

HB

50

ALASKA CHAPTER
ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

POSITION STATEMENT

ON LEGISLATION INCREASING

THE

ALASKA BIDDER PREFERENCE (HB 50)



POSITION PAPER ON HB 50

The Alaska Chapter, Associated General Contractors of America, Inc. (A.G.C.) represents more than 900 member companies, including most of the general contracting companies engaged in Alaska's commercial construction.

A.G.C. is opposed to HB 50 which proposes to raise the Alaska bidder preference percentage, contained in AS 37.05.230, from 5% to 10%. Primarily, A.G.C. opposes any local preference for the construction industry including the existing 5% preference. A.G.C.'s opposition is founded on both practical and philosophical considerations.

From a practical perspective, a preference for local contractors:

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

Further, there is a strong likelihood that such a scheme is unconstitutional. In Attorney Robert Goldberg's recent study submitted to the Department of Labor, pages 50 and 51 state in part:

". . . While that court has not decided the constitutionality of the five percent bidder preference in AS 37.05.230, two of the five justices (Rabinowitz and Burke) have already announced that they regard the preference as manifestly unconstitutional because: 'A discrimination between residents and non residents 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.' Irby-Northface v. Commonwealth Electric Co., 664 P.2d 557, 562 (Alaska 1983) (Rabinowitz, J., concurring), quoting Lynden Transport, Inc. v. State, 532 P.2d 700, 710 (Alaska 1975)"

From a philosophical perspective, A.G.C. opposes government regulations of the construction industry. A.G.C. supports the free market, competitive bidding system for awarding construction contracts. This system has stood the test of time as the most economical system for the owner and a fair system for the contractors. Consistency dictates that A.G.C. not see special regulatory favor for Alaska contractors. Further, local preference is not consistent with the competition free market system.

Although this legislation has no effect on projects awarded by the Department of Transportation and Public Facilities, it would affect such State agencies as: The Alaska Power Authority, University of Alaska, Department of Corrections, Department of Administration, Pioneer Homes and the Court System. The Alaska Power Authority has experienced bidder preference law suits, including a case that had to be settled by the Supreme Court before the bid could be let. Litigation prior to project award increases the cost and is not in the best interest of the construction industry or the general public.

A 10% bidder preference will unnecessarily and substantially increase the cost of building Alaska's infrastructure. At a time of dwindling oil revenues we suggest that the 10% bidder preference not be approved.

D. Statutory Provisions Governing Public Contracts

Title 36 of the Alaska Statutes, which governs public contracts, includes three chapters granting preferences to Alaskan individuals and businesses. AS 36.10, discussed above, requires preferential hiring of Alaska residents in the performance of public works contracts. AS 36.15 requires the use, wherever practicable, of Alaska forest products in state-funded construction. AS 36.20.010 provides that: "In making purchases or awarding contracts for supplies, commodities or material for an office or institution of this state preference shall be given, whenever practicable, to producers and dealers in the state, price and quality being equal." This provision is implemented in AS 37.05.230(1) which establishes competitive bidding requirements but provides that "a bid shall be awarded to an Alaska bidder if the bid is not more than five percent higher than the lowest nonresident bidder's..."

The future of these preferences, however, appears uncertain at best. The Superior Court has recently ruled AS 36.10.010 to be violative of the privileges and immunities clause in Francis v. Robison, et al., 3AN 83-9969 Civil, a decision the state is currently appealing to the Alaska Supreme Court. While that court has not decided the constitutionality of the five percent bidder preference in AS 37.05.230, two of the five

justices (Rabinowitz and Burke) have already announced that they regard the preference as manifestly unconstitutional because: "A discrimination between residents and non residents 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." Irby-Northface v. Commonwealth Electric Co., 664 P.2d 557, 562 (Alaska 1983) (Rabinowitz, J., concurring), quoting Lynden Transport, Inc. v. State, 532 P.2d 700, 710 (Alaska 1975).

Conspicuous by their absence from Alaska's public contract statutes are provisions in effect in some jurisdictions permitting or requiring bidding preferences or set-asides for small business and/or minority business enterprises. Nor does Alaska have a statutory requirement that contractors have affirmative action programs, although such requirements are in practice included in some state contracts. As discussed below, measures such as these could serve as constitutionally permissible means of fighting unemployment in Alaska.

E. DOT & PF Affirmative Action Program

One major state agency has made commitments to increase contracting opportunities for minority business enterprises. In 1980, the Department of Transportation and Public Facilities (DOT & PF) entered into a settlement agreement