in the aircraft, or if more than one state employee is flying in the aircraft by the employee in charge; in all cases the air taxi operator shall have complied with AS 02.05.010 — 02.05.260 and other prequalifying regulations established by the department;

(7) the provisions of this section relative to an "Alaska bidder" do not apply to contracts estimated to exceed \$5,000, of either the Department of Transportation and Public Facilities, which are authorized under AS 35.15.010 — 35.15.120, or the Department of Highways, which are authorized under AS 19.10.010 — 19.10.280;

(8) the provisions of this section relative to competitive bids do not apply to the purchase of products or services manufactured or provided by a sheltered workshop;

(9) the provisions of this section relative to competitive bids do not apply to the purchase of products or services provided by the correctional industries program established under AS 33.32;

(10) requests for and acceptance of bids or other proposals for professional services shall comply with AS 24.23 or AS 36.98. (§ 3 art IV ch

82 SLA 1955; am §§ 8 — 10, 23 ch 186 SLA 1957; am § 1 ch 77 SLA 1959; am § 1 ch 158 SLA 1962; am § 1 ch 82 SLA 1964; am §§ 1, 2 ch 92 SLA 1967; am § 1 ch 61 SLA 1970; am § 1 ch 92 SLA 1975; am §§ 1, 2 ch 194 SLA 1975; am Executive Order No. 39, § 11 (1977); am § 5 ch 53 SLA 1982; am §§ 6 — 8 ch 144 SLA 1982)

Revisor's notes. — The reference to AS 14.09.010 in paragraph (4) was originally a reference to AS 14.10.070. Chapter 98, SLA 1966 revised Title 14 and the substance of AS 14.10.070 became AS 14.09.010.

Effect of amendments. — The first 1982 amendment, effective July 1, 1982, added paragraph (9).

The second 1982 amendment, effective July 22, 1982, in paragraph (2), substituted "\$5,000" for "\$2,500" near the

beginning and inserted "limit the solicitation of bids or" near the end. The amendment also substituted "\$5,000" for "\$2,500" and "\$500" for "\$300" in paragraph (3) and added paragraph (10).

Editor's notes. — As enacted, paragraph (9) contained a reference to AS 33.30.463 — 33.30.490. These provisions, however, were renumbered by the revisor of statutes pursuant to AS 01.05.031 and the reference in paragraph (9) was changed accordingly.

NOTES TO DECISIONS

Notice requirements. — This section makes no requirement for notice by special delivery, registered or certified mail. State ex rel. Department of Administration v. Bowers Office Prods., Inc., Sup. Ct. Op. No. 2244 (File No. 4792), 621 P.2d 11 (1980).

Amendments to bid invitations. — Using regular mail to send an amendment to an invitation for bids is a proper procedure for notifying known bidders. State ex rel. Department of Administration v. Bowers Office Prods., Inc., Sup. Ct. Op. No. 2244 (File No. 4792), 621 P.2d 11 (1980).

Judicial review of agency actions of rejecting a bid for failing to return an

amendment should extend only to whether there was a reasonable basis for the agency to decide that the bid in question was nonresponsive. State ex rel. Department of Administration v. Bowers Office Prods., Inc., Sup. Ct. Op. No. 2244 (File No. 4792), 621 P.2d 11 (1980).

The department had a reasonable basis to determine that a defect in a bid was material and that the bid was nonresponsive when the bidder failed to acknowledge receipt of amendments. State ex rel. Department of Administration v. Bowers Office Prods., Inc., Sup. Ct. Op. No. 2244 (File No. 4792), 621 P.2d 11 (1980).

Sec. 37.05.240. Award of contracts and purchases. (a) Except as otherwise provided in AS 37.05.230, a contract or purchase made by or under the supervision of the department for which competitive bids are required shall be awarded to the lowest responsible bidder. The department shall determine the responsibility of the bidder based upon the bidder's (1) adherence to the bid specifications, (2) proposed terms of delivery, (3) compliance with state laws, (4) performance record, (5) financial capability, and (6) compliance with conditions imposed in the solicitation for bids. The purchasing agent may cancel the solicitation for bids before the award upon a written finding which specifies the relevant facts that it is in the state's best interest. However, if the purchasing agent makes the contract or purchase after the solicitation for bids is cancelled, the purchase or contract shall be made in accordance with AS 37.05.230(2). Before the awarding of a contract for a building or the making of repairs upon a building, the department shall see that the bids conform with plans and specifications approved by the

ALASKA STATE LEGISLATURE

SENATE STATE AFFAIRS COMMITTEE

SENATOR VIC FISCHER, CHAIRMAN

POUCH V, JUNEAU 99811

(907) 465-4954



MEMORANDUM

TO: Committee Members
FROM: Senator Vic Fischer *Vic*
DATE: May 20, 1983
SUBJ: HB 106--Alaska bidder's preference

As you will recall, last Thursday the committee passed out a committee substitute for HB 106, relating to the Alaska bidder's preference. The committee substitute dealt with the problem of joint ventures resulting from the Irby case but deleted all of the original bill language dealing with a change in the percentage of preference for qualified Alaska bidders. It was the consensus of the committee that the latter issue would be better dealt with in a separate State Affairs bill.

I would appreciate it if you could be thinking about the best legislative approach to this problem. For your convenience, I have attached an early draft of the committee substitute for HB 106 which reflects my most recent thinking on the issue; i.e. increased protection and encouragement of small and minority businesses in particular. I have also attached a list of potential options and a copy of the current statute.

Please feel free to contact me or David Dye of my staff on this matter. David is also available to work with your staff.

Attachments

Sectional Analysis SCSHB 106 (SA)

Section 1

Adds a purpose section to the Alaska bidder's preference law. Legal counsel has advised that this will help to shield this law from constitutional attack based on equal protection (see legal opinion of Richard Folta, Legislative Counsel).

Section 2

Amends AS.37.05.230(1)(B) to give qualified Alaska bidders a 15% preference on contract bids of less than \$100,000. Contract bids over \$100,000 have a 5% preference.

Section 3

Requires that all members of a joint venture qualify individually under the state if the joint venture is to receive the bidder's preference.

Section 4

Under current law, contracts of DOT/PF over \$5,000 are exempt from the bidder's preference. This section amends the law to exempt all DOT/PF contracts over \$100,000 from the bidder's preference but applies the 15% preference to contracts under \$100,000 unless such a preference would result in the loss of federal funds.

SCSHB 106

Winner:

<u>Non Resident Bid</u>	<u>Alaskan Bid</u>	<u>15%-\$100,000 Bid 5% Thereafter</u>	<u>15%-100,000 Contract 5% Thereafter</u>
\$50,000.00	\$57,500.00	Alaskan	Alaskan
\$86,956.52	\$100,00.00	Alaskan	Alaskan
\$90,000.00	\$100,000.00	Alaskan	Alaskan
\$90,000.00	\$101,000.00	Alaskan	Non Resident
\$100,000.00	\$115,000.00	Alaskan	Non Resident
\$100,001.00	\$105,100.00	Non Resident	Non Resident

RLS/dlr
6/0516-02/6GSS2

SENATE AMENDMENT #1

~~ST~~ (51)

By SENATOR VIC FISCHER

To: _____ SENATE BILL No. SENATE CS HB 106 (State Aff.)

To: _____ HOUSE BILL No. SCS HB 106 (State Affairs)

PAGE: 1 LINE: 14

after "participant" strike "using state funds"

Sec. 37.05.225. PURPOSE. The legislature finds that there exists in the state continuing high unemployment, underutilization of resident construction and supply firms, and high costs unfavorable to the welfare of Alaskans and to the economic health of the state. The purpose of bidder preference for resident firms when the state acts as a market participant (using state funds) is to encourage local industry, strengthen and stabilize the economy, decrease unemployment, and enhance the tax and revenue base of the state.

VF offered this + it passed - maybe this should go in committee file?

STATE OF ALASKA
FISCAL NOTE

Revision Date: _____, 198

I. REQUEST

Bill/Resolution No.: SCS HB 106
 Title: An Act Relating to Bidder Proced.
 Sponsor: Ward et al
 Requestor: Senate State Affairs

II. FISCAL DETAIL

Agency Affected: Administration
 Program Category Affected: Gen Admin Svcs
 BRU, Program of Subprogram(s) Affected:
General Services & Supply

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	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
 Division: General Services & Supply

Phone: 465-2250
 Date: May 24, 1983

Approved by Commissioner: Lisa Rudd
 Department: ADMINISTRATION

Date: May 24, 1983

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

ALASKA BIDDER'S PREFERENCE OPTIONS

(pick one from each column)

% Preference

- 1) 5%
- 2) 10%
- 3) 15%
- 4) (or any other figure)

Applied to:

- 1) contracts of any amount
- 2) only contracts under a certain amount (e.g. \$100,000)
- 3) only to contracts over a certain amount
- 4) combination of 2 and 3 above with different percentage preferences

Agency exemption:

- 1) exemption for DOT/PF contracts
- 2) exemption for APA contracts
- 3) exemption for only construction contracts of DOT/PF
- 4) exemption for only construction contracts of APA
- 5) combination of 1 & 2 or 3 & 4 above
- 6) no exemption for any agency

Alaska Bidders Preference Options

% Preference

5%

10%

15%

(or any ~~other~~ figure)



SKILL
RESPONSIBILITY
INTEGRITY

THE ALASKA CHAPTER
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, INC.

BOX 4-2500 • ANCHORAGE, ALASKA 98509
TELEPHONE (907) 276-5354
TELEX 25-394



3201 SPENARD ROAD
ANCHORAGE
RICHARD M. PITTENGER
MANAGER

SENATE STATE AFFAIRS COMMITTEE

May 17, 1983

HB 106

Thank you Mr. Chairman. My name is Resa King and I represent the Alaska Chapter of the Associated General Contractors of America. Our Chapter consists of approximately 850 construction and construction related firms engaged in Alaska construction. On behalf of this membership, I have been instructed to inform you that the Chapter opposes HB 106 which proposes raising the "local preference" percentage, contained in AS 37.05.230, from 5% to 15%. Primarily AGC opposes any local preference for the construction industry including the existing 5% preference. AGC's opposition is founded on both practical and philosophical considerations.

From a practical perspective, a preference for local contractors:

- increases the uncertainty in the bidding process
- increases the cost to the owner
- increases construction bidding requirements
- increases the potential for litigation
- and delays the awarding of projects

Further, there is a strong likelihood that such a scheme is unconstitutional.

From a philosophical perspective AGC opposes the increasing regulation by government of the construction industry; consistency

requires AGC not to seek special regulatory favor. Further, a "local preference" does not appear to be consistent with the competitive free market system.

The existing statute does not apply to the Department of Transportation, the statute does apply to the Alaska Power Authority and the University of Alaska projects. Both of these state agencies have experienced law suits, and some have had to go all the way to the Supreme Court before the bid could be let. Since these projects have been fraught with litigation and uncertainty neither the contractor nor the public wins.

Thank you for your time. I will attempt to answer any questions that you or the Committee members may have.

STATE OF ALASKA
FISCAL NOTE

Revision Date: _____, 1983

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OPERATING						
100 PERSONAL SERVICES	0					
200 TRAVEL	0					
300 CONTRACTUAL	0					
400 COMMODITIES	0	25	25	25	25	25
500 EQUIPMENT	0	25	25	25	25	25
600 LAND & STRUCTURES	0					
700 GRANTS, CLAIMS, ETC	0					
TOTAL OPERATING	0	50	50	50	50	50
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		50	50	50	50	50
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME		0	0	0	0	0
PART-TIME		0	0	0	0	0
TEMPORARY		0	0	0	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
 Division: General Services & Supply

Phone: 465-2250
 Date: May 16, 1983

Approved by Commissioner: Lisa Rudd
 Department: ADMINISTRATION

Date: May 16, 1983

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3/8/83

IV. ANALYSIS:

Senate Bill SCS HB 106
Date: May 16, 1983

The only quantifiable costs associated with this bill are the impact on agency operating budgets for commodities and non-professional services, which would have occurred if the bill passed last year. The larger and more unquantifiable costs would be due to reduced competition as out-of-state firms are driven out of the Alaskan market.

This cost estimate does not include effects on contracts for travel or professional services which are not effected by this Act. No estimate has been made of effects on the Alaska Power Authority or the Department of Transportation and Public Facilities.

The State already spends a majority of its commodity and non-professional dollars with Alaskan vendors.



ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

May 5, 1983

MEMORANDUM

TO: Representative Barbara Lacher
Attention: Sarah Robinson

FROM: David Teal *Teal*
Research Staff

RE: Alaska Bidders' Preference
Research Request 83-130

You asked for information on the bidding process used by the Alaska Power Authority (APA) for the Anchorage-Fairbanks electrical intertie. Sarah Robinson, of your staff, called to modify the request after the Alaska Superior Court ruled that a bid submitted by a joint venture was not entitled to Alaska's five percent resident bidders preference unless all the parties to the joint venture individually qualify for preferential treatment. Sarah limited the scope of the research to an exploration of the potential effects of legislation designed to put the Superior Court decision into law. This memorandum discusses several points related to the bidders preference statute.¹

Clarity of the Law

Current statutory language concerning eligibility for the resident bidders preference is clear except in the case of joint ventures. The APA has interpreted the language in a way that grants the preference to joint ventures as long as at least one of the partners is eligible for the preference. As you know, the Superior Court ruled on April 1 that this interpretation was incorrect and the Alaska Supreme Court reversed the decision of the Superior Court on April 29. Given the latest legal ruling, your interest in implementing the ruling of the Superior Court can be accomplished only by revising the law to clarify this intent.

¹The relevant language is found in AS 37.05.230.

Representative Lacher
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Practical Application of the Law

Executive-branch contracts for professional services and for procurement of materials go through the Department of Administration. The Division of General Services and Supply handles the bidding process for all contracts which go to bid. Vince Isturis, from that Division, said that joint ventures are rare and that Alaska firms are very competitive even without the five percent preference. He supplied the attached statistical report which shows that the bidders preference altered the outcome of the bidding process in only 2.97 percent of the bid awards in FY 1982.

Contracts for construction of most State facilities are handled by the Department of Transportation and Public Facilities (DOT/PF). According to AS 37.05.230(7), the bidders preference rules do not apply to DOT/PF contracts which are estimated to exceed \$5,000. Assistant Attorney General Don McClintock ascribes the exemption to 1) use of federal funds in many projects and 2) former Governor Keith Miller's opinion that local construction firms already enjoy a natural competitive advantage because of their closer proximity to the job.

I spoke with representatives of the University of Alaska, the Legislature, the Court system and the Alaska Power Authority to determine if other state-level public entities apply the resident bidders preference. The University and the APA apply the bidders preference to all contracts, and the court system applies the preference to procurement contracts.

According to Gerald Dubie, manager of materiel operations for the court system, the Judicial branch has used standard forms obtained from DOT/PF for Court system construction contracts. As mentioned above, DOT/PF is exempt from the bidders preference on major construction contracts. The result of using DOT/PF forms is that language related to bidders preference has been omitted from bid requests issued by the Court system.

Myrt Charney, Executive Director of the Legislative Affairs Agency, said that the agency does not necessarily accept the low bid and that no preference is given to Alaska firms. He added that most, if not all, construction projects have been awarded to Alaska firms despite the lack of bidders preference.

Supreme Court Interpretation of the Law

The Supreme Court's interpretation of the bidders preference statute is the broadest possible reading of the law. Page 11 of the Court's ruling points out that the only means by which the legislative purpose of

Representative Lacher
May 5, 1983
Page 3

giving a preference to an Alaska business can be fulfilled when an eligible Alaska business enters a joint venture with an ineligible firm is to grant the preference to the joint venture. The Supreme Court did not rule on whether or not granting preference to Alaska businesses is a constitutional purpose or whether or not the statute is reasonably related to that purpose. However, Justice Rabinowitz and Chief Justice Burke joined in a concurring opinion which stated that the bidders preference is clearly unconstitutional as written.

Constitutional Challenge

The constitutional challenge to the bidders preference legislation is serious. The obvious intent of the legislation is to provide favorable treatment on the basis of residency; under Alaska's constitution, that purpose may not be legitimate. According to Assistant Attorney General Don McClintock, a constitutional challenge has been set up and awaits only a firm willing to litigate.

Ways to Reduce Vulnerability to Legal Challenge

Assistant Attorney General Don McClintock suggested several means of reducing the probability that the bidders preference statute would be challenged in court. He said that the sentiment expressed in the concurring opinion which accompanied the recent Supreme Court ruling might be softened somewhat if a preamble which specified intended results were inserted into statute. Mr. McClintock said that favorable treatment based on place of residence is not a legitimate purpose of legislation, but goals such as impact on employment, standard of living, or the general health of the state economy are consistent with the current statutory language and may be less vulnerable to legal challenge.

Mr. McClintock added that demonstrating a need for the bidders preference and providing evidence that the legislation accomplishes its intent might also reduce the probability of legal challenge and may increase the probability that the bidders preference statute could withstand a legal challenge. Ms. Astrid de Parry, legal counsel for

Representative Lacher

May 5, 1983

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the University of Alaska, suggested that laws or regulations which define actions necessary to establish a "place of business" in Alaska might also help avoid legal challenges.²

Actions that may Increase Vulnerability to Legal Challenge

Dave Eberle, project manager for the APA, and Assistant Attorney General Don McClintock concur that increasing the bidders preference to 15 percent will intensify an already controversial situation. A 15 percent preference might so severely offset profit margins that firms would be forced to set up "shell" offices in Alaska if they expect to win contract awards. Legal disputes over the "place of business" requirement could be expected, and the larger preference could also increase the probability of a challenge on constitutional grounds due to the increased chance that the preference statute would affect the outcome of contract awards.

Mr. Eberle also noted that larger contracts might also increase the legal vulnerability of the bidders preference statute. Larger contracts not only increase the chances that firms will respond as joint ventures, they also increase the probability that a contract award would be worth the expense of a legal challenge. The APA is particularly concerned about contract size because they anticipate putting several multi-million dollar contracts to bid in the next decade.

Revising the law to comply with the more restrictive interpretation of the Superior Court might also increase the vulnerability of the bidders preference to a challenge on constitutional grounds. As Don McClintock points out, more restrictive language would increase the chances that the preference would influence the outcome of contract awards. Justices Rabinowitz and Burke of the Supreme Court have warned that even the liberal interpretation by that court is open to constitutional challenge.

²The University of Alaska is currently involved in a dispute over eligibility for the five percent bidders preference. The apparent low bidder on a construction project did not meet the "normal" requirements for establishing a place of business in Alaska yet claimed to be eligible for the bidders preference. I can provide more details on this subject if you wish, but you may wish to speak directly with Astrid de Parry. Her phone number is 474-7259.

Cost of the Bidders Preference Statute

It may appear that the cost to the State of the bidders preference is directly related to the amount of the bidders preference. That is, it may seem that a five percent bidders preference costs the State five percent on all contracts and that increasing the preference to 15 percent would triple the cost of preference legislation. The intertie contracts awarded by the APA can be used to demonstrate two points: 1) not all contracts are affected by the bidders preference and 2) even those contracts which are affected by the bidders preference do not cost the State the full five percent which is allowed by law.

There have been 9 procurement contracts awarded for the intertie project. For 6 of the contracts, Alaska firms submitted the low bid so that no bidders preference was involved. One contract went to an out-of-state firm even after application of the bidders preference, and the two remaining contracts were awarded to Alaska firms that beat the manufacturers' bids by virtue of the 5 percent preference. In these cases, the State received the identical product but paid a fee to Alaska firms which then obtained the products from the manufacturer.

In making a contract award for a conductor, the APA paid an additional \$60,000 because the low bidder did not qualify for Alaska's five percent bidders preference. According to Joe Perkins, of the APA, the contract award for the conductor was \$4.56 million. The \$60,000 "premium" paid to the Alaska supplier represents less than .5 percent of the value of the contract. A full 5 percent would have cost the State \$225,000.

Through April of 1983, the total value of procurement contract awards for the intertie was \$19,461,808. The portion of these awards attributable to the bidders preference is \$76,208, or .4 percent of the total contract awards. The Tye project shows similar results; procurement contract awards total \$10,282,600, of which \$40,271 (.4 percent) is attributable to the bidders preference. Bidders preference did not affect any construction awards for either project.

The attached statistical report of the Division of General Services and Supplies shows similar results. As mentioned earlier in this memorandum, the statistical report shows that the bidders preference affected the outcome of contract awards in less than three percent of contracts awarded in FY 1982. The amount attributable to bidders preference was \$22,754, or .5 percent of the \$4.88 million value of contracts awarded in FY 1982.

Representative Lacher

May 5, 1983

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Potential Impact of the Bidders Preference

You asked what questions might be raised in analyzing a revision of the preference legislation so that it would comply with the Superior Court's interpretation of existing statutes. Although the following questions haven't been fully explored, you may wish to consider them in your deliberation of this issue.

Would a more restrictive interpretation than that of the Supreme Court encourage the growth of small Alaska firms or would it eliminate them from the bidding process because of their inability to handle large contracts? Do joint ventures with larger out-of-state firms provide an opportunity for growth of the smaller Alaska firms or do they simply give the larger firms a cost advantage in the bidding process? Would out-of-state firms cut profit margins in order to obtain work in Alaska and to establish bidders preference on future contracts? Would out-of-state firms establish "shell" offices in Alaska in order to qualify for the bidders preference? What is the best definition of an Alaska firm? Do the benefits of preference legislation outweigh the costs? Are there better ways of accomplishing the desired result?

The questions are especially relevant because of the large-scale projects planned for Alaska and the simultaneous world-wide recession. Alaska has become an attractive market for both manufacturers and construction companies. The APA pointed out that Kanematso-Gosho and other Japanese and Korean trading companies will qualify for the Alaska bidders preference on future contracts. They foresee the day that Alcoa or some other American company which does not qualify for the Alaska bidders preference (but otherwise has the low bid) will lose a contract to a foreign company which qualifies for the preference by virtue of an agent acting in its behalf.

Additional Information

The attached article from the Colorado Law Review discusses preference laws enacted by various states. Although the tone of the article is negative, I believe the information will be useful to you. I have also attached portions of legal briefs for preference legislation which has been upheld by State Courts in Wyoming and Arizona. The Washington statutes have also been upheld by State Courts, but I was unable to obtain a copy of the brief for attachment to this memorandum.

I was also unable to find any reference to the U.S. Supreme Court and its treatment of bidders preference legislation in New Mexico. The Department of Law performed a thorough search of decisions and is fairly

Representative Lacher

May 5, 1983

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certain that the U.S. Supreme Court has not ruled on any state bidders preference legislation. Don McClintock also pointed out that court decisions on other states' statutes do not have a direct impact on Alaska's ruling because Alaska has a relatively stringent equal protection clause and because the statutory language varies from state to state.

* * *

I hope you find this information useful. If you have additional questions or would like additional material, please contact the agency.

DT

Attachments

MEMORANDUM

State of Alaska

TO: George Elgee
 Director
 Division of General Services & Supply
 Department of Administration

DATE: August 5, 1982

FILE NO:

TELEPHONE NO: 465-2250

THRU: Bob Link
 FROM:

SUBJECT:

Robert L. Schofield
 Purchasing and Facility Manager
 Division of General Services & Supply
 Department of Administration

FY 82 Purchasing
 Action

The following is a statistical report of business transacted by your Purchasing Section in Juneau and Anchorage. It is more comprehensive and covers fiscal year 1982, July 1, 1981 to June 30, 1982.

PURCHASE REQUISITIONS RECEIVED DURING FY 82

	<u>TOTAL P.R.'s</u>	<u>TOTAL LINE ITEMS</u>
01 Governor	58	96
02 Administration	185	486
03 Law	46	74
04 Revenue	25	56
05 Education	102	1,835
06 Health and Social Services	548	10,569
07 Labor	95	151
08 Commerce and Economic Development	53	92
09 Military Affairs	35	46
10 Natural Resources	187	459
11 Fish and Game	351	1,197
12 Public Safety	177	387
18 Environmental Conservation	59	137
21 Community and Regional Affairs	27	38
25 DOT/PF	447	1,004
30 Ombudsman	0	0
31 Legislative Council	1	1
33 Legislative Audit	1	1
41 Alaska Court System	15	15
TOTALS -	2,412	16,644

As a result of the above, the following bids (formal and informal) and negotiation were accomplished.

BIDS PUBLISHED FY 82

	FORMAL	INFORMAL	NEG
JULY	22	1	27
AUGUST	22	0	50
SEPTEMBER	26	0	54
OCTOBER	26	0	63
NOVEMBER	35	16	31
DECEMBER	34	13	19
JANUARY	39	0	30
FEBRUARY	27	0	24
MARCH	38	0	75
APRIL	35	0	72
MAY	29	0	35
JUNE	33	0	66
TOTALS -	366	30	546

TOTAL ANCHORAGE AND JUNEAU - 942

Subsequent to the above, purchase orders were issued as follows:

- (1) Total number of PURCHASE ORDERS issued to IN-STATE vendors -
TOTAL - 1002
- (2) Total DOLLAR VALUE of PURCHASE ORDERS issued to IN-STATE vendors -
TOTAL - \$ 24,372,083.25
- (3) Total number of PURCHASE ORDERS issued to OUT-OF-STATE vendors -
TOTAL - 406
- (4) Total DOLLAR VALUE of PURCHASE ORDERS issued to OUT-OF-STATE vendors -
TOTAL - \$ 9,993,085.68
- (5) Total COST of AWARDS made as a direct result of 5% BIDDERS PREFERENCE LAW-
TOTAL - \$ 22,753.79

This amount is the result of 28 separate awards of which 4 awards were responsible for \$ 17,946.35. Balance of \$ 4,807.44 resulted from the remaining 24 awards, 24 of which were for less than \$ 1,000. The awards based on the 5% bid preference generated \$ 4,789,672.91 in in-state business.

The 5% preference made the difference in only 2.97% of the bid awards for FY 82, again emphasizing the highly competitive nature of the Alaskan vendor.

PURCHASE ORDERS ISSUED TO MAJOR STATE METROPOLITAN AREAS - FY 82

Anchorage	-	782 PO's	=	\$ 18,569,441.81
Fairbanks	-	32 PO's	=	\$ 317,594.53
Juneau	-	<u>127 PO's</u>	=	<u>\$ 4,732,420.19</u>
SUB-TOTAL	-	941 PO's		\$ 23,619,456.53
Other Areas	-	<u>61 PO's</u>	=	<u>\$ 752,626.72</u>
TOTAL	-	1,002 PO's		\$ 24,372,083.25

The Purchasing Section issued the following term contract awards, many of which have estimated values.

CONTRACT AWARDS ISSUED DURING FY 82NO. OF CONTRACT AWARDSDOLLAR VALUE

TOTAL - 658

TOTAL - \$ 65,241,064.46

Of 658 contract awards, 485 were issued to Alaskan firms for a total dollar volume of \$ 42,936,690.70.

As an overview, \$ 94,411,900.58 or 75% of the \$ 125,098,474.00 spent during FY 82 was spent with Alaskan vendors.

JM/je
5/0805-05/GSS1

FIVE PERCENT BID PREFERENCE ANALYSIS
FISCAL 82

\$ 212.00	July	Anchorage 0 Juneau 1	\$ 123.00	January	Anchorage 0 Juneau 1
\$ 1,396.50	August	Anchorage 1 Juneau 2	\$ 2,735.00	February	Anchorage 1 Juneau 0
\$ 87.80	September	Anchorage 0 Juneau 2	\$ 335.42	March	Anchorage 1 Juneau 3
\$ 1,067.94	October	Anchorage 2 Juneau 2	\$13,007.35	April	Anchorage 1 Juneau 2
\$ 541.50	November	Anchorage 1 Juneau 3		May	Anchorage 0 Juneau 0
\$ 2,539.00	December	Anchorage 1 Juneau 1	\$ 708.28	June	Anchorage 1 Juneau 2

Awarded Alaskan Bidders: TOTAL - \$ 4,789,672.91

5% Bid Preference: TOTAL - \$ 22,753.79

GRAND TOTAL DOLLAR VOLUME - \$ 4,883,543.22

JM/je
5/0805-04/GSS1

IN-STATE AND OUT-OF-STATE PURCHASES
MADE FOR DEPARTMENTS

	<u>Non-Alaska Vendors</u>		<u>Alaska Vendors</u>		<u>Total</u>	
	<u>No. POs</u>	<u>Amount</u>	<u>No. POs</u>	<u>Amount</u>	<u>No. POs</u>	<u>Amount</u>
01 Governor	5	\$ 80,659.00	21	\$ 132,884.25	26	\$ 213,543.25
02 Administration	55	990,176.19	57	1,278,795.93	112	2,268,972.12
03 Law	0	0	9	100,227.32	9	100,227.32
04 Revenue	6	51,927.00	5	28,608.58	11	80,535.58
05 Education	27	254,491.71	76	423,534.98	103	678,026.69
06 Health & Social Services	93	368,353.14	464	1,629,278.39	557	1,997,631.53
07 Labor	6	104,212.80	48	228,919.87	54	333,132.67
08 Commerce & Econ. Develop.	4	144,383.15	15	43,203.34	19	187,586.49
09 Military Affairs	1	29,500.00	4	65,875.00	5	95,375.00
10 Natural Resources	30	1,456,718.38	43	563,935.52	73	2,020,653.90
11 Fish and Game	74	1,139,170.38	83	568,253.72	157	1,707,424.10
12 Public Safety	23	932,043.70	51	978,450.92	74	1,910,494.62
18 Environmental Conserv.	7	94,645.50	6	31,930.29	13	126,575.79
21 Community & Reg'l Affairs	0	0	7	18,645.37	7	18,645.37
25 Transportation	74	4,234,034.18	150	17,561,245.72	224	21,795,279.90
31 Legislative Affairs	<u>0</u>	<u>0</u>	<u>2</u>	<u>1,875.75</u>	<u>1</u>	<u>1,875.75</u>
Total -	405	9,880,315.13	1,041	23,655,664.94	1,445	33,535,980.00

FY'82

BREAKDOWN OF \$ AMOUNT OF PO'S:

	<u>How many PO's</u>	<u>\$ Amount</u>
0 - \$2,500	461	\$ 435,938.89
2,501 - 5,000	314	1,147,920.43
5,001 - 10,000	270	1,931,161.80
10,001 - 25,000	200	3,214,251.55
25,001 - 50,000	88	3,083,589.41
50,001 - 100,000	46	4,107,297.75
over \$100,000	55	20,445,009.10
	<u>1,434</u>	<u>\$34,365,168.93</u>

SUMMARY CHART - FISCAL YEAR 81 vs FISCAL YEAR 82

PURCHASING SECTION ACTIVITY

<u>DOCUMENTS PROCESSED</u>	<u>NUMBER RECEIVED & ISSUED</u>		<u>AVERAGE TRANSACTION TIME</u>		<u>AVERAGE - P.A. PER MONTH</u>	
	<u>FY-81 TOTAL</u>	<u>FY-82 TOTAL</u>	<u>FY-81 TOTAL</u>	<u>FY-82 TOTAL</u>	<u>FY-81 TOTAL</u>	<u>FY-82 TOTAL</u>
PURCHASE REQUISITION	2,445	2,412	21.83			
INVITATION TO BID	1,212	942	10.82			
PURCHASE ORDER	1,879	1,434	16.78		255,954.29	
CONTRACT AWARD	515	658	4.60		319,911.38	
LEASE	19	100	1.06		24,483.19	

CONTRACT AWARDS

	<u>NO. ISSUED</u>		<u>TOTAL VALUE</u>	
	<u>FY-81 TOTAL</u>	<u>FY-82 TOTAL</u>	<u>FY-81 TOTAL</u>	<u>FY-82 TOTAL</u>
ISSUED TO ALASKAN FIRMS	428	485	\$27,133,849.97	\$44,547,576.71
ISSUED TO OUT-OF-STATE FIRMS	37	173	8,696,224.65	20,693,487.75
TOTAL	<u>515</u>	<u>658</u>	<u>\$35,830,074.62</u>	<u>\$65,241,064.46</u>

PURCHASE ORDERS

	<u>NO. ISSUED</u>		<u>TOTAL VALUE</u>	
	<u>FY-81 TOTAL</u>	<u>FY-82 TOTAL</u>	<u>FY-81 TOTAL</u>	<u>FY-82 TOTAL</u>
ISSUED TO ALASKAN FIRMS	1,272	1,002	\$17,875,744.67	\$24,372,083.25
ISSUED TO OUT-OF-STATE FIRMS	607	406	10,791,135.26	9,993,085.68
TOTAL	<u>1,879</u>	<u>1,408</u>	<u>\$28,666,879.93</u>	<u>\$34,365,168.93</u>

LEASES

	<u>FY-82 TOTAL</u>	<u>TOTAL VALUE</u>	<u>FY-82 TOTAL</u>
NO. LEASES ISSUED:	100		\$25,492,240.62

	<u>FISCAL 1981</u>	<u>FISCAL 1982</u>
GRAND TOTAL DOLLAR AMOUNT:	\$67,239,071.77	\$125,098,174.00

JM/dlr

COMMENT

IN-STATE PREFERENCES IN PUBLIC CONTRACTING: STATES' RIGHTS VERSUS ECONOMIC SECTIONALISM

Every state, either by statute or by administrative practice, extends some type of special preference to businesses operating within the state when awarding public contracts. The advantage may extend to those who build roads as well as to those who sell pencils to public schools. Although the type of preference granted varies among the states, there are several types which have been widely adopted. It may at first seem reasonable that a state would want to keep tax dollars inside the state by buying from local businesses, but preference laws may have a substantial adverse impact on businesses located in other states. Close analysis also suggest that even states which have in-state preference practices are not actually benefited. ?

In this effort to analyze and evaluate the validity and desirability of in-state preference laws, their scope and application will be examined first. An assessment then will be made of their overall effects, both on interstate commerce and on the economy of an individual state. In light of those findings, the constitutional validity of preference laws will be discussed in terms of the commerce clause, the fourteenth amendment, and the privileges and immunities clause. Finally, it will be determined whether congressional action could or should directly preempt such laws.

INTERSTATE VARIATIONS IN PREFERENCE LAWS

Basic Classifications

In-state preference laws can be divided into five general categories.¹ Perhaps the most controversial type of preference is known as a "percentage" preference. Under such a system, in-state bidders are given a specified advantage over those from other states in the award of public contracts. If, for example, the percentage preference were five percent, a business from out-of-state would have to bid at least five percent lower than any resident before it would be awarded

1. The wide variety of preference laws could be categorized more narrowly or more broadly. For example, statutes which may impose burdens on non-resident contractors other than in bid evaluations, such as additional bonding or prequalification requirements, are not discussed in this Comment. See *Garden State Dairies of Vineland, Inc. v. Sills*, 46 N.J. 349, 217 A.2d 126 (1966), on remand, 98 N.J. Super. 109, 236 A.2d 176 (1967), *rev'd*, 53 N.J. 71, 248 A.2d 427 (1968).

the contract. At least twelve states,² Guam,³ Puerto Rico,⁴ and the Virgin Islands⁵ have statutes providing for such preferences, and percentages range from two⁶ to nineteen percent.⁷ At present Hawaii has the most elaborate statute,⁸ but a recently enacted New York law has the potential for even greater administrative complexity.⁹

tie bid

A second group of preference laws are known as "tie bid" preferences. Provided for by statute or administrative practice in at least twenty-eight states,¹⁰ the "tie bid" is the most common type of preference. An in-state bidder is preferred only when its bid is the same as that of a non-resident. Statutes typically provide that quality also must be equal; but, for standardized products, meeting the minimum specifications is all that is normally required of the lowest bidder.

A third general type of in-state preference laws consists of those which are general preferences, with the size of the preference uncer-

2. ALA. CODE tit. 55, § 506 (Supp. 1973); ALASKA STAT. § 37.05.230 (1) (1976); ARIZ. REV. STAT. §§ 34-241, 242, 245 (1974); ARK. STAT. ANN. §§ 14-119, 14-6142 (Supp. 1977); HAW. REV. STAT. §§ 103-41 to 103-45, 103-53.5 (1968); IDAHO CODE § 60-103(b) (Supp. 1977); LA. REV. STAT. ANN. §§ 38:2251, 38:5255 (West 1968); MONT. REV. CODES ANN. §§ 82-1137 (1966), 82-1924 (Supp. 1975); N.M. STAT. ANN. §§ 6-5-32-A, B, and C (1974); N.Y. STATE FIN. LAW §§ 163-174 (McKinney Supp. 1977-78); W. VA. CODE § 5A-3-44 (Supp. 1977); WYO. STAT. §§ 9-664, 9-667, 9-669 (1957).

3. See COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL PURCHASING, Appendix A at 8 (1975).

4. P. R. LAWS ANN. tit. 3, § 918b (1965).

5. V. I. CODE ANN. tit. 31, § 236a(b) (1976).

6. E.g., W. VA. CODE § 5A-3-44 (Supp. 1977).

7. HAW. REV. STAT. §§ 103-41 to 43 (1976). Although the maximum preference under these sections is ten percent, Section 103-51 (1976) provides a fifteen percent preference for public printing. Finally, Section 103-53.5 requires that an extra four percent be added to the bids of all non-residents. The four percent addition is justified as an adjustment for a retail excise tax, but such a tax is not assessed in sales to the state. Thus, it appears that the total preference would be nineteen percent for printing, and fourteen percent for many other goods and services.

8. HAW. REV. STAT. §§ 103-41 to 48 (1976) award a preference of three to ten percent, depending on the proportion of manufacturing or production cost that was incurred in Hawaii. A state agency is required to compile a list of Hawaiian products fitting into the various categories, and it is distributed to all public procurement officials in the state.

9. N.Y. STATE FIN. LAW §§ 163-74 (McKinney Supp. 1976-77) provide that the New York State Job Retention Board shall examine "preferential bidding" forms to ensure that "a bidder has substantial economic ties with New York State and/or contributes heavily to the state's economy so that an informed determination can be made as to whether the award of a state contract to the lowest bidder is in the best interest of the state." *Id.* § 163-a. The forms require detailed information about items such as where the products are manufactured, employment of New York residents, and the amount of taxes paid in New York.

10. ALA. CODE tit. 55, §§ 502, 514 (Supp. 1973); ALASKA STAT. § 36.20.010 (1973); ARK. STAT. ANN. § 14-221 (1968); CAL. GOV'T CODE § 4331 (West 1966); COLO. REV. STAT. § 24-30-404(1) (1973); FLA. STAT. ANN. § 287.052 (West 1975); GA. CODE ANN. §§ 40-1903, 1920 (1975), 40-1954 (Supp. 1977); IDAHO CODE § 67-5718 (Supp. 1977); IOWA CODE ANN. § 73.2 (West 1973).

tain.¹¹ Depending on specific language and administrative interpretations, the preference could range from a tie bid preference to a relatively large percentage preference. Terms such as "comparable,"¹² "in the best interests of the state,"¹³ and "as far as may be practicable"¹⁴ are often used in these statutes.

A fourth category includes states with an "absolute" preference. Under these laws, certain classes of goods or services must be procured from within the state, sometimes with an exception in very narrow circumstances. Seven states require that some or all public printing be done within the state,¹⁵ and at least thirteen insist that certain categories of public contractors' employees be in-state residents.¹⁶

general

absolute

KAN. STAT. § 75-3740 (1969); LA. REV. STAT. ANN. § 38:2184 (West 1968); ME. REV. STAT. tit. 5, § 1816.S (1964); MICH. STAT. ANN. § 3.395 (1977); MISS. CODE ANN. § 31-7-15 (1972); MO. ANN. STAT. §§ 34.070 (Vernon 1969), 71.140 (Vernon 1949); N.Y. STATE FIN. LAW § 168 (McKinney 1974); N.C. GEN. STAT. § 143-59 (Supp. 1975); N.D. CENT. CODE § 61-21-25 (Supp. 1977); OKLA. STAT. ANN. tit. 61, § 6 and 9 (West 1963); OR. REV. STAT. § 279.021 (1975); S.C. CODE § 1-25 (Supp. 1975); TEX. CIV. CODE ANN. tit. 604-2, § 1 (Vernon 1964); UTAH CODE ANN. § 63-2-50 (1968). Five states, Connecticut, Illinois, Indiana, Nebraska, and New Hampshire, reported that they had tie bid preferences in COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL PURCHASING Appendix A at A.1 to A.9 (1975). Even without statutory authority, such preferences could be created by administrative regulation or informal practices.

11. IOWA CODE ANN. §§ 18.6 (West Supp. 1977-78), 384.99 (1976); KY. REV. STAT. § 57.285 (Baldwin 1975); LA. REV. STAT. ANN. § 39.173 (West 1968); MASS. ANN. LAWS ch. 7, § 22(17) (Michie/Law Co-od 1973); MINN. STAT. ANN. § 16.34 (West 1977); MISS. CODE ANN. § 19-13-107 (1972); MO. ANN. STAT. § 8.280 (Vernon 1969); MONT. REV. CODES ANN. § 82-1920 (Supp. 1977); NEV. REV. STAT. § 333.160-2 (1973); N.J. STAT. ANN. § 52:25-23 (West Cum. Supp. 1977-78); N.Y. STATE FIN. LAW § 164.9 (McKinney Supp. 1976-77); N.D. CENT. CODE §§ 46-02-10 to 10.2 (1960); OKLA. STAT. ANN. tit. 74, § 85.5(7) (West 1965), tit. 74, § 85.3 (West Cum. Supp. 1977-78); S.C. CODE §§ 1-21, 22 (1962); S.D. COMPILED LAWS ANN. § 5-19-1 (1974); TENN. CODE ANN. §§ 12-348, 349 (Supp. 1977), 12.501 (1973); VT. STAT. ANN. tit. 29, § 903(a) (1970); VA. CODE § 2.1-284 (1973); WIS. STAT. ANN. § 16.75(1)(a) (West Cum. Supp. 1977-78); WYO. STAT. § 7-606 (1957); see also P.R. LAWS ANN. tit. 3, § 918a (1), (1965).

12. E.g., IOWA CODE ANN. § 18.6 (West Supp. 1977-78); MONT. REV. CODES ANN. § 82-1920 (1947).

13. E.g., IOWA CODE ANN. § 384.99 (West 1976); VT. STAT. ANN. tit. 29, § 903(a) (1970); see also N.Y. STATE FIN. LAW § 163-a (McKinney Supp. 1977-78) where such language was the justification for an addition to the statute which authorized as much as a 10% preference.

14. E.g., KY. REV. STAT. § 57.285 (Baldwin 1975); LA. REV. STAT. ANN. § 39.173 (West 1968); NEV. REV. STAT. § 333.160-2 (1973); VA. CODE § 2.1-292 (1973).

15. FLA. STAT. ANN. §§ 283.03, 287.102 (West 1975); IND. CODE ANN. § 4-13-4-8 (Burd 1974); MONT. REV. CODE ANN. § 16-1230 (1947); NEV. REV. STAT. § 268.070 (1975); N.J. STAT. ANN. § 52:30-3 (West 1955); OHIO REV. CODE ANN. § 125.56 (Page 1978); OR. REV. STAT. § 282.210(1) (1975).

16. ALASKA STAT. § 36.10.010 (1973); ARK. STAT. ANN. § 14-607 (1968); COLO. REV. STAT. § 43-2-208 (1973); CONN. GEN. STAT. ANN. §§ 31-52(a), 52a (1958); DEL. CODE tit. 29, § 6913 (1974); IOWA CODE ANN. § 73.3 (West Supp. 1977-78); LA. REV. STAT. ANN. § 38:2185 (West 1968); MISS. CODE ANN. §

Four states have absolute requirements that certain goods be procured from within the state.¹⁷

Finally, fourteen states have "reciprocal" in-state preference laws.¹⁸ Clearly enacted in retaliation to preference practices in other states, these statutes only prefer residents against those from states with preference laws. As might be expected, the size of the preference is determined by that preference imposed against an out-of-state bidder in the non-resident's home state. For example, for a number of years Pennsylvania has had a statute which forbids *any* procurement from residents of states with "absolute" preference laws.¹⁹ Its strict enforcement in the middle sixties is credited with the repeal of preference laws in several eastern states.²⁰

reciprocal
interesting
Foreign??

Diversity in Application

Even within each of the five basic categories discussed above there are broad variations in the scope and method of administration of in-state preference laws. While most preferences are mandatory,²¹ a few may be invoked or disregarded at the option of the purchasing

31-5-17 (1972); N.D. CENT. CODE § 43-07-20 (Supp. 1977); S.D. COMPILED LAWS ANN. § 5-19-6 (1974); TEX. REV. CIV. STAT. ANN. art. 6674p, §1 (Vernon 1977); VT. STAT. ANN. tit. 19, § 27 (1968); WYO. STAT. § 9-680-3 (Supp. 1975).

17. ALASKA STAT. § 36.15.010 (1973) (timber and lumber products used in state-financed projects must be grown or produced in Alaska); N.M. STAT. ANN. § 6-6-5 (1953) (public works contractors must use materials from New Mexico unless there is evidence of price fixing); R.I. GEN. LAWS § 37-2-5 (1956) (food products grown in Rhode Island must be purchased for state institutions at prevailing market prices); S.D. COMPILED LAWS ANN. § 5-23-2 (1974) (all state purchasing or leases of motor vehicles must be from dealers licensed in the state).

18. ILL. ANN. STAT. ch. 127, § 132.0e (Smith-Hurd Supp. 1977); KAN. STAT. § 75-3740a (Supp. 1976); LA. REV. STAT. ANN. § 38:2221A (West Cum. Supp. 1977); MINN. STAT. ANN. § 16.365-1 (West 1977); MISS. CODE ANN. § 31-7-47 (1972); NEB. REV. STAT. § 73-101.01 (1943); N.D. CENT. CODE § 44-08-01 (Supp. 1977); OKLA. STAT. ANN. tit. 61, § 14 (West Cum. Supp. 1977-78), tit. 74, § 85.17 (West 1965); PA. STAT. ANN. tit. 71, § 203 (Purdon 1962); S.D. COMPILED LAWS ANN. § 5-19-3 (1974); VA. CODE § 11-20-1 (1973); WASH. REV. CODE ANN. § 39-16-005 (Supp. 1976); WIS. STAT. ANN. § 35-012 (West Supp. 1977-78); WYO. STAT. § 9-667 (1957).

19. PA. STAT. ANN. tit. 71 § 203 (Purdon 1962). It is ironic that a provision intended to discourage preference laws in other states might itself be challenged as unconstitutional. Although the constitutional issues are not directly under attack, the application of § 203 is being challenged in *Lutz Appellate Printers, Inc. v. Commonwealth of Pa. Dept. of Property and Supplies*, 370 A.2d 1210 (Pa. 1977) (affirming the denial of New Jersey printer's request for a preliminary injunction).

20. See COMMITTEE ON COMPETITION IN GOVERNMENTAL PURCHASING, REPORT TO THE NATIONAL ASSOCIATION OF STATE PURCHASING OFFICIALS: "The In-State Preference Story" (September 1966).

21. E.g., COLO. REV. STAT. § 24-30-404(1) (1973); NEB. REV. STAT. § 73-101.01 (1943).

or contracting official.²² Others require that the residents request a preference before the bids are opened.²³

Many preferences are extended to businesses which are residents of the state,²⁴ but an almost equal number apply only to products manufactured or produced, or services performed in the state.²⁵ Some extend to either or both. Definitions of residency and domestic production vary widely, and often reflect an effort to curb the ingenuity of those who seek to evade such laws.²⁷

Another important variable in the application of preference statutes involves the types of contracts or purchases subject to the in-state preference. Most laws apply only to contracts made through a state procurement official.²⁸ Many preference statutes, however, apply to all public contracts entered into by all levels of government.²⁹ A few statutes, on the other hand, apply only to very narrow categories of public procurement.³⁰

resident vs. product

THE EFFECT OF IN-STATE PREFERENCES

Assessment of the impact of in-state preference laws on interstate commerce and on the economies of individual states is a necessary prerequisite to the evaluation of their constitutionality and desirability. The task is complicated by the lack of data on the impact of such laws, as well as by the difficulty of determining the preference practices of local governments.

Burden on Interstate Commerce

Each time a contract is awarded to a resident because of an in-state preference, what otherwise would have been interstate com-

22. E.g., MD. ANN. CODE art. 41, § 31-1 (1957); N.Y. STATE FIN. LAW § 163-a (McKinney Supp. 1977-78).

23. E.g., ALA. STAT. ANN. § 14-119 (1968); N.Y. STATE FIN. LAW § 163-a (McKinney Supp. 1977-78).

24. E.g., COLO. REV. STAT. § 24-30-104(1) (1973); KAN. STAT. §§ 75-3740 (1969), 3740a (Supp. 1976); WYO. STAT. §§ 9-664 to 667 (1957).

25. E.g., FLA. STAT. ANN. § 287.082 (West 1975); WYO. STAT. § 9-669 (1957). For simplicity, the term "resident" will be used to refer to both types of preferences.

26. E.g., MONT. REV. CODES ANN. § 82-1920 (Supp. 1977); NEV. REV. STAT. § 331.300 (1975); N.Y. STATE FIN. LAW § 163-a (McKinney Supp. 1977-78).

27. E.g., MONT. REV. CODES ANN. § 82-1925 (Supp. 1977) provides that a business will be prima facie eligible for a preference after one year in the state, but it may be disqualified if the public procurement official finds that the business is a wholly owned subsidiary of a foreign corporation, or if it was formed for the purpose of circumventing the residency requirement.

28. E.g., COLO. REV. STAT. § 24-30-104(1) (1973); ME. REV. STAT. tit. 5, § 1516 (1961).

29. E.g., CAL. GOV'T CODE § 4331 (West 1966); KAN. STAT. § 75-3740 (1969).

30. E.g., IOWA CODE ANN. § 73.1 (West 1973) (coal produced in Iowa must be used by state government); VT. STAT. ANN. tit. 19, § 27 (1963) (trucks owned in Vermont must be used in highway construction).

merce is reduced by an amount equal to the value of that contract. At the heart of the success of our national economy is the protection of free trade between the states. The removal of virtually all interstate trade barriers in the private sector has allowed greater efficiency and productivity through specialization, raising the standard of living for the nation as a whole. In the public sector, on the other hand, preference laws force a reduction in the flow of interstate commerce. As a result, the cost to taxpayers of a given level of governmental goods and services is correspondingly increased.

Any preference which gives in-state bidders an affirmative advantage operates essentially as a tariff on out-of-state goods in the public sector market.³¹ The size of a percentage preference would be the amount of the tariff. Similarly, an absolute preference is the functional equivalent of an embargo on foreign goods. Tie bid preferences are rarely used in contract awards, but widespread enactment of tie bid preference laws may indicate a substantial total impact on commerce. Although the impact on interstate commerce will vary depending on the degree of potential competition from businesses in surrounding states, the impact will be more severe when a stronger preference is in effect.

In 1976, state and local spending was \$246.2 billion,³² and purchases alone amounted to \$102 billion.³³ With statutes or practices in every state overtly intended to prefer residents for much of that public spending, the overall impact on interstate commerce is surely substantial.³⁴ Preference practices may be more prevalent on the local

31. Although no actual charge is made on goods from other states, the non-resident business must underbid residents by more than the amount of the preference before it will be awarded the contract. The competitive disadvantage is identical whether a tariff or a preference is imposed, since certain categories of resident businesses are "protected" at the expense of non-residents.

32. DEPARTMENT OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, 57 SURVEY OF CURRENT BUSINESS No. 9 (Sept. 1977).

33. *Id.*

34. Although it is difficult if not impossible to precisely calculate to what extent interstate commerce would be increased if such trade barriers in governmental procurement were eliminated, the amount is surely at least several billion dollars per year. In a closely related area, it has been estimated that the federal government's policy of procuring from domestic firms (the "Buy American policy") reduced expected imports in the public sector by 80-85%. Lowinger, *Discrimination in Government Procurement of Foreign Goods in the U.S. and Western Europe*, 42 S. Econ. J. 451 (1976). Although most in-state preferences are not as strong as the 50% preference reportedly imposed by the Department of Defense during this period, there is normally far more trade between states than there is with other countries. The burden on commerce is diminished to the extent that public officials, particularly at the local level, may be unaware of statutory requirements; but misunderstanding may also result in overapplication of the preference. See D. MINGE, *EFFECT OF LAW ON COUNTY AND MUNICIPAL EXPENDITURES* 118 (1975). Criminal penalties for an infraction probably encourage broader interpretations, especially when the preference laws are ambiguous in the first place. A majority of the states provide criminal penalties for

level than on the state level,³⁵ adding further to the impact on interstate commerce.

The impact of in-state preferences may also be manifested in subtle ways. A strong policy of favoring local bidders could encourage a procurement official to reject all bids when an outsider submits the lowest one.³⁶ If the contract is rebid, a nonresident may simply become discouraged and withdraw from the competition. The frustration of competing against residents who are protected by an in-state preference practice will cause some contractors to stop bidding entirely for contracts in that state. In addition, a combination of such factors might induce the procurement official to be less aggressive in soliciting bids from out-of-state. Thus, the total impact on commerce may be far greater than statutory provisions would indicate.

Finally, preference laws may generate animosity between states that extends beyond public procurement. The commercial feud between the states is even older than the union,³⁷ and preference laws may only be another battle in that war. Reciprocal preferences are an overt form of counterattack.

Costs and Benefits to Individual States

Despite widespread disparagement by purchasing organizations and others,³⁸ there are many supporters of preference laws, often

procurement officials who do not honor local preference statutes. E.g., ARIZ. REV. STAT. § 34-246 (1974); ARK. STAT. ANN. § 14-625 (1963).

35. See Melder, *The Economics of Trade Barriers*, 16 IND. L.J. 127, 140 (1940); COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL GOVERNMENT PURCHASING 26 (1974).

36. Most states give purchasing officials discretionary power to reject all bids, often for reasons such as "when in the best interests of the state," which makes that discretion virtually unlimited. E.g., LA. REV. STAT. ANN. § 38:2255 (West 1968); VT. STAT. ANN. tit. 29, § 903 (1970). The practice can easily be exercised in a manner which will effectively exclude non-local suppliers. Cf. UTAH CODE ANN. § 63-2-50 (1953) (residents are given a second opportunity to underbid non-residents in certain circumstances).

37. It is widely agreed that one of the principle failures of the Articles of Confederation was the absence of a prohibition on tariffs and other barriers to trade between the states. See C. Beard, *Forty-Eight Sovereigns*, reprinted in J. JOHNSON, INTERSTATE TRADE BARRIERS 178-80 (1940).

38. See COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL PURCHASING 94 (1975); Linde, *Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State*, 40 WASH. L. REV. 10, 49-67 (1965); Comment, *Competitive Bidding on Public Works in Wyoming: Determinations of Responsibility and Preference*, 11 LAND & WATER L. REV. 243 (1976); Comment, *Home-State Preference in Public Contracting: A Study in Economic Balkanization*, 58 IOWA L. REV. 576 (1973). A large number of preference laws and related trade barriers were enacted during the depression, and a flurry of criticism was generated in the late thirties and early forties. See COUNCIL OF STATE GOVERNMENTS, TRADE BARRIERS AMONG THE STATES: PROCEEDINGS OF THE NATIONAL CONFERENCE ON INTERSTATE TRADE BARRIERS (1939); J. JOHNSON, INTERSTATE TRADE BARRIERS (1940); E. MELDER, STATE AND LOCAL BARRIERS TO INTERSTATE

among business and labor organizations in individual states.³⁹ It could be conceded that purchasing costs will be increased, but argued that procurement officials take too narrow a view of the role played by preference laws. As with many types of special preferences,⁴⁰ other socio-economic goals are sought through such laws.

Older cases sometimes stated that public purchases involved the expenditure of funds specially entrusted by the taxpayers to procurement officials.⁴¹ As such, there was a duty to spend the funds inside the state. This theory was based upon the questionable assumption that people of the state were benefited when purchases were made from residents. Although the assertion may have merit in terms of federalism, it says nothing about the actual benefits flowing from a policy of in-state preference.

With spurious justifications set aside, it is clear that the primary purpose of preference laws is to protect local public contractors.⁴² It is felt that spending tax revenues within the state will promote new industry, reduce unemployment, and eventually increase the tax base of the state. In addition, profits made on the transaction by local businesses will be taxed by the state, thus "offsetting" the higher pur-

COMMERCE IN THE UNITED STATES (1937). Trade publication: uniformly condemn such laws. E.g., R. FORBES, GOVERNMENTAL PURCHASING 178-80 (1929); G. JENNINGS, STATE PURCHASING 96-7 (1969); NATIONAL ASSOCIATION OF STATE PURCHASING OFFICIALS, COMMITTEE ON COMPETITION IN GOVERNMENTAL PURCHASING, IN-STATE PREFERENCES IN PUBLIC PURCHASING 1 (1970): "A policy of in-state preference in public purchasing is a bad policy, a shortsighted policy, and worse, bad governmental purchasing." The Council of State Governments and The National Association of State Purchasing Officials have been strongly and actively opposed to preference laws for many years. They have recently been joined by the National Governors Conference through a policy statement; denouncing preference laws as anticompetitive and inefficient. N.G.C. POLICY POSITIONS (1976-77).

39. In *National Oil and Supply Co., Inc. v. Gray*, Civ. No. F.S.-76-75-C (W. D. Ark., filed May 3, 1975) (voluntarily dismissed in 1977 after statutory change), the Arkansas five percent preference was to have been constitutionally challenged. The Arkansas Chapter of Associated General Contractors of America, Inc. successfully intervened as a defendant on April 5, 1977. Labor and management testimony generally favored proposals to strengthen the federal counterpart to preference laws, the "Buy American Act," 41 U.S.C. § 10a (1970). *Proposed Amendments to the Federal "Buy American Act": Hearings on H. R. 13283 and Related Bills Before the Subcom. on Public Buildings and Grounds of the House Comm. on Public Works, 92d Cong., 2d Sess. (1972).*

40. Procurement preferences exist in many states for small or minority owned businesses, the handicapped, and for prison-made goods. For a partial collection of such laws, see NATIONAL SUBSTANTIVE COMMITTEE ON SOCIO-ECONOMIC POLICIES OF THE COORDINATING COMMITTEE ON A MODEL PROCUREMENT CODE OF THE AMERICAN BAR ASSOCIATION, MODEL PROCUREMENT CODE SOCIO-ECONOMIC PROVISIONS INDEX (1977).

41. *People v. Crane*, 214 N.Y. 154, 108 N.E. 427 (per Justice Cardozo), *aff'd*, 239 U.S. 105 (1915); *Atkin v. Kansas*, 191 U.S. 207, 222-23 (1903).

42. Other justifications cited for preference laws are better service or a higher level of responsibility from local businesses. Those factors are indeed important for some contracts, but they can be required in bid specification and applied in a non-discriminatory manner in such cases.

chasing cost. Wages paid to resident workers would be taxed and spent in the state, generating even more tax revenue and further encouraging the local economy.⁴³ Such arguments are very appealing on a superficial level, but the complexities of economic theory and the realities of unemployment mandate a closer examination.

As noted previously, in-state preference laws have economic and competitive effects almost identical to tariffs. Also, trade between the states is similar in many respects to trade among nations. Thus, the well-developed economic theory of tariffs is helpful in evaluating the effectiveness⁴⁴ of preference laws. Although protectionism continues to have its vocal supporters, economists are virtually unanimous in advocating free trade, except in certain very narrow circumstances.⁴⁵ At the heart of their conviction is the theory of comparative advantage.⁴⁶

The theory of comparative advantage begins with the rather obvious assertion that the welfare of every state will increase if it specializes

43. At the federal level, it was estimated that each dollar of domestic federal expenditures would yield thirty-six cents in taxes from that transaction alone. *Proposed Amendments to the Federal "Buy American Act:" Hearings on H.R. 13283 and Related Bills Before the Subcomm. on Public Buildings and Grounds of the House Comm. on Public Works, 92d Cong., 2d Sess. 22-24 (1972)*. According to this analysis, even more tax revenue would be generated through indirect suppliers and their employees and shareholders. The intuitive appeal to this line of reasoning is summed up by a statement sometimes attributed to Abraham Lincoln: "I don't know much about the tariff. But I do know that when I buy a coat from England, I have the coat and England has the money. But when I buy a coat in America, I have the coat and America has the money." See P. SAMUELSON, *ECONOMICS* 694 (10th ed. 1977).

44. In this section "effectiveness" refers only to the economic advantage to a single state. The Nation as a whole would clearly be better off if such practices did not exist. See text accompanying notes 30-34 *supra*.

45. See e.g., the strong assertion in P. ELLSWORTH, *THE INTERNATIONAL ECONOMY* 219 (3d ed. 1964):

The case for free trade has never been successfully refuted, nor even has an intellectually acceptable argument for long-run, enduring protection, based on economic considerations, ever been devised, though much ingenuity has gone into the attempt. The arguments for protection that do have validity, are either short-run or noneconomic in character, or require the realization of very special conditions. Yet most of the arguments advanced by protectionists are unqualified, asserted with great conviction, and what is more important, are widely believed. (Emphasis supplied.)

See also P. SAMUELSON, *ECONOMICS* 679-80 (10th ed. 1977); R. WYKSTRA, *INTRODUCTORY ECONOMICS* 652-57 (1971).

46. The theory was originally stated in 1776 by Adam Smith in II *THE WEALTH OF NATIONS* 29-60 (1939 reprint by Oxford University Press). It has been refined and expanded upon by David Ricardo, *PRINCIPLES OF POLITICAL ECONOMY* (3d ed. 1821); John Stuart Mill, *PRINCIPLES OF POLITICAL ECONOMY*, Book III, Ch. XVIII (1848); and countless economists since their time.

It is not entirely clear how fully the theory of comparative advantage applies to trade between the states. Early formulations of the theory assumed there would be many barriers to the flow of resources and labor among nations, but very few within individual countries. But there are at least some trade barriers

in the production of goods which it can produce more efficiently than others. If Michigan is "best" at production of automobiles and California "best" at the production of wine, the consumers of each state are better off if there is free trade in those commodities. Barriers will only increase prices of the goods.

The more significant aspect of comparative advantage is less obvious. The theory also demonstrates that even if a state is inefficient in the production of two commodities relative to another state, trade will still occur, and benefits will be derived for each, if each state produces the goods which it is best at producing. Because other states would have to sacrifice output of their most efficient products to compete with that state, it is said to enjoy a "comparative advantage" over the other states.⁴⁷ This point is illustrated by positing a man who is the best lawyer and the best typist in town.⁴⁸ If he can charge clients more for his legal work than for his typing, this hypothetical worker can make the most money by spending all his time practicing law, and by hiring someone else to do his typing. In much the same way, trade will occur between states in situations where production costs for any particular traded good would be lower in a single state, but where it is unable to produce enough of the commodity to supply the entire nation.

Although there is room for some doubt,⁴⁹ the theory of comparative advantage indicates that preference laws benefit in-state public contractors only at the expense of taxpayers and other businesses. Such laws probably do little to help unemployment,⁵⁰ and it has been

within the United States, such as transportation costs and restrictive local regulations. Thus, economists agree that the theory of comparative advantage applies to trade between the states. See L. LLOYD, *TARIFFS: THE CASE FOR PROTECTION* 73 (1975); H. NOURSE, *REGIONAL ECONOMICS* 155-60, 220-36 (1968); H. SIEBERT, *REGIONAL ECONOMIC GROWTH: THEORY AND POLICY* 84-94 (1969).

47. See P. ELLSWORTH, *THE INTERNATIONAL ECONOMY* 59-102 (3d ed. 1964).

48. P. SAMUELSON, *ECONOMICS* 669 (10th ed. 1977).

49. As with all theories, the conclusions of economic theories which advocate free trade are virtually unassailable if their initial assumptions are a reasonable reflection of reality. Fundamental to the theory of comparative advantage is the assumption of full employment. It is assumed that some workers will be displaced by imports in the least efficient industries, but that they will be absorbed into the state's economy as it expands to accommodate the increased demand for goods which other states no longer have the capacity to produce. Economists emphasize that there should be no unemployment, and that today's experience is only a temporary phenomenon. Moreover, it is argued that far more effective and efficient ways exist to deal with unemployment, such as creating jobs through direct programs and improving fiscal and monetary policies. Also, preference laws apply only to a limited sector of the economy, one which may very well not need the special encouragement. See P. STEIN, *THE RAPE OF THE TAXPAYER* 206-227 (1973).

50. The overall economy would be better off if resources were encouraged to flow to the most efficient uses, rather than as a subsidy to relatively inefficient producers. The argument against using preferences to reduce unemployment was summarized by the United States-Japan Trade Council:

found that the income of in-state businesses overall may actually be reduced.⁵¹ Thus, the purported economic advantage to a state from preference laws is at best minimal.

There are also several direct and indirect costs associated with preference practices. The major effect of such laws is to increase the cost of government. Indeed, an obvious cost is any amount which must be paid in excess of the lowest bid from non-residents. Many experts feel that prices for public contracts generally rise in the amount of any percentage preference.⁵² Regardless of the total costs, the net effect is to distribute extra tax dollars to public contractors at the expense of taxpayers generally—both consumers and other businesses. Any tariff operates as a subsidy for particular industries; and there may be no reason why those who sell their goods and services to the government need or deserve special treatment. In this sense preference laws are similar to a tax reduction enjoyed by only a limited group of businesses.

cost
not here - if not at 5%
going to 15% will have

At best, Buy National policies offer only minimal short-term assistance, and do little to overcome the more fundamental causes of trade imbalance. Rather than subsidize inefficiency, government ought to attack it at its roots. Putting the tax dollars lost by Buy American policies into basic research and development, technological advancement, and worker retraining would help to strengthen the fundamental competitive advantage of U.S. domestic industries. When that advantage is aggressively exploited in the competitive market place the long range benefits in terms of industrial expansion, more jobs, and increased tax revenues will be far greater than any short term benefits to be gained by protecting domestic industries.

Proposed Amendments to the Federal "Buy American Act": Hearings on H. R. 13283 and Related Bills Before the Subcomm. on Public Buildings and Grounds of the House Comm. on Public Works, 92d Cong., 2d Sess. 68 (1972).

51. Richardson, *The Subsidy Aspects of a "Buy American" Policy in Government Purchasing*, in JOINT ECONOMIC COMMITTEE OF THE CONGRESS OF THE UNITED STATES, A COMPENDIUM OF PAPERS, PART 2, INTERNATIONAL SUBSIDIES 220 (1975):

Regardless of the goal of "Buy American" policy, however, and regardless of whether the policy takes the form of "price favoritism" or "general favoritism," the central conclusion of the analysis of this study is that the policy is always in part self-defeating and may under some circumstances be perverse in its effects.

In fact, the possibility that "Buy American" policy actually reduces the income of domestic producers is shown to exist.

The primary reason for such a surprising result is that the protection of a preference law may raise domestic prices in private markets as well as in the public sector. Out-of-state prices could then be forced down to compete in the public sector. As a result, private purchasers may buy the less expensive imports, offsetting or even negating any reduction in imports from governmental purchases. See *id.* at 220-236. Ironically, the laws will increase interstate commerce to the extent that this effect occurs.

52. See NASPO COMMITTEE ON COMPETITION IN GOVERNMENTAL PURCHASING, *In-State Preference in Public Purchasing* (1965). In this respect, preference laws have the same effect as tariffs, which clearly lead to higher prices. See P. ELLSWORTH, *THE INTERNATIONAL ECONOMY* 215-19 (3d ed. 1964).

There are other adverse effects of preference laws which may be less obvious, but which may be equally significant. As an artificial incentive in the normal market mechanism, a preference law may encourage or force a business to establish two facilities when it normally would have had only one. Not only will there be additional construction and set up costs, but the single plant would probably have been more efficient overall.⁵³ The extra costs of this inefficiency from two plants will often be passed on to the taxpayers.

In-state preferences also may indirectly produce anticompetitive practices such as bid-rigging and other forms of collusion. Because the laws function essentially as a barrier to entry into the marketplace⁵⁴ and will reduce the pool of bidders in other ways,⁵⁵ a smaller number of firms will be competing for public contracts. The smaller the number of competitors, the more likely they will engage in collusive or oligopolistic behavior.⁵⁶ Indeed, laws which require services, such as public printing, to be performed in a particular county may lead to a single source of supply not unlike a "natural monopoly."⁵⁷

Finally, even the superficially apparent benefits from preference laws will be negated to the extent that surrounding states engage in similar practices. Neighboring jurisdictions have a strong tendency to enact percentage preference laws.⁵⁸

THE CONSTITUTIONALITY OF IN-STATE PREFERENCE LAWS

The Commerce Clause

In-state preference laws may be unconstitutional as unreasonable burdens on interstate commerce. As discussed above,⁵⁹ preference laws have a significant adverse impact on interstate commerce. Their economic effect is the same as a tariff, and the commerce clause⁶⁰

53. This assumes that the business would be more likely to operate at a level which minimizes its costs if it is subject to lower external cost barriers, such as local preference practices.

54. Since out-of-state bidders are often excluded entirely or forced to cut costs in order to compete, preference laws are analogous to many traditional barriers to entry. The effect is anticompetitive almost by definition.

55. See text accompanying notes 36-38 *supra*.

56. See McLachlan, *Monopoly and Collusion in Public Procurement: A Survey of Recent American Experience*, 8 ANTI-TRUST L. AND ECON. REV. 69, 78-9 (1976).

57. "Natural" monopolies exist where production costs or distribution mechanisms create a natural tendency toward a single supplier. Classic examples are public utilities. Strong local procurement preferences may *artificially* alter the public sector market to a point where only a single firm will be reasonably capable of supplying certain goods or services.

58. Percentage preference laws exist in many of the western states: Alaska, Arizona, Hawaii, Idaho, Montana, New Mexico, and Wyoming. The percentage preferences awarded by Arkansas and Louisiana are offset by each other as well as by the reciprocal provisions in Mississippi and Oklahoma. See notes 2 and 17 *supra*.

59. See text accompanying notes 31-39 *supra*.

60. U.S. CONST. art. I, § 8, cl. 3.

was intended to mitigate if not eliminate such burdens on interstate commerce.⁶¹ An anomaly in commerce clause doctrine, however, has generally protected in-state preference laws from successful constitutional attack.

Although commerce clause cases are not always free from inconsistency in their language, several well-accepted general principles have emerged. It is unquestioned that state laws can be invalidated under the commerce clause even absent conflict with congressional action.⁶² State laws which overtly discriminate against business from other states are normally held invalid regardless of the state interest being protected. In striking down a New York law designed to protect in-state dairy farmers, Justice Cardozo wrote for a unanimous Court:

Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing being transported. . . . [I]mposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception by the provision committing commerce of that order to the power of the Congress. . . . [I]f New York in order to promote the economic welfare of her farmers, may guard them against competition with cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation. . . .

Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief list; or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.⁶³

61. See *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 543-35 (1949); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824); F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 1-10 (1937). As Madison wrote:

The practice of many states in restricting the commercial intercourse with other states and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the Federal Articles, is certainly adverse to the spirit of the union, and tends to beget retaliating regulations, not less expensive and vexacious to themselves than they are destructive of the general harmony. Letter by James Madison (1787) (urging that a constitutional convention be called), reprinted in Banc, *Interstate Trade Barriers*, 16 *IND. L.J.* 121 (1940).

62. *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333 (1977); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

63. *Robbin v. C. A. F. Seelig, Inc.*, 291 U.S. 511, 521-23 (1935).

Many such discriminatory laws were enacted during the depression, but the commerce clause was repeatedly used to protect free trade between the states.⁶⁴

Most of the diversity in the commerce clause cases arises where a state is pursuing a legitimate interest in a manner which affects businesses from other states and impedes the flow of interstate commerce. Such burdens might be upheld if they are found to be indirect,⁶⁵ insignificant, not undue,⁶⁶ or otherwise non-discriminatory.⁶⁷ Recently the Court has overtly recognized that a balancing approach is being used in such cases.⁶⁸ The strength of the state interest is weighed against the burden on interstate commerce, and an inquiry is made into less burdensome alternative methods of achieving the desired end.

Numerous state courts have declined to follow the normal commerce clause analysis. There were a large number of unsuccessful challenges to in-state preference laws in the early part of this century.⁶⁹ Almost without exception,⁷⁰ the laws were upheld. Although the early rationales varied somewhat, the predominant view was that individual states should be free to spend their tax dollars in any manner, without constitutional interference.⁷¹ At that time state expenditures were relatively small,⁷² there was less industrial specialization, and transportation between states was more difficult. Thus, the impact on interstate commerce was minimal.

64. *E.g.*, *Edwards v. California*, 314 U.S. 160 (1941); *Best and Co. v. Maxwell*, 311 U.S. 451 (1940); *Hale v. Bimco Trading Inc.*, 306 U.S. 375 (1939).

65. *Field v. Barber Asphalt Paving Co.*, 194 U.S. 618 (1904); *Atkin v. Kansas*, 191 U.S. 207 (1903).

66. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *H. P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949).

67. *Huron Portland Cement Co. v. Detroit*, 302 U.S. 440 (1960).

68. *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333 (1977); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

69. *Denver v. Bossie*, 83 Colo. 329, 266 P. 214 (1928); *In re Gremmill*, 20 Idaho 732, 119 P. 298 (1911); *State ex rel. Collins v. Senatobia Blank Book and Stationery Co.*, 115 Miss. 251, 76 So. 258 (1917); *Allen v. Lapsap*, 188 Mo. 692, 87 S.W. 926 (1905); *Pasche v. South St. Joseph Town-Site Co.*, 190 S.W. 50 (Mo. App. 1916); *Hersey v. Nelson*, 47 Mont. 132, 131 P. 30 (1913).

70. A rare exception was *People ex rel. Treat v. Coler*, 166 N.Y. 144, 59 N.E. 776 (1901), where a statute requiring all stone purchased by New York to be worked in the state was held invalid as a violation of the commerce clause. Unfortunately, the court's language was overbroad, and there was little sound analysis of the commerce problem. Because of language in *Atkin v. Kansas*, 191 U.S. 207 (1903), which was also probably overbroad, *Coler* has not been followed. *See People v. Crane*, 214 N.Y. 154, 108 N.E. 427 (1915), *aff'd*, 239 U.S. 195 (1915).

71. *See Tribune Printing and Binding Co. v. Barnes*, 7 N.D. 591, 597, 75 N.W. 904, 906 (1898).

72. In 1902, state and local governments spent only \$1.1 billion, and half of that sum was for personal services. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 2 *Historical Statistics of the United States* 1127 (1975). The total had risen to \$28 billion by 1950, *id.*, but is currently in excess of \$247 billion per year. *See note 32 supra.*

Early decisions justified a departure from established commerce clause doctrine by distinguishing between "governmental" and "proprietary" powers of government.⁷³ Governmental functions were those in traditional areas of government, such as police and fire protection, and the regulation of private business. On the other hand, proprietary functions were similar to the actions of individuals or businesses, such as hiring or firing employees, and entering into contracts. This distinction had been a fiction of limited usefulness in the areas of sovereign immunity from tort liability⁷⁴ and the power to make long-term contracts.⁷⁵ The doctrine has nevertheless continued to serve as a shield for in-state preference laws.⁷⁶ Early cases used unpersuasive reasoning in asserting that such state action was immune from constitutional scrutiny altogether, but they were often cited by subsequent courts without discussion.⁷⁷ The few discussions that were made simply relied on the proprietary function rationale. Subsequent cases clearly demonstrate that proprietary functions of government are state action and thus subject to the same constitutional limitations as other functions.⁷⁸ The proper question should have been whether the burden on commerce imposed by preference laws was of such a nature or degree to constitute a commerce clause violation.

The line of authority upholding preference laws was broken in *Garden State Dairies of Vineland, Inc. v. Sills*.⁷⁹ The case involved a New Jersey statute which required businesses selling milk to any state agency to certify that (1) it had purchased from New Jersey suppliers in the prior year at least the amount of milk to be supplied under the contract, and that (2) it would purchase at least that amount in the next year. In its initial opinion, the New Jersey Supreme Court acknowledged the line of cases virtually immunizing public contracting from constitutional scrutiny, but it recognized an inconsistency with more recent Supreme Court pronouncements on

73. E.g., *Tribune Printing and Binding Co. v. Barnes*, 7 N.D. 591, 75 N.W. 904 (1898).

74. *Bailey v. Mayor of New York*, 3 Hill 531 (N.Y. 1842); *Hodgins v. Bay City*, 156 Mich. 687, 121 N.W. 274 (1909). Although the distinction is still followed in some jurisdictions, it has been sharply criticized by scholars. See W. Prosser, *HANDBOOK OF THE LAW OF TORTS*, § 131 at 970-83 (4th ed. 1971).

75. E.g., *City of High Point v. Duke Power Co.*, 120 F.2d 806 (4th Cir. 1941).

76. See *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972); *City of Phoenix v. Super. Ct.*, 139 Ariz. 533, 514 P.2d 454 (1973); *Schrey v. Allison Steel Mfg. Co.*, 75 Ariz. 282, 255 P.2d 601 (1952).

77. E.g., *Hersey v. Neilson*, 47 Mont. 132, 131 P. 30 (1913).

78. See, e.g., *Elrod v. Burns*, 427 U.S. 347 (1976); *Sogaman v. Dougall*, 113 U.S. 634 (1973).

79. 46 N.J. 349, 217 A.2d 126 (1966), *on remand*, 98 N.J. Super. 109, 236 A.2d 176 (1967), *rev'd*, 53 N.J. 71, 248 A.2d 427 (1968).

the commerce clause.⁸⁰ Although many recent Supreme Court cases would indicate per se invalidity for such an overt discrimination,⁸¹ the court held that federalism considerations mandated greater discretion for states in their internal operations. Thus, it held that in-state preferences⁸² should be judged by a reasonableness standard rather than a per se rule of invalidity; the inquiry in such cases would be whether the burden was "undue" or unreasonable.⁸³

Under the *Sills* standard, statutes which only involved minor interference with commerce, such as tie bid preferences, would be upheld. At the same time, percentage preferences probably would be invalid because of their larger direct and indirect burdens on interstate commerce. Absolute preferences surely would be declared invalid as a prohibition of trade between states. Reciprocal preference laws would present the more difficult question. They are probably invoked less often than percentage or absolute preferences, and are somewhat justifiable as a form of self-defense against unconstitutional laws of other states. Because they present the same type of burden on commerce as percentage preferences, however, they are probably constitutionally invalid.⁸⁴

80. 46 N.J. at 358, 217 A.2d at 130.

81. E.g., *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 301 (1964); See also, *H. P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525 (1949):

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders, such has been the doctrine of this Court which has given it reality.

Id. at 526.

82. The statute involved in *Sills* was not a typical in-state preference as the term has been used in this Comment. Its effect, however, was to force in-state production at the expense of producers and distributors from other states, which is almost identical to the effect of preference laws.

83. On remand, the Superior Court found that it was unreasonable to require suppliers to purchase milk from residents in the prior year, but the requirement that a similar amount be purchased in the coming year was upheld. The finding was based on an apparently careful analysis of the New Jersey fluid milk market. 98 N.J. Super. 109, 114-15, 236 A.2d 176, 179-80 (1967). The New Jersey Supreme Court reversed and remanded again, indicating that some additional evidence may establish "significant discouragements of free bidding and additional burdens on interstate commerce." 53 N.J. 71, 74, 248 A.2d 427, 429 (1968). Also, it noted that federal activity in the area may have rendered the statute unnecessary. *Id.* at 75, 248 A.2d at 249.

84. Reciprocal provisions in other types of statutes have typically been upheld against a variety of challenges, but usually only because the legislation of the other state is legitimate. See *B & L Motor Freight, Inc. v. Heymann*, 120 N.J. Super 270, 293 A.2d 711 (1972).

The *Sills* approach was rejected in *American Yearbook Co. v. Askeu*,⁸⁵ a later case involving a Florida statute which required that all public printing be performed in the state.⁸⁶ The attack was by a school yearbook printer which had no printing facilities in Florida. Relying on the older line of cases and the fiction of proprietary power, the court upheld the statute on both equal protection and commerce clause grounds. The court saw merit in the *Sills* holding, but it felt that an *ad hoc* measurement of the impact on commerce would be necessary for each bid. The court, however, misinterpreted *Sills*. The *Sills* court intended that a preference statute would be invalid in its entirety if its overall burden on commerce was unreasonable.⁸⁷

The United States Supreme Court has never issued an opinion on the validity of preference laws.⁸⁸ A summary analysis of the recent case of *Hughes v. Alexandria Scrap Corp.*,⁸⁹ however, might indicate that in-state preference laws would be found constitutionally valid. The Supreme Court upheld a special program in Maryland which encouraged faster processing of abandoned or wrecked automobile "hulks" in the state. An important element in the success of the program was a provision for clearing titles to the automobiles. A 1974 amendment to the Act⁹⁰ withdrew part of the special title clearing device from out-of-state processors. As a result, they challenged the validity of the amendments on commerce clause and equal protection grounds. Since the case involved a state expenditure program with the effect of favoring resident processors, it resembled in-state procurement preference laws. Indeed, the issues were framed in terms of state "purchases,"⁹¹ especially by the dissenters.

85. 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972).

86. FLA. STAT. ANN. § 283.03 (West 1975).

87. Indeed, it would be absurd to examine the impact on commerce from each transaction and to scrutinize the unconstitutionality of the statute as applied to it. The burden on commerce for the purpose of assessing the reasonableness of a statute is the *entire* burden, rather than the effect from a single transaction. It is obvious that individual purchases will most often have only minimal impact.

88. *But see* *American Yearbook Co. v. Askeu*, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972). The Supreme Court can be expected to give little weight to *Askeu*, particularly since it was not fully argued or briefed. See *Endelman v. Jordan*, 415 U.S. 651, 671 (1974) (Court's holding contrary to the results of three summary affirmances in previous four years); *cf. Hicks v. Miranda*, 422 U.S. 332 (1975). *Askeu* has not been followed by other courts. See *Image Carrier Corp. v. Beame*, 430 F. Supp. 579, 583 (S.D.N.Y. 1977).

89. 426 U.S. 791 (1976).

90. See MD. TRANSP. CODE ANN. § 1-501 (1977).

91. At one point the Court noted that:

Until today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State.

426 U.S. at 808.

Closer scrutiny, however, suggests some important differences between the Maryland program and in-state preference laws. The Maryland program had motives other than discrimination. Its general goal was to help the environment and aesthetics in the state. Even the 1974 amendments were justifiable as an effort to minimize the dislocation and dishonesty inherent in interstate shipments and easy title clearance. The Court noted that the amendments helped Maryland avoid paying bounties to processors for hulks abandoned in other states.⁹²

Also, the majority may well have been implicitly relying on federalism principles and an unspoken balancing approach. Such a viewpoint would emphasize the important role of the states as experimenters with innovative programs, and reflect a desire to encourage states to accomplish laudable goals such as environmental protection.⁹³ Such a holding is consistent with the rule adopted by *Sills*. Thus, even in light of the dictum in *Hughes*,⁹⁴ preference laws should not survive commerce clause scrutiny because they lack any justification as special experiments or programs with non-discriminatory motives.

The Equal Protection Clause

Many cases which involve challenges to preference laws on commerce clause grounds allege violations of the equal protection clause of the fourteenth amendment as well.⁹⁵ The analysis should be very

92. 426 U.S. at 404-05.

93. Courts have frequently noted reluctance to strike down state legislation which represents a novel approach to a particular problem. See *Whalen v. Roe*, 429 U.S. 589, 597 (1977); *Procter and Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir. 1975), cert. denied 421 U.S. 978 (1975); *American Can Co. v. Oregon Liquor Control Comm'n*, 15 Or. App. 618, 517 P.2d 691 (1973).

94. See note 91 *supra*. The dissenters accurately pointed out that the decision was a retreat from established commerce clause doctrine, 426 U.S. at 817-19, but their concern that the Court was abrogating its role in preserving nationalism and interstate cooperation was overstated. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Complete Auto Transit, Inc. v. Brach*, 430 U.S. 274 (1977); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (unanimous decision striking down a discriminatory New York tax on commerce clause grounds):

the prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Dean Milk Co. v. Madison*, 310 U.S. 349, 356 (1951).

See also *Great Atlantic and Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976).

95. E.g., *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 901 (1972); *City of Phoenix v. Super. Ct.*, 109 Ariz. 533, 511 P.2d 454 (1973); *Schrey v. Allison Steel Mfg. Co.*, 75 Ariz. 282, 255 P.2d 604 (1952).

different from that under the commerce clause, but, unfortunately, courts too often use only a single rationale.⁹⁶

While the focus of commerce clause scrutiny is on the impact upon interstate commerce, the equal protection clause addresses the rationality of using the classification scheme of the preference statute. Determining whether a preference statute is "rational" will necessarily require balancing the legitimate interests which the state seeks to achieve against the statute's impact upon a particular business or the class of non-resident businesses affected.

Some courts have been reluctant to engage in such a balancing approach. For example, in *American Yearbook Co. v. Askew*,⁹⁷ the governmental-proprietary distinction was invoked in support of the broad dictum that "[w]hen the state exercises its proprietary or business power, however, it is subject to no more limitation than a private individual or corporation would be in transacting the same business."⁹⁸ The *Askew* court, however, was clearly wrong; all state action will be subject to at least some fourteenth amendment scrutiny.⁹⁹

Even though *Askew* was affirmed by the Supreme Court, it has not been followed by other federal courts.¹⁰⁰ *Askew* was not even cited by the court in *Rayco Construction Co. v. Vorsanger*,¹⁰¹ in which a three judge court used a traditional equal protection analysis to find that the Arkansas three percent in-state preference statute was unconstitutional. Since the overt purpose of the act was to discriminate against non-resident bidders, the court noted that "the statute would at best be highly suspect whether considered from the standpoint of

96. See *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972); *City of Phoenix v. Super. Ct.*, 109 Ariz. 533, 514 P.2d 454 (1973); *Tribune Printing and Binding Co. v. Barnes*, 7 N.D. 501, 75 N.W. 904 (1898).

97. 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972).

98. 359 F. Supp. at 721. The only case cited for the proposition that proprietary functions are specially protected, *Atkin v. Kansas*, 191 U.S. 207 (1903), involved a limitation on congressional power to regulate internal state policies, and not fourteenth amendment issues.

99. See *Elrod v. Burns*, 427 U.S. 347 (1976); *Sugarman v. Dougall*, 413 U.S. 634 (1973). The flaw in the Court's reasoning is most obvious in cases involving suspect classifications or fundamental rights, but such situations are different from the normal preference law attack only in that there is a higher level of scrutiny. Proper weight can be given to federalism considerations under either standard of review without completely immunizing preference statutes from attack.

100. For example, in *Image Carrier Corp. v. Beame*, 430 F. Supp. 570, 583 (S.D.N.Y. 1977), the court saw "no justification in the case law, the language of the Amendment, or in reason for restricting the reach of the equal protection clause. Indeed, such a course would be fraught with danger to the very principles underpinning the Amendment." The court rejected the *Askew* approach and declared that a New York City practice of not contracting with non-union printers constituted an equal protection violation.

101. 397 F. Supp. 1105 (E.D. Ark. 1975).

the Equal Protection Clause or from the standpoint of the Commerce Clause."¹⁰² The state had attempted to justify the act on a variety of bases, including enhancement of the state's economy and an eventual increase in tax revenues. The court replied, however, that:

The trouble with that proposition is that its truth is not self-evident, and there is no evidence before us tending to show that the preference has in fact served the fiscal interests of State and local government in Arkansas in any significant way or that it is likely to do so in the future.

On the other hand, it is clear to us what Act 264, including its criteria, is reasonably calculated to () is discourage persons from entering the public contracting field in Arkansas, reduce competition in the field, and substantially increase the cost of public work in this State as it would have done in this case but for our holding.¹⁰³

Once such an overtly discriminatory motive is shown, the burden shifts to the state to prove the legitimacy and rationality of the practice.¹⁰⁴ It is doubtful that a state could establish that attempting to gain an economic advantage at the expense of citizens of other states is a legitimate interest.¹⁰⁵ Normally legislative judgments about disputed economic issues would be entitled to deference by the judiciary, but judicial control is far more important when a state legislature is burdening those from other states. Without supervision by the courts, citizens of other states could protect themselves only through retaliatory measures and other forms of economic warfare.¹⁰⁶ Although tie bid preferences may be justified because of their minimal impact, percentage preference laws would probably be found invalid under the equal protection clause.

Although in-state preference laws which require contractors to employ only residents or citizens for certain public projects involve slightly different considerations, they are also probably unconstitutional under the equal protection clause. Those statutes typically require a period of residency and often both state and United States

102 *Id.* at 1111.

103 *Id.* at 1112.

104 *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

105 See *Tomer v. Witsell*, 334 U.S. 385 (1948); *Lynden Transport, Inc. v. State*, 532 P.2d 700, 710 (Alaska 1975): "A discrimination between residents and nonresidents based solely on the object of assisting one class over the other economically cannot be upheld under either the privileges and immunities or equal protection clauses."

106 In *Austin v. New Hampshire*, 420 U.S. 656 (1975) the Supreme Court used a stricter standard of review in invalidating a New Hampshire tax on non-resident workers because retaliation in their home state would be their only other effective remedy.

citizenship.¹⁰⁷ Two recent cases¹⁰⁸ have declared such laws unconstitutional through the use of a strict scrutiny standard of review. That standard was held to be appropriate because a durational residency requirement may violate the penumbral "right to travel,"¹⁰⁹ and a citizenship requirement may discriminate against resident aliens.¹¹⁰ Both courts held that the states could still require public contractors to employ only bona fide residents, as long as duration of residency and citizenship were not factors. The rights of the parties before those courts might be adequately protected under such a ruling, but public contractors from other states could be severely harmed.¹¹¹ An employer may be able to successfully challenge a resident employment preference under the equal protection clause, but he could not vicariously assert the rights of his employees to obtain a higher standard of review.

The Privileges and Immunities Clause

In-state preference laws could also be challenged based on the privileges and immunities clause.¹¹² When the state creates a classification based on in-state residency, the privileges and immunities analysis is somewhat similar to that under the equal protection clause.

The case of *Toomer v. Witsell*¹¹³ considered the validity of a group of South Carolina statutes with many similarities to in-state preference laws. One of the sections imposed an annual license fee of \$25.00 on shrimp boats owned by residents, and \$2,500.00 on non-residents who were engaged in shrimping off the North Carolina coast.¹¹⁴ As with preference laws, such statutes discriminate overtly against businesses from other states. Most significant in the opinion is the Court's restatement of the underlying values furbered by the privileges and immunities clause:

The primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. It

107. See note 15 *supra*.

108. *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977), *probable jurisdiction noted*, 46 U. L.W. 3293 (Oct. 31, 1977); *People ex rel. Holland v. Bleigh Constr. Co.*, 61 Ill.2d 258, 335 N.E.2d 469 (1975).

109. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

110. See *Graham v. Richardson*, 403 U.S. 365 (1971).

111. A requirement to employ only residents may in practice operate to preclude them from competing for projects in states with such laws. The impact could be particularly severe to the extent that the project required a large proportion of skilled employees, since it would be more difficult to hire such individuals locally for a temporary job.

112. U.S. CONST., art. IV, § 2. The clause provides simply that: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

113. 334 U.S. 385 (1948).

114. S. C. CODE ANN. § 3379 (1947).

was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation . . .

In line with this underlying purpose, it 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 citizens of that State.¹¹⁵

Because the degree of discrimination did not bear a close relationship to any valid state objective, the Court found that the licensing scheme violated the privileges and immunities clause.¹¹⁶

Toomer, then, stands for the proposition that businesses should be able to compete in other states under substantially the same conditions as residents of those states. The argument which is sometimes asserted that an in-state preference is compensation for lost tax revenues is unconvincing. A state will lose some tax revenues *any* time goods are produced or services performed outside the state. If there is unrestricted free trade among states, specialization in one state will leave a vacuum to be filled by goods which can be best produced elsewhere. Thus, allowing freer trade will increase efficiency and total output, and ultimately *increase* the tax base in each state.¹¹⁷ The privileges and immunities clause "outlaw[s] classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed."¹¹⁸ Insulation of home-state businesses is simply not a legitimate interest under the privileges and immunities clause.

The Foreign Affairs Theory

In-state preference laws may also be invalid to the extent that they interfere with the broad national power over foreign affairs. Although the power to regulate interstate and foreign commerce is

115. 334 U.S. at 395-96 (footnotes omitted).

116. 334 U.S. at 396.

117. It makes no difference that the government is purchasing the goods rather than private businesses. In this area the wisdom of our Nation's founders is amply supported by the latest economic theories. See text accompanying notes 45-58 *supra*.

118. *Toomer v. Witsell*, 334 U.S. 385, 398 (1945); *but see* *People ex rel. Holland v. Bleigh Const. Co.*, 61 Ill.2d 258, 335 N.E.2d 469 (1975), where reducing unemployment was found to be a valid state interest under both the equal protection and the privileges and immunities clauses. Although such a goal appears even more compelling on its surface than the "retention" of tax dollars, in principle it is the same. Reducing unemployment is surely an important state interest, but doing it at the expense of jobs in other states is an activity that the privileges and immunities clause was intended to prohibit.

granted to Congress in the same clause of the Constitution,¹¹⁹ state activities in the two areas are governed by very different standards. An important and legitimate state interest may justify "even substantial burdens on interstate commerce;¹²⁰ but in the area of foreign affairs, state regulation which could embarrass or interfere with federal policy is prohibited regardless of the state's interest.¹²¹

The federal government may legitimately discriminate against businesses from foreign countries. Since 1933 the federal procurement system has pursued a "Buy American" policy,¹²² with percentage preferences set by executive order at six to twelve percent.¹²³ A fifty percent domestic preference was imposed in 1964 for all defense department spending in an effort to assist in balance of payments problems.¹²⁴ About one third of the states also have Buy American statutes.¹²⁵ Although such laws superficially appear consistent with the federal Buy American program, they are unauthorized and clearly have an adverse effect on foreign trade.¹²⁶ Accordingly, California's

119. U.S. CONST. art. I, § 8, cl. 3.

120. E.g., *Parker v. Brown*, 317 U.S. 341 (1943); *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977).

121. *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *U.S. v. Belmont*, 301 U.S. 324, 330 (1937); cf. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851); see B. SCHWARTZ, II A COMMENTARY ON THE CONSTITUTION § 206, at 97-98 (1963). The exclusive power of the federal government over foreign affairs is an implied power inherent in our national system and is broader than the power to regulate commerce or the power to make treaties with foreign nations. *Zschernig v. Miller*, 389 U.S. 429 (1968); *U.S. v. Pink*, 315 U.S. 203, 230-34 (1942). Since foreign commerce is included in the broader category of foreign affairs, different standards apply to state interference with interstate as opposed to foreign commerce. Cf. *Hale v. Bimeo Trading Co.*, 306 U.S. 375 (1939).

122. 47 STAT. 1520 (1933), 41 U.S.C. §§ 10a-d (1970).

123. Exec. Order No. 10582, 19 Fed. Reg. 3983 (1952).

124. Memorandum from Cyrus Vance to Assistant Secretary of Defense, (March 7, 1964), reprinted in Trainor, *The Buy American Act: Examination, Analysis, and Comparison*, 64 MIL. L. REV. 101, 120 n.128 (1974). In 1976, defense spending for procurement and other contracting amounted to almost 70% of all federal expenditures other than for personal services. DEPT. OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, 57 *Survey of Current Business* No. 9 (Sept. 1977).

125. E.g., HAWAII REV. STAT. § 103-24 (1976); N.J. STAT. ANN. §§ 52:33-2 (West 1955); OKLA. STAT. ANN. tit. 61, § 51 (West 1955); PA. STAT. ANN. tit. 71, § 639 (Purdon 1962). See National Association of State Purchasing Officials Committee on Competition in Government Purchasing, 1963 *Survey of In-State Preference Practices, Domestic vs. Foreign Purchases*.

126. Particularly because state expenditures are presently so large, the interference with foreign policy could be substantial. Indeed, some states have a policy of purchasing no foreign goods, even absent statutory authorization. And since restrictive licensing or inspection policies can accomplish similar results, at least some foreign businesses completely withdraw from the competition. See Comment, *State "Buy American" Policies—One Vice, Many Voices*, 32 GEO. WASH. L. REV. 584, 586, 604 (1964); Comment, *State Buy-American Statutes: Their Relation to the General Agreement on Tariffs and Trade and the Federal Constitution*, 32 OHIO ST. L.J. 568 (1971).

Buy American law was declared unconstitutional in *Bethlehem Steel Corp. v. Board of Commissioners*.¹²⁷

In-state preference laws accomplish a result similar to Buy American statutes.¹²⁸ The resemblance of in-state preference laws to state imposed tariffs is even more striking when such preferences are applied to foreign contractors. Although there may be no direct conflict between most in-state preference laws and the General Agreement on Tariffs and Trade,¹²⁹ they lead to inconsistent and often unfair treatment of foreign businesses. Thus, to the extent in-state preference laws interfere with our foreign relations, they represent an invalid exercise of state power.

In-state preference laws, however, are unlikely to be attacked on a foreign affairs theory. Domestic contractors would lack standing to assert the violation, and it is rarely worth the effort for a foreign contractor to bring suit in the United States over such an issue. Also,

127. 276 Cal.App.2d 221, 80 Cal. Rptr. 800 (1969).

The California Buy American Act, in effectively placing an embargo on foreign products, amounts to an usurpation by this state of the power of the federal government to conduct foreign trade policy. That there are prevailing state policies which are served by the retention of such an act is "wholly irrelevant to judicial inquiry . . ." Only the federal government can fix the price of fair competition when such competition is on an international basis. Foreign Trade is properly a subject of national concern, not state regulation. State regulation can only impede, not foster international trade policies.

Id. at 225-26, 80 Cal. Rptr. at 803; *but cf.* *K. S. B. Technical Sales v. No. New Jersey Dist. Water Comm'n*, 150 N.J. Super. 533, 376 A.2d 203 (Super. Ct. 1977) (dictum), *aff'd on other grounds*, 151 N. J. Super. 218, 376 A.2d 960 (App. Div.); *Am. Institute for Imported Steel v. County of Erie*, 58 Misc.2d 1059, 297 N.Y.S.2d 602 (Sup. Ct. 1968), *rev'd on other grounds*, 32 A.2d 231, 302 N.Y.S.2d 61 (1969).

128. California's attorney general later concluded that the in-state preference laws also had an adverse impact on foreign commerce, and he declared that they also were unconstitutional. 53 Op. Atty Gen. of Cal. 72-73 (1970).

129. 61 Stat. Pt. 5, T.I.A.S. No. 1700 (1947). The agreement (GATT) prohibits state or local governments from imposing any restriction or regulation which results in less favorable treatment for foreign goods than is accorded to domestic or in-state products in any aspect of the distribution, transportation, or selling process. *Id.* at A 19. But another section states:

The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial resale.

61 Stat. Pt. 5, 67-68, T.I.A.S. No. 1700 (1947). Thus, most public procurement would be exempt from the GATT requirements, with the exception of purchases for functions such as publicly funded utilities. *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 208 Cal.App.2d 803, 25 Cal. Rptr. 798 (1962); *K. S. B. Technical Sales v. No. New Jersey Dist. Water Supply Comm'n*, 151 N.J. Super. 218, 376 A.2d 960 (1977). See Note, *California's Buy-American Policy: Conflict with GATT and the Constitution*, 17 STANFORD L. REV. 119 (1964).

more subtle mechanisms could accomplish similar results.¹³⁰ Thus, the foreign affairs theory will probably generate only rare litigation.

PREEMPTION

Even if in-state preference laws are not found unconstitutional, federal power over commerce might be invoked to supercede, or preempt, them. Because public contracting is often considered an internal state function, however, federalism considerations and the tenth amendment¹³¹ may limit the reach of the commerce power in such a situation.

Federal regulation of virtually all aspects of business and many state activities has become commonplace in recent times. Indeed, the expansion of uniform national requirements was probably essential to the rapid development and prosperity of our commercial system. There can be no doubt that the relative importance of state governments has been diminished in the process. The need for protection of states' rights, however, was recognized recently by the Supreme Court in *National League of Cities v. Usery*.¹³²

Writing for the majority of five, Justice Rehnquist found that the ability to determine wages and hours for state employees were "functions essential to separate and independent existence," so that Congress could not interfere with the states' decisions by extending minimum wage and overtime provisions to them. Important to his conclusion was the finding that the federal requirements would impose substantial financial burdens on the states, so that many programs would have to be cut back, and some even discontinued. In contrast, the absence of in-state preferences would directly reduce the expense of governmental procurement, and might even benefit the overall state economy.¹³³ Although some of the language in *National League of*

130. Many of the practices are informal, unwritten policies of state procurement officials. See Note, *State "Buy American" Policies—One Vico, Many Voices*, 32 Geo. Wash. L. Rev. 584, 586 (1964). Also, foreign contractors could be effectively excluded through restrictive bid specifications, excessive bonding requirements, unfair inspections, licensing restrictions and inadequate advertising of bids.

131. U. S. Const. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

132. 426 U.S. 833 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)). *National League of Cities* involved a 1974 amendment to the Fair Labor Standards Act which expanded the definition of "employer" to include most state and local governmental agencies. Pub. L. No. 93-259, § 6(a)(1), (5), (6), 88 Stat. 58 (1974) (codified at 29 U.S.C. § 203(d), (s)(5), (k) (1970)). This had the effect of making the entire Act applicable to those activities, but the only extension at issue was that of the minimum wage and overtime provisions. 29 U.S.C. §§ 206, 207 (1970).

133. See text accompanying notes 45-58 *supra*.

Cities is broad enough to preclude virtually all federal regulation of state activities,¹³⁴ its actual holding appears to be much narrower. Contrary to the fears expressed in Justice Brennan's dissent,¹³⁵ the case has not been expanded beyond the narrow factual situation it involved. It has been held that the equal pay provisions of the Fair Labor Standards Act¹³⁶ could still be justified under the commerce power since the intrusions are less significant and discrimination cannot be considered an "essential governmental function."¹³⁷ Also, the application of Title VII of The Civil Rights Act¹³⁸ to the states was upheld by the Court without dissent under section five of the fourteenth amendment.¹³⁹ Under such an analysis, discrimination against those from other states could be considered an illegitimate governmental purpose under the commerce clause, the privileges and immunities clause, and perhaps even under the equal protection clause.¹⁴⁰ Thus, the reach of the commerce clause should extend far enough to preempt in-state preference laws.¹⁴¹

134. *E.g.*, 420 U.S. at 852:

We hold that insofar as the challenged amendments operate to directly displace the states' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art I, § 8, cl. 3.

135. 426 U.S. at 858-800, 875.

136. 29 U.S.C. §§ 206(d)(1) (1970).

137. *Christensen v. Iowa*, 417 F. Supp. 423 (N.D. Iowa 1976); *Usery v. Dallas Ind. School Dist.*, 421 F. Supp. 111 (N.D. Tex. 1976); *Brown v. County of Santa Barbara*, 427 F. Supp. 112 (C.D. Cal. 1977). Stating that discrimination is not an important attribute of state sovereignty is somewhat conclusory, but it reflects a judicial conclusion about the weight given to the state's interest when balancing it against national concerns. Such a weighing process was inherent in the *National League of Cities* decision. See Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 *YALE L. J.* 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 *HARV. L. REV.* 1065 (1977); Note, *National League of Cities v. Usery: A New Approach to State Sovereignty?*, 48 *U. COLO. L. REV.* 467 (1977).

138. 42 U.S.C. § 2000e 2(a) (1970).

139. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (per Rehnquist, J.).

140. Some courts have upheld the application of the equal pay provisions of the Fair Labor Standards Act to the states on the basis of section five of the fourteenth amendment instead of on the commerce clause. See *Usery v. Allegheny County Institution Dist.*, 544 F.2d 148 (3d Cir. 1976); *Usery v. Edward J. Meyer Memorial Hospital*, 428 F. Supp. 1368 (W.D.N.Y. 1977).

141. If Congressional power over interstate commerce was sufficient to supercede in-state preference laws, federal administrative action might accomplish a similar result. The Federal Trade Commission has recently been granted broad rulemaking powers, 15 U.S.C.A. § 57a(a)(1)(B) (West Supp. 1976), and the anticompetitive effects of preference laws could readily bring them within the realm of "unfair trade practices" over which the F.T.C. might exercise its jurisdiction. See *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). There is some doubt as to whether the states fall within the jurisdiction of the F.T.C. even in its rule-making capacity. See *California ex rel. Christensen v. F.T.C.*, 549 F.2d 1321 (9th Cir. 1977). But recent activities have begun probing deeper and deeper into anticompetitive activities on the part of states. Rule-making pro-

CONCLUSION

The wisdom and ultimate efficacy of in-state preference laws are open to serious question. Such laws impose substantial burdens on interstate commerce, and very likely constitute commerce clause violations for that reason. Most would probably not be upheld under a fourteenth amendment attack, and they also appear to violate the privileges and immunities clause. Further, such laws are invalid to the extent that they represent an intrusion by the states into the federal domain of foreign affairs. Finally, preference laws could be directly preempted by action of the federal government through its power over interstate commerce.¹⁴² It is unfortunate that such laws have been so widely enacted and surprising that they have not been successfully challenged more often.

Donald E. Jordan

ceedings or investigations are underway which would effectively invalidate state prohibitions of advertising by sellers of prescription drugs, veterinarians and the eyeglass industry, and the commentators uniformly advocate F.T.C. jurisdiction over anticompetitive state practices. See Badal, *Restrictive State Laws and the Federal Trade Commission*, 29 ADMIN. L. REV. 239 (1977); Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 DUKE L. J. 225; Note, *The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act*, 89 HARV. L. REV. 715 (1976).

142. In light of the many attacks which might be made on preference laws, it is sometimes too easy to overlook the fact that they could be modified or repealed at any time by individual states. The American Bar Association Sections on Local Government Law and Public Contract Law are nearly finished with their joint project of drafting a model procurement code. Sections on Local Government Law and Public Contract Law of the American Bar Association, *Model Procurement Code*, (Preliminary Working Paper No. II 1977). It will represent the "state of the art" in purchasing laws, and will encourage efficiency and competition at all levels of government. The present version of the Code contains the alternatives of a tie bid or a percentage preference. The percentage preference is properly discouraged, and should not be adopted by any state contemplating a reform of their procurement laws.

State v. Krutchen, 101 Ariz. 186, 417 P.2d 510 (1966), cert. denied, 385 U.S. 1013, 87 S.Ct. 784, 17 L.Ed. 2d 687 (1967).

[6.7] The fact that Savoy was not present during the replaying of the tapes is not reversible error. *Bustamante v. Eymann*, 456 F.2d 269 (9th Cir. 1972) held narrowly that in a capital case the defendant's right to be present in the courtroom is constitutional and cannot be waived. However, in less than a capital case it may be harmless error. Therefore Savoy's absence during the replaying of the tape falls under the rule of *State v. Bustamante*, supra and *State v. Cufio*, 12 Ariz.App. 461, 471 P.2d 763 (1970) holding that unless prejudice is shown the error is harmless. No prejudice was shown here.

Affirmed.

HAYS, C. J., CAMERON, V. C. J., and STRUCKMEYER, and HOLOHAN, JJ. concur.



109 Ariz. 533

CITY OF PHOENIX, a political subdivision of the State of Arizona, City of Mesa, a political subdivision of the State of Arizona, and Zurn Engineers, a corporation, Petitioners,

v.

The SUPERIOR COURT of the State of Arizona IN AND FOR the COUNTY OF MARICOPA and Morris Rozar, Judge thereof, and M. M. Sundt Construction Co., an Arizona corporation, Respondents.

No. 11094.

Supreme Court of Arizona,
In Banc.

Sept. 20, 1973.

Special action to prevent the enforcement of the decision of Superior Court which ordered the award of certain construction contract by the city to certain

contractor. The Supreme Court, Holohan, J., held, inter alia, that the statute requiring that a contract for public work which would be paid from public funds be let to contractor who has paid certain state and county taxes in case a better bid from non-qualified contractor is less than 5% lower is not unconstitutional as denying equal protection of the laws or as violating the commerce clause of the Federal Constitution.

Relief sought denied.

1. Commerce ⇨54

Constitutional Law ⇨211

Municipal Corporations ⇨327

Statute providing, in letting of contracts for expenditure of public funds, for granting of 5% preference to contractors who had paid county and state taxes for two successive years immediately prior to making of bid is not unconstitutional as violating the equal protection provision of the Fourteenth Amendment and the commerce clause of the Federal Constitution. A.R.S. § 34-241, subd. B; U.S.C.A.Const. art. I, § 8, cl. 3; Amend. 14.

2. Municipal Corporations ⇨336(1)

Proceeds of revenue bonds for construction of water treatment plant to supply domestic water for city constituted "public funds" within statute requiring a 5% preference to be given in letting bids on contracts for public work to be paid from public funds in case of contractor who have paid state and county taxes. A. R.S. §§ 9-521 et seq., 9-536, 34-241, subd. B.

See publication Words and Phrases for other judicial constructions and definitions.

3. Statutes ⇨219(1)

Courts give great weight to opinions of those charged with duty of administering the regulation of a pursuit involving technical expertise.

4. Appeal and Error ⇨1010.1(6)

The Supreme Court will not disturb findings of trial court when supported by substantial evidence.

tated 151 A.L.R. 781, 796. In *Liberty Mutual Insurance Company v. Jones*, 344 Mo. 932, 130 S.W.2d 945, 125 A.L.R. 1149 (1939), annotated in 125 A.L.R. 1173, at 1182, it was said that an insurance adjuster should not state or act upon his own opinion as to the legal rights of the insured. Steps taken against the unauthorized practice of law are not primarily for the protection of attorneys but for the protection of the public from potential injury resulting from reliance on laymen for the performance of acts requiring the training, knowledge, and responsibility of a licensed attorney. *Herman v. Prudence Mutual Casualty Company*, 41 Ill.2d 468, 244 N.E.2d 809 (1969).

We, therefore, find an underlying reason why the adjuster would not authorize the contractor to proceed but required Moewes to do that. He was ignorant about materialmen's liens and not in a position to give Moewes any advice in that regard; and, if he had, he might have unlawfully engaged in the practice of law.

In *White v. Hartford Casualty Company*, La.App., 297 So.2d 744 (1974), it was held that a lay adjuster has no duty to advise claimants of the law, citing *Green v. Grain Dealers Mutual Insurance Company*, La. App., 144 So.2d 685 (1962), where it was said a simple inquiry to a Louisiana lawyer would have avoided the difficulty. In the case now before us, it is undisputed that Moewes and the adjuster were equally ignorant of the law of materialmen's liens. There was certainly no evidence that Moewes was deliberately or even, as the basis for an action, constructively lulled into any sense of security. In *Smith v. City of Dallas*, Tex.Civ.App., 425 S.W.2d 467 (1968) it was held an adjuster was under no duty in adjusting a claim to interpret for the claimant a notice provision of the city charter, of which he was not even aware, or even advise claimant to employ an attorney; his duty was to investigate and attempt to settle claims for the insurance company. That is all that the insurance adjuster here was doing.

We conclude and hold that an adjuster for an insurance company, under the cir-

cumstances of this case, is under no duty to give an insured the legal advice she claims should have been given.

Affirmed.



GALESBURG CONSTRUCTION COMPANY, INC. OF WYOMING, Plaintiff,

v.

The BOARD OF TRUSTEES OF MEMORIAL HOSPITAL OF CONVERSE COUNTY, Defendant.

No. 5607.

Supreme Court of Wyoming.

March 9, 1982.

A constitutional question was reserved from the District Court of Converse County. William A. Taylor, J., as to whether statute giving preference to residents on public contracts was unconstitutional. The Supreme Court, Raper, J., held that: (1) statute as applied to nonresident corporation did not warrant strict scrutiny analysis, because resident corporation was not a member of a suspect classification, and because the fundamental rights of interstate travel and the right to vote do not extend to a corporation; (2) as applied to nonresident corporation bidding on public contract, statute was not unconstitutional as violative of the equal protection clause of the Fourteenth Amendment, because the purpose of the statute, that is, to encourage local industry, was a legitimate state interest, and because the statute as drawn was rationally related to the advancement of that interest; and (3) argument by nonresident corporation that statute should be declared unconstitutional on a public policy basis would not be considered.

Question answered.

Rooney, J., dissented and filed opinion.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-1800


Need "purpose" clause

MEMORANDUM

May 13, 1983

SUBJECT: Constitutionality of Work Order No. 13-1359

TO: Senator Vic Fischer
 Chairman, Senate State Affairs Committee

FROM: Richard C. Folta 
 Legislative Counsel

To date there has not been a definitive decision by the U.S. Supreme Court on the constitutionality of state bidder preference statutes under equal protection or privileges and immunities provisions. However, in the February, 1983, White v. Massachusetts Council of Construction Employees case, a copy of which is attached, the Court held that the City of Boston's resident work force preference (consisting of at least 50 percent of bona fide residents of Boston) did not violate the commerce clause of the U.S. Constitution.

The only Alaska Supreme Court case to date on the question is Irby-Northface v. Commonwealth Electric Co., et. al., (April 1983), a copy of the opinion is appended. Only the dissent by Justices Rabinowitz and Burke, address the constitutionality of AS 37.05.230. They reason that under Lynden Transport, Inc. v. State, 532 P.2d 700 (Alaska 1975), the bidder preference is clearly unconstitutional, under the Alaska Constitution, since the purpose of the preference is to discriminate economically between residents and nonresidents. So, at the present time, two of the five Alaska justices are on record against the bidder preference on equal protection grounds.

The bidder preference statute does not impinge upon a fundamental right and is not based on a suspect criteria so as to bring into play the compelling state interest standard. Instead of strict scrutiny, the Alaska court would apply the less strict rational basis standard utilized in testing economic legislation under the equal protection clause. Lynden Transport Inc. v. State, supra; State v. Erickson, 574 P.2d 1 (Alaska 1978).

May 13, 1983

First, the Court would look at the purpose of the statute, viewing the legislation as a whole and the circumstances surrounding it. The purpose must be legitimate, falling within the state police powers. Second, the means chosen must substantially further the goal of the enactment. The Court would examine means used to accomplish legislative objectives and reasons advanced. Third, the state interest in the means chosen must be balanced against the nature of the constitutional right involved.

The Alaska bidder preference statute was enacted in 1955 and has remained at five percent since that time. The legislative records do not state a purpose for the statute, however very likely the resident Alaska construction and supply firms were thought to need some competitive edge against the larger more experienced outside companies and that resident firms would hire more residents, pay more taxes and stimulate the Territorial economy. In Galesburg Construction Company v. Board of Trustees of Memorial Hospital, 641 P.2d 745 (Wyoming 1982), the Wyoming Supreme Court stated that a five percent bidder preference favoring resident firms was constitutional under equal protection because the purpose of the statute of encouraging local industry, was a legitimate state interest.

Considering a chronic high state unemployment, high costs and the condition of the construction and supply companies in Alaska the bidder preference could be seen as substantially furthering the objectives of the legislature, assuming it to be encouraging the local industry.

Determining whether the preference statute is "rational" will necessarily require balancing the legitimate interests which the state seeks to achieve against the statute's impact upon the class of nonresident businesses affected. If an overtly discriminatory motive is shown, i.e., economic protection of Alaska construction and supply firms, for instance, the burden would likely shift to the state to prove the legitimacy and rationality of the bidder preference practice.

Legislative judgments about disputed economic issues are entitled to deference by the judiciary, if the purposes are expressed, however, in the Alaska bidder preference statutes, those purposes are not expressed at the present time. It is believed that the Alaska court would take a very close look at the rationale for the statute and without a purpose clause,

Senator Vic Fischer
Page 3
May 13, 1983

AS 37.05.230(1)(B) would likely be held to violate the state's equal protection provision.

Any purpose clause would have to be firmly supported by relevant facts to survive analysis by a court already somewhat hostile to a bidder preference statute that could be seen as discriminatory on its face.

RCF:ljb
19/032

Conditions indicate J. White's reply

(28)

	A		B		C		D		E		F		G		H
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	
• ALABAMA	x		x		x		x		x				x		No
• ALASKA		x	5%		x		x		x		x	x	x		NO
• ARIZONA		x	5%		x		x				x		x		*
• ARKANSAS	x		5%		x		x		x		x		x		**
• CALIFORNIA		x	1%		x		x		x		x				Small Businesses
• COLORADO	x			x	x		x		x		x		x		
• CONNECTICUT	x			x	x			x		x		x		x	
• DELAWARE															
• FLORIDA	x			x	x		x		x		x		x		No items
• GEORGIA	x			x	x		x		x		x		x		No
• HAWAII		x	3/5/10%		x		x		x		x		x		
• IDAHO	x		10%		x								x	x	Printing
• ILLINOIS		x		x	x		x		x		x		x		No
• INDIANA				x	x		x		x		x		x		NO
• IOWA	x			x											
• KANSAS	x			x	x		x		x		x		x		Reciprocal
• KENTUCKY		x		x											No preference
• LOUISIANA	x		3%		x		x		x		x		x		No
• MAINE	x			x	x		x		x		x		x		
• MARYLAND	x			x	x		x		x				x		
• MASSACHUSETTS	x		5%		x								x		
• MICHIGAN	x			x	x		x								
• MINNESOTA	x			x	x		x		x						Small Business
• MISSISSIPPI	x			x	x		x		x		x		x		No
• MISSOURI	x			x	x								x		
• MONTANA	x		3%		x		x		x		x		x		
• NEBRASKA	x			x	x										
• NEVADA															
• NEW HAMPSHIRE	x			x		x		x			x		x		
• NEW JERSEY															
• NEW MEXICO			5%												
• NEW YORK		x	10%		x				x		x		x		Trade Commission
• NORTH CAROLINA	x								x						
• NORTH DAKOTA	x			x	x				x				x		***
• OHIO															
• OKLAHOMA	x		3%		x						x		x		****
• OREGON	x			x	x		x								
• PENNSYLVANIA		x		x	x		x		x		x		x		No
• RHODE ISLAND	x			x	x		x		x						
• SOUTH CAROLINA	x			x	x		x		x		x		x		
• SOUTH DAKOTA	x				x		x						x		
• TENNESSEE				x											
• TEXAS	x			x	x		x								
• UTAH															
• VERMONT	x														
• VIRGINIA	x			x											
• WASHINGTON		x		x	x		x		x		x		x		*****
• WEST VIRGINIA			2%												
• WISCONSIN	x			x	x		x		x		x		x		No
• WYOMING			5%		x		x		x		x		x		

See list of jobs

*Recip
Print*

- * Public works construction only;
- ** Except printing & office supplies
- *** If State has a preference against us we take same preference against them
- **** If produced, manufactured, or grown in Oklahoma
- ***** Items manufactured by rehabilitation workshops
- A-Tie bids only?
- B-Percentage?
- C-By statute?
- D-Mandatory?
- E-Discretionary?
- F-Request of in-state bidder?
- G-All items?
- H-Specific?

MEMORANDUM

State of Alaska

TO: George Elgee
 Director
 Division of General Services & Supply
 Department of Administration

DATE: August 5, 1982

FILE NO:

TELEPHONE NO: 465-2250

THRU: Bob Link

FROM: Robert L. Schofield
 Purchasing and Facility Manager
 Division of General Services & Supply
 Department of Administration

SUBJECT: FY 82 Purchasing
 Action

The following is a statistical report of business transacted by your Purchasing Section in Juneau and Anchorage. It is more comprehensive and covers fiscal year 1982, July 1, 1981 to June 30, 1982.

PURCHASE REQUISITIONS RECEIVED DURING FY 82

	<u>TOTAL P.R.'s</u>	<u>TOTAL LINE ITEMS</u>
01 Governor	58	96
02 Administration	185	480
03 Law	46	74
04 Revenue	25	56
05 Education	102	1,835
06 Health and Social Services	548	10,569
07 Labor	95	151
08 Commerce and Economic Development	53	92
09 Military Affairs	35	46
10 Natural Resources	187	459
11 Fish and Game	351	1,197
12 Public Safety	177	387
18 Environmental Conservation	59	137
21 Community and Regional Affairs	27	38
25 DOT/PF	447	1,004
30 Ombudsman	0	0
31 Legislative Council	1	1
33 Legislative Audit	1	1
41 Alaska Court System	15	15
TOTALS -	2,412	16,644

As a result of the above, the following bids (formal and informal) and negotiation were accomplished.

BIDS PUBLISHED FY 82

	FORMAL	INFORMAL	NEG
JULY	22	1	27
AUGUST	22	0	50
SEPTEMBER	26	0	54
OCTOBER	26	0	63
NOVEMBER	35	16	31
DECEMBER	34	13	19
JANUARY	39	0	30
FEBRUARY	27	0	24
MARCH	38	0	75
APRIL	35	0	72
MAY	29	0	35
JUNE	33	0	66
TOTALS -	366	30	546

TOTAL ANCHORAGE AND JUNEAU - 942

Subsequent to the above, purchase orders were issued as follows:

- (1) Total number of PURCHASE ORDERS issued to IN-STATE vendors -
TOTAL - 1002
- (2) Total DOLLAR VALUE of PURCHASE ORDERS issued to IN-STATE vendors -
TOTAL - \$ 24,372,083.25
- (3) Total number of PURCHASE ORDERS issued to OUT-OF-STATE vendors -
TOTAL - ~~406~~
- (4) Total DOLLAR VALUE of PURCHASE ORDERS issued to OUT-OF-STATE vendors -
TOTAL - ~~\$ 9,999,085.68~~
- (5) Total ~~cost~~ of AWARDS made as a direct result of 5% BIDDERS PREFERENCE LAW -
TOTAL \$ 22,753.79

This amount is the result of 28 separate awards of which 4 awards were responsible for \$ 17,946.35. Balance of \$ 4,807.44 resulted from the remaining 24 awards, 24 of which were for less than \$ 1,000. The awards based on the 5% bid preference generated \$ 4,789,672.91 in in-state business.

The 5% preference made the difference in only 2.97% of the bid awards for FY 82, again emphasizing the highly competitive nature of the Alaskan vendor.

3.19% .49%
 spin 1/2m to create or maintain 100 direct jobs. + ?
 how many indirect.

PURCHASE ORDERS ISSUED TO MAJOR STATE METROPOLITAN AREAS - FY 82

Anchorage	-	782 PO's	=	\$ 18,569,441.81	
Fairbanks	-	32 PO's	=	\$ 317,594.53	109.
Juneau	-	<u>127 PO's</u>	=	<u>\$ 4,732,420.19</u>	
SUB-TOTAL	-	941 PO's		\$ 23,619,456.53	
Other Areas	-	<u>61 PO's</u>	=	<u>\$ 752,626.72</u>	
TOTAL	-	1,002 PO's		\$ 24,372,083.25	

The Purchasing Section issued the following term contract awards, many of which have estimated values.

CONTRACT AWARDS ISSUED DURING FY 82

<u>NO. OF CONTRACT AWARDS</u>	<u>DOLLAR VALUE</u>
TOTAL - 658	TOTAL - \$ 65,241,064.46

Of 658 contract awards, 485 were issued to Alaskan firms for a total dollar volume of \$ 42,936,690.70.

As an overview, \$ 94,411,900.58 or 75% of the \$ 125,098,474.00 spent during FY 82 was spent with Alaskan vendors.

FIVE PERCENT BID PREFERENCE ANALYSIS
FISCAL 82

\$ 212.00	July	Anchorage	0	\$ 123.00	January	Anchorage	0
		Juneau	1			Juneau	1
\$ 1,396.50	August	Anchorage	1	\$ 2,735.00	February	Anchorage	1
		Juneau	2			Juneau	0
\$ 87.80	September	Anchorage	0	\$ 335.42	March	Anchorage	1
		Juneau	2			Juneau	3
\$ 1,067.94	October	Anchorage	2	\$13,007.35	April	Anchorage	1
		Juneau	2			Juneau	2
\$ 541.50	November	Anchorage	1		May	Anchorage	0
		Juneau	3			Juneau	0
\$ 2,539.00	December	Anchorage	1	\$ 708.28	June	Anchorage	1
		Juneau	1			Juneau	2

Awarded Alaskan Bidders: TOTAL - \$ 4,789,672.91

5% Bid Preference: TOTAL - \$ 22,753.79

GRAND TOTAL DOLLAR VOLUME - \$ 4,883,543.22

JM/je
5/0805-04/GSS1

IN-STATE AND OUT-OF-STATE PURCHASES
MADE FOR DEPARTMENTS

	Non-Alaska Vendors		Alaska Vendors		Total	
	<u>No. POs</u>	<u>Amount</u>	<u>No. POs</u>	<u>Amount</u>	<u>No. POs</u>	<u>Amount</u>
01 Governor	5	\$ 80,659.00	21	\$ 132,884.25	26	\$ 213,543.25
02 Administration	55	990,176.19	57	1,278,795.93	112	2,268,972.12
03 Law	0	0	9	100,227.32	9	100,227.32
04 Revenue	6	51,927.00	5	28,608.58	11	80,535.58
05 Education	27	254,491.71	76	423,534.98	103	678,026.69
06 Health & Social Services	93	368,353.14	464	1,629,278.39	557	1,997,631.53
07 Labor	6	104,212.80	48	228,919.87	54	333,132.67
08 Commerce & Econ. Develop.	4	144,383.15	15	43,203.34	19	187,586.49
09 Military Affairs	1	29,500.00	4	65,875.00	5	95,375.00
10 Natural Resources	30	1,456,718.38	43	563,935.52	73	2,020,653.90
11 Fish and Game	74	1,139,170.38	83	568,253.72	157	1,707,424.10
12 Public Safety	23	932,043.70	51	978,450.92	74	1,910,494.62
18 Environmental Conserv.	7	94,645.50	6	31,930.29	13	126,575.79
21 Community & Reg'l Affairs	0	0	7	18,645.37	7	18,645.37
25 Transportation	74	4,234,034.18	150	17,561,245.72	224	21,795,279.90
31 Legislative Affairs	<u>0</u>	<u>0</u>	<u>2</u>	<u>1,875.75</u>	<u>1</u>	<u>1,875.75</u>
Total -	405	9,880,315.13	1,041	23,655,664.94	1,445	33,535,980.08

SUMMARY CHART - FISCAL YEAR 81 vs FISCAL YEAR 82

PURCHASING SECTION ACTIVITY

<u>DOCUMENTS PROCESSED</u>	<u>NUMBER RECEIVED & ISSUED</u>		<u>AVERAGE TRANSACTION TIME</u>		<u>AVERAGE - P.A. PER MONTH</u>	
	<u>FY-81 TOTAL</u>	<u>FY-82 TOTAL</u>	<u>FY-81 TOTAL</u>	<u>FY-82 TOTAL</u>	<u>FY-81 TOTAL</u>	<u>FY-82 TOTAL</u>
PURCHASE REQUISITION	2,445	2,412	21.83			
INVITATION TO BID	1,212	942	10.82			
PURCHASE ORDER	1,879	1,434	16.78		255,954.29	
CONTRACT AWARD	515	658	4.60		319,911.38	
LEASE	119	100	1.06		24,483.19	

CONTRACT AWARDS

	<u>NO. ISSUED</u>		<u>TOTAL VALUE</u>	
	<u>FY-81 TOTAL</u>	<u>FY-82 TOTAL</u>	<u>FY-81 TOTAL</u>	<u>FY-82 TOTAL</u>
ISSUED TO ALASKAN FIRMS	428	485	\$27,133,849.97	\$44,547,576.71
ISSUED TO OUT-OF-STATE FIRMS	87	173	8,696,224.65	20,693,487.75
TOTAL	515	658	\$35,830,074.62	\$65,241,064.46

PURCHASE ORDERS

	<u>NO. ISSUED</u>		<u>TOTAL VALUE</u>	
	<u>FY-81 TOTAL</u>	<u>FY-82 TOTAL</u>	<u>FY-81 TOTAL</u>	<u>FY-82 TOTAL</u>
ISSUED TO ALASKAN FIRMS	1,272	1,002	\$17,875,744.67	\$24,372,083.25
ISSUED TO OUT-OF-STATE FIRMS	607	406	10,791,135.26	9,993,085.68
TOTAL	1,879	1,408	\$28,666,879.93	\$34,365,168.93

LEASES

	<u>FY-82 TOTAL</u>	<u>TOTAL VALUE</u>	<u>FY-82 TOTAL</u>
NO. LEASES ISSUED:	100		\$25,492,240.62

	<u>FISCAL 1981</u>	<u>FISCAL 1982</u>
GRAND TOTAL DOLLAR AMOUNT:	\$67,239,071.77	\$125,098,474.00

JM/dlr

JOBS BILL

"An Act Relating to Alaska Bidders Preference"

Alaska, in 1955, enacted a 5% bidders preference. This doesn't help many Alaska vendors so they simply don't bid. Many other states have a 3, 5 or 10% preference for in-state bidders. We don't.

This creates a problem and the fact that we have a 30% higher cost of living than the contiguous U.S. compounds the problem. If a business has a 50% labor factor, then 15% will allow them to compete with/without outside firms.

This preference would help local economy by allowing local businesses to hire more people (Vendors in Seattle and California don't hire many Alaskans.) who pay more taxes, buy more houses, cars and consumer goods. (Employees in Seattle and California don't buy many homes in Alaska.) Local business profits would be reinvested in Alaska.

In Alaska, we have high unemployment and among them some of the hardest working and best educated people in the world. They are looking to us to help them simply by keeping as many dollars as possible within the Alaskan economy to create new jobs.

Basically, this is a jobs bill and not for the sole benefit of the Alaskan vendor but for the Alaskan working person. 1.1 million spent in Alaska provides approximately 20 jobs at \$25,000 per year. 1 million spent outside is just 1 million gone. This means we must sell another million dollars worth of non-renewable resources to replace it.

IN THE HOUSE

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 106

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to Alaska bidder preference."

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

*Section 1. AS 37.05.230(1)(R) is amended to read:

(B) a bid shall be awarded to an Alaska bidder if the (HIS) bid is not more than 15 (FIVE) percent higher than the lowest nonresident bidder's; and

*Section 2. AS 37.05.230(5)(A) is amended to read:

(HOLDS) has held a current Alaska Business License for a period of six months immediately preceding the date of the bid.

*Section 3. AS 37.05.230(5) is amended by adding a new subparagraph to read:

(D) if a joint venture, is composed entirely of venturers that qualify under this paragraph;

*Section 4. AS 37.05.230(7) is amended to read:

The provisions of this section do not apply to contracts for construction or repairs estimated to exceed (\$5,000) \$100,000. (OF EITHER THE DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, WHICH ARE AUTHORIZED UNDER AS 35.15.010 - 35.15.120, OR THE DEPARTMENT OF HIGHWAYS, WHICH ARE AUTHORIZED UNDER AS 19.10.010 - 19.10.280) *unless such*

a preference would threaten federal funds

What is applied to wholly State funded projects

- ① every agency (inc. DOT) gets 15% preference < \$100,000 except if fed. funds threatened
- ② every agency except DOT get 50% preference in contracts > \$100k
- ③ DOT contracts > \$100k have no preference

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 "K" Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

IRBY-NORTHFACE, a joint
venture,)

Appellant,)

v.)

COMMONWEALTH ELECTRIC)
COMPANY, HARRISON WESTERN)
CORPORATION-NEWBERRY ALASKA,)
INC., a joint venture d/b/a)
SUSITNA CONSTRUCTORS and the)
ALASKA POWER AUTHORITY,)

Appellees.)

File No. 7632

HARRISON WESTERN CORPORATION-)
NEWBERRY ALASKA, INC., a joint)
venture d/b/a SUSITNA)
CONSTRUCTORS,)

Cross-Appellant,)

v.)

COMMONWEALTH ELECTRIC)
COMPANY and the ALASKA POWER)
AUTHORITY,)

Cross-Appellees.)

File No. 7649

O P I N I O N

[No. 2664 - April 29, 1983]

Appeal from the Superior Court of the
State of Alaska, Third Judicial Dis-
trict, Anchorage,
Karl S. Johnstone, Judge.

Appearances: Stephen M. Ellis, William E. Moseley and Marc D. Bond, Delaney, Wiles, Hayes, Reitman & Brubaker, Inc., Anchorage, for Appellant Irby-Northface. Robert J. Dickson, Atkinson, Conway, Bell & Gagnon, Anchorage, for Appellee/Cross-Appellee Commonwealth Electric Company. Donald W. McClintock and Ross A. Kopperud, Assistant Attorneys General, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee/Cross-Appellee the Alaska Power Authority. Richard L. Wagg and Lawrence T. Feeney, Faulkner, Banfield, Doogan & Holmes, Anchorage, for Appellee/Cross-Appellant Harrison Western Corporation-Newbery Alaska, Inc.

Before: Burke, Chief Justice, Rabinowitz, Matthews and Compton, Justices, and Dimond, Senior Justice.* (Connor, Justice, not participating.)

COMPTON, Justice.
RABINOWITZ, Justice, concurring, with whom BURKE, Chief Justice, joins.

The single issue that must be addressed to resolve this appeal and cross-appeal is whether a joint venture qualifies as an Alaska bidder under the Alaska bidder preference statute, AS 37.05.230, when only one of its venturers would individually qualify as an Alaska bidder. For the reasons set forth below, we conclude that such a joint venture does qualify.

*Dimond, Senior Justice, sitting by assignment made pursuant to article IV, section 11, of the Constitution of Alaska.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 25, 1982, the Alaska Power Authority ("APA") issued invitations to bid on Transmission Line Construction Contract #1 for the Anchorage-Fairbanks Inter-tie. The bids received by the APA that are at issue in this case were as follows:

Irby-Northface	\$ 28,437,328.00
Susitna	\$ 28,931,030.00
Commonwealth (original)	\$ 30,877,773.00
Commonwealth (amended)	\$ 28,777,773.00

The Alaska bidder preference statute, AS 37.05.230, specifies that state contracts for construction projects must be awarded to the "lowest responsible bidder," with the exception that "a bid shall be awarded to an Alaska bidder if his bid is not more than five per cent higher than the lowest nonresident" bid. AS 37.05.230(5) defines an Alaska bidder as a person who:

(A) holds a current Alaska business license,

(B) submits a bid for goods or services under the name as appearing on his current Alaska business license, [and]

(C) has maintained a place of business within the state for a period of six months immediately preceding the date of his bid.

Irby-Northface is a joint venture entered into by Irby Construction Co. and Northface Construction, Inc. It does not have an Alaska business license and did not maintain a place of business within the state for the six months preceding its bid submission. Northface, however, has been a licensed general contracting business in Alaska since 1977. Irby, on the other hand, is not licensed to conduct business in Alaska. It specializes in the construction of electrical transmission line systems and has built such systems in over thirty-nine states.

Susitna is a joint venture entered into by Harrison Western Corp. and Newbery Alaska, Inc. The joint venture obtained an Alaska business license before bidding on this contract. The joint venture did not, however, maintain a place of business in the state for the six months preceding its bid. Nonetheless, both corporations were licensed in Alaska and had maintained a place of business in Alaska for the six months preceding the submission of their joint bid.

The Commonwealth Electric Corp. is licensed to do business in Alaska and maintained a place of business in the state for the six months preceding its bid. Accordingly, it is the only indisputably qualified "Alaska bidder" under the statute, although it does not conduct its business exclusively in this state.

Before Irby-Northface prepared its bid, it received assurance from the APA that it qualified as an Alaska bidder on the basis that Northface individually qualified. On February 16, 1983, the sealed bids were opened and the APA subsequently issued a notice of intent to award the contract to Irby-Northface, the apparent low bidder. Susitna then commenced this action in the superior court, challenging the intended award. It argued that Irby-Northface does not qualify as an Alaska bidder because the joint venture does not have an Alaska business license and did not maintain a place of business in the state for the six months preceding its bid. Furthermore, the joint venture is composed of two businesses, one of which could not qualify individually as an Alaska bidder. Susitna contended that it qualifies as an Alaska bidder, even though its joint venture did not maintain a place of business in the state for the six months preceding its bid, because each of its two venturers would individually qualify as an Alaska bidder. Finally, Susitna argued that Commonwealth's bid amendment was made improperly and was therefore ineffective. Susitna's bid was lower than Commonwealth's initial bid and was within five percent of Irby-Northface's bid; Susitna therefore concluded that the contract should be awarded to it.

Commonwealth joined in Susitna's suit. It agreed with Susitna that Irby-Northface should not be treated as an Alaska bidder. It argued, however, that its bid amendment was proper and effective. Its amended bid was lower than Susitna's bid and it therefore concluded that the contract should be awarded to it.

Irby-Northface responded with several arguments. The only one relevant to this appeal is the argument that Irby-Northface does qualify as an Alaska bidder under the statute.

The parties stipulated to the facts and agreed that there are no material issues of fact precluding the court from resolving the case on summary judgment. The parties also waived any further appeal rights from the administrative decision of the APA so that the superior court's judgment would be binding.

The superior court rejected all of Irby-Northface's arguments and agreed with Susitna and Commonwealth that Irby-Northface should be treated as a nonresident bidder. It therefore concluded that it would be an abuse of discretion for the APA to award the contract to Irby-Northface because the bid of Susitna and the amended bid of Commonwealth were within five percent of Irby-Northface's bid. The court further concluded that Commonwealth's bid amendment was proper and effective.

Commonwealth's amended bid was lower than Susitna's bid and the court therefore ruled that Commonwealth was the lowest Alaska bidder.

Irby-Northface appeals from the superior court's judgment, repeating the arguments it made on the motion for summary judgment. Susitna cross-appeals, contending that the superior court was correct in ruling that Irby-Northface is a nonresident bidder, but erred in ruling that Commonwealth's bid amendment was proper. Commonwealth and the APA argue in response that the superior court's judgment was proper in all respects. The APA, however, has expressly declined to take any position before this court on the proper meaning of the term "Alaska bidder."

As explained below, we disagree with the superior court's ultimate conclusion. We hold that the APA's determination was correct: Irby-Northface qualifies as an Alaska bidder under the statute. It submitted the lowest bid and it therefore should be awarded the contract. We accordingly find it unnecessary to address the other arguments raised by the parties because they cannot affect the outcome of the case.

II. DISCUSSION

Commonwealth contends that, in order for a joint venture to qualify as an Alaska bidder, the joint venture itself must fulfill the requirements enumerated in AS 37.05.230(5), which are: (1) hold a current Alaska business license, (2) submit its bid under the name appearing on the license, and (3) have maintained a place of business within the state for a period of six months immediately preceding the submission of its bid. Susitna contends that a joint venture may alternatively qualify as an Alaska bidder if each of the venturers would individually qualify. The superior court agreed with Susitna, stating:

The Court recognizes that joint ventures are often formed for the purpose of making a bid on a particular job. Where principals of the joint venture have maintained a place of business within the state for a period of six months immediately preceding the date of the bid, this Court concludes that AS 37.05.230(5)(c) is substantially complied with. Furthermore, where the joint venture acquires a current business license in the joint venture name prior to award of the contract, and all members of the joint venture hold a current Alaska business license at the time of the bid, this Court concludes that AS 37.05.230(5)(a) and (b) are substantially complied with.

We agree with this much of the superior court's decision and similarly hold that a joint venture may qualify as an Alaska bidder if each of the venturers would individually qualify.

The court further held, however, that "all principals of a joint venture or any other bidder applying for a preference must have maintained places of business within the State of Alaska for at least six months prior to the bid to be eligible for the Alaska Bidders Preference." (Emphasis added.) In accordance with this analysis, Irby-Northface could not qualify as an Alaska bidder because one of the two venturers, Irby Construction, did not have an Alaska business license and had not maintained a place of business within the state for the six months preceding the joint venture's bid submission.

Before it decided to submit a bid on the contract, Irby-Northface was uncertain whether its joint venture would qualify for bidder preference. The corporations accordingly inquired of the APA as to its policy. They were informed that the APA interpreted AS 37.05.230 as permitting a joint venture to qualify for preference if any of the venturers would qualify individually as an Alaska bidder. They were further informed that the APA has consistently granted preference to joint ventures when one of the venturers qualified individually as an Alaska bidder.

The parties dispute the amount of deference this court should give to the APA's interpretation of the statute. As we recently indicated, "The independent judgment standard is used when agency expertise of the

determination of fundamental policies are not involved.
. . . However, even under the independent judgment standard
. . . the court should give some weight to what the agency
has done, especially where the agency interpretation is
longstanding." National Bank of Alaska v. State, 642 P.2d
811, 815 (Alaska 1982) (citations omitted).

The APA's longstanding interpretation of the
bidder preference statute is based upon three factors:
first, this is the same interpretation given to the statute
by the Department of Administration; second, it is in accor-
dance with the purpose of the statute; and third, it is
harmonious with the only Alaska statute addressing an analo-
gous situation. As to the first of these factors, the
Department of Administration has indicated by affidavit that
it interprets the statute as requiring that preference be
given to a joint venture when any one of the venturers qual-
ifies as an Alaska bidder "in order to accomplish the objec-
tives of insuring that Alaskan firms receive a preference."
The Department notes that "a more literal interpretation
would result in joint ventures of Alaskan firms not
receiving the bidder preference - a result clearly not
intended by the statute."

Turning to the second factor relied upon by the
APA, the purpose of the statute, it is clear that the
statute's purpose is to give Alaskan businesses a

competitive chance with nonresident businesses in the award of state contracts. We need not and do not decide whether this is a constitutional purpose and whether the statute is reasonably related to that purpose. We do hold, however, that the APA's interpretation of the statute is the most consonant with that purpose.

As a practical matter, an Alaskan business may be unable to bid on a contract by itself and may be unable to find another Alaskan business with which to associate on the bid. The Alaskan business may thus be compelled to associate with a nonresident bidder. The only means by which the legislative purpose of giving a preference to the Alaskan business can be fulfilled under these circumstances is by granting a preference to the entire joint venture. The mere fact that a nonresident bidder is accordingly also given preference does not make this interpretation unreasonable. When the bidder is a joint venture comprised of one corporation that would qualify for preference and another corporation that would not, a conflict in purpose arises. On the one hand, the legislature has indicated that nonresidents are not to be given preference, but on the other hand, it has also indicated that qualifying corporations are to be given preference. Under these circumstances, we believe the paramount interest is that qualifying corporations be given

preference, which can only be accomplished by giving preference to the entire joint venture. As one commentator notes:

Chancellor Kent made a classic observation that: "In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. . . ." If upon examination the general meaning and object of the statute is inconsistent with the literal import of any clause or section, such clause or section must, if possible, be construed according to that purpose.

2A C. Sands, Sutherland Statutory Construction § 46.05, at 57 (4th ed. 1973) (footnotes omitted). Accordingly, we conclude that the APA's interpretation of the statute is the proper one.

This conclusion is supported by the third factor relied upon by the APA. The APA notes that there is only one statute addressing an analogous situation, AS 08.18.011. This statute provides as follows:

It is unlawful for a person to submit a bid or work as a contractor until that person has been issued a certificate of registration by the Department of Commerce and Economic Development. A partnership or joint venture shall be considered registered if one of the general partners or venturers whose name appears in the name under which the partnership or venture does business is registered.

(Emphasis added.) As indicated in this statute, contractors are not permitted to bid on state projects unless they are

registered in this state. A situation analogous to the one posed by this case arises when a joint venture wishes to bid on a contract, but only one of the venturers is a registered contractor. The state legislature resolved this problem by holding that the joint venture may bid on the project as long as one of the venturers is a registered contractor. We believe that the legislature intends the same result to occur with respect to "Alaska bidders." We therefore conclude that the proper interpretation of the bidder preference statute is that a joint venture must be given preference if one of the venturers qualifies individually for the preference.

In its bid evaluation, the APA concluded that Irby-Northface qualified for preference, stating as follows:

[Irby-Northface] submitted the bid on the appropriate forms, properly completed and signed, all addendums were acknowledged and bid security was furnished as required. Both joint venture partners are registered as Contractors in the State of Alaska. The bidder qualifies for Alaska Bidders Preference based on the fact that one of the joint venture partners (Northface Construction) possesses a valid business license (BL # 048240) and has been in business for more than the required six months.

This evaluation is in accordance with the interpretation of AS 27.05.230 that we have made in the exercise of our independent judgment, giving some weight to the APA's

longstanding interpretation. Accordingly, the contract should be awarded to Irby-Northface, the lowest responsive bidder.

The judgment of the superior court is REVERSED.

RABINOWITZ, Justice, with whom BURKE, Chief Justice, joins, concurring.

I agree with the majority's conclusion that Irby-Northface should be considered an Alaska bidder under AS 37.05.230 for the reasons stated in the opinion of the court.

I would, however, address the clear unconstitutionality of the bidder preference statute under our precedent of Lynden Transport, Inc. v. State, 532 P.2d 700 (Alaska 1975).¹ In Lynden we stated that:

A discrimination between residents and nonresidents based solely on the object of assisting the one class over the other economically cannot be upheld under either the privileges and immunities or equal protection clauses.

Id. at 710. In this case, "it is clear that the statute's purpose is to give Alaskan businesses a competitive chance with nonresident businesses in the award of state

1. Normally it is appropriate to avoid constitutional rulings unnecessary to the decision of a particular case. In the present context, however, the constitutional defect of AS 37.05.230 is manifest and, as the state notes in its amicus brief, the disruptive consequences of uncertainty in the law are considerable in the area of public construction. Thus, in this circumstance I think it appropriate to address the constitutional issue.

contracts,"² as noted by the majority. Under Alaska's equal protection clause, such a purpose does not justify a statute which discriminates against nonresidents. Lynden, 532 P.2d at 711.³

2. The state and Susitna argue that the real purpose of the preference statute is to strengthen the local economy. Such an argument was advanced and rejected in Lynden, 532 P.2d at 709.

3. Lynden was decided under the federal rational basis equal protection analysis. 532 P.2d at 707, citing, Morey v. Doud, 354 U.S. 457, 463-64, 1 L.Ed.2d 1485, 1490 (1957). Since Lynden, we have established that the lowest level of scrutiny to be employed under Alaska's equal protection clause is more stringent than the minimum federal standard. Gilman v. Martin, ___ P.2d ___, Op. 2652 at 13 (Alaska, April 1, 1983); State v. Erickson, 574 P.2d 1, 12 (Alaska 1978); Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976).

legislative findings

- The cost of maintaining a principal place of business in Alaska is significantly higher than elsewhere in the U.S.

- That small businesses ^{create economic diversity and therefore} are vital to a healthy economy

that because of economies of scale and other reasons small businesses in Alaska are at a competitive disadvantage in the marketplace

① To ~~keep state revenues circulating in the local economy~~

To maximize ^{the positive} impact of state revenue expenditures on the local economy by encouraging the recirculation of these dollars within the state

To maximize the circulation of state revenue expenditures

To help alleviate the chronic unemployment within the state

* Section 1. AS 37.05.230(5) is amended to read:

(5) an "Alaska bidder," for the purpose [OF BID AWARDS UNDER (1)(B)] of this section, is

(A) a person who

(i) holds a current Alaska business license ;
[,]

(ii) submits a bid for goods or services under the name as appearing on that person's [HIS] current Alaska business license; [,]

(iii) has actively engaged in the business of providing the goods or services for which the bid is submitted in [MAINTAINED A PLACE OF BUSINESS WITHIN] the state for a period of six months immediately preceding the date of the [HIS] bid;

(iv) has derived at least 50 percent of earned

income from the operation of the business in the state for a period of six months immediately preceding the date of the bid; and

(v) is not delinquent in the payment of state taxes; or

(B) a joint venture, partnership, or other business association consisting of more than one person if:

(i) at least one of the persons satisfies A(i) and A(iii)-(v) of this paragraph; and

(ii) the person or persons described in (i) of this subparagraph control at least 10 percent of the joint venture, partnership, or other business association;

* Section 2. AS 37.05.230(1)(B) is amended to read:

(B) A bid shall be awarded to the lowest Alaska bidder whose bid is eligible for an award preference. A bid is eligible for an award preference if it does not exceed the bid of the lowest qualified non-Alaska bidder by more than

(i) five percent, for Alaska bidders under subparagraph (5)(A) of this section; or

(ii) .055 percent for each whole percent of control of the business association in excess of 10 percent, for Alaska bidders under subparagraph (5)(B) of this section.

(1) WHAT ABOUT MAJOR CONTRACTORS (MCK, P&L) DOING A SMALL PORT OF THEIR BUSINESS IN ALASKA, BUT HAVING A PERMANENT OPERATION SITE IN STATE?

Legislative Bill Request
Bidder Preference

In order to provide preference to Alaskan companies contracting for State jobs and yet not provide a 5 percent subsidy to companies largely in outside ownership, it is proposed that qualification for bidder preference requires a minimum of 10 percent Alaskan ownership and that the 5 percent allowable overbid be reduced in proportion to the degree of non Alaskan ownership.

It should be recognized that it can be advantageous for Alaskan businesses to work in conjunction with outside firms with special expertise. Therefore, in the case of joint ventures or partnerships, the entities should be considered as a whole and 10 percent Alaskan ownership by any portion of the business entity should qualify the business for a bidder preference.

*or a total of 10 percent among the business members
~~of 10%~~ Alaskan ownership*

ALASKA BIDDER PREFERENCE ALLOWANCE

Each 1% ownership over 10% merits one bidder preference credit of .055%
($1/90 \times .05\% = .055\%$)

<u>% Ownership</u>	<u>Credit</u>	<u>Overbid Allowance</u>
10	1/90 x .05	.055%
11	2/90 x .05	.11%
12	3/90 x .05	.16%
13	4/90 x .05	.22%
14	5/90 x .05	.27%
15	6/90 x .05	.33%
20	11/90 x .05	.61%
30	21/90 x .05	1.16%
40	31/90 x .05	1.72%
50	41/90 x .05	2.27%
60	51/90 x .05	2.83%
70	61/90 x .05	3.38%
80	71/90 x .05	3.94%
90	81/90 x .05	4.50%
100	91/90 x .05	5.00%

(Section 1. AS 37.05.230(1)(B) is amended to read:

(B) [A BID SHALL BE AWARDED TO AN ALASKA BIDDER IF HIS BID IS NOT MORE THAN FIVE PERCENT HIGHER THAN THE LOWEST NONRESIDENT BIDDER'S; AND] if companies, partnerships, joint ventures or any other legally recognized entities, which are at least ten percent Alaskan owned, submit bids, the bid shall be awarded to the lowest Alaska bidder as long as that bid does not exceed the bid of the lowest qualified nonresident bidder by an amount based on a formula as follows:

(i) for entities with Alaskan ownership of greater than zero but less than ten percent, the allowable excess over the lowest nonresident bid is zero;

(ii) for entities with Alaskan ownership ^{of} ~~to~~ ten percent or more, the allowable excess over the lowest bid shall increase from .055 percent to a maximum of 5.0 percent at a rate which equals .055 percent for each additional one percent Alaskan ownership over ten percent.

Sec. 2. AS 37.05.230(5) is repealed.

Kevin Dougherty

ATTORNEY AT LAW

P. O. Box 899

Anchorage, Alaska 99510

(907) 276-1640

May 16, 1983

Senator Vic Fischer
c/o David Dye
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

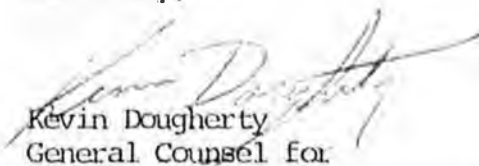
Dear David:

I have enclosed certain correspondence which may explain my complete disappointment in the University's failure to fully enforce the Alaska Bidder's Preference statute, as we discussed on May 12, 1983.

Despite Mr. Sherman Carter's assurances in his April 11, 1983 letter that they would decide whether or not to terminate the contract with Century Construction Company, the University has failed to make any decision whatsoever. I find this nonfeasance totally unacceptable for paid public officials especially when administering a public works contract. They have an affirmative duty to uphold AS 37.05.230(5).

I appreciate the Senator's concern in this matter as the University's action in this case may indicate future problems as well. I believe it is essential that the University provide honest assurances to the public and our Legislators that AS 37.05.230 on Alaska bidder preference will be respected on the capital projects it now requests in SB 18, SB 19, SB 229, HB 32, HB 95, HB 272. Thank you for your interest.

Sincerely,


Kevin Dougherty
General Counsel for
Alaska State District Council
of Laborers



Sherman Carter
Executive Vice President
474-7448

University of Alaska
Fairbanks, Alaska 99701

April 11, 1983

Kevin Dougherty, Esq.
P. O. Box 899
Anchorage, AK 99510

Dear Mr. Dougherty:

Thank you for your letter of 6 April.

An information copy of a letter which I sent to Century Construction Company, before your letter to me arrived, is attached. As indicated in it, the university will do its best promptly to settle these questions and issues, namely either secure from Century Construction Company the information requested in my attached letter or automatically terminate the contract and then again proceed as expeditiously as possible.

Sincerely,


Sherman Carter

SFC/pe

Attachment

cc: Astrid de Parry, General Counsel



Sherman Carler
Executive Vice President
474-7448

University of Alaska
Fairbanks, Alaska 99701

April 6, 1983

Jerome P. Cohen, President
Century Construction Co.
1617 S. Jackson Street
P. O. Box 3085
Seattle, WA 98114

Jerome P. Cohen, President
Century Construction Co.
202 East 26th
P. O. Box 103916
Anchorage, AK 99501

Re: CONDITIONAL NOTICE OF TERMINATION
Tanana Valley Community College
Construction Contract #TVF-78nfg

Dear Mr. Cohen:

On the advice of legal counsel, I am obliged to demand that you promptly provide me with a sworn statement, plus appropriate supporting documentation, concerning your company's assertion that it has maintained a place of business in Alaska for at least six months immediately preceding the date of your bid on the above-referenced project. In particular, I would like you to confirm in writing and verify by way of notarized copies of lease agreements, rent receipts, utility bills, cancelled checks, subcontractors' and suppliers' bids, bank statements and other pertinent documentation, that Century Construction Company has, in fact, maintained business offices at the following addresses:

- 1) 3209 Doris Street, #1
Anchorage, AK 99503;
- 2) 6151 "A" Street
Anchorage, AK 99502;
- 3) 202 East 26th
Anchorage, AK 99501.

Please be advised that a recent investigation revealed that the first listed address is the site of an 8-unit residential apartment complex; the second has been occupied by Redi Electric Company for several years; and the third is occupied by Control Contractors Inc. I am particularly disturbed to learn that representatives of Redi Electric Company have disclaimed any knowledge of your organization and expressly denied ever having leased space to Century Construction Company. It is even more curious that Control Contractors Inc. is itself listed in a

Jerome P. Cohen, President

April 6, 1983

Page 2

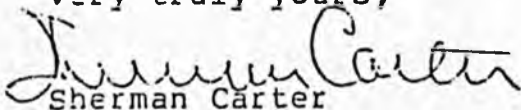
current telephone directory as having an address at "6151 'A' Street."

In light of the foregoing, I am forced to conclude that your firm may have fraudulently misrepresented material facts in support of your claim that Century Construction Company is entitled to the 5 per cent Alaska bidder's preference under AS 37.05.230. Unless you can provide me with sufficient evidence to the contrary within ten (10) business days of your receipt of this letter, I will have no choice but to terminate Century Construction Company's right to proceed with the work pursuant to Article 47 of the General Conditions ("Right of Owner to Terminate Contract"), upon expiration of that ten (10) day period of time.

In the event that Century Construction Company fails or refuses to provide the information requested above, or if the documentation to be supplied is not complete and adequate to rebut the presumption of fraud, then this letter shall serve as notice that Century's right to proceed with the work will have terminated automatically upon expiration of the ten (10) day period of time. In the meantime, however, you are hereby directed diligently and faithfully to continue performing the work in progress so as to avoid unnecessary delays and expense to the Owner in completing this project.

Mr. Cohen, I am sure you can appreciate the gravity of our concerns in this matter and I trust that you will make every reasonable effort to provide us with the required assurances in a timely manner. If you have any questions or comments in this regard, please do not hesitate to contact either myself or Astrid de Parry, General Counsel, at the following phone numbers: 907-474-7563 or 907-474-7259.

Very truly yours,


Sherman Carter

SC:ADP:LSD

cc: Astrid de Parry, General Counsel
Rod Enos, President, TVCC
Chris Ahoy, Director, Facil. Planning & Construction
John Nickles, Contracting Officer

Kevin Dougherty

ATTORNEY AT LAW

P. O. Box 899

Anchorage, Alaska 99510

(907) 276-1640

April 6, 1983

Dr. Sherman Carter
Executive Vice-President
University of Alaska
Fairbanks, AK 99701

Re: Century Construction Co./Bid No. 83-B-149

Dear Dr. Carter:

Per your April 4, 1983 request, I have summarized below our concerns and objections to the TVCC construction award made by the University to Century Construction.

As discussed, the Alaska Bidders Preference statute AS 37.05.230(5) requires that a local bidder (1) hold an Alaskan business license, (2) that the bid be submitted in the name of that license and, (3) that the bidder have maintained a place of business within the state for a period of six months preceding the date of bid. The University was obliged by law to properly apply this statute when awarding the TVCC construction contract.

It is our contention that the University improvidently granted Century preference. To begin with, the correspondence between Century and the University on the matter itself raises serious doubts about Century's eligibility for local bidder preference. In its February 16, 1983 letter Century admitted it had no projects in Alaska while claiming that Mountain Pacific Company's work is somehow relevant. Although, .230(5) is broadly written so to provide for all state contracts for goods and services, any reasonable application of the statute to construction contracts, in particular, should raise serious doubts about Century's eligibility on this fact alone.

In addition, several other factors in the correspondence itself indicate Century was in no way a bona fide local contractor. The University failed to obtain answers to the specific questions set forth in its February 11, 1983 request to Century. Specifically, Century did not respond whether its office was leased or "registered" in its name; whether its telephone was listed in its name; and whether Century carried any inventory, supplies, equipment, etc. at that location. Also note that the Certificate of Insurance and Performance Bond were executed in Seattle.

Aside from the correspondence, other factors should have given fair warning of Century's ineligibility. Virtually, all correspondence was through Century's Seattle office. A letter sent to the alleged Anchorage office was returned "addressee unknown". Telephone contacts with Century in Anchorage were not possible. And it is probable that still further indications, not apparent to us from the correspondence, may have occurred.

Acting on our reasonable doubts of Century's status as a local bidder, we bring the following to your attention.

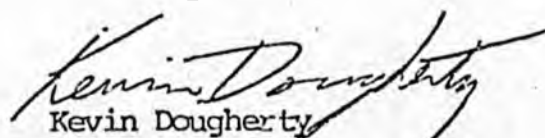
Century's alleged address at 3209 Doris St., Apartment #1 is a residential duplex apartment. Zoning restrictions (R-2) would prohibit operation of any typical construction contractors business in this area. Most importantly we have talked with Marilyn _____, the present resident. When asked if Century Construction was, or ever has been, located at that address she responded "No its not here ... they never were here... I live here I work for Barokas & Martin and Mark Nelson only used this address for business purposes, we represented him." The phone number she gave us was registered to a Mark Nelson on 4/1/83, a private residence. We did not disclose the purpose of our inquiry.

Century's later address, allegedly at 6151 "A" st., is also an outright misrepresentation. That building is owned by Redi-Electric Company and the owners of that company have directly informed us that Century never has been located at that office, and have had no contact or knowledge about Century Construction Company.

We have also investigated Century's current Alaskan address alleged to be at 202 East 26th St. The building gives no indication of occupancy by Century Construction and is maintained by a Boling Company. When we asked the office person whether that was Century's office, he responded "No, why do you want them" and that "Mark stops in once or twice a week to pick up messages". When we asked how to contact Century Construction he gave the telephone #(206) 329-5656 (Century in Seattle). No equipment or vehicles marked Century were in the lot at this location.

It is not our intent to find fault with the University in challenging the contract award since the labor community hopes to continue its strong support for the institution. But it is essential at this time that the University promptly place the contract in the hands of the bona fide lowest bidder per applicable statute. As Attorney deParry is aware, Century's material misrepresentations not only call for rescission of this void agreement with Century by contract, but the preference statute itself requires rescission. Your immediate action is necessary to prevent further injury to the affected parties and the public interest.

Sincerely,


Kevin Dougherty
for Alaska State District
Council of Laborers

KD/ks

ALASKA STATE LEGISLATURE

SENATE STATE AFFAIRS COMMITTEE

SENATOR VIC FISCHER, CHAIRMAN

POUCH V, JUNEAU 99811

(907) 465-4954



May 17, 1983

Butrovich Room

Members Present

Senator Vic Fischer, Chair
Senator Tim Kelly
Senator Arliss Sturgulewski

Agenda

HB 6 Driving a motor vehicle
HB 17 Advisory vote on raising the drinking age to 21
HJR 28 Native Allotments
HB 184 Title for Vehicles
HCR 9 Veterans' memorial
HCR 17 State medal of heroism
HCR 18 Display of flags
HB 106 Alaska bidder preference
HB 165 Relating to the Alaska Public Offices Commission

HB 6 Driving a motor vehicle

Committee staff presented a proposed committee substitute. The committee substitute is an amended version of SB 61 which has been considered previously by the committee.

Alan Baily, Anchorage Municipal Prosecutor and Gayle Horetski, Department of Law, testified in favor of the committee substitute.

Senator Sturgulewski asked if there are latent constitutional problems with administrative revocation of driver's licenses. Ms. Horetski replied that there are no problems per se.

Senator Fischer called attention to Sec. 13, sobriety check points, which has been added to the bill.

Senator Kelly moved and asked unanimous consent to adopt the committee substitute and pass it from committee with individual recommendations. There was no objection.

HB 17 Advisory vote on raising the drinking age to 21

Senator Kelly asked to withdraw his proposed committee substitute. He then moved and asked unanimous consent to pass the bill from committee with individual recommendations. There was no objection.

HJR 28 Native Allotments

Senator Fischer proposed a committee substitute which refined and clarified certain language but made no substantive changes.

The committee substitute was passed from committee with individual recommendations.

HB 184 Title for vehicles

Wally Kubley, representing himself, testified for the bill.

There was discussion regarding whether the definition of "mobile home" should be by statute or by regulation. It was decided to follow the written recommendation of the Department of Public Safety and have the definition by regulation. Committee staff was directed to prepare a committee substitute to that effect.

HCR 9 Veterans' memorial

Senator Fischer expressed concerns about the resolution including the issue of censorship of art and possible copyright law violations.

Natalie Rauthaus, Juneau Arts and Humanities Council, spoke in favor of leaving the sculpture "Nimbus" where it is. She felt that there would be negative repercussions from the National Endowment for the Arts if the State of Alaska did not hold up its grant agreement.

Senator Sturgulewski said she favors leaving "Nimbus" alone.

Peter Kelley, Vietnam Veterans of Alaska, testified in favor of moving "Nimbus" to another location and placing a veterans' memorial at that location.

Senator Fischer said he favored a resolution which would look at the entire capital city area for potential sites for a veterans' memorial.

Steve Smith, Southeast Alaska Visual Artists Association, testified he personally thought that the present site is not ideal for a work such as "Nimbus" but that he had reservations about moving the work. He suggested that a more appropriate memorial could be dedicated to all those who have been lost in Alaska's waters, with special emphasis on veterans.

The resolution was held over pending study by staff.

HCR 17 State Medal of Heroism

The resolution was passed with a unanimous do pass recommendation without discussion.

HCR 18 Display of flags

Representative Milo Fritz (prime sponsor) testified for the resolution. He has noticed that during holidays the flag poles in Juneau are often empty. He finds this situation deplorable. He thinks flags should be flown on state government buildings throughout the state.

Senator Fischer suggested that there be a slight wording change to clarify that flags are to be flown only when there is a security or maintenance person on regular duty.

Senator Sturgulewski moved and asked unanimous consent to adopt a committee substitute to that effect and to move the bill from committee with individual recommendations. There was no objection.

HB 106 Alaska bidder preference

Senator Fischer introduced a proposed committee substitute for the Committee's consideration.

Resa King, Associated General Contractors, testified against the bill and bidder's preferences in general because of increased costs.

Bob Link, Director of the Division of General Services and Supply, Department of Administration, said that the bidder's preference was easy to administer. He said the bill could lead to significantly increased costs.

Dave Hutchins, Alaska Rural Electric Cooperative Association, testified against raising the bidder's preference to 15%.

The bill was held over pending additional staff work.

HB 165 Relating to the Alaska Public Offices Commission

Representative Rick Uehling (prime sponsor) testified for the bill and gave a brief legislative history of the bill.

Theda Pittman, Executive Director of the Alaska Public Offices Commission, testified in favor of the bill and recommended that a House floor amendment deleting certain requirements be added back into the bill by this committee.

Senator Fischer stated that the bill would be held over pending preparation of a committee substitute.

The meeting was adjourned at 4:32 p.m.

by
David Dye
committee aide

ALASKA STATE LEGISLATURE

SENATE STATE AFFAIRS COMMITTEE

SENATOR VIC FISCHER, CHAIRMAN

POUCH V, JUNEAU 99811

(907) 465-4954



May 19, 1983
3:00 p.m.

Butrovich Room

Members Present

Senator Vic Fischer, Chair
Senator Tim Kelly
Senator Pat Rodey
Senator Arliss Sturgulewski

Agenda

HB 106 Alaska bidder's preference
HB 165 Relating to the Alaska Public Offices Commission
HB 184 Title for vehicles
HB 128 Child prostitution penalties
HJR 2 Constitutional Amendment--length of legislative session

HB 106 Alaska bidder's preference

The bill was discussed by the committee and the consensus was that the portion of the bill dealing with the percentage of preference should be deleted and made the subject matter of a separate state affairs committee bill. The new committee substitute for HB 106 would thus contain the "purpose" section and a section relating to joint venture.

Senator Rodey moved and asked unanimous consent to adopt the committee substitute and to pass the bill from committee with individual recommendations. There was no objection.

General discussion ensued on the topic of session extensions once the limit had been met.

The committee adjourned at 3:45 p.m.

STATE OF ALASKA
FISCAL NOTE

Revision Date: _____, 1983

I. REQUEST

Bill/Resolution No.: SCS HB 106
 Title: An Act Relating to Bidder Proced.
 Sponsor: Ward et al
 Requestor: Senate State Affairs

II. FISCAL DETAIL

Agency Affected: Administration
 Program Category Affected: Gen Admin Svcs
 BRU, Program of Subprogram(s) Affected:
General Services & Supply

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	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
 Division: General Services & Supply

Phone: 465-2250
 Date: May 24, 1983

Approved by Commissioner: Lisa Rudd
 Department: ADMINISTRATION

Date: May 24, 1983

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

ALASKA STATE LEGISLATURE

SENATE STATE AFFAIRS COMMITTEE

SENATOR VIC FISCHER, CHAIRMAN

POUCH V, JUNEAU 99811

(907) 465-4954



MEMORANDUM

TO: Committee Members
FROM: Senator Vic Fischer *Vic*
DATE: May 20, 1983
SUBJ: HB 106--Alaska bidder's preference

As you will recall, last Thursday the committee passed out a committee substitute for HB 106, relating to the Alaska bidder's preference. The committee substitute dealt with the problem of joint ventures resulting from the Irby case but deleted all of the original bill language dealing with a change in the percentage of preference for qualified Alaska bidders. It was the consensus of the committee that the latter issue would be better dealt with in a separate State Affairs bill.

I would appreciate it if you could be thinking about the best legislative approach to this problem. For your convenience, I have attached an early draft of the committee substitute for HB 106 which reflects my most recent thinking on the issue; i.e. increased protection and encouragement of small and minority businesses in particular. I have also attached a list of potential options and a copy of the current statute.

Please feel free to contact me or David Dye of my staff on this matter. David is also available to work with your staff.

Attachments

ALASKA BIDDER'S PREFERENCE OPTIONS

(pick one from each column)

% Preference

- 1) 5%
- 2) 10%
- 3) 15%
- 4) (or any other figure)

Applied to:

- 1) contracts of any amount
- 2) only contracts under a certain amount (e.g. \$100,000)
- 3) only to contracts over a certain amount
- 4) combination of 2 and 3 above with different percentage preferences

Agency exemption:

- 1) exemption for DOT/PF contracts
- 2) exemption for APA contracts
- 3) exemption for only construction contracts of DOT/PF
- 4) exemption for only construction contracts of APA
- 5) combination of 1 & 2 or 3 & 4 above
- 6) no exemption for any agency

(d) Votes required to be conducted under (c) of this section may be conducted by teleconference. (§ 1 ch 170 SLA 1980)

Cross references. — For the 1980 special appropriation to the reserve for emergency operating expenses account, see Chapter 171, SLA 1980, in the Temporary and Special Acts binder.

Article 4. Uniform Purchasing.

Section

230. Competitive bids

240. Award of contracts and purchases

Sec. 37.05.230. Competitive bids. In the manner provided in AS 37.05.010 — 37.05.350 and rules and regulations established under it

(1) a contract for construction and repairs, or a purchase of and contract for supplies, materials, equipment, and contractual services must be based on competitive bids; an award shall be made to the lowest responsible bidder after advertising for bids, except that (A) Repealed by § 2 ch 92 SLA 1967; (B) a bid shall be awarded to an Alaska bidder if his bid is not more than five per cent higher than the lowest nonresident bidder's; and (C) competitive bids need not be required (i) for contractual services where no competition exists; (ii) for sales involving fair trade items; (iii) when, in the judgment of the purchasing agent, food, clothing, or medical supplies, or materials for use in laboratory and experimental studies may be purchased otherwise to the best advantage of the state; (iv) where rates are fixed by law or ordinance; (v) for items traded in on like items; or (vi) for professional services;

(2) if the amount of the contractual services, purchase, or sale is estimated to exceed \$5,000, sealed bids shall be solicited, when practicable, by publication in a newspaper calculated to reach prospective bidders and by posting notices in public places within the area where the work is to be performed or material furnished and in addition the department may also designate a trade journal for publication; the department shall also solicit bids by sending notices by mail to all active prospective bidders known to it and all bids shall be sealed when received, and shall be opened in public at the hour stated in the notice; the department may limit the solicitation of bids or negotiate directly if it finds that it is in the best interests of the state;

(3) a contractual service, purchase or sale where the known requirements are estimated to be less than \$5,000 may be made either upon competitive bids in accordance with (2) of this section or in the open market, in the discretion of the department; but, so far as practicable, shall be based on at least three competitive bids and recorded as provided in AS 37.05.240; small purchases of less than \$500 in the discretion of the department may be made on the open market, and may be by cash payment from petty cash accounts set aside for that purpose;

the department shall determine the amount of the petty cash accounts needed by each state agency, and inspect the petty cash accounts at least once each year to determine that the total plus amounts of receipts for unreplenished disbursements is equal to the fixed sum of cash set aside; shortages in petty cash accounts are a personal liability of the responsible head of the agency to whom the account is set aside; the department shall make all necessary rules and regulations governing use and replenishment of petty cash funds;

(4) the provisions of this section relative to competitive bids do not apply to contracts for the operation of transportation systems for students to and from the schools within the state, as are authorized under AS 14.09.010; and these contracts may be awarded by bid or negotiation and, at the discretion of the Board of Education, may be awarded for periods of three years or less;

(5) an "Alaska bidder," for the purpose of bid awards under (1) (B) of this section, is a person who

(A) holds a current Alaska business license,

(B) submits a bid for goods or services under the name as appearing on his current Alaska business license,

(C) has maintained a place of business within the state for a period of six months immediately preceding the date of his bid;

(6) the competitive bid requirements of this section do not apply to air taxi services used by state employees when no formal contract is executed; the department affected shall pay the air taxi operator the tariff rates as published by him with the Air Transportation Commission for the type of aircraft required; the tariffs need not be uniform throughout the state and may reflect the diverse conditions of various areas of the state; the air taxi service used in each case shall be selected by the state employee who is to fly in the aircraft, or if more than one state employee is flying in the aircraft by the employee in charge; in all cases the air taxi operator shall have complied with AS 02.05.010 — 02.05.260 and other prequalifying regulations established by the department;

(7) the provisions of this section relative to an "Alaska bidder" do not apply to contracts estimated to exceed \$5,000, of either the Department of Transportation and Public Facilities, which are authorized under AS 35.15.010 — 35.15.120, or the Department of Highways, which are authorized under AS 19.10.010 — 19.10.280;

(8) the provisions of this section relative to competitive bids do not apply to the purchase of products or services manufactured or provided by a sheltered workshop;

(9) the provisions of this section relative to competitive bids do not apply to the purchase of products or services provided by the correctional industries program established under AS 33.32;

(10) requests for and acceptance of bids or other proposals for professional services shall comply with AS 24.23 or AS 36.98. (§ 3 art IV ch

82 SLA 1955
1959; am § 1
92 SLA 1967
2 ch 194 SL
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82 SLA 1955; am §§ 8 — 10, 23 ch 186 SLA 1957; am § 1 ch 77 SLA 1959; am § 1 ch 158 SLA 1962; am § 1 ch 82 SLA 1964; am §§ 1, 2 ch 92 SLA 1967; am § 1 ch 61 SLA 1970; am § 1 ch 92 SLA 1975; am §§ 1, 2 ch 194 SLA 1975; am Executive Order No. 39, § 11 (1977); am § 5 ch 53 SLA 1982; am §§ 6 — 8 ch 144 SLA 1982)

Revisor's notes. — The reference to AS 14.09.010 in paragraph (4) was originally a reference to AS 14.10.070. Chapter 98, SLA 1966 revised Title 14 and the substance of AS 14.10.070 became AS 14.09.010.

Effect of amendments. — The first 1982 amendment, effective July 1, 1982, added paragraph (9).

The second 1982 amendment, effective July 22, 1982, in paragraph (2), substituted "\$5,000" for "\$2,500" near the

beginning and inserted "limit the solicitation of bids or" near the end. The amendment also substituted "\$5,000" for "\$2,500" and "\$500" for "\$300" in paragraph (3) and added paragraph (10).

Editor's notes. — As enacted, paragraph (9) contained a reference to AS 33.30.400 — 33.30.490. These provisions, however, were renumbered by the revisor of statutes pursuant to AS 01.05.031 and the reference in paragraph (9) was changed accordingly.

NOTES TO DECISIONS

Notice requirements. — This section makes no requirement for notice by special delivery, registered or certified mail. State ex rel. Department of Administration v. Bowers Office Prods., Inc., Sup. Ct. Op. No. 2244 (File No. 4792), 621 P.2d 11 (1980).

Amendments to bid invitations. — Using regular mail to send an amendment to an invitation for bids is a proper procedure for notifying known bidders. State ex rel. Department of Administration v. Bowers Office Prods., Inc., Sup. Ct. Op. No. 2244 (File No. 4792), 621 P.2d 11 (1980).

Judicial review of agency actions of rejecting a bid for failing to return an

amendment should extend only to whether there was a reasonable basis for the agency to decide that the bid in question was nonresponsive. State ex rel. Department of Administration v. Bowers Office Prods., Inc., Sup. Ct. Op. No. 2244 (File No. 4792), 621 P.2d 11 (1980).

The department had a reasonable basis to determine that a defect in a bid was material and that the bid was nonresponsive when the bidder failed to acknowledge receipt of amendments. State ex rel. Department of Administration v. Bowers Office Prods., Inc., Sup. Ct. Op. No. 2244 (File No. 4792), 621 P.2d 11 (1980).

Sec. 37.05.240. Award of contracts and purchases. (a) Except as otherwise provided in AS 37.05.230, a contract or purchase made by or under the supervision of the department for which competitive bids are required shall be awarded to the lowest responsible bidder. The department shall determine the responsibility of the bidder based upon the bidder's (1) adherence to the bid specifications, (2) proposed terms of delivery, (3) compliance with state laws, (4) performance record, (5) financial capability, and (6) compliance with conditions imposed in the solicitation for bids. The purchasing agent may cancel the solicitation for bids before the award upon a written finding which specifies the relevant facts that it is in the state's best interest. However, if the purchasing agent makes the contract or purchase after the solicitation for bids is cancelled, the purchase or contract shall be made in accordance with AS 37.05.230(2). Before the awarding of a contract for a building or the making of repairs upon a building, the department shall see that the bids conform with plans and specifications approved by the

Original sponsors: Ward, Zharoff,
Flood, et al

*bidder
construction
industry*

1 IN THE HOUSE

BY THE STATE AFFAIRS COMMITTEE

2 SENATE CS FOR HOUSE BILL NO. 106 (State Affairs)

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 Alaska bidder preference."

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

8 * Section 1. AS 37.05 is amended by adding a new section to read:

9 Sec. 37.05.225. PURPOSE. The legislature finds that there
10 exists in the state continuing high unemployment, underutilization of
11 resident construction and supply firms, and high costs unfavorable to
12 the welfare of Alaskans and to the economic health of the state. The
13 purpose of bidder preference for resident firms when the state acts as
14 a market participant using state funds is to encourage local industry,
15 strengthen and stabilize the economy, decrease unemployment, and
16 enhance the tax and revenue base of the state.

17 * Sec. 2. AS 37.05.230(1)(B) is amended to read:

18 (B) a bid shall be awarded to an Alaska bidder if the
19 [HIS] bid is not more than five percent higher than the lowest
20 nonresident bidder's, except that a contract bid of \$100,000 or
21 less shall be awarded to an Alaska bidder if the bid is not more
22 than 15 percent higher than the lowest nonresident bidder's; and

23 * Sec. 3. AS 37.05.230(5) is amended by adding a new subparagraph to
24 read:

25 (D) if a joint venture, is composed entirely of ven-
26 turers that qualify under this paragraph;

27 * Sec. 4. AS 37.05.230(7) is amended to read:

28 (7) the provisions of this section relative to an "Alaska
29 bidder" do not apply to a contract [CONTRACTS] estimated to exceed

1 \$100,000 [\$5,000], of [EITHER] the Department of Transportation and
2 Public Facilities, which is [ARE] authorized under AS 35.15 and the
3 provisions of this section do not apply to a contract of less than
4 \$100,000 of that department if their application would result in loss
5 of federal funds [AS 35.15.010 - 35.15.120, OR THE DEPARTMENT OF HIGH-
6 WAYS, WHICH ARE AUTHORIZED UNDER AS 19.10.010 - 19.10.280];
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SCSHB 106

Winner:

<u>Non Resident Bid</u>	<u>Alaskan Bid</u>	<u>15%-\$100,000 Bid 5% Thereafter</u>	<u>15%-100,000 Contract 5% Thereafter</u>
\$50,000.00	\$57,500.00	Alaskan	Alaskan
\$86,956.52	\$100,00.00	Alaskan	Alaskan
\$90,000.00	\$100,000.00	Alaskan	Alaskan
\$90,000.00	\$101,000.00	Alaskan	Non Resident
\$100,000.00	\$115,000.00	Alaskan	Non Resident
\$100,001.00	\$105,100.00	Non Resident	Non Resident

RLS/dlr
6/0516-02/6GSS2

STATE OF ALASKA
FISCAL NOTE

Revision Date: _____, 1983

I. REQUEST

Bill/Resolution No.: SCS HB 106
 Title: An Act Relating to Bidder Proced.
 Sponsor: Ward et al
 Requestor: Senate State Affairs

II. FISCAL DETAIL

Agency Affected: Administration
 Program Category Affected: Gen Admin Svcs
 BRU, Program of Subprogram(s) Affected: General Services & Supply

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES	0					
200 TRAVEL	0					
300 CONTRACTUAL	0					
400 COMMODITIES	0	25	25	25	25	25
500 EQUIPMENT	0	25	25	25	25	25
600 LAND & STRUCTURES	0					
700 GRANTS, CLAIMS, ETC	0					
TOTAL OPERATING	0	50	50	50	50	50
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		50	50	50	50	50
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME		0	0	0	0	0
PART-TIME		0	0	0	0	0
TEMPORARY		0	0	0	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
 Division: General Services & Supply
 Approved by Commissioner: Lisa Rudd
 Department: ADMINISTRATION

Phone: 465-2250
 Date: May 16, 1983
 Date: May 16, 1983

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

IV. ANALYSIS:

Senate Bill SCS HB 106

Date: May 16, 1983

The only quantifiable costs associated with this bill are the impact on agency operating budgets for commodities and non-professional services, which would have occurred if the bill passed last year. The larger and more unquantifiable costs would be due to reduced competition as out-of-state firms are driven out of the Alaskan market.

This cost estimate does not include effects on contracts for travel or professional services which are not effected by this Act. No estimate has been made of effects on the Alaska Power Authority or the Department of Transportation and Public Facilities.

The State already spends a majority of its commodity and non-professional dollars with Alaskan vendors.