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SENATE COMMITTEE REPORT

FURTHER JUD

DATE TURNED INTO OFFICE 3/13/89

3/6/89

Mr. President:

L&C Committee considered CSHB 75 (JUD)

construction contractor licensing requirements; efd

and recommended

[ ] replace with ___ CS ____________________) [] same title
[ ] or adopt _______ CS ____________________) [] new title
[] technical title change (HB only)

[ ] attached amendment(s) and

[ ] ________________ letter of intent adopted

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to ________________________

FISCAL NOTE(S) [ ] zero [ ] fiscal impact [ ] appropriation no FN
[ ] new [ ] updated [ ] previous
[✓] same as previous fiscal note(s) published ____________________

MEMBERS SIGNING DO PASS	OTHER RECOMMENDATIONS
[signature]	
[signature]	

[signature]
Chairman signature and recommendation

[ ] Committee Backup attached

MEMORANDUM

State of Alaska

Department of Law

TO Randall Burns, Director
Division of Occupational Licensing
Department of Commerce and Economic Development

DATE February 15, 1989

FILE NO

TEL NO 465-3600

SUBJECT HB 75 ("An Act relating to construction contractor licensing requirements and exemptions; and providing for an effective date.")

FROM Beth
Elizabeth J. Kerttula
Assistant Attorney General
Commercial Section-Juneau

During the House Labor and Commerce meeting last week, there were three questions concerning this bill. I have researched the issues and my analysis follows.

1. SECTION ONE OF HB-75 IS CONSTITUTIONAL.

The first question that was asked was whether section 1 of the bill was constitutional. AS 08.18.101 (1) (B) as written in the bill presents no problem, but since AS 08.18.101 (1) (A) distinguishes between contractors who have insurance from companies who are admitted to do business in Alaska, and contractors who do not, this raises a question whether there might be an equal protection issue under the 14th Amendment of the U.S. Constitution, or under Art. I, §1 of the Alaska Constitution.

I do not find an unconstitutional discriminatory effect in HB-75.

Since there is no discrimination between residents and non-residents, I do not think that equal protection is violated as far as contractors are concerned. The requirement applies to both resident and non-resident contractors alike.

Neither is there discrimination against insurance companies, since any company, resident or non-resident, can become "admitted" to do business in Alaska. Therefore, HB-75 is not requiring the purchase of insurance from <u>resident</u> insurance companies only. Although the bill requires that the insurance company be admitted to do business in Alaska, this is a fairly minimal, and legitimate, requirement.

If HB-75 required that contractors purchase insurance from only resident companies, or if it required residency as a prerequisite to obtain a contractor's license, then there might be a violation of equal protection. Since HB-75 does not, there is no problem.

Even if a court were to analyze this section under equal protection, the section would meet constitutional muster. For purposes of clarification, I have included the following three-step analysis. See, Alaska Pacific Assurance Co. v. Brown,, 687 P.2d 264, 269 (Alaska 1984) (helpful explanation of equal protection analysis in Alaska).

A. What is the weight of the constitutional interest impaired? Depending on the primacy of the interest involved the state will have a lesser or greater burden in justifying its legislation.

The interests involved here are economic. Contractors may have to pay more to get proper coverage, and insurance companies will have to be registered in Alaska to be "valid" under the proposed licensing requirement in HB-75. These economic concerns are not very weighty. See, Lynden Transport, Inc. v. State, 532 P.2d 700, 707 (Alaska 1975). Thus, there is a lesser burden on the state in justifying the legislation.

B. What purpose does the statute serve? Depending upon the level of review, the state may be required to show purposes which at the low end of the scale are simply "legitimate objectives" all the way to a "compelling state interest" at the upper end.

Since this is an economic regulation, we have a lower level of review, and probably all the state will have to meet is a "legitimate objective". Id. There can be a number of reasons for the legislation, and since we are at a low level of review the fact that we have one valid reason should suffice. Aiding injured workers through requiring proper workers compensation coverage is a proper purpose.

C. What is the state's interest in the particular means employed to further its goals? The state's burden differs in accordance with the determination of the level of scrutiny under "A", and goes from a "substantial relationship between the means and ends" to a much closer fit.

Here we have the lowest scrutiny, so the state would only have to show that there is a "substantial relationship between the means and the ends" of this statutory requirement. The fit does not have to be absolutely perfect.

The main goal of HB-75 is to provide proper compensation to injured workers. By requiring a contractor to

buy insurance from a company registered to do business in Alaska we assure that we have a method to monitor the type of coverage a contractor has. Without this type of requirement the Department of Labor has not been able to effectively enforce the state's workers compensation laws because there is no way to monitor who has proper coverage and who does not.

Under my initial analysis, section one of the bill passes constitutional muster. Key to this is the fact that any company can be "admitted to do business" in Alaska, and that does not necessarily mean that they have to be resident corporations.

2. WE CAN EXEMPT SOLE PROPRIETORS TO CLARIFY THAT THE LEGISLATION DOES NOT APPLY TO THEM.

The second question was whether this legislation applied to sole proprietors.

I do not think it does, but to be safe we can easily include a provision exempting sole proprietors (and partners). Since sole proprietors and partners can currently opt into the workers compensation program if an insurer will accept them, under AS 23.30.239, people who chose this option should remain within the ambit of the bill. Section 2 of HB-75, dealing with liability, would still apply to sole proprietors.

I suggest re-drafting the bill to include a section "a" after the words "INSURANCE REQUIRED" at line 11, and then adding a section "b" after line 27, to state:

> (b) Section a (1) does not apply to sole proprietors or partners who do not elect under AS 23.30.239 to utilize workers compensation coverage as an employee.

This will clarify that sole proprietors (and partners) who are not in the workers compensation program are not required to prove that they have workers compensation coverage before being granted a contractor's license.

3. WE CANNOT REQUIRE FEDERAL CONTRACTORS TO HAVE STATE CONTRACTOR'S LICENSES.

The final question was whether we can repeal AS 08.18.161(7).

This section currently exempts contractors on federal projects from being required to obtain an Alaskan contractor's license.

After research I conclude that we cannot require that federal contractors obtain a state license.

As a sovereign, the U.S. government controls federal territory. It also controls its own employees and has jurisdiction over them both. States have no jurisdiction over the government itself, or the governments' employees, unless there is a specific grant of authority from the U.S. government to the states.

Although private contractors are not government employees in the same sense as employees such as postal workers, under 10 U.S.C.A. § 2305, the federal government has preempted any state contracting license requirements that conflict with its own requirements concerning private federal contractors.

In Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956); the U.S. Supreme Court faced the exact question of whether state licensing requirements applied to federal contractors. The Court held that "Subjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of "responsibility" and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder." Miller at 190.

The court analyzed the federal determination of "responsibility" as including contractors who were economically sound, had experience and were generally qualified. Arkansas's licensing requirement was similar (as is Alaska's).

The court relied on Johnson v. Maryland, 254 U.S. 51, 57 (1920), in reaching their conclusion, and noted that the following rationale was applicable:

> It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the

> duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed.

If the state requires federal contractors to prove that they have workers compensation and liability insurance (and other requirements) we will be in conflict with the federal law regulating procurement. We too would be "laying hold" of them by "requiring qualifications in addition to those that the Government has pronounced sufficient." Because of this, we cannot require that federal contractors have state licenses.

I have attached Miller v. Arkansas for your information.

Thus, the exemption currently in statute should not be repealed and section 2 of HB-75 should be removed. There would be no applicability to federal contractors even if we repealed the exemption, but the exemption provides clarity.

It is interesting to note that under 40 U.S.C.A. § 290, federal law grants states the right to impose their (the state's) workers compensation laws to federal projects within a state's boundaries. Begay v. Kerr McGee Corp., 682 F.2d 1311, 1319 (1982). States do not have to formally acknowledge this through law to have this power. Capetola v. Barclay White Co., 139 F.2d 556 (1943), cert. den., 321 U.S. 799 (1944). However, because of sovereign immunity and federal jurisdiction, states do not have the power to enforce their workers compensation laws against the federal government itself. Roelofs v. U.S., 501 F.2d 556 (1974), rehearing den., 511 F.2d 1402, cert. den., 423 U.S. 830 (1975).

4. CONCLUSION

I see no constitutional problem with requiring contractors to get their insurance from companies admitted to do business in Alaska. We are not discriminating against nonresidents, and even under an equal protection analysis this section of the bill is valid.

I think that sole proprietors would be excluded from the workers compensation requirements in the bill as drafted, but to be positive I have made suggestions to clarify that they are excluded from this, but not the liability, requirement. They are excluded unless they opt to take part in the workers compensation

program (if they can get an insurance company to accept them) as is their present option.

Finally, since we cannot require federal contractors to have a state license, I have suggested deleting section 2 of the bill.

I hope you find this helpful. If I can be of further assistance please do not hesitate to ask.

EJK:jf

cc: Representative Peter Goll
Representative Max Gruenberg
Representative Ann Spohnholz
Representative Dave Donley

Introduced: 1/9/89
Referred: Labor & Commerce and Judiciary

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1 IN THE HOUSE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

2 HOUSE BILL NO. 75

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to construction contractor licensing
7 requirements and exemptions; and providing for an
8 effective date."

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

10 * Section 1. AS 08.18.101 is amended to read:

11 Sec. 08.18.101. INSURANCE REQUIRED. (a) Each applicant, at the time
12 of applying for registration <u>or renewal of registration</u>, shall file
13 with the commissioner satisfactory evidence that the applicant has in
14 effect

15 <u>(1) either</u>

16 <u>(A) workers' compensation insurance that is purchased</u>
17 <u>from a private insurer who is admitted to do business in Alaska</u>
18 <u>and that shows Alaska coverage, appropriate employee classifica-</u>
19 <u>tions, and Alaska rates, or</u>

20 <u>(B) has a valid workers' compensation self-insurance</u>
21 <u>certificate issued by the Alaska Workers' Compensation Board to</u>
22 <u>cover Alaska workers; and</u>

23 <u>(2)</u> public liability and property damage insurance covering
24 the applicant's contracting operations <u>in Alaska</u> in the sum of not
25 less than $20,000 for damage to property, $50,000 for injury, includ-
26 ing death, to any one person and $100,000 for injury, including death,
27 to more than one person.

(b) Section a (1) does not apply to ~~persons~~ sole proprietors or partners who do not elect under AS 23.30.239 to utilize workers compensation coverage as an employee.

28 ~~* Sec. 2. AS 08.18.161(7) is repealed.~~

29 * Sec. ~~3~~ 2. This Act takes effect immediately under AS 01.10.070(c).

reflect the intention of
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Affirmed.

l *the problem of judicial re-* ocedures provided in the bill, ecurity and the protection of zens of this country, *remain of the Administrative Proce-* rocedure is afforded the alien ceedings." (Emphasis sup- :., 2d Sess., at 127.

r action was filed January 19,

LESLIE MILLER, INC., *v.* ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 51. Argued December 5–6, 1956.—Decided December 17, 1956.

Section 3 of the Armed Services Procurement Act of 1947 provides that awards on advertised bids "shall be made . . . to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered . . . ." Appellant was awarded a contract under this section and commenced construction of facilities at an Air Force base in Arkansas over which the United States had not acquired jurisdiction pursuant to 54 Stat. 19, 40 U. S. C. § 255. Appellant was convicted under Ark. Stat., 1947, §§ 71–701 through 71–721, for submitting a bid, executing a contract, and commencing work as a contractor in the State of Arkansas without having obtained a license for such activities from the State Contractors Licensing Board. *Held:* The state statute is in conflict with the federal statute and the regulations thereunder, and the state statute cannot constitutionally be applied to appellant. *Johnson* v. *Maryland*, 254 U. S. 51. Pp. 187–190.

225 Ark. 285, 281 S. W. 2d 946, reversed and remanded.

Leffel Gentry argued the cause and filed a brief for appellant.

By special leave of Court, *John F. Davis* argued the cause for the United States, as *amicus curiae*, urging reversal. On the brief were *Solicitor General Rankin*, *Assistant Attorney General Doub* and *Melvin Richter*.

William J. Smith argued the cause for appellee. With him on the brief were *Tom Gentry*, Attorney General of Arkansas, and *Thorp Thomas*, Assistant Attorney General.

PER CURIAM.

Appellant submitted a bid in May 1954 for construction of facilities at an Air Force Base in Arkansas over

which the United States had not acquired jurisdiction pursuant to 54 Stat. 19, 40 U. S. C. § 255. The United States accepted appellant's bid, and in June appellant began work on the project. In September, the State of Arkansas filed an information accusing appellant of violation of Ark. Stat., 1947, §§ 71-701 through 71-721, for submitting a bid, executing a contract, and commencing work as a contractor in the State of Arkansas without having obtained a license under Arkansas law for such activity from its Contractors Licensing Board. The case was tried on stipulated facts. Appellant was found guilty and fined. The trial court's judgment was affirmed by the Arkansas Supreme Court, 225 Ark. 285, 281 S. W. 2d 946, and the case came here on appeal. 351 U. S. 948. Appellant and the United States as *amicus curiae* contend that the application of the Arkansas statute to this contractor interferes with the Federal Government's power to select contractors and schedule construction and is in conflict with the federal law regulating procurement.

Congress provided in § 3 of the Armed Services Procurement Act of 1947, 62 Stat. 21, 23, 41 U. S. C. § 152, that awards on advertised bids "shall be made . . . to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered . . . ." The report from the Committee on Armed Services of the House of Representatives indicated some of the factors to be considered: "The question whether a particular bidder is a 'responsible bidder' requires sound business judgment, and involves an evaluation of the bidder's experience, facilities, technical organization, reputation, financial resources, and other factors." H. R. Rep. No. 109, 80th Cong., 1st Sess. 18; see S. Rep. No. 571, 80th Cong., 1st Sess. 16. The Armed Services Procurement Regulations,

promulgated under the Act, set forth a list of guiding considerations, defining a responsible contractor as one who

> "(a) Is a manufacturer, construction contractor, or regular dealer . . . .
>
> "(b) Has adequate financial resources, or ability to secure such resources;
>
> "(c) Has the necessary experience, organization, and technical qualifications, and has or can acquire the necessary facilities (including probable subcontractor arrangements) to perform the proposed contract;
>
> "(d) Is able to comply with the required delivery or performance schedule (taking into consideration all existing business commitments);
>
> "(e) Has a satisfactory record of performance, integrity, judgment, and skills; and
>
> "(f) Is otherwise qualified and eligible to receive an award under applicable laws and regulations." 32 CFR § 1.307; see also 32 CFR § 2.406–3.

Under the Arkansas licensing law similar factors are set forth to guide the Contractors Licensing Board:

> "The Board, in determining the qualifications of any applicant for original license . . . shall, among other things, consider the following: (a) experience, (b) ability, (c) character, (d) the manner of performance of previous contracts, (e) financial condition, (f) equipment, (g) any other fact tending to show ability and willingness to conserve the public health and safety, and (h) default in complying with the provisions of this act . . . or any other law of the State. . . ." Ark. Stat., 1947, § 71–709.

Mere enumeration of the similar grounds for licensing under the state statute and for finding "responsibility" under the federal statute and regulations is sufficient to

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indicate conflict between this license requirement which Arkansas places on a federal contractor and the action which Congress and the Department of Defense have taken to insure the reliability of persons and companies contracting with the Federal Government. Subjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of "responsibility" and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder. In view of the federal statute and regulations, the rationale of *Johnson* v. *Maryland*, 254 U. S. 51, 57, is applicable:

> "It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed. . . ."

The judgment of the Supreme Court of Arkansas is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.