

ALASKA LEGISLATURE COMMITTEE BILL FILES - 1987 - 1988 8879

CSHB 44 cont., HB 45 217

Original sponsors: Donley, Collins
and Davidson

1 IN THE HOUSE BY THE FINANCE COMMITTEE
2 CS FOR HOUSE BILL NO. 44 (Finance) am
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to motor vehicle liability insurance
7 and vehicle registration; and providing for an effective date."
8

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

10 * Section 1. AS 21.89.020 is amended by adding a new subsection to
11 read:

12 (f) An automobile liability insurance policy must provide that
13 all expenses and fees, not including counsel fees, incurred because of
14 arbitration or mediation shall be paid as a part of the arbitration
15 award.

16 * Sec. 2. AS 28.10.021(a) is amended to read:

17 (a) The owner of a vehicle subject to registration shall apply
18 for registration under this chapter by properly completing the form
19 prescribed by the commissioner under AS 28.05.041. Before the issuance
20 of a certificate of registration by the department, the owner
21 shall

22 (1) pay all registration fees and taxes required under this
23 chapter and federal heavy vehicle use taxes required under 26 U.S.C.
24 4481 (Internal Revenue Code of 1954);

25 (2) unless the owner qualifies as a self-insurer under
26 AS 28.20.400, or is exempted from obtaining liability insurance under
27 AS 28.22.200, certify to the department the existence of a motor
28 vehicle liability policy that complies with AS 28.22.200 for the
29 vehicle being registered and certify that the liability policy will

1 remain in effect for the term the vehicle is registered and being
2 driven on a highway, vehicular way or area, or until the vehicle is
3 sold; and

4 (3) [SHALL] comply with [ANY] other applicable statutes and
5 regulations.

6 * Sec. 3. AS 28.10.041(a) is amended to read:

7 (a) The department may refuse to register a vehicle if

8 (1) the application contains a false or fraudulent state-
9 ment;

10 (2) the applicant fails to furnish information required by
11 the department;

12 (3) the applicant is not entitled to the issuance of a
13 certificate of title or registration under this chapter;

14 (4) the vehicle is determined to be mechanically unsafe to
15 be driven or moved on a highway, vehicular way or area, or other
16 public property in the [THIS] state;

17 (5) the department has reasonable grounds to believe that
18 the vehicle was stolen or fraudulently acquired or that the granting
19 of registration would be a fraud against the rightful owner or other
20 person having a valid lien upon the vehicle;

21 (6) the registration of the vehicle has been suspended or
22 revoked for any reason under the laws of the [THIS] state;

23 (7) the required fees or taxes have not been paid;

24 (8) the vehicle or applicant fails to comply with this
25 chapter or regulations authorized by this section;

26 (9) the vehicle is without a certificate of inspection
27 required under AS 28.32.010;

28 (10) the vehicle is subject to a state-approved local
29 emission inspection program adopted by municipal ordinance under

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

1 remain in effect for the term the vehicle is registered and being
2 driven on a highway, vehicular way or area, or until the vehicle is
3 sold; and

4 (3) [SHALL] comply with [ANY] other applicable statutes and
5 regulations.

6 * Sec. 3. AS 28.10.041(a) is amended to read:

7 (a) The department may refuse to register a vehicle if

8 (1) the application contains a false or fraudulent state-
9 ment;

10 (2) the applicant fails to furnish information required by
11 the department;

12 (3) the applicant is not entitled to the issuance of a
13 certificate of title or registration under this chapter;

14 (4) the vehicle is determined to be mechanically unsafe to
15 be driven or moved on a highway, vehicular way or area, or other
16 public property in the [THIS] state;

17 (5) the department has reasonable grounds to believe that
18 the vehicle was stolen or fraudulently acquired or that the granting
19 of registration would be a fraud against the rightful owner or other
20 person having a valid lien upon the vehicle;

21 (6) the registration of the vehicle has been suspended or
22 revoked for any reason under the laws of the [THIS] state;

23 (7) the required fees or taxes have not been paid;

24 (8) the vehicle or applicant fails to comply with this
25 chapter or regulations authorized by this section;

26 (9) the vehicle is without a certificate of inspection
27 required under AS 28.32.010;

28 (10) the vehicle is subject to a state-approved local
29 emission inspection program adopted by municipal ordinance under

1 AS 46.03.210, and the vehicle does not meet the standards of that
2 program, unless the vehicle uses a fuel source that does not primarily
3 emit carbon monoxide;

4 (11) the applicant fails to certify to the department the
5 existence of a motor vehicle liability policy that complies with
6 AS 28.22.010 for the vehicle being registered, unless the owner of the
7 vehicle qualifies as a self-insurer under AS 28.20.400, or is exempted
8 from obtaining liability insurance under AS 28.22.200.

9 * Sec. 4. AS 28.10.051 is amended by adding a new subsection to read:

10 (b) Unless the owner qualifies as a self-insurer under AS 28.-
11 20.400, or is exempted from obtaining liability insurance under
12 AS 28.22.200, the department may suspend or revoke the registration of
13 a vehicle that is not insured by a motor vehicle liability policy that
14 complies with AS 28.22.010.

15 * Sec. 5. AS 28.10.421(c) is amended to read:

16 (c) The annual registration fees under this subsection are
17 imposed and are based upon the actual unladen weight as established by
18 the manufacturer's advertised weight or upon the actual weight which
19 the owner shall furnish, subject to the approval of the commissioner
20 or the commissioner's representative, for a vehicle, including a motor
21 vehicle pulling a trailer or semi-trailer, used or maintained for the
22 transportation of passengers for hire, excepting taxicabs and buses
23 under (b) of this section, or for the transportation of property for
24 hire or for other commercial use, including a commercial vehicle such
25 as a trailer, semi-trailer, truck, wrecker, tow car, hearse, ambu-
26 larce, and tractor, as follows:

- 27 (1) up to and including 5,000 pounds \$51 [\$50];
28 (2) more than 5,000 pounds to and including 12,000 pounds .
29 \$86 [\$85];

1 (3) more than 12,000 pounds to and including 18,000 pounds
2 \$156 [\$155];
3 (4) more than 18,000 pounds \$221 [\$220].

4 * Sec. 6. AS 28.10.421 is amended by adding a new subsection to read:
5 (f) The fees collected by the department under this section
6 shall be deposited in the general fund. The Department of Adminis-
7 tration shall separately account for three percent of the fees col-
8 lected under this section and deposited in the general fund. The
9 annual estimated balance in the account may be used by the legislature
10 to make appropriations for administration of AS 28.10.021(a) and
11 AS 28.22 (Alaska Mandatory Automobile Insurance Act).

12 * Sec. 7. AS 28.15.255(c) is amended to read:
13 (c) In this section, the term "proof of financial responsibility
14 [FOR THE FUTURE]" has the meaning given in AS 28.20.630 [AS 28.20.-
15 230(b)] and may be established as provided in AS 28.20.

16 * Sec. 8 AS 28.20.630 is amended to read:
17 Sec. 28.20.630. DEFINITIONS [DEFINITION]. In this chapter,
18 unless the context otherwise requires,
19 (1) "judgment" ["JUDGMENT"] means a judgment that [WHICH]
20 is final by expiration without appeal of the time within which an
21 appeal may be taken, or final by affirmation on appeal, given by a
22 court of a [ANY] state or of the United States, upon a cause of action
23 arising out of the ownership, maintenance, or use of a vehicle of a
24 type subject to registration under the laws of this state, for dam-
25 ages, including damages for care and loss of services, because of
26 bodily injury to or death of a person, or for damages because of
27 injury to or destruction of property, including the loss of use of
28 property, or upon a cause of action on an agreement of settlement for
29 such damages;

1 (2) "proof of financial responsibility" means an owner's
2 motor vehicle liability policy that covers all vehicles owned by the
3 person that are subject to registration in this state, or if the
4 person does not own a vehicle, proof required under AS 28.20.390.
5 * Sec. 9. AS 28.22 is amended by adding a new section to read:
6 Sec. 28.22.610. SHORT TITLE. This chapter may be cited as the
7 Alaska Mandatory Automobile Insurance Act.
8 * Sec. 10. Section 1 of this Act applies to automobile liability insur-
9 ance policies entered into or renewed on or after January 1, 1989 .
10 * Sec. 11. AS 28.20.230(b) is repealed.
11 * Sec. 12. Sections 17, 18, 19, 20, and 23 of ch. 70, SLA 1984, are
12 repealed.
13 * Sec. 13. Sections 1 - 11 of this Act take effect January 1, 1989.
14 * Sec. 14. Section 12 of this Act takes effect immediately under
15 AS 01.10.070(c).

SENATE COMMITTEE REPORT

rev'd 4/22
arm

5-03400

FURTHER

FINANCE

4/22/88

DATE TURNED INTO OFFICE

Mr. President:

JUDICIARY Committee considered CSHB 44 (FIN) am

motor vehicle liability insurance and vehicle registration; efd

and recommended

replace with SCS CSHB 44(Jud) same title
 or adopt CS new title

attached amendment(s) and

do pass

do pass

do not pass

no recommendation

individual recommendations

further referral to

letter of intent adopted

Committee attached or adopted fiscal note(s)

new updated or previous
 zero fiscal impact

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

Paul J. Jensen
John
William Sturgis

Do pass
Chairman signature and recommendation

Committee Backup attached

SENATE COMMITTEE REPORT

5-0340M

FURTHER Judiciary
Finance

DATE TURNED INTO OFFICE 4-21-88

1/15/88
Mr. President:

State Affairs Committee considered CSHB 44 (FIN) am
motor vehicle liability insurance and vehicle registration; efd

and recommended

replace with 5 CS CSHB 44 (SA) (f) same title
 or adopt CS new title

attached amendment(s) and *+ reports it back as follows*

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

letter of intent adopted _____

Committee attached or adopted fiscal note(s)

new updated or previous
 zero fiscal impact

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

Joe [Signature]

Do NOT Pass

[Signature]
Chairman signature and recommendation

Committee Backup attached

48

45

HOUSE COMMITTEE REPORT

(11)

Date referred: 3/4/87

FURTHER REFERRALS:

DATE: 3/8/88
HB 45

The Finance Committee has considered

"An Act relating to an Alaska business bidder preference; and providing for an effective date."

RECOMMENDS:

- replace with CS HB 45 (Fin) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

[Signature]
 POLURCHOT
[Signature]
 LARSON
[Signature]
 SWALEC-HAMMER
[Signature]
 BROWN
[Signature]
 FRANK

SIGNING OTHER RECOMMENDATIONS:

[Signature] ADAMS Al Adams - No Rec
[Signature] RIEGER Steve Rieger -- Effective Date Must Need Amend'ment
[Signature] GULL Steve Gull OK
[Signature] BOYER Mark Boyer - Question tying effective date to
[Signature] WALLIS Kay Wallis' proposal of Constitutional amend.
[Signature]
[Signature] DAVIS Mike Davis

[Signature]
Chairman's signature

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Department of Administration
 Title: An Act Relating To The Alaska Bidder Preference BRU: General Services & Supply
 Sponsor: Donley and Grussendorf Components: Purchasing
 Requestor: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

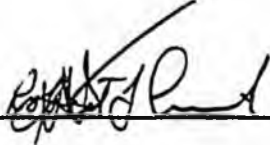
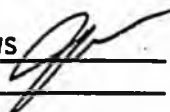
GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

(See Attached)

Prepared By: Robert J. Link, Director  Phone: 465-2250
 Division: General Services & Supply Date: 1-28-88
 Approved by Commissioner: John M. Andrews  Date: 1-28-88
 Agency: Department of Administration

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

ANALYSIS OF
HB 45 FISCAL NOTE

HB 45 has been reviewed to determine the fiscal impact in two areas. These areas are as follows:

A. Cost of conducting the procurement activity: HB 45 has negligible impact on the cost of conducting the procurement activity for the Department of Administration or any other Department's procurement offices. The current bidders preference requires a level of administrative activity that would be only minimally increased by the redefinition of the bidders preference in HB 45.

B. Increased or decreased cost of the actual items purchased: HB 45 would have some impact on the cost of the actual items purchased. The express purpose of the bill is to allow state agencies to lower prices submitted by in-state vendors by a fixed percentage when these prices are compared with out-of-state vendors during the bid evaluation process. If the lowering of the in-state bidders price allows the in-state vendors to win the bid, the state agency then awards the bid to the in-state bidder but pays the vendor at his higher original bid price. So the impact of HB 45 is such that the state would end up paying a "premium" on a per unit cost over what the state would have paid for an item without HB 45 in some cases. But the instance of this occurring is only when the lowering of evaluation prices actually impacts the outcome of the award. In some cases, the Alaska vendor would win with or without the preference.

Calculating the "increase" cost in this area is difficult at best. The response of most agencies to this "increase" would be to simply buy less of the product, because the "per unit" cost will increase. In a few cases, the increased cost would prevent the agency from awarding if costs exceed available budgeted funds. If this problem arises, the agency will have to revise their specifications or descriptions of the goods they desire to purchase.

The Department of Administration feels that the percentages allowed in HB 45, while larger than current law, are still low enough to avoid additional appropriations to each Department's budget. Only practice under HB 45 would provide us with the data to substantiate a claim that HB 45 would require additional appropriations.

During FY 87, General Services used a 5% bidders preference applied to all purchases irrespective of their size. During this period (7/1/86 to 6/30/87), 1301 contracts were issued--1081 contracts to Alaska vendors and 220 contracts to out-of-state vendors. Very few of the contracts issued

to Alaska vendors were the result of applying the 5% bidders preference. Alaska vendors for the most part won those contracts based upon their original bid price and consequently the 5% bidders preference did not materially affect the price paid for the goods. In the few cases where the Alaska Bidders Preference materially affected who actually won the award, the total price difference between what the state would have paid to out-of-state vendors if they had won versus what the state paid to in-state vendors was \$17,914.30.

In the attached analysis, we have applied the HB45 preference to the 220 contracts awarded to out-of-state vendors in FY 87. If the HB45 preferences had been in place, 48 of these 220 contracts would have gone to in-state vendors rather than out-of-state vendors. These contracts were worth \$793,500 to out-of-state vendors and would have been worth \$850,000 to in-state vendors. The state would have paid a premium of \$56,500 to move these contracts in-state.

ANALYSIS OF FY 87 BIDS FOR GOODS ISSUED BY GENERAL SERVICES
 (EXCLUDING CONSTRUCTION CONTRACTS AND PROFESSIONAL SERVICES CONTRACTS)

<u>OUT OF STATE BIDS BY DOLLAR BRACKET</u>						
<u># BIDS IN RANGE</u> <u>\$0-\$25K</u>	<u># BIDS IN RANGE</u> <u>\$25K-50K</u>	<u># BIDS IN RANGE</u> <u>\$100-500K</u>	<u># BIDS IN RANGE</u> <u>OVER 500K</u>	<u>TOTAL</u>	<u>%</u>	<u>"MATERIAL EFFECT"</u>
43	3	2	0	48	22%	48 OF 220 BIDS WOULD SHIFT FROM OUT OF STATE TO INSTATE BIDDERS.
25	10	2	0	37	17%	37 OF 220 BIDS WOULD REMAIN OUT OF STATE.
102	23	10	0	135	61%	135 OF 220 BIDS--THERE WERE <u>NO ALASKA BIDDERS</u>
<u>170</u>	<u>36</u>	<u>14</u>	<u>0</u>	<u>220</u>	<u>100%</u>	<u>TOTAL BIDS</u>

<u>DOLLAR AMOUNT OF BIDS (000) BY DOLLAR BRACKET</u>						
<u>BID RANGE</u> <u>\$0-\$25K</u>	<u>BID RANGE</u> <u>\$25K-50K</u>	<u>BID RANGE</u> <u>\$100-500K</u>	<u>BID RANGE</u> <u>OVER 500</u>	<u>TOTAL</u>	<u>%</u>	<u>"MATERIAL EFFECT"</u>
\$268.3	\$125.4	\$399.7	0	\$793.5	14%	\$793.5 WOULD SHIFT FROM OUT OF STATE TO INSTATE BIDDERS <u>THE AMT PAID WOULD BE 850.0 OR AN INCREASE OF \$56.5</u>
\$213.7	\$491.3	\$250.7	0	\$955.7	17%	\$955.7 OF 5637.5 WOULD REMAIN OUT OF STATE
\$755.4	\$919.8	\$2213.1	0	\$3888.3	69%	\$3888.3 OF 5637.5 NO ALASKA BIDDERS
<u>\$1237.4</u>	<u>\$1536.5</u>	<u>\$2863.5</u>	<u>0</u>	<u>\$5637.5</u>	<u>100%</u>	<u>TOTAL DOLLARS</u>

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 45 (Finance)

PUBLISH DATE:

REQUEST:

FISCAL NOTE

Revision Date:
Title: An Act Relating to an Alaska Business
Bidder Preference
Sponsor: Donley & Gruessendorf
Requestor: Adams

Agency Affected: DOT&PF
BRU: Engineering & Operations Stds.
Design & Construction Stds
Components:

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	2.0	0	0	0	0
CONTRACTURAL	0	3.0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	5.0	0	0	0	0

CAPITAL	0	50.0	50.0	50.0	50.0	50.0
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REVENUE	0	0	0	0	0	0
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FUNDING: (THOUSANDS OF DOLLARS)

GENERAL FUND	0	55.0	50.0	50.0	50.0	50.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	55.0	50.0	50.0	50.0	50.0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Loren L. Rasmussen
Division: Engineering & Operations Standards
Approved by Commissioner: Mark S. Hickey
Agency: Department of Transportation and Public Facilities

Phone: 465-2960

Date: 3-7-88

Date: 3-7-88

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

House Bill No. 45

An Act Relating to an Alaska Business Bidder Preference

The bill was analyzed considering only State funded projects administered directly by DOT&PF. The preference could not be applied to any Federally assisted projects.

This analysis was based on contracts awarded during the 1987 calendar year (approximately \$17,000,000). Based on 1987 bid results, approximately 10% of the contracts could be non-residents. The additional cost (i.e. fiscal impact) would be as follows.:

Contract Range	Total contracts	Assume 10% Awards	Additional Costs
1 to 100,000	495,079	49,508 @ 10%	4,951
100,000 to 500,000	3,694,612	369,461 @ 5%	18,473
500,000 to 10,000,000	13,503,237	1,350,324 @ 2%	27,006
10,000,000	0	@ 1%	<u>0</u>
			50,430

Assuming State funded CIP is in the same level as last year the impact would be approximately \$50,000. This is the figures used in the fiscal note.

There would be some additional administrative cost associated with the preference. These include updating the Alaska Administrative Code, DOT&PF procedures and the impact on individual bid openings in determining the low bidder. For appropriate public input it is assumed that two public hearings will be required. The estimated total cost is \$5,000 and would be a one time only cost. The estimated cost of each hearing is \$1,000 for travel and \$500 for advertising, printing, etc. In addition \$2,000 is estimated for review by the Attorney General's Office.

The above analysis was based on the DOT&PF's very low volume year for construction. If there was a substantial increase in future years, this would obviously impact the costs.

For example, if the awards were \$50,000,000 annually and the range of out of state bidders was from 2% to 10%, the costs could vary from \$28,000 to \$140,000, as the following analysis shows:

\$50,000,000 in Contracts
10% Out of State Contractors

Contract Range	Total Contracts	Assume 10% Award	Additional Costs
1 to 100,000~(5%)(50,000,000)	= 2,500,000	250,000 @ 10%	25,000
100,000 to 500,000~(20%)(50,000,000)	=10,000,000	1,000,000 @ 5%	50,000
500,000 to 10,000,000~(55%)(50,000,000)	=27,500,000	2,750,000 @ 2%	55,000
10,000,000 + ~ (20%)(50,000,000)	=10,000,000	1,000,000 @ 1%	<u>10,000</u>
			\$140,000

\$50,000,000 In Contracts
2 % Out of State Contractors

Contract Range	Total Contracts	Assume 10% Award	Additional Costs
1 to 100,000~(5%)(50,000,000)	= 2,500,000	50,000 @ 10%	5,000
100,000 to 500,000~(20%)(50,000,000)	=10,000,000	200,000 @ 5%	10,000
500,000 to 10,000,000~(55%)(50,000,000)	=27,000,000	555,000 @ 2%	11,000
10,000,000 + ~(20%)(50,000,000)	=10,000,000	200,000 @ 1%	<u>2,000</u>
			\$28,000

Original sponsors: Donley, Grussendorf,
Gruenberg, et al.

1 IN THE HOUSE

BY THE FINANCE COMMITTEE

2 CS FOR HOUSE BILL NO. 45 (Finance)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to an Alaska business bidder prefer-
7 ence, an Alaska products preference, and to procure-
8 ment involving state money; and providing for an
9 effective date."

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

11 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that due
12 to the state's noncontiguous geographic location and unique climate, busi-
13 ness dealings with non-Alaskan firms produce administrative expenses not
14 commonly incurred in business dealings with resident businesses.

15 (b) The purpose of the Alaska business bidder preference when the
16 state acts as a market participant is to reduce state administrative costs,
17 strengthen the state's tax and revenue base, encourage local industry,
18 reduce the social ills created by unemployment and a depressed economy, and
19 to strengthen and stabilize the state's economy.

20 * Sec. 2. AS 36.15.050(e) is amended to read:

21 (e) An interested party [, AS DEFINED IN AS 36.30.699,] may seek
22 administrative or judicial review of the award of a contract in viola-
23 tion of this section and may recover damages and seek other remedies
24 provided by law for the violation of this section.

25 * Sec. 3. AS 36.15.050(g) is amended to read:

26 (g) In this section,

27 (1) "agricultural products" includes, but is not limited
28 to, dairy products, timber and lumber harvested in the state and
29 products manufactured in the state from timber and lumber that has

1 been harvested in the state;

2 (2) "interested party" has the meaning given in AS 36.30.-
3 699;

4 (3) "state money" includes state grants and reimbursement
5 to municipalities, [AND] school districts, and other entities for
6 school or related construction, foundation funding for education,
7 municipal assistance, revenue sharing, and state funds for capital
8 projects.

9 * Sec. 4. AS 36.30.170(b) is repealed and reenacted to read:

10 (b) The procurement officer shall award a contract based on
11 solicited bids to the lowest responsible and responsive Alaska bidder
12 if the bid, after receiving a preference applicable to the bid under
13 AS 36.30.322 - 36.30.338, is not more than

14 (1) one percent higher than the lowest nonresident bidder's
15 and the contract is \$10,000,000 or more;

16 (2) two percent higher than the lowest nonresident bidder's
17 and the contract is more than \$500,000 and less than \$10,000,000;

18 (3) five percent higher than the lowest nonresident bid-
19 der's and the contract is more than \$100,000 and \$500,000 or less; or

20 (4) 10 percent higher than the lowest nonresident bidder's
21 and the contract is \$100,000 or less.

22 * Sec. 5. AS 36.30.170(c) is amended to read:

23 (c) Notwithstanding (b) of this section, if [IF] a bidder qual-
24 ifies under (e) [(b)] of this section as an Alaska bidder, is offering
25 services through an employment program as defined under AS 36.30.-
26 100(c), and is the lowest responsible and responsive bidder with a bid
27 that is not more than 10 percent higher than the lowest bid of a
28 nonresident, the procurement officer shall award the contract to that
29 bidder.

1 * Sec. 6. AS 36.30.170 is amended by adding a new subsection to read:

2 (e) In this section, "Alaska bidder" means a person who

3 (1) holds a current Alaska business license;

4 (2) does more than \$1,000,000 worth of annual business in
5 the state or performs more than 50 percent of the person's annual
6 business in the state, whichever is less;

7 (3) has maintained a permanent place of business in the
8 state staffed by the bidder or an employee of the bidder for a period
9 of six months immediately preceding the date of the bid;

10 (4) submits a bid for goods or services under the name that
11 appears on the person's current Alaska business license;

12 (5) is incorporated or qualified to do business under the
13 laws of the state, is a sole proprietorship and the proprietor is a
14 resident of the state, or is a partnership and all partners are resi-
15 dents of the state;

16 (6) if a joint venture, is composed entirely of persons who
17 qualify under (1) - (5) of this subsection; and

18 (7) is an Alaska domestic insurer, if the contract is
19 insurance-related and the procurement is based on solicited bids.

20 * Sec. 7. AS 36.30.250(b) is amended to read:

21 (b) In determining whether a proposal is advantageous to the
22 state, the procurement officer shall take into account, in accordance
23 with regulations of the commissioner, whether the offeror qualifies as
24 an Alaska bidder under AS 36.30.170(e) [AS 36.30.170(b)] or is offer-
25 ing the services of an employment program as defined in AS 36.30.-
26 100(c).

27 * Sec. 8. AS 36.30.850(e) is amended to read:

28 (e) AS 36.30.170 and 36.30.322 - 36.30.338 apply [APPLIES] to
29 all [INSURANCE] contracts involving state money, including state

1 grants and reimbursement to municipalities, school districts, and
2 other entities for school or related construction, foundation funding
3 for education, municipal assistance, revenue sharing, and state funds
4 for capital projects.

5 * Sec. 9. AS 36.30 is amended by adding a new section to read:

6 Sec. 36.30.895. COMBINATION OF PREFERENCES. In the evaluation
7 of a bid or proposal, if a contractor qualifies as an Alaska bidder
8 under AS 36.30.170(e) and is also entitled to an Alaska products
9 preference under AS 36.30.328 for a contract, the procurement officer
10 shall decrease the bid or proposal price by the total of the two
11 applicable percentages.

12 * Sec. 10. AS 36.30.900 is amended to read:

13 Sec. 36.30.900. PREFERENCE FOR ALASKA PRODUCTS. This chapter
14 does not modify AS 36.15.010 and 36.15.020 regarding preference for
15 Alaska forest products, or AS 36.15.050 and 36.15.060, regarding
16 preference for Alaska agricultural and fisheries products [, EXCEPT AS
17 PROVIDED IN AS 36.30.170(b) AND (c)].

18 * Sec. 11. AS 36.30.170(d) is repealed.

19 * Sec. 12. Sections 1 - 3 of this Act take effect January 1 of the
20 calendar year that follows the calendar year in which the voters of the
21 state ratify the state constitutional amendment contained in the version of
22 HJR 18 that is passed by the Fifteenth Alaska State Legislature.

23 * Sec. 13. Sections 4 - 11 of this Act take effect upon the ratifica-
24 tion by the voters of the state of the state constitutional amendment
25 contained in the version of HJR 18 that is passed by the Fifteenth Alaska
26 State Legislature.

file 3/9/88
rev'd 3/11/88

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 45 (Finance)
PUBLISH DATE:

REQUEST: FISCAL NOTE

Revision Date:
Title: An Act Relating to an Alaska Business
Bidder Preference
Sponsor: Donley & Gruessendorf
Requestor: Adams

Agency Affected: DOT&PF
BRU: Engineering & Operations Stds.
Design & Construction Stds
Components:

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERS_NAL SERVICES	0	0	0	0	0	0
TRAVEL	0	2.0	0	0	0	0
CONTRACTURAL	0	3.0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	5.0	0	0	0	0

CAPITAL	0	50.0	50.0	50.0	50.0	50.0
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REVENUE	0	0	0	0	0	0
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FUNDING: (THOUSANDS OF DOLLARS)

GENERAL FUND	0	55.0	50.0	50.0	50.0	50.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	55.0	50.0	50.0	50.0	50.0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Loren L. Rasmussen
Division: Engineering & Operations Standards

Phone: 465-2960
Date: 3-7-88

Approved by Commissioner: Mark S. Hickey
Agency: Department of Transportation and Public Facilities

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

RECEIVED
MAR 10 1988

House Bill No. 45

An Act Relating to an Alaska Business Bidder Preference

The bill was analyzed considering only State funded projects administered directly by DOT&PF. The preference could not be applied to any Federally assisted projects.

This analysis was based on contracts awarded during the 1987 calendar year (approximately \$17,000,000). Based on 1987 bid results, approximately 10% of the contracts could be non-residents. The additional cost (i.e. fiscal impact) would be as follows.:

Contract Range	Total contracts	Assume 10% Awards	Additional Costs
1 to 100,000	495,079	49,508 @ 10%	4,951
100,000 to 500,000	3,694,612	369,461 @ 5%	18,473
500,000 to 10,000,000	13,503,237	1,350,324 @ 2%	27,006
10,000,000	0	@ 1%	<u>0</u>
			50,430

Assuming State funded CIP is in the same level as last year the impact would be approximately \$50,000. This is the figures used in the fiscal note.

There would be some additional administrative cost associated with the preference. These include updating the Alaska Administrative Code, DOT&PF procedures and the impact on individual bid openings in determining the low bidder. For appropriate public input it is assumed that two public hearings will be required. The estimated total cost is \$5,000 and would be a one time only cost. The estimated cost of each hearing is \$1,000 for travel and \$500 for advertising, printing, etc. In addition \$2,000 is estimated for review by the Attorney General's Office.

The above analysis was based on the DOT&PF's very low volume year for construction. If there was a substantial increase in future years, this would obviously impact the costs.

For example, if the awards were \$50,000,000 annually and the range of out of state bidders was from 2% to 10%, the costs could vary from \$28,000 to \$140,000, as the following analysis shows:

\$50,000,000 in Contracts
10% Out of State Contractors

Contract Range	Total Contracts	Assume 10% Award	Additional Costs
1 to 100,000~(5%)(50,000,000)	= 2,500,000	250,000 @ 10%	25,000
100,000 to 500,000~(20%)(50,000,000)	=10,000,000	1,000,000 @ 5%	50,000
500,000 to 10,000,000~(55%)(50,000,000)	=27,500,000	2,750,000 @ 2%	55,000
10,000,000 + ~ (20%)(50,000,000)	=10,000,000	1,000,000 @ 1%	<u>10,000</u>
			\$140,000

\$50,000,000 In Contracts
2 % Out of State Contractors

Contract Range	Total Contracts	Assume 10% Award	Additional Costs
1 to 100,000~(5%)(50,000,000)	= 2,500,000	50,000 @ 10%	5,000
100,000 to 500,000~(20%)(50,000,000)	=10,000,000	200,000 @ 5%	10,000
500,000 to 10,000,000~(55%)(50,000,000)	=27,000,000	555,000 @ 2%	11,000
10,000,000 + ~ (20%)(50,000,000)	=10,000,000	200,000 @ 1%	<u>2,000</u>
			\$28,000



Dept. of Transportation & Public Facilities

POSITION PAPER

BILL NO: CS HB 45 (Finance)

TITLE: An Act Relating to an Alaska Business
Bidder

Mark S. Hickey
APPROVED: Mark S. Hickey
Commissioner
DATE: March 7, 1988

House Bill 45 amends the procurement bill (which became effective January 1, 1988) to provide for a preference for an Alaska business in award on contracts. The preference is 1) 1% for contracts over \$10,000,000 2) 2% for contracts over \$500,000 but less than \$10,000,000 3) 5% for contracts over \$100,000 but less than \$500,000 4) 10% for contracts under \$100,000.

It appears that the Alaska bidder qualifications as written could be discriminatory toward any newly created Alaska firms desiring to bid on State projects. A new firm would first have to have a permanent place of business in the State for at least six months preceding the date of the bid. Then the bidder would have to have done more than \$1,000,000 worth of annual business or perform more than 50 percent of his or her annual business in Alaska, whichever is less. Taken literally, a new firm would have to be in business in Alaska for a period of at least one year before qualifying as an Alaska bidder.

The proposed revisions in HB 45 can be awkward to put into practice and can lead to delays in determining the low bidder.

We would propose to amend CS HB 45 (Finance), Sec. 3, AS 36.30.170(b) to read:

(b) The procurement officer shall award a contract based on solicited bids to the lowest responsive and responsible bidder after an Alaska bidder preference and an Alaska products preference as described in AS 36.30.222 -- 36.30.388 have been applied. The Alaska bidder preference shall be as follows:

1. one percent for the Alaska bidder's if the contract is \$10,000,000 or more;
2. two percent for the Alaska bidder's if the contract is more than \$500,000 and less than \$10,000,000;
3. five percent for the Alaska bidder's if the contract is more than \$100,000 and \$500,000 or less; or
4. ten percent for the Alaska bidder's if the contract is \$100,000 or less.

With this proposed amendment, at a bid opening, the apparent low bidder could be determined and announced easily and quickly. The language is compatible with the present procurement code.

We would prefer an Alaska bidder preference process that was included in the bid specifications and not be left to the bidders to determine. We would be willing to work with the Attorney General's office to propose some specific language.

_____ NEW LANGUAGE

[] DELETED LANGUAGE

Original sponsors: Donley, Grussendorf,
Gruenberg, et al.

1 IN THE HOUSE

BY THE FINANCE COMMITTEE

2 CS FOR HOUSE BILL NO. 45 (Finance)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to an Alaska business bidder prefer-
7 ence, an Alaska products preference, and to procure-
8 ment involving state money; and providing for an
9 effective date."

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

11 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that due
12 to the state's noncontiguous geographic location and unique climate, busi-
13 ness dealings with non-Alaskan firms produce administrative expenses not
14 commonly incurred in business dealings with resident businesses.

15 (b) The purpose of the Alaska business bidder preference when the
16 state acts as a market participant is to reduce state administrative costs,
17 strengthen the state's tax and revenue base, encourage local industry,
18 reduce unemployment and the social ills it creates, and to strengthen and
19 stabilize the state's economy.

20 * Sec. 2. AS 36.15.050(e) is amended to read:

21 (e) An interested party [, AS DEFINED IN AS 36.30.699,] may seek
22 administrative or judicial review of the award of a contract in viola-
23 tion of this section and may recover damages and seek other remedies
24 provided by law for the violation of this section.

25 * Sec. 3. AS 36.15.050(g) is amended to read:

26 (g) In this section,

1 been harvested in the state;

2 (2) "interested party" has the meaning given in AS 36.30.-
3 699;

4 (3) "state money" includes state grants and reimbursement
5 to municipalities, [AND] school districts, and other entities for
6 school or related construction, foundation funding for education,
7 municipal assistance, revenue sharing, and state funds for capital
8 projects.

9 * Sec. ^{LSI}4. AS 36.30.170(b) is repealed and reenacted to read:

10 (b) The procurement officer shall award a contract based on
11 solicited bids to the lowest responsible and responsive Alaska bidder
12 if the bid, after receiving a preference applicable to the bid under
13 AS 36.30.322 - 36.30.338, is not more than

14 (1) ^[five] one percent higher than the lowest nonresident bidder's
15 and the contract is ^[\$500,000] \$10,000,000 or more;

16 (2) ^[ten] two percent higher than the lowest nonresident bidder's
17 and the contract is more than ^[\$100,000] \$500,000 and less than ^[\$500,000] \$10,000,000;

18 (3) ^[15] five percent higher than the lowest nonresident bid-
19 der's and the contract is more than ^[\$25,000] \$100,000 and ^[\$100,000] \$500,000 or less; or

20 (4) ^[20] 10 percent higher than the lowest nonresident bidder's
21 and the contract is ^[\$25,000] \$100,000 or less.

22 * Sec. ^[4]5. AS 36.30.170(c) is amended to read:

23 (c) Notwithstanding (b) of this section, if [IF] a bidder qual-
24 ifies under ^[d](e) [(b)] of this section as an Alaska bidder, is offering
25 services through an employment program as defined under AS 36.30.-
26 100(c), and is the lowest responsible and responsive bidder with a bid

[5]

* Sec. 6. AS 36.30.170 is amended by adding a new subsection to read:

(e) In this section, "Alaska bidder" means a person who

(1) holds a current Alaska business license;

(2) does more than \$1,000,000 worth of annual business in the state or performs more than 50 percent of the person's annual business in the state, whichever is less;

(3) has maintained a permanent place of business in the state staffed by the bidder or an employee of the bidder for a period of six months immediately preceding the date of the bid;

(4) submits a bid for goods or services under the name that appears on the person's current Alaska business license;

(5) is incorporated or qualified to do business under the laws of the state, is a sole proprietorship and the proprietor is a resident of the state, or is a partnership and all partners are residents of the state;

(6) if a joint venture, is composed entirely of persons who qualify under (1) - (5) of this subsection; and

(7) is an Alaska domestic insurer, if the contract is insurance-related and the procurement is based on solicited bids.

* Sec. 7. AS 36.30.250(b) is amended to read:

(b) In determining whether a proposal is advantageous to the state, the procurement officer shall take into account, in accordance with regulations of the commissioner, whether the offeror qualifies as an Alaska bidder under AS 36.30.170(e) [AS 36.30.170(b)] or is offering the services of an employment program as defined in AS 36.30.100(c).

[sec. 36.30.336. APPLICATION. Notwithstanding other provisions of thi

1 grants and reimbursement to municipalities, school districts, and
2 other entities for school or related construction, foundation funding
3 for education, municipal assistance, revenue sharing, and state funds
4 for capital projects.

5 * Sec. 9. AS 36.30 is amended by adding a new section to read:

6 Sec. 36.30.895. COMBINATION OF PREFERENCES. In the evaluation
7 of a bid or proposal, if a contractor qualifies as an Alaska bidder
8 under AS 36.30.170(e) and is also entitled to an Alaska products
9 preference under AS 36.30.328 for a contract, the procurement officer
10 shall decrease the bid or proposal price by the total of the two
11 applicable percentages.

12 * Sec. 10. AS 36.30.900 is amended to read:

13 Sec. 36.30.900. PREFERENCE FOR ALASKA PRODUCTS. This chapter
14 does not modify AS 36.15.010 and 36.15.020 regarding preference for
15 Alaska forest products, or AS 36.15.050 and 36.15.060, regarding
16 preference for Alaska agricultural and fisheries products [, EXCEPT AS
17 PROVIDED IN AS 36.30.170(b) AND (c)].

18 * Sec. 11. AS 36.30.170(d) is repealed.

19 * Sec. 12. Sections 1 - 3, and 12 - 13 of this Act take effect July 1,
20 1988.

21 * Sec. 13. Sections 4 - 11 of this Act take effect immediately under
22 AS 01.10.070(c).

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

REQUEST: _____
 Revision Date: _____
 Title: An Act Relating to an Alaska Business Bidder Preference
 Sponsor: Donley and Grussendorf
 Requestor: _____

Bill Version: House Bill No. 45
 Publish Date: 1/19/87

Agency Affected: DOT&PF
 BRU: Engineering and Operations Standards Design and Construction
 Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	2.0	0	0	0	0
CONTRACTUAL	0	3.0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	5.0	0	0	0	0

CAPITAL	0	300.0	300.0	300.0	300.0	300.0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	305.0	300.0	300.0	300.0	300.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Loren L. Rasmussen 2/12/87

Prepared by: Loren L. Rasmussen Phone: 465-2960
 Division: Engineering & Operations Standards Date: 2/5/87

Approved by Commissioner: [Signature] Date: 2/9/87
 Agency: Department of Transportation and Public Facilities

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)
 Senate Secretary

House Bill No. 45

An Act Relating to an Alaska Business Bidder Preference

The bill was analyzed considering only State funded projects. The preference could not be applied to any Federally assisted projects.

This analysis was based on contracts awarded during the 1986 calendar year (Approximately \$64,000,000). Based on FY 86 bid results, approximately 10% of the contracts will be non-residents. The additional cost (i.e. fiscal impact) would be as follows:

<u>Contract Value</u>	<u>10% Awards</u>	<u>Additional Cost</u>
< 25,000	4,473 @ 20%	900
25,000 to 100,000	87,941 @ 15%	13,200
100,000 to 500,000	564,077 @ 10%	56,400
>500,000	5,793,574 @ 5%	<u>289,700</u>
		360,200

Assuming a State funded program in the range of 60 million the impact would be approximately 360,000±.

There would be some additional administrative cost associated with the preference. These include updating the Alaska Administrative Code, DOT&PF procedures and the impact on individual bid openings in determining the low bidder. For appropriate public input it is assumed that two public hearings will be required. The estimated total cost is \$5,000 and would be a one time only cost. The estimated cost of each hearing is \$1,000 for travel and \$500 for advertising, printing, etc. In addition \$2,000 is estimated for review by the Attorney General's Office.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 45
Publish Date: _____

REQUEST _____

Revision Date: _____
Title: An Act Relating to the Alaska Bidder Preference
Sponsor: Donley and Grussendorf
Requestor: _____

Agency Affected: Department of Administration
BRU: Division of General Services & Supply
Components: Purchasing

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
OPERATING						
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

We feel there would be a fiscal impact on departments purchasing goods and services but have no way to calculate it.

Prepared By: Bob Link *Bob Link* Phone: 465-2250
Division: General Services & Supply Date: February 4, 1987
Approved by Commissioner: Garrey Peska *GP* Date: 2/10/87
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

No. 1

REQUEST: _____

Bill Version : CSHB 45(L&C)
Publish Date : HOUSE 3/4/87

Revision Date: _____

Agency Affected : DOT&PF

Title : An Act Relating to an Alaska Business Bidder Preference

BRU : Engineering and Operations Standards Design and Construction

Sponsor : Donley and Grussendorf

Components : _____

Requestor : _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	2.0	0	0	0	0
CONTRACTUAL	0	3.0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	5.0	0	0	0	0

CAPITAL	0	300.0	300.0	300.0	300.0	300.0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	305.0	300.0	300.0	300.0	300.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Loren L. Rasmussen 2/12/87

Prepared by : Loren L. Rasmussen
Division : Engineering & Operations Standards

Phone : 465-2960
Date : 2/5/87

Approved by Commissioner : *R.D. Alvarado*
Agency : Department of Transportation and Public Facilities

Date : 2/12/87

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management and Budget
 - Impacted Agency(ies)
 - Senate Secretary

An Act Relating to an Alaska Business Bidder Preference

The bill was analyzed considering only State funded projects. The preference could not be applied to any Federally assisted projects.

This analysis was based on contracts awarded during the 1986 calendar year (Approximately \$64,000,000). Based on FY 86 bid results, approximately 10% of the contracts will be non-residents. The additional cost (i.e. fiscal impact) would be as follows:

<u>Contract Value</u>	<u>10% Awards</u>	<u>Additional Cost</u>
< 25,000	4,473 @ 20%	900
25,000 to 100,000	87,941 @ 15%	13,200
100,000 to 500,000	564,077 @ 10%	56,400
>500,000	5,793,574 @ 5%	<u>289,700</u>
		<u>360,200</u>

Assuming a State funded program in the range of 60 million the impact would be approximately 300,000±.

There would be some additional administrative cost associated with the preference. These include updating the Alaska Administrative Code, DOTSPF procedures and the impact on individual bid openings in determining the low bidder. For appropriate public input it is assumed that two public hearings will be required. The estimated total cost is \$5,000 and would be a one time only cost. The estimated cost of each hearing is \$1,000 for travel and \$500 for advertising, printing, etc. In addition \$2,000 is estimated for review by the Attorney General's Office.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

No. 1

REQUEST: _____

Bill Version: CSHB 45 (L&C)
Publish Date: HOUSE 3/4/87

Revision Date: _____

Agency Affected: DOT&PF

Title: An Act Relating to an Alaska Business Bidder Preference

BRU: Engineering and Operations Standards Design and Construction

Sponsor: Donley and Grussendorf

Components: _____

Requestor: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	2.0	0	0	0	0
CONTRACTUAL	0	3.0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	5.0	0	0	0	0

CAPITAL	0	300.0	300.0	300.0	300.0	300.0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	305.0	300.0	300.0	300.0	300.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Loren L. Rasmussen
Division: Engineering & Operations Standards

Phone: 465-2960
Date: 2/5/87

Approved by Commissioner: [Signature]
Agency: Department of Transportation and Public Facilities

Date: 2/10/87

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

An Act Relating to an Alaska Business Bidder Preference

The bill was analyzed considering only State funded projects. The preference could not be applied to any Federally assisted projects.

This analysis was based on contracts awarded during the 1986 calendar year (Approximately \$64,000,000). Based on FY 86 bid results, approximately 10% of the contracts will be non-residents. The additional cost (i.e. fiscal impact) would be as follows:

<u>Contract Value</u>	<u>10% Awards</u>	<u>Additional Cost</u>
< 25,000	4,473 @ 20%	900
25,000 to 100,000	87,941 @ 15%	13,200
100,000 to 500,000	564,077 @ 10%	56,400
>500,000	5,793,574 @ 5%	289,700
		<u>360,200</u>

Assuming a State funded program in the range of 60 million the impact would be approximately 300,000±.

There would be some additional administrative cost associated with the preference. These include updating the Alaska Administrative Code, DOTSPF procedures and the impact on individual bid openings in determining the low bidder. For appropriate public input it is assumed that two public hearings will be required. The estimated total cost is \$5,000 and would be a one time only cost. The estimated cost of each hearing is \$1,000 for travel and \$500 for advertising, printing, etc. In addition \$2,000 is estimated for review by the Attorney General's Office.

Pouch V
Juneau, Alaska 99811

Alaska State Legislature
House of Representatives

Phone:
(907) 465-3892




Labor and Commerce Committee

February 4, 1987

M E M O R A N D U M

To: Grace Berg Schaible, Attorney General
State of Alaska - Department of Law

From: Representative Dave Donley, Chair 
House Labor and Commerce Committee

Re: Request for Attorney General opinion

I am writing to request an Attorney General's opinion on HB 45, relating to an Alaska business bidder preference.

Specifically, I'd like to know if there are any Constitutional concerns with HB 45 and, if so, whether there is anything we can do to amend the bill in Committee to better enable it to withstand a Constitutional challenge.

We will be hearing HB 45 on Tuesday, February 10, so I would appreciate an opinion as soon as possible.

Please call me or my House Labor and Commerce Committee aide, Ginger Baim at 3892, if you have any questions or need additional information.

And welcome.

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE
DISTRICT ELEVEN : SPENARD

P.O. BOX V, JUNEAU 99811
(907) 465-3892



CHAIRMAN
LABOR AND COMMERCE
COMMITTEE

MEMBER
STATE AFFAIRS COMMITTEE
HEALTH, EDUCATIONAL
AND SOCIAL SERVICES COMMITTEE
INTERNATIONAL TRADE
SUB-COMMITTEE

February 5, 1987

M E M O R A N D U M

To: All Members, Alaska State House of Representatives
From: Representative Dave Donley
Re: HB 45 - Alaska Bidder's Preference

HB 45, relating to an Alaska Bidder's Preference, will be heard Tuesday, February 10, at 1:30 p.m. before the House Labor and Commerce Committee.

HB 45, raises the existing bidder's preference given to Alaska companies. Current law allows contracts to be awarded to Alaska firms if their bid was not more than 5 percent higher than the lowest bid by a nonresident company.

HB 45 increases the preference through a sliding scale to 10 percent on bids over \$100,000 and less than \$500,000, 15 percent on contracts more than \$25,000 and less than \$100,000 and 20 percent on bids of \$25,000 or less.

The purpose of the bidder's preference is to reduce state administrative costs, strengthen our tax and revenue base, encourage local industry, and reduce our staggering unemployment rate and the social ills it creates.

HB 45 has been carefully drafted to avoid possible Constitutional problems. First, the courts have recognized that when a state operates as a market participant they are free to exercise their own independent discretion as to the parties with whom they deal and the conditions they set.

Second, the state has a legitimate and compelling interest in assuring that local businesses have an equitable chance to compete for public contracts. The findings section in HB 45 carefully identifies the public purpose at issue, then proposes a solution that is narrowly tailored to correct inequities in our competitive bidding process.

Finally, Alaskans have the right to get the best deal possible for their public money. There are extra administrative costs involved when the State contracts with nonresident bidders. Our current contracting procedures fail to recognize those extra costs, thus placing Alaska businesses at an unfair disadvantage.

Dealing with nonresident firms is more expensive for Alaska because there is more likely to be costly change orders and problems with long distance communication. In addition, the State has little recourse to collect on improper or incomplete contracts when we are dealing with nonresident businesses.

We've had some real problems in the past with "fly-by-night" contractors and HB 45 should help avoid those problems and assure that Alaska gets full benefit from our public dollars.

HB 45 will help boost our economy and protect the public from the extra costs involved in doing business with nonresident firms. I urge you to support this measure.

Please call me or my aide, Ginger Baim, at 3892 if you have any questions or need additional information.

1

A M E N D M E N T

Offered in the House

By Donley

TO: CSHB 45()

Page 4, line 19:

Delete ", 12, and 13"

Page 4, lines 19 and 20:

Delete "July 1, 1988"

Insert "January 1 of the calendar year that follows the calendar year in which the voters of the state ratify the state constitutional amendment contained in the version of HJR 18 that is passed by the Fifteenth Alaska State Legislature."

Page 4, line 21:

Delete "4 and 5 - 11"

Insert "4 - 11"

Page 4, lines 21 and 22:

Delete "immediately under AS 01.10.070(c)"

Insert "upon the ratification by the voters of the state of the state constitutional amendment contained in the version of HJR 18 that is passed by the Fifteenth Alaska State Legislature"

Adopted 3/8/88

5-0307B1
Bannister

A M E N D M E N T #2

Offered in the HOUSE

By Donley

TO: CSHB 45

Page 1, line 18:

Delete "unemployment and the social ills it creates"

Insert "the social ills created by unemployment and a depressed economy"



Dept. of Transportation & Public Facilities

POSITION PAPER

BILL NO: CS HB 45 (Finance)

TITLE: An Act Relating to an Alaska Business Bidder

W. H. Hickey
APPROVED: Mark S. Hickey

Commissioner

DATE: March 7, 1988

House Bill 45 amends the procurement bill (which became effective January 1, 1988) to provide for a preference for an Alaska business in award on contracts. The preference is 1) 1% for contracts over \$10,000,000 2) 2% for contracts over \$500,000 but less than \$10,000,000 3) 5% for contracts over \$100,000 but less than \$500,000 4) 10% for contracts under \$100,000.

It appears that the Alaska bidder qualifications as written could be discriminatory toward any newly created Alaska firms desiring to bid on State projects. A new firm would first have to have a permanent place of business in the State for at least six months preceding the date of the bid. Then the bidder would have to have done more than \$1,000,000 worth of annual business or perform more than 50 percent of his or her annual business in Alaska, whichever is less. Taken literally, a new firm would have to be in business in Alaska for a period of at least one year before qualifying as an Alaska bidder.

The proposed revisions in HB 45 can be awkward to put into practice and can lead to delays in determining the low bidder.

We would propose to amend CS HB 45 (Finance), Sec. 3, AS 36.30.170(b) to read:

(b) The procurement officer shall award a contract based on solicited bids to the lowest responsive and responsible bidder after an Alaska bidder preference and an Alaska products preference as described in AS 36.30.222 -- 36.30.388 have been applied. The Alaska bidder preference shall be as follows:

1. one percent for the Alaska bidder's if the contract is \$10,000,000 or more;
2. two percent for the Alaska bidder's if the contract is more than \$500,000 and less than \$10,000,000;
3. five percent for the Alaska bidder's if the contract is more than \$100,000 and \$500,000 or less; or
4. ten percent for the Alaska bidder's if the contract is \$100,000 or less.

With this proposed amendment, at a bid opening, the apparent low bidder could be determined and announced easily and quickly. The language is compatible with the present procurement code.

We would prefer an Alaska bidder preference process that was included in the bid specifications and not be left to the bidders to determine. We would be willing to work with the Attorney General's office to propose some specific language.

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE

DISTRICT ELEVEN • SPENARD

NORTHWOOD • SPENARD • THOMPSON • TURNAGAIN • UPPER MIDTOWN • WINDEMERE

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CHAIRMAN
LABOR AND COMMERCE
COMMITTEE

MEMBER
STATE AFFAIRS COMMITTEE
HEALTH, EDUCATIONAL
AND SOCIAL SERVICES COMMITTEE

March 7, 1988

SECTIONAL ANALYSIS - CS HB 45 (FINANCE)

Prepared by Rep. Dave Donley

Prime Sponsor - HB 45

Section 1.

Section 1 outlines the findings and purposes of the legislature in adopting an Alaska bidders' preference and states that (a) the Legislature finds that Alaska's position results in additional costs when dealing with non-resident firms and that (b) the purpose of the bidders' preference established under this Act is to reduce state administrative costs, strengthen the state's tax and revenue base, encourage local industry, reduce social ills created by unemployment, and to strengthen and stabilize the state's economy.

Section 2.

Section 2 amends AS 36.15.050(e) to allow interested parties who seek an administrative or judicial review of an award under this Act to be entitled to damages and other remedies provided by law.

Section 3.

Section 3 amends AS 36.15.050 (g) to include a new paragraph (2) defining "interested party", and to amend paragraph (3) to clarify the definition of "state money" to include state grants and state money to other entities for school construction, foundation funding for education, municipal assistance, revenue sharing, and state funds for capital projects.

Section 4.

Section 4 repeals and reenacts AS 36.30.170(b) to establish a sliding scale for a bidders' preference that provides a preference of one percent for bids over \$10 million dollars, two percent for bids over \$500,000 but under \$10 million, five percent for bids over \$100,000 but under \$500,000 and ten percent for bids below \$100,000.

ANCHORAGE OFFICE

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Section 5.

Section 5 amends AS 36.30.170(c) to provide a ten percent preference for an Alaskan bidder offering services through a sheltered employment program.

Section 6.

Section 6 amends AS 36.30.170 to add a new subsection (e) to define an Alaska bidder as a person who (1) holds a current Alaska business license, (2) does more than \$1 million dollars worth of annual business in the state or performs more than 50 percent of the person's annual business in the state, whichever is less, (3) has maintained a permanent staffed place of business in the state for a period of six months or more, (4) submits a bid under the name that appears on their Alaska business license (5) is incorporated or qualified to do business under the laws of the state, is a sole proprietorship and the proprietor is a resident, or is a partnership and all partners are residents of the state, (6) if a joint venture, is composed entirely of persons who would qualify individually as an Alaska bidder, (7) is a Alaska domestic insurer and the contract is insurance-related and procurement is based on solicited bids.

Section 7.

Section 7 amends AS 36.30.250(b) to reflect the new definition of Alaska bidder under AS 36.30.170(e).

Section 8.

Section 8 amends AS 36.30.850(e) to require that AS 36.30.322-36.30.338 (statutes governing preferences for Alaska products and goods manufactured in Alaska) applies to all contracts involving state money, state grants and reimbursement to municipalities, school districts, and other entities for school or related construction, foundation funding for education, municipal assistance, revenue sharing, and state funds for capital projects.

Section 9.

Section 9 amends AS 36.30 to address a combination of preferences when a bidder may qualify for both an Alaska bidders' preference and an Alaska products preference. In this case, the procurement officer shall decrease the bid or proposal price by the total of the two applicable percentages.

Section 10.

Section 10 amends AS 36.30.900, governing preferences for Alaska products, to amend language to make this section consistent with the changes proposed in this Act.

Section 11.

Section 11 repeals AS 36.30.170(d) - relating to procurement of insurance-related contracts - that is inconsistent with language adopted in this Act under AS 36.30.170(e)(7).

Section 12.

Provides that sections 1-3, 12, and 13 of the Act take effect on July 1, 1988.

Section 13.

Provides that sections 4 and sections 5-11 have an immediate effective date.

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE

DISTRICT ELEVEN • SPENARD

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P.O. BOX V, JUNEAU 99811

(907) 465-3892



CHAIRMAN

LABOR AND COMMERCE
COMMITTEE

MEMBER

STATE AFFAIRS COMMITTEE
HEALTH, EDUCATIONAL
AND SOCIAL SERVICES COMMITTEE

March 7, 1988

M E M O R A N D U M:

To: Representative Al Adams, Chair
House Finance Committee

From: Representative Dave Donley

Re: HB 45 - Alaska Bidders' preference

A proposed House Finance Committee Substitute for HB 45, establishing an Alaska bidders' preference, is before the Committee today. I support the proposed CS and ask the Committee to adopt this measure today with the attached amendments.

Amendment #1 changes the effective date under sections 12 and 13 to provide that the measure does not become effective until the voters ratify the ballot proposition presented under HJR 18. HJR 18, currently pending before the House Finance Committee, would place a ballot proposition before the voters as to whether Alaska's constitution should be amended to authorize the state to grant certain preferences to its own citizens.

You are each familiar with the issues presented in HJR 18 as I am sure you are aware of the fact that Alaska's local hire law was turned down last week on the basis of equal protection clause in Alaska's constitution. Over 40 other states have some kind of resident bidder preference on their books but because few have ever gone to court, there is insufficient case law to judge the chances of HB 45 meeting constitutional muster under the federal constitution.

However, in a case before the Alaska Supreme Court, two justices expressed the opinion that a bidders' preference law would have a hard time meeting a constitutional challenge under the states constitution. As a result, it makes little sense to adopt HB 45 until the voters have had the opportunity to express their support for amending our state constitution so that our citizens can enjoy the protection of resident preference laws consistent with the standards established under the United State constitution.

Amendment #2 proposes changes to the intent and purpose section of the bill to make the language consistent with recent court rulings.

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Dept. of Transportation & Public Facilities

Position Paper

^{CS}
BILL NO: House Bill No. 45 (LTC)
TITLE: An Act Relating to an Alaska Business Bidder Preference

APPROVED: Rocky Gutierrez
Commissioner
DATE: February 5, 1987

House Bill 45 amends the procurement bill (which becomes effective July 1, 1987) to provide for a preference for an Alaska business in award of contracts. The preference is 1) 5% for contracts over \$500,000 2) 10% for contracts over \$100,000 but less than \$500,000 3) 15% for contracts over \$25,000 but less than \$100,000 4) 20% for contracts under \$25,000.

It appears that the Alaska bidder qualifications as written could be discriminatory toward any newly created Alaska firms desiring to bid on State projects. A new firm would first have to have a permanent place of business in the State for at least six months preceding the date of the bid. Then the bidder would have to have done more than \$1,000,000 worth of annual business or perform more than 20 percent of the his or her annual business in Alaska, whichever is less. Taken literally, a new firm would have to be in business in Alaska for a period of at least one year before qualifying as an Alaska bidder.

POSITION PAPER

CS HB 45 (L+G)

The bill provides that an Alaska business will be awarded a contract if they are a responsive and responsible bidder and if their bid is not more than: 1) 5% higher than the lowest nonresident bidder's and the contract is \$50⁰,000 or more; 2) 10% higher than the lowest nonresident bidder's and the contract is more than \$100,000 and less than \$500,000; 3) 15% higher than the lowest nonresident bidder's and the contract is more than \$25,000 and less than \$100,000; 4) 20% higher than the lowest nonresident bidder's and the contract is \$25,000 or less.

The impact of this provision of the bill may be reduced competition and there may be some increase in prices since out-of-state bidders may be unwilling to compete against in-state preferences of up to 20%. Another impact may be that Alaska businesses will face a corresponding preference when they attempt to sell to some other states since 19 states have a reciprocity law which requires that they impose a like penalty on bidders who reside in a state that has an in-state bidder's preference.

The bill also redefines what is required to be considered an "Alaskan bidder." These requirements state, in part, that an Alaskan bidder is one who ". . . 2) does more than \$1,000,000 worth of annual business in the state or performs more than 20% of the person's annual business in the state, whichever is less"

This requirement seems to be designed to discourage vendor "carpetbaggers" associated with businesses who primarily operate outside of Alaska from coming to the state and opening a "Post Office Box Number" business, merely for the purpose of qualifying for the bidder preference. The bill seems to require that a firm must do \$1,000,000 a year in business within Alaska or that the firm's Alaskan outlet does, at least, 20% of the firm's total business.


The impact of this provision may be that large companies, whose primary operation is outside of the state, may be discouraged from opening an Alaskan outlet since they will not qualify for the Alaska bidder's preference until their sales in Alaska reach \$1,000,000 or until the Alaskan outlet is producing 20% of the firm's total sales.



Robert J. Link, Director
Division of General Services & Supply

2/6/86

Date



Commissioner Garrey Peska
Department of Administration

2/10/87

Date

February 26, 1987

x P.O. Box K

465-3603

The Honorable Dave Donley
Alaska House of Representatives
P.O. Box V
Juneau, Alaska 99811

Re: HB 45, Alaska Bidder's
Preference

Dear Representative Donley:

On February 4, 1987, you sent a memorandum to the Attorney General requesting an opinion as to whether there were "any constitutional concerns with HB 45 and, if so, whether there is anything we can do to amend the bill in committee to better enable it to withstand a constitutional challenge." On February 10, 1987, I appeared before the House Labor and Commerce Committee to discuss in detail the provisions of HB 45 and to advise the committee on potential constitutional problems.

We discussed the concept of the state as a market participant versus a market regulator and considered three of the constitutional provisions which have in the past been used to challenge various types of laws which tended to economically favor residents. ^{1/} On February 14, 1987, you requested further clarification regarding the circumstances under which a state might be considered a market regulator and a market participant. You also asked that I elaborate on some of the discussion that we had during the committee hearing on February 10, 1986.

^{1/} Those constitutional provisions include the privileges and immunities clause of section 2, article IV, of the United States Constitution, the commerce clause under article I, section 8 of the United States Constitution, and the equal protection provisions of the 14th Amendment of the United States Constitution and article I, section 1, of the Alaska Constitution.

The Alaska Supreme Court has recently described in general how it distinguishes between a market participant and a market regulator. In Robison v. Francis, 713 P.2d 259, 264 (Alaska 1986), at note 4, the court stated:

When the state acts as an employer, a lender, a landlord, a buyer, a seller, or an owner of natural resources, it may be regarded as a market participant and for some purposes will be treated differently than when it acts solely as a sovereign body regulating the conduct of others within its jurisdiction.

This general statement by the court is consistent with the example which I gave you at the hearing regarding the difference between a market participant and a market regulator. As you may recall, if the state were simply to go out into the marketplace in order to purchase a number of motor vehicles for state use, it would certainly be considered a market participant. Likewise, when the state contracts for goods and services it also will normally be considered a market participant. 2/ The simple fact that the state is a market participant in a particular situation is not likely to be determinative of whether the Alaska bidder's preference law is constitutional. Being a market participant rather than a market regulator apparently had greater importance when defending commerce clause challenges to a statute. See, e.g., Reeves, Inc. v. State, et. al., 100 S.Ct. 2271 (1980); Hughes v. Alexandria Scrap Corp. 426 U.S. 794 (1976).

2/ Your memorandum of February 14, 1987, indicated that I thought the courts would consider the total volume of business in Alaska in relationship to the state's share thereof in determining whether or not it was a regulator or a participant in the marketplace. Indeed, as the state percentage of the total volume of business in a particular market increases, the natural conclusion is that it also has the ability (whether it does so or not) to regulate that market. In addition, I described the situation set up by a bidder preference statute where the state participates in a market which it has already regulated. It seems that a state either participates or regulates a market and so far, at least, the courts have not distinguished the situation where a state both regulates a market and then participates therein on the terms it has created. However, since the market

(footnote continued)

Other factors have taken on much more importance, especially since challenges under the commerce clause have in most cases been replaced by or supplemented with challenges under other constitutional provisions. See footnote 3.

As indicated earlier, even if legislation has been tailored to make it consistent with the conclusion that the State of Alaska is simply a market participant therein, this will not necessarily insure that the legislation will withstand challenge under the privileges and immunities or the equal protection provisions of the United States and Alaska Constitutions. 3/ There is only more deference given to the state in that situation. As the Alaska Supreme Court stated in Robison:

However, more leeway is granted the state in its perception of "local evils and prescribing appropriate cures" when it is acting in a proprietary capacity, as where it "is merely setting conditions on the expenditures of funds it controls." Camden, 465 U.S. at 223, 104 S.Ct. at 1030, 79 L.Ed.2d at 261 (citations omitted).

This analytical framework, except for the deference given to the state as a market participant, is quite similar to what has come to be called the level of intermediate scrutiny under the federal equal protection clause. Classifications may be made only for "important" purposes, and the means used to accomplish them must be "fairly and substantially related" to the achievement of those purposes. State of Alaska v. Ostrosky, 667 P.2d 1184, 1192 (Alaska 1983) (citations omitted) (footnote omitted).

(footnote continued)

participant/market regulator distinction has not been a decisive factor that distinction may not have any practical effect.

3/ For the most part, successful challenges have been on the basis of the privileges and immunities and equal protection provisions. We fully expect that a challenge to the Alaska bidder's preference law would be based on either or both of those two provisions, depending primarily on the situation which gives rise to the challenge.

The amount of deference due a state when acting as a market participant is not clear from federal cases. The state suggests, and we believe, that a variable standard must be employed. Thus, where the discrimination is far-reaching and exclusive in nature, and extends to the fringes of the state's proprietary interests, the state is entitled to little deference. On the other hand, where the discrimination is narrow in scope and involves a direct relationship between the state and affected individuals, greater deference is called for.



Robison, 713 P.2d at 264 (emphasis added).

The Alaska Supreme Court has thus indicated with at least some certainty the parameters by which it will determine the amount of leeway it will give the state in favoring its residents (whether they be persons or businesses) in the marketplace. The legislation must be tailored to fit within these parameters.

Beyond that, I must again point out to you what was said by Justice Rabinowitz, with whom Chief Justice Burke concurred in Irby-Northface v. Commonwealth Electric Company, 664 P.2d 557, 562 (Alaska 1983)(footnote omitted):

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) 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 contracts," as noted by the majority. Under Alaska's equal protection clause, such a purpose does not justify a statute which

The Honorable Dave Donley
HB 45, Alaska Bidder's Preference

February 26, 1987
Page 5

discriminates against nonresidents. Lynden,
532 P.2d at 711.

We view this expression as a rather clear indication of the current thinking of the court and therefore must make it clear that the likelihood of any Alaska bidder's preference statute to withstand judicial scrutiny is at best, not good. }

I have discovered cases which have upheld bidder preference statutes in several other states. Although my research is far from exhaustive, I have enclosed copies of at least those cases in the hopes they may be of some help. Unfortunately, in light of Irby, Supra, I have my doubts about their impact on an Alaska challenge.

If you wish me to discuss this further with you or the committee, please feel free to contact my office at your convenience. In addition, if you have any further questions, please contact me at any time.

Sincerely yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By:



Gary I. Amendola
Assistant Attorney General

GIA:jh

cc: Jan DeYoung

GARY CONCRETE PRODUCTS, INC. v. RILEY S. C. 335

Cite as 331 S.E.2d 335 (S.C. 1985)

GARY CONCRETE PRODUCTS, INC., Appellant.

v.

Richard W. RILEY, Governor of South Carolina; Grady L. Patterson, Jr., Treasurer of South Carolina; Earle E. Morris, Jr., Comptroller General of South Carolina; Rembert C. Dennis, Chairman, Senate Finance Committee; and Tom Mangum, Chairman, House Ways and Means Committee, constituting the State Budget and Control Board, Respondents.

No. 22330.

Supreme Court of South Carolina.

Heard April 8, 1985.

Decided May 20, 1985.

Vendor brought action for declaratory judgment regarding the constitutionality of statute under procurement code. The Common Pleas Court of Richland County, Walter T. Cox, III, J., entered its order that said statute was not unconstitutional, and vendor appealed. The Supreme Court, Harwell, J., held that: (1) statute which gave preference to resident vendors, under certain circumstances, as applied to state's purchase of reinforced concrete pipe, did not have substantial regulatory effect outside of that particular market, and thus, did not violate the commerce clause, and (2) classifications established by statute between resident and nonresident vendors were rationally related to legitimate state interest in directing benefits, generated by state purchases, to state citizens and did not deny equal protection of the laws to nonresidents.

Affirmed.

Gregory, J., dissented and filed opinion, in which Chandler, J., concurred.

Bell and the rate imposed on retail businesses, hospitals, and others.

nized that a reasonable basis for the differential treatment was essential to the constitutionality thereof." *United States Fidelity and Guaranty Co. v. City of Newberry*, 257 S.C. 433, 186 S.E.2d 239, 242 (1972).

[5] The gross disparity in the license tax rate imposed by the Spartanburg ordinance is reflected by the fact that Southern Bell pays a tax of 1% of its gross receipts (\$238,375 in 1981 and \$267,262 in 1982), while a textile mill or manufacturing plant with the same revenue as Southern Bell pays a maximum of \$725.³ The city has advanced no reasonable basis for the differential treatment. The amendment was not part of any overall reform of the ordinance. Nor did the city prove that Southern Bell benefited more from city services than did other businesses. *United States Fidelity and Guaranty Co. v. City of Spartanburg*, 263 S.C. 169, 209 S.E.2d 36 (1974). Moreover, since Southern Bell is the highest *ad valorem* taxpayer in the city, it contributes greatly to the cost of city government. Apparently, the sole consideration in drastically increasing the tax on Southern Bell was that, since Duke Power had agreed by contract to pay the city 3% of its gross revenues, Southern Bell's taxes should be increased.

We conclude that the rate disparity between Southern Bell and other companies not parties to contracts with the city is palpably unreasonable and violative of equal protection of the laws.

The judgment below is, accordingly,

AFFIRMED.

LITTLEJOHN, C.J., and NESS, GREGORY and CHANDLER, JJ., concur.



3. In addition, the record reveals a great disparity between the tax rate imposed on Southern

ould supply unless the business.

se tax was January 1, Southern taxpayer in 1; \$267,262

Southern he tax was ent.

s that the at the city rned from made from artanburg here is no istate calls : purposes. r, 279 S.C. e city also from serv- nburg ex- gree. The nues from to custom- mits. See ic Service S.E.2d 599

tends that ordinance tection of

lative en- nstitution- r to prove reasonable i Corp. v. S.C. 470, r, "[i]n all fication in een chal- the equal has recog-

service not

many years, n the city.

1. Commerce \S 12

States cannot pass any regulations which unduly burden the free flow of commerce between the states or with foreign country. U.S.C.A. Const. Art. 1, \S 8, cl. 3.

2. Commerce \S 54

Commerce clause [U.S.C.A. Const. Art. 1, \S 8] does not limit state's right to favor said state's own citizens over others, where state enters market in competition with other market participants.

3. Commerce \S 60(1)

Statute [Code 1976, \S 11-35-1520(9)(d)] which gave preference to resident vendors, under certain circumstances, as applied to state's purchase of reinforced concrete pipe, did not violate the commerce clause [U.S.C.A. Const. Art. 1, \S 8], as state was acting as market participant rather than regulating the market. U.S.C.A. Const. Art. 1, \S 8, cl. 3.

4. Constitutional Law \S 213.1(2)

Determination of whether classification established by statute is reasonable is initially one for the legislature and classification will not be set aside by the courts unless there is no reasonable hypothesis to support it, so that it is plainly arbitrary. U.S.C.A. Const. Amend. 14; Const. Art. 1, \S 3.

5. Constitutional Law \S 213.1(2)

Statute may be limited to particular class, provided there is reasonable relationship between said classification and proper legislative purpose.

6. Constitutional Law \S 225.4States \S 98

Classifications between resident and nonresident vendors established by statute [Code 1976, \S 11-35-1520(9)(d)] which gives preference to resident vendors, under certain circumstances, when the state purchases supplies, services and goods, are rationally related to state's legitimate interest to benefit its taxpayers, and thus, do not deny equal protection of the laws to nonresidents, even though nonresidents who maintain office in the state and pay state taxes are accorded preference over other nonresi-

dents. Code 1976, \S 11-35-20(f); U.S.C.A. Const. Amend. 14.

Thomas H. Pope, of Pope and Hudgens, Newberry, for appellant.

Atty. Gen., T. Travis Medlock, Chief Deputy Atty. Gen. Joseph A. Wilson, and Asst. Atty. Gen. Charles W. Gambrell, Jr., Columbia, for respondents.

HARWELL, Justice:

The appellant Gary Concrete Products, Inc. initiated this action against the respondent State Budget and Control Board for a declaratory judgment regarding the constitutionality of S.C. Code Ann. \S 11-35-1520(9)(d) (1984 Cum. Supp.). We affirm.

The appellant is a Georgia corporation which manufactures and sells reinforced concrete pipe. The appellant was invited to submit bids for state purchases during the year September 1, 1983 through August 31, 1984. On June 30, 1983, the appellant submitted its bid for pipe to be used in twenty-two counties. It was the low bidder in several counties; however, the State awarded the contracts to resident bidders as authorized by Code \S 11-35-1520(9)(d) (1984).

We adopt the Order of the trial judge, as amended.

"The issue before this Court is whether or not S.C. Code Ann. \S 11-35-1520(9)(d) violates the Commerce Clause of the United States Constitution or, alternatively, violates the Equal Protection Provisions of the United States Constitution or the South Carolina Constitution.

South Carolina Code \S 11-35-1520(9)(d) provides:

Competitive procurements made by any governmental body shall be made from a responsive and responsible vendor resident in South Carolina: (i) for procurements under \$2,500,000, if such bid does not exceed the lowest qualified bid from a nonresident vendor by more than two percent of the latter bid, and if such resident vendor has made written claim for such preference at the time the bid

was submitted; (ii) for procurements in excess of \$2,500,000, if such bid does not exceed the lowest qualified bid from a nonresident vendor by more than one percent of the latter bid, and if such resident vendor has made written claim for such preference at the time the bid was submitted. A vendor shall be deemed to be a resident of this State if such vendor be an individual, partnership, association or corporation that is authorized to transact business within the State, maintains an office in the State, maintains a representative inventory of commodities on which the bid is submitted and has paid all taxes duly assessed. Preferences under this subsection shall not apply to either prime contractors or subcontractors as relates to the construction industry nor to a vendor of goods whether in quantity or not when the price of a single unit of the item involved is more than ten thousand dollars.

The effect of this section is to give a preference to South Carolinians, under certain circumstances, when the State of South Carolina purchases supplies, services and goods.

COMMERCE CLAUSE

[1] The appellant alleges that S.C. Code Ann. § 11-35-1520(9)(d) imposes an unlawful burden upon interstate commerce, constituting a violation of Article I, § 8 of the United States Constitution. The Commerce Clause gives the federal government the power to regulate interstate and foreign commerce. The states cannot pass any regulations which unduly burden the free flow of commerce between the states or with a foreign country. *McCaw v. Fase*, 216 F.2d 700 (9th Cir.1954), cert. den., 348 U.S. 927, 75 S.Ct. 340, 99 L.Ed. 727 (1955).

[2] Admittedly, there are circumstances under which S.C. Code § 11-35-1520(9)(d) will operate to favor South Carolina vendors over out-of-state vendors and thereby arguably burden interstate commerce. However, if a state enters a market in

competition with other market participants, the Commerce Clause does not limit the state's ability to operate as freely within the market place as the other participants. *Reeves v. Stake*, 147 U.S. 429, 437, 100 S.Ct. 2271, 2277, 65 L.Ed.2d 244 (1980). This freedom includes the right to favor the state's own citizens over others. *White v. Mass. Council of Construction Employers*, 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976); *Carll v. South Carolina Jobs-Economic Development Authority*, 327 S.E.2d 331 (S.C.1985).

In *Reeves, Inc. v. Stake, supra*, the Supreme Court discussed the rights of a state as a market participant. South Dakota owned and operated a cement plant. In 1978 a cement shortage occurred and the state adopted a policy of supplying all South Dakota customers first and, thereafter, any out-of-state commitments would be met on a first come, first served basis. The plaintiff was an out-of-state distributor who had purchased cement from the South Dakota cement plant on a regular basis for twenty years. The Supreme Court held that the state had acted as a market participant and had not violated the Commerce Clause. It stated that the distinction drawn in *Alexandria Scrap* between states as market participants and market regulators was good law since the Commerce Clause is aimed principally at limiting state taxes and regulatory measures which impede free private trade, but places no similar limitations on the ability of states to operate freely in the open market. *Id.*, 447 U.S. at 437, 100 S.Ct. at 2277. The Court then gave several reasons for judicial restraint in this area.

Restraint in this area is also counseled by considerations of state sovereignty, the role of each State "as guardian and trustee for its people," and "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." Moreover, state

proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause. Finally, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, *Alexandria Scrap* wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court. [Footnotes and citations omitted.]

Id., 447 U.S. at 438-439, 100 S.Ct. at 2278-2279.

In the instant matter, the State of South Carolina is acting as a market participant by purchasing reinforced concrete pipe. As a market participant, South Carolina can impose restrictions on itself and not run afoul of the Commerce Clause. The present factual situation is virtually on all fours with the *Reeves* decision. South Carolina is preferring its own citizens in the purchasing process—a process which, by definition, vaults South Carolina into the marketplace as a market participant.

The Supreme Court's latest ruling on these issues came in the case of *South-Central Timber Development, Inc. v. Wunnicke*, — U.S. —, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984). The Court held the Alaska requirement that timber taken from state lands be processed within the State prior to export violative of the Commerce Clause. The Court also provided some guidelines.

The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of

that particular market. Unless the "market" is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible State purpose of fostering local industry. *Id.* at 83.

The Court concluded that Alaska was not only a seller in the timber market, but a regulator of the conditions downstream in the timber processing market.

[3] In the case at bar, the State of South Carolina is merely choosing its trading partners so as to favor residents. No regulation of the market is present. Therefore, the preference statute does not violate the Commerce Clause.

EQUAL PROTECTION

The appellant contends that the "preference" section is unconstitutional as violative of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, § 3 of the South Carolina Constitution.

[4, 5] The determination of whether a classification is reasonable is initially one for the legislature and will not be set aside by the courts unless it is plainly arbitrary. *State ex rel. Medlock v. S.C. Family Farm Development Authority*, 279 S.C. 316, 321, 306 S.E.2d 605, 609 (1983). A statute may be limited to a particular class, provided the limitation established is for a proper public purpose. *Ex parte Hollman*, 79 S.C. 9, 60 S.E. 19 (1908); *Simmons v. Western Union Telegraph Co.*, 63 S.C. 425, 41 S.E. 521 (1902). Although the classification may not be arbitrary and there must be a reasonable relationship between the classification and a proper legislative purpose, *United States Fidelity and Guaranty Co. v. City of Newberry*, 257 S.C. 433, 186 S.E.2d 239 (1972), a classification will be sustained against constitutional attack if there is 'any reasonable hypothesis' to support it. *Thomas v. Spartanburg Railway, Gas & Electric Co.*, 100 S.C. 478, 85 S.E. 50

Cite as 331 S.E.2d 335 (S.C. 1985)

(1915). The South Carolina Supreme Court summarized the controlling principles as follows:

The requirements of equal protection are satisfied if (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis.

State ex rel. Medlock v. S.C. Family Farm Development Authority, supra.

The standard for determination of constitutionality on equal protection grounds under the Fourteenth Amendment was succinctly stated by the United States Supreme Court in *City of New Orleans v. Duke*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976):

When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determination as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economics under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.

... In short, the judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. In the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. [Citations and footnote omitted.]

Id. 427 U.S. at 303-304, 96 S.Ct. at 2516-2517. See also, *Fidelity Guarantee Mortgage Corp. v. Connecticut Housing Finance Authority*, 532 F.Supp. 81, 83 (D.Conn.1982).

The classifications established by S.C. Code Ann. § 11-35-1520(9)(d) are between resident and non-resident vendors. The statute is designed to protect South Carolina's legitimate interest in directing benefits, generated by state purchases, to the citizens of South Carolina—"the people who fund the state treasury from which the purchases are made and the people whom the state was created to serve."

Accordinging preference to resident bidders encourages local industry, thus stabilizing state and local economies. The money payable under the contracts is likely to remain within the state and enhance the tax base of state and local government. See *Galesburg Constr. Co. v. Bd. of Trustees*, 641 P.2d 745 (Wyo.1982).

The statute is tailored to meet these goals without substantially impeding the goal that state purchases be as economical as possible. S.C.Code Ann. § 11-35-20(f). The preference for residents applies only when their bids are, at most, two percent higher than those of non-residents. In addition, the preference does not apply to any unit costing \$10,000 or more or to prime or subcontractors in the construction industry.

[6] The appellant contends that the statutory definition of residents is irrational because it includes some non-residents. We disagree. The statute authorizes the state to prefer bids of non-residents only when they maintain an office in the state, as well as a representative inventory, and pay all assessed taxes. The differential treatment of the two groups of non-residents is rational because it favors those who pay taxes in South Carolina and who have manifested a desire to do business here. We conclude that the classifications made by § 11-35-1520(9)(d) are rationally related to a legitimate state interest and do not deny equal protection of the laws to non-residents.

The judgment below is, accordingly,
AFFIRMED.

LITTLEJOHN, C.J., and NESS, J., concur.

GREGORY and CHANDLER, JJ., concur in dissenting opinion.

GREGORY, Justice (dissenting):

I dissent. I would hold the Statute [S.C. Code Ann. § 11-35-1520(9)(d) (Cum.Supp. 1984)] unconstitutional as a violation of equal protection under the State and Federal Constitutions.

The disputed section is in conflict with the entire Procurement Code [S.C. Code Ann. § 11-35-10, *et seq.* (Cum.Supp. 1984)]. One of the purposes of the Code is to require competition and fairness in procurement procedures. S.C. Code Ann. § 11-35-20(c) and (e) (Cum.Supp. 1984). Furthermore, the system is designed to maximize economy in the use of state funds. Section 11-35-20(f). To allow the preference of the disputed section to stand is to ignore the basic premise of the Code, thereby increasing the burden on the state treasury and all taxpayers to favor a small select group of South Carolina residents.

Under equal protection, the classification must bear a reasonable relation to the legislative purpose. *State ex rel. Medlock v. S.C. Family Farm Dev. Authority*, 279 S.C. 316, 306 S.E.2d 605 (1983). Section 11-35-1520(9)(d) not only fails to meet the reasonable relationship test, but is also in direct conflict with the *express* legislative purposes of the Procurement Code. Section 11-35-20.

I would reverse.

CHANDLER, J., concurs.



Jeffrey Hiram ANDERS, Respondent.

v.

Victoria Labell Watt
ANDERS, Appellant.

No. 22333.

Supreme Court of South Carolina.

Heard April 10, 1985.

Decided May 28, 1985.

Husband petitioned for a divorce on grounds of adultery, and wife petitioned for a divorce on grounds of physical cruelty. The Family Court, Greenville County, Larry R. Patterson, J., granted divorce to husband, awarded him custody of children, and distributed marital assets. Wife appealed. The Supreme Court held that: (1) circumstantial evidence was sufficient to support finding of adultery; (2) there was therefore no error in refusing wife's petition for a divorce; and (3) award of custody and distribution of property was within judge's discretion.

Affirmed.

Gregory, J., dissented and filed opinion.

1. Divorce §129(9)

Either circumstantial or direct evidence, or a combination of the two, may be sufficient to prove adultery as grounds for a divorce.

2. Divorce §129(9)

Circumstantial evidence that wife, while separated from husband, may have spent lengthy period of time in the early morning hours with another man in his apartment was sufficient to support finding of adultery as grounds for husband's petition for divorce.

3. Divorce §150.2

Where evidence was sufficient to support granting of divorce to husband on grounds of adultery and divorce was granted on that ground, trial court did not err in

GALESBURG CONST. CO. v. BOARD OF TRUSTEES Wyo. 745

Cite as, Wyo., 341 P.2d 745

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.

GALESBURG CONST. CO. v. BOARD OF TRUSTEES Wyo. 747

Cite as, Wyo., 641 P.2d 745

RAPER, Justice.

We are presented in this case with a reserved question pursuant to § 1-13-101, W.S.1977.¹ The question set out in plaintiff's brief is whether § 9-8-302, W.S.1977, violates Art. I, § 6, of the Wyoming Constitution,² Art. I, § 3, of the Wyoming Constitution³ and § 1 of the Fourteenth Amendment to the United States Constitution.⁴ The questioned statute, § 9-8-302, supra provides:

"Whenever a contract is let by the state, or any department thereof, or any county, city, town, school district, high school district, or other public corporation of the state for the erection, construction, alteration, or repair of any public building, or other public structure, or for making any addition thereto, or for any public work or improvements, such contract shall be let, if advertisement for bids is not required, to a resident of the state. If advertisement for bids is required the contract shall be let to the responsible resident making the lowest bid if such resident's bid is not more than five per-

cent (5%) higher than that of the lowest responsible nonresident bidder."

We shall uphold the statute.

On June 1, 1981, Galesburg Construction Company (Galesburg) was issued its Certificate of Incorporation by the Secretary of State for the State of Wyoming. In July of that year, the Board of Trustees of Memorial Hospital of Converse County (Hospital) announced bidding would be held for a construction project in Douglas. Galesburg submitted a bid on the project to the Hospital. On August 27, 1981, the bids were opened and it was discovered that Galesburg was the lowest bidder for the project. However, on September 14, 1981, the Hospital informed Galesburg that, since it did not qualify as a "resident" of the state of Wyoming, as that term is defined in § 9-8-301, W.S.1977,⁵ and because its bid was not more than five percent lower than the lowest resident bidder under § 9-8-302, supra, it would not be awarded the project.

On September 23, 1981, Galesburg filed suit seeking to have § 9-8-302 as applied to

1. Section 1-13-101, W.S.1977:

"When an important and difficult constitutional question arises in a proceeding pending before the district court on motion of either party or upon his own motion the judge of the district court may cause the question to be reserved and sent to the supreme court for its decision."

2. Article I, § 6, Wyoming Constitution:

"No person shall be deprived of life, liberty or property without due process of law."

3. Article I, § 3, Wyoming Constitution:

"Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction."

4. Section 1 of the Fourteenth Amendment to the United States Constitution:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citi-

zens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, § 34, Wyoming Constitution is the Wyoming version of the right to equal protection:

"All laws of a general nature shall have a uniform operation."

Washakie County School District Number One v. Herschler, infra.

5. Section 9-8-301, W.S.1977:

"As used in this act [§§ 9-8-301 to 9-8-304, 9-8-308] the word 'resident' means any person who shall have been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract; a partnership or association, each member of which shall have been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract; a corporation which has been organized under the laws of the state of Wyoming and has been in existence therein for one (1) year or more immediately prior to bidding upon the contract and which has its principal office and place of business within the state of Wyoming."

it declared unconstitutional.⁹ On October 7, 1981, the parties and the Wyoming Attorney General entered into a stipulation setting forth the uncontroverted facts and requesting that the question of the statute's constitutionality be reserved to this court. Pursuant to that request, the district judge filed his findings of fact and ordered that the constitutional question be reserved. The district court fully complied with the rule that all preliminary matters including factual questions must first be disposed of before the supreme court will consider a reserved constitutional question. *State v. Rosachi, Wyo.*, 549 P.2d 318 (1976).

I

[1] When presented with a constitutionally based challenge to a statute, this court presumes the statute to be constitutional unless the party mounting the challenge proves otherwise. *Nickelson v. People, Wyo.*, 607 P.2d 904 (1980). This is because there exists a strong presumption in favor of constitutionality. *Sorenson v. State, Wyo.*, 604 P.2d 1031 (1979). Any doubt in the matter must be resolved in favor of the statute's constitutionality. *Washakie County School District Number One v. Herschler, Wyo.*, 606 P.2d 310 (1980), cert. denied 449 U.S. 824, 101 S.Ct. 86, 66 L.Ed.2d 28. Thus, before we will strike down a statute we must find that it clearly violates one of the principles of our state and national constitutions by which we are bound. When there is a transgression of either of those documents, we must not and will not hesitate to declare the legislative enactment invalid. *Washakie County School District Number One v. Herschler, supra*.

II

[2] Though Galesburg stated the question for us in terms which included chal-

6. Galesburg's complaint stated in pertinent part:

"11. W.S. 9-8-302, on its face and as applied to the Plaintiff by the Defendant:

"a. violates Article I, Section 6 of the Constitution of the State of Wyoming by depriving the Plaintiff of its property rights without due process of law;

lenges based upon Art. I, §§ 3 and 6 of the Wyoming Constitution, these provisions were not argued as authority in the brief, and, in fact, were not mentioned other than in the statement of the issues. A constitutional question reserved to the supreme court from the district court is too important to be answered at random and it will not be answered unless fully presented and argued. *Salt Creek Transportation Company v. Public Service Commission, 37 Wyo.* 488, 263 P. 621 (1928). The real crux of Galesburg's challenge can be found in the two-tiered equal protection-due process analysis which has been developed by the United States Supreme Court in connection with the Fourteenth Amendment, *supra*. Galesburg has argued that under such an approach § 9-8-302, *supra*, must fall.

[3] The test for determining whether a legislative enactment passes muster under an equal-protection or due-process challenge exists on two levels. The decision as to which level of scrutiny should be employed has often been as important as the actual application of the test. Strict scrutiny, which requires a much more rigorous examination, is used when the statute in question employs a suspect classification or traverses a fundamental right. Under strict scrutiny, before the statute can be upheld, the reviewing court must find that the statute serves some compelling state interest and that it is narrowly drawn so as to not unnecessarily interfere with a fundamental right or use a suspect classification. *Washakie County School District Number One v. Herschler, supra*.

Under a lower level of scrutiny, the reviewing court must merely determine whether the statute serves a legitimate state interest. If so, all that is required is that the statute be rationally related to the advancement of that interest. Unless these

"b. violates the Plaintiff's due process and equal protection guarantees under Section 1, Amendment 14 to the Constitution of the United States;

"c. creates a classification which arbitrarily discriminates against the Plaintiff without any rational relationship to a legitimate state interest."

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GALESBURG CONST. CO. v. BOARD OF TRUSTEES Wyo. 749

Cite as, Wyo., 641 P.2d 745

conditions are shown not to exist, the statute must be upheld. *Washakie County School District Number One v. Herschler*, supra.⁷

III

[4] Galesburg argues that we should evaluate the constitutionality of § 9-8-302, supra, with strict scrutiny. It supports this position by string citing other cases in which durational residency requirements were subjected to strict scrutiny. However, Galesburg failed to carefully consider why each of those cases deserved the higher level of scrutiny.⁸

In each of the cited cases either a fundamental right or a suspect classification was implicated. The fundamental rights generally found injured by durational residency requirements in those cases were the right of interstate travel and the right to vote. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1960); *State v. Van Dort*, Alaska, 502 P.2d 453 (1972); *Jarmel v. Putnam*, 179 Colo. 215, 499 P.2d 603 (1972); *Delgiorno v. Huisman*, Wyo., 498 P.2d 1246 (1972). These fundamental rights have never been extended to corporations under the Fourteenth Amendment. In fact, the language in the Amendment seemingly excludes corporations by referring to "[a]ll persons born or naturalized in the United States." Corporations are fictitious entities incapable of being born (in a biological sense), voting, or traveling. They do not possess those fundamental rights.

7. There have been some indications a third level may exist for gender-based classifications. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), i.e., "must serve important governmental objectives and must be substantially related to achievement of those objectives."

8. Not all the cases cited were right on point. One, *York v. State*, 53 Hawaii 557, 498 P.2d 644 (1972), found a three-year residency requirement for public employment not to require strict scrutiny; however, the court struck it down anyway using only the rationally-related test. Another case cited not belonging here was *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948). That case was

Neither can we accept that Galesburg is a member of a suspect classification. Such status is usually only awarded to racial and nationality minorities, victims of invidious discrimination. *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 288, 13 L.Ed.2d 222 (1964). There is nothing in the record showing Galesburg to belong to such a minority. Further, such status has never been given to corporations since the Fourteenth Amendment was designed to protect people not business organizations. Accordingly the statute as applied to Galesburg does not warrant strict scrutiny, and thus we must employ the lower level of scrutiny.

IV

[5, 6] The recognized testing criteria to determine whether a state statute violates equal protection rights under the rational-basis standard are summarized in *Morey v. Doud*, 354 U.S. 457, 463-464, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957):

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is

decided on the basis of the Privilege and Immunities Clause. However, that clause, which protects citizens of one state in regards to activities in another state, is not involved here because Galesburg is a Wyoming corporation trying to do business in Wyoming. We also can find no support for Galesburg's position in *Rayco Construction Company, Inc. v. Vorsanger*, 397 F.Supp. 1105 (ED Ark.1975). It held the statute in question discriminatory as to both domestic and foreign contractors and applied a strict construction test because of its criminal sanctions for violations. It did not hold that a proper preference may not be allowed and in fact intimated it could.

called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' [Citation.]"

Viewing the statute, as it is applied to Galesburg, under the lower level of scrutiny, we must determine whether the statute serves a legitimate state interest and whether it is rationally related to the advancement of that interest. Previously it has been said that the purpose of § 9-8-302, supra, was "to encourage local industry." Opinions, Attorney General of Wyoming, No. 49, June 24, 1963, at page 240.⁹ We agree that this appears to have been the legislature's likely intent. We further hold that this is definitely a legitimate state interest. Accordingly, the only question left is whether the statute as drawn is rationally related to the advancement of this state interest. We hold that it is.

By giving Wyoming corporations¹⁰ a handicap in bidding on public contracts, the statute in essence increases the likelihood that a Wyoming corporation will be awarded the contract. When contracts are awarded to Wyoming corporations, as opposed to out-of-state corporations, local industry is encouraged. This contributes to, strengthens, and stabilizes the state and

9. Opinions of the Attorney General construing statutes are entitled to weight, particularly when they have been weathered by time and where the legislature has failed over a long period to make any change in a statute following its interpretation by the Attorney General. Such acquiescence is worthy of careful consideration in an inquiry into the intent of that body. *School Districts Nos. 2, 3, 6, 9 and 10, Campbell County v. Cook*, Wyo., 424 P.2d 751 (1967). That construction has stood for nearly twenty years.

10. We note that Galesburg's challenge in this case is to § 9-8-302, supra. No challenge was made to § 9-8-301, supra, which defines a Wyoming corporation as one having been incorporated in Wyoming for more than one year. Thus, we need not evaluate the one-year requirement.

local economy—the primary interest is that of the public. *Equitable Shipyards, Inc. v. State*, 93 Wash.2d 465, 611 P.2d 396 (1980). A benefit to a particular person, be it corporate or natural, is only incidental and not lethal to constitutionality. The money payable under the contract is more likely to remain within the state, and enhance the tax base of state and local government.¹¹ Therefore, we conclude that, as applied to Galesburg, the statute does not run afoul of the Fourteenth Amendment.

Galesburg has failed to carry its burden that the statute is essentially arbitrary.

V

[7, 8] The remaining portion of Galesburg's argument is to the effect that we should declare the statute unconstitutional on a public policy basis. As stated earlier, we have no authority to overturn statutes enacted by the legislature merely because we believe that they are against public policy. The legislature announces public policy by its enactments. Statutes are entitled to a presumption of constitutionality unless the challenging party clearly establishes that constitutional principles are violated by the statute. Public policy is not a basis for declaring a statute unconstitutional. Wisdom or expediency of statutes is for the legislature and not the courts. *Denny v. Stevens*, 52 Wyo. 253, 75 P.2d 378, 113 A.L.R. 1337 (1933). Courts must not usurp or encroach upon the legislative function.

11. Arizona has a statute which specifically grants a 5% preference to contractors who have paid county and state taxes for two successive years previous to making the bid. In *Schrey v. Allison Steel Mfg. Co.*, 75 Ariz. 282, 255 P.2d 604 (1953), the statute was held constitutional as not discriminatory in that the legislature had a right to believe and it may be a fact that the interests of the state and the political subdivisions would be better served. The taxes requirement was held to be a reasonable test to determine the responsibility of the bidder. We note that § 9-8-302, supra, the Wyoming statute being questioned, requires that the contract must be let to a responsible bidder.

Kennedy v. S. (1977). We op when the const spoken. The le public policy in we cannot cons

We hold tha § 9-8-302, supr

Returned to constitutional

ROONEY, Ju

Although I a state interest in I cannot agree results from a person who has for many year tion of a publi penalty, simpl privilege to de within the yes cepting all of t opinion, I canr state interest" basis for givin lived in Wyom his bid on cons as an individu Wyoming for t under the nai owned by his month prior to

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"IT IS TH JUDGED A lowing spec and the sam to the Wyo decision:

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GALESBURG CONST. CO. v. BOARD OF TRUSTEES Wyo. 751

Cite as, Wyo., 641 P.2d 743

Kennedy v. State, Wyo., 559 P.2d 1014 (1977). We only consider public policy when the constitution or statutes have not spoken. The legislature has announced the public policy in this instance. Accordingly, we cannot consider Galesburg's argument.

We hold that, as applied to Galesburg, § 9-8-302, *supra*, is constitutional.

Returned to the district court, reserved constitutional question argued, answered.

ROONEY, Justice, dissenting.

Although I agree that there is a definite state interest in encouraging local industry, I cannot agree that such encouragement results from a statute which prevents a person who has been a resident of the state for many years from bidding on construction of a public building contract, without penalty, simply because he exercised his privilege to do business as a corporation within the year previous to the bid. Accepting all of the law cited in the majority opinion, I cannot find either a "legitimate state interest" or a "reasonable/rational" basis for giving a preference to A, who has lived in Wyoming for two years and makes his bid on construction of a public building as an individual, over B, who has lived in Wyoming for thirty years but makes his bid under the name of a corporation wholly owned by him but incorporated only a month prior to the bid.

That exact situation can result from the majority holding. The statute, then, would have an arbitrary and capricious application and would be violative of all of the constitutional provisions set forth in the question here reserved to us by the district court:

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the following specific constitutional question be, and the same hereby is, reserved and sent to the Wyoming Supreme Court for its decision:

1. Section 9-8-301, W.S.1977, provides:
"As used in this act [§§ 9-8-301 to 9-8-304, 9-8-308] the word 'resident' means any person who shall have been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract; a partnership or association, each member of which shall have been a bona fide resident of

"WHETHER W.S. 9-8-302, WHICH STATES:

"Whenever a contract is let by the state, or any department thereof, or any county, city, town, school district, high school district, or other public corporation of the state for the erection, construction, alteration, or repair of any public building, or other public structure, or for making any addition thereto, or for any public work or improvements, such contract shall be let, if advertisement for bids is not required, to a resident of the state. If advertisement for bids is required the contract shall be let to the responsible resident making the lowest bid if such resident's bid is not more than five percent (5%) higher than that of the lowest responsible nonresident bidder."

"VIOLATES ARTICLE I, SECTION 6, OF THE WYOMING CONSTITUTION, AND/OR ARTICLE 1, SECTION 3, OF THE WYOMING CONSTITUTION AND/OR SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

It may be contended that I am assuming a fact not present—that the record does not reflect the plaintiff's stockholders to have been Wyoming residents for an extended period prior to incorporation. But the majority opinion makes a like assumption. The record does not reflect that such stockholders were *not* long-time residents of Wyoming. If this fact were necessary to resolve the constitutional question, the matter would not be ripe for answer to a reserved question. *State v. Rosachi*, Wyo., 549 P.2d 318 (1976). However, the intent of the legislature as indicated by the legislative history of § 9-8-301, W.S.1977¹ was to preclude

the state for one (1) year or more immediately prior to bidding upon the contract; a corporation which has been organized under the laws of the state of Wyoming and has been in existence therein for one (1) year or more immediately prior to bidding upon the contract and which has its principal office and

a long-time resident from bidding on construction of a public building contract, without penalty, through a wholly-owned corporation within a year after its incorporation. The following amendment to changes in § 9-8-301 was accepted on the House's second reading of the file in 1961, but was struck on the third reading:

"At the end of the last sentence strike the period insert a semi-colon and the following language: 'provided, however, that any corporation formed by persons who are bona fide residents of the State for one year or more immediately prior to bidding upon a contract and the corporate stock of which is owned in full by such bona fide residents shall be included within the meaning of the word "resident".'" Digest of Journals, 36th Legislature, p. 65 (1961).

Legislative intent may be determined through legislative history. *Saffels v. Bennett*, Wyo., 630 P.2d 505 (1981); *Sanchez v. Sanchez*, Wyo., 626 P.2d 61 (1981).

It may also be contended that the reserved question concerns an inquiry about § 9-8-302, W.S.1977² and that we should not consider the constitutionality of § 9-8-301, W.S.1977. Such contention overlooks the fact that § 9-8-301 defines the terms used in § 9-8-302. The meaning and legislative intent as expressed in § 9-8-302 cannot be ascertained without reference to the validity of § 9-8-301. Whether or not § 9-8-302 is violative of the Constitution depends upon the language thereof as defined by § 9-8-301. The word "resident" as used in § 9-8-302 makes the application of the section unconstitutional. Section 9-8-301 must be examined to determine the constitutionality of § 9-8-302. They must be considered *pari materia*.

"It is a fundamental principle of statutory construction that to ascertain the meaning of a given law all statutes relating to the same subject or having the

place of business within the state of Wyoming."

same general purpose shall be read in connection with it as constituting one law. They must be construed in harmony, else the law of the State would consist of disjointed and unharmonious parts with a conflicting and confusing result. . . ." *Stringer v. Board of County Commissioners of Big Horn County*, Wyo., 347 P.2d 197, 200 (1959). See *Kuntz v. Kinne*, Wyo., 395 P.2d 236 (1964); *Brinegar v. Clark*, Wyo., 371 P.2d 62 (1962).

Although upholding a state tax exemption for nonresidents on merchandise held in storage, the United States Supreme Court said, in applying the rational-basis test:

" . . . [T]here is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' . . ." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527, 79 S.Ct. 437, 441, 3 L.Ed.2d 480 (1959). See *York v. State*, 53 Hawaii 557, 498 P.2d 644 (1972).

I am not here addressing the reasonableness of the 5 percent figure vis-a-vis 4 percent, 1 percent, 25 percent, 65 percent, etc.—nor did the majority opinion—nor did the stipulation of facts upon which was based the finding of facts in the court's order. And I am not here addressing the constitutionality of the statute as it might pertain to a penalty applicable only to actual nonresident persons or entities. I note in this connection, however, that an arbitrary classification has been held to exist in a statute prohibiting employment of aliens on public works. *Purly & Fitzpatrick v. State*,

2. Section 9-8-302, W.S.1977, is quoted in the question as reserved. *supra*.

71 Cal.2d 5 (1969). See *Game Con* 1128, 92 L.

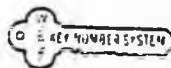
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GALESBURG CONST. CO. v. BOARD OF TRUSTEES Wyo. 753

Cite as: Wyo., 641 P.2d 745

71 Cal.2d 566, 79 Cal.Rptr. 77, 456 P.2d 645 (1969). See *Torao Takahashi v. Fish and Game Commission*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1473 (1948). Wyoming residents who have chosen to do business as a corporation within a year previous to the bids referred to in the statute.

I would answer the reserved question by holding the statute unconstitutional in denying equal protection to some persons to which it is applicable, i.e., those long-time



93 Wash.2d 465
**EQUITABLE SHIPYARDS,
 INC., Appellant,**

v.

The STATE of Washington, By and
 Through its DEPARTMENT OF
 TRANSPORTATION and the Wash-
 ington State Transportation Commis-
 sion, Respondent,

v.

**MARINE POWER & EQUIPMENT
 CO., Intervenor.**

No. 46330.

Supreme Court of Washington,
 En Banc.

May 8, 1980.

Action was brought by foreign shipbuilder complaining that State Transportation Commission acted arbitrarily and capriciously in awarding ferry construction contract to domestic shipbuilder and additionally challenging constitutionality of statute limiting review of Commission's administrative decision, constitutionality of bidding preference statute, and construction of that statute. The Superior Court, Thurston County, Gerry L. Alexander, J., rejected challenges, and the case came before the Supreme Court on certification from the Court of Appeals. The Supreme Court, Hicks, J., held that: (1) rational relation existed between purposes of statute establishing bidding preference for domestic shipbuilders and its classification of in-state and out-of-state shipbuilding firms, and thus bidding preference statute did not violate equal protection guarantees; (2) early hearing provision was not invalid under due process clause, particularly where foreign shipbuilder was previously given opportunity to be heard at an open public meeting and its appeal was heard approximately one month after it was filed; (3) Commission did not violate Open Public Meetings Act; and (4) State's method of evaluating proposal, by aggregating bid, life cycle cost and 6% preference impact for each proposal to determine most advantageous proposal, was correct.

Affirmed.

1. Public Contracts ⇨6

Primary purpose of public bidding is to benefit taxpayers by procuring best work or material at lowest price practicable; a secondary purpose is to provide bidders with fair forum for award of public contracts.

2. Administrative Law and Procedure ⇨760, 763

When applying arbitrary and capricious standard of review, reviewing court does not substitute its judgment for that of agency and, where there is room for two opinions, action is not arbitrary or capricious if exercised honestly and upon due consideration even if reviewing court believes erroneous conclusion was reached; when contracts are to be awarded on terms "most advantageous to" or "in the best interest of" the state, discretion in making award may be even somewhat broader.

3. States ⇨98

Arbitrary or capricious review standard provided by statute, which states that upon appeal from award of ferry contract, court may affirm decision of State Transportation Commission or it may reverse decision if it determines that action of Commission was arbitrary or capricious, does not include constitutional review. West's RCWA 47.60.650(6)(b).

4. Declaratory Judgment ⇨204

Statute which provides that, on appeal from award of ferry construction contract, court may affirm decision of State Transportation Commission or it may reverse Commission's decision if Commission's action was arbitrary or capricious, does not divest court of jurisdiction to hear constitutional challenges under Declaratory Judgment Act. West's RCWA 7.24.010 et seq.; 47.60.650(6)(b).

5. Constitutional Law ⇨213.1(1)

Strict scrutiny is appropriate when statutory classification is based on suspect category or infringes upon fundamental right. West's RCWA Const. Art. 1, § 12; U.S.C.A.Const. Amend. 14.

6. Constitutional Law

Foreign shipbuilder designated a "foreign" as an "alien" for purpose of analysis since in context, alienage refers to citizenship. West's R. 12; U.S.C.A.Const. Art.

See publication for other judicial definitions.

7. Constitutional Law

Bidding preference favors domestic shipbuilders for purpose of construction contracts awarded on only rational basis if it violated equal RCWA 47.60.670; U. 14.

3. Constitutional Law

Rational basis of equal protection challenge whether classification members within designated some basis in reality distinguishing between without designated classification has rational challenged statute. 14.

9. Constitutional Law

There is strong constitutionality in economic and burden of refusal.

**10. Constitutional Law
 Public Contracts**

Rational relationship of bidding preference favors domestic shipbuilders for purpose of construction contracts of in-state and out-of-state firms, and thus preference violates equal protection. West's RCWA 47.60.670; U.S.C.A.Const. Art. 1, § 12; 14.

6. Constitutional Law ⇨210(1)

Foreign shipbuilder, which could be designated a "foreign corporation," was not an "alien" for purposes of equal protection analysis since in context of suspect categories, alienage refers to non-United States citizenship. West's RCWA Const. Art. 1, § 12; U.S.C.A.Const. Amend. 14.

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

7. Constitutional Law ⇨225.4

Bidding preference statute, which favors domestic shipbuilders over foreign shipbuilders for purposes of procuring ferry construction contracts, was most closely allied with economic legislation, thus requiring only rational basis scrutiny to determine if it violated equal protection. West's RCWA 47.60.670; U.S.C.A.Const. Amend. 14.

8. Constitutional Law ⇨213.1(2)

Rational basis inquiry applicable to equal protection challenge involves test whether classification applies alike to all members within designated class, whether some basis in reality exists for reasonably distinguishing between those within and without designated class, and whether classification has rational relation to purpose of challenged statute. U.S.C.A.Const. Amend. 14.

9. Constitutional Law ⇨48(1)

There is strong presumption of constitutionality in economic acts of legislature and burden of refutation is on challenger.

10. Constitutional Law ⇨225.4

Public Contracts ⇨2

Rational relation exists between purposes of bidding preference statute, which favors domestic shipbuilders over foreign shipbuilders for purposes of procuring ferry construction contracts, and its classification of in-state and out-of-state shipbuilding firms, and thus preference statute does not violate equal protection guarantees. West's RCWA 47.60.670; West's RCWA Const. Art. 1, § 12; U.S.C.A.Const. Amend. 14.

11. Statutes ⇨79(2)

Under constitutional prohibition of special law that grants corporate powers or privileges, a special law is one which arbitrarily separates some person, place or thing from those upon which it would otherwise operate and focuses upon what law excludes; if nothing is excluded that should be included, the law is general enactment and when only limitation is legitimate classification of law's objects, it is a general law. West's RCWA Const. Art. 2, § 28, subd. 6.

12. Statutes ⇨79(2)

Bidding preference statute, which related to particular bidders for ferry construction contracts as a class and not particular bidders of a class, did not separate out a particular person or entity for special treatment, and thus did not represent "special law" granting corporate powers or privileges in violation of the Constitution. West's RCWA 47.60.670; West's RCWA Const. Art. 2, § 28, subd. 6.

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

13. Records ⇨30

State Transportation Commission's refusal to disclose plans and specifications of one competitor to another in connection with award of ferry construction contract was not arbitrary and capricious where foreign shipbuilder made no allegation that Commission failed to give identical information to both competitors, where foreign shipbuilder obtained access to plans and specifications under court order and took full advantage of that access, and where it demonstrated no prejudice from Commission's refusal to allow it to review plans and specifications earlier. West's RCWA 42.17.250-42.17.340, 42.17.270.

14. States ⇨98

Action of State Transportation Commission in considering prequalification files in connection with award of ferry construction contract to domestic shipbuilder was not arbitrary or capricious where, to extent that certain commissioners may have intimated some question concerning prequalification criterion of financial responsibility,

this did not deflect focus of meetings, where no prejudice resulted, and where after examination was permitted, foreign shipbuilder did not identify any portion of files as objectionable or inaccurate.

15. Constitutional Law ⇨62(5)

States ⇨98

Statutory provision for hearing on appeal within ten days after award of ferry construction contract by State Transportation Commission did not violate separation of powers doctrine where statute was construed by trial court as directory, not mandatory, and where trial ultimately was held one month after appeal was filed and not ten days as statute provided. West's RCWA 47.60.650(6)(b).

16. Constitutional Law ⇨276(2)

States ⇨98

Where hearing date set one month after award of ferry construction contract to domestic shipbuilder by State Transportation Commission reflected conscientious effort by trial court to afford foreign shipbuilder a reasonable time to prepare, to allow for and to hear and decide matters, and still give some efficacy to statute which provided 90-day limitation on proposals, early hearing provision set by statute, which called for hearing on appeal within ten days, was not invalid under due process clause, particularly since foreign shipbuilder was previously afforded opportunity to be heard at open public meeting. West's RCWA 47.60.650(4)(i); U.S.C.A.Const. Amendments. 5, 14.

17. States ⇨98

Any independent examination by State Transportation Commission of domestic shipbuilder's plans and specifications constituted neither "action" nor "meeting" under Open Public Meetings Act, and thus Commission, which took its "action" in awarding ferry construction contract to domestic rather than foreign shipbuilder in open public meeting following presentation by both firms, experts and the public, did not violate the Act. West's RCWA 42.30.010, 42.30.020(3).

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

18. States ⇨98

State's method of evaluating shipbuilder's ferry construction proposal by aggregating bid, life cycle costs and 6% preference for domestic shipbuilders for each proposal to determine proposal most advantageous to state, rather than by determining contract award solely by comparing vessel price of the in-state proposal with vessel price of out-of-state proposal as enhanced by 6% preference penalty, constituted correct application of preference bidding statute. West's RCWA 47.60.650(5, 6), 47.60.-670.

Graham & Dunn, Charles S. Mullen, Seattle, for appellant.

Slade Gorton, Atty. Gen., Thomas R. Garlington, Sr., Atty. Gen., William G. Boland, Asst. Atty. Gen., Olympia, for respondent.

Aiken, St. Louis & Siljed, Wallace Aiken, Gregory L. Bertram, Seattle, for intervenor.

HICKS, Justice.

Equitable Shipyards, Inc., of New Orleans (Equitable), complains that the State Transportation Commission (Commission), the directing entity of the Department of Transportation (Department), acted arbitrarily and capriciously in awarding a ferry construction contract to Marine Power & Equipment Co., of Seattle (MP&E). Additionally, Equitable challenges: (1) the constitutionality of a statute limiting review of the Commission's administrative decision; (2) the constitutionality of a bidding preference statute; and (3) the construction of that statute. See RCW 47.60.650-670. The trial court rejected Equitable's challenges and the case is here upon certification from Division Two of the Court of Appeals. Equitable requests this court to direct that it be awarded the contract; remand to the trial court for further proceedings; or remand to the Commission for further proceedings. We affirm the trial court.

In the course of this opinion, for convenience and when appropriate, the Commission and the Department will be collectively referred to as the "State".

In 1977, the construction of additional award of a construction builder. Laws of p. 610; RCW 4 was to be selected design-bidding process to compete required to prepare 47.60.660 before considered. An issued notice of for design and c By November prequalified, include.

Under RCW proposals (RFP) ry vessels was The RFP required specifications to ferries be delivered from November Basic requirements meet to be considered RFP.

Those to the submit a base The RFP include Commission works.

On or about 1 and MP&E each Under RCW 47 substitute an offer days after submission provides for evaluation

The [Commission] timely proposal with the request shall estimate nance costs

After evaluation select the firm "most advantageous into consideration and the in-st

1. The powers authority and by

EQUITABLE SHIPYARDS, INC. v. STATE, ETC. Wash. 399

Cite as, Wash., 611 P.2d 396

In 1977, the legislature authorized construction of additional ferries through an award of a construction contract to a shipbuilder. Laws of 1977, 1st Ex.Sess., ch. 166, p. 610; RCW 47.60.650.¹ The shipbuilder was to be selected through a competitive design-bidding procedure. Any firm desiring to compete for the contract was required to prequalify as prescribed in RCW 47.60.660 before a bid or proposal would be considered. August 1977, the Department issued notice of intent to request proposals for design and construction of ferry vessels. By November 1977, seven shipyards had prequalified, including MP&E and Equitable.

Under RCW 47.60.650(4), a request for proposals (RFP) for construction of six ferry vessels was issued to prequalified firms. The RFP required complete vessel design specifications to be furnished and that the ferries be delivered in 6-month intervals from November 30, 1979 to May 30, 1982. Basic requirements that the ferries must meet to be considered were set forth in the RFP.

Those to the RFP were authorized to submit a base proposal and two alternates. The RFP included copies of the forms the Commission would use in evaluating proposals.

On or about December 30, 1977, Equitable and MP&E each submitted three proposals. Under RCW 47.60.650(9), all proposals constitute an offer and remain open for 90 days after submission. RCW 47.60.650(5) provides for evaluation of proposals:

The [Commission] shall evaluate all timely proposals . . . for compliance with the requirements specified in the request for proposal, and, in addition, shall estimate the operation and maintenance costs of each firm's vessel design

After evaluation, the Commission was to select the firm presenting the proposals "most advantageous" to the state, taking into consideration the RFP requirements and the in-state preference provided in

1. The powers and duties of the toll bridge authority and highway department were transferred

RCW 47.60.670. RCW 47.60.650(6). RCW 47.60.670 establishes a "preference" for shipbuilding firms located in Washington, "providing such bid or proposed price does not exceed by more than six percent the lowest price proposal for a negotiated contract or the lowest comparable bid of any shipbuilding firm located outside the state of Washington."

The Department retained a naval architect to assist in evaluating the proposals. Evaluation meetings were held with each shipbuilder on January 25, 1978. The naval architect estimated the life cycle costs of each proposal and issued a report dated January 30, 1978. Based on this evaluation, recommended ranking of six proposals was:

- (1) MP&E Alternate A
- (2) Equitable Alternate A
- (3) MP&E Alternate B
- (4) Equitable Alternate B
- (5) MP&E Base proposal
- (6) Equitable Base proposal (not in compliance with RFP)

The rankings incorporated the 6 percent out-of-state "penalty" preference.

The report and recommendation were submitted to the Commission at an "adjourned regular meeting" on February 3, 1978. The Commission was responsible for evaluating and selecting the proposal most advantageous to the state. RCW 47.60.650(6)(a). By February 3rd all proposals satisfied the RFP, except the Equitable base proposal which was subsequently brought into compliance on February 17th.

The commissioners heard from the naval architect and representatives from both shipyards. Both firms were then permitted to submit additional information and provide their own evaluation of the proposals. Equitable introduced a memorandum objecting to the application of the 6 percent in-state preference. It also made repeated requests to review the plans and specifications of MP&E. The requests were denied.

red to the Department of Transportation. RCW 47.01.031.

Based on the additional information and the shipyard's evaluations, the naval architect reevaluated the proposals in a report dated February 17, 1978. The proposals were ranked as follows:

PROPOSAL	SINGLE VESSEL PRICE**	SINGLE VESSEL LIFE CYCLE COST**
MP&E - A	\$ 17,694,000	\$ 32,011,000
MP&E - B	17,237,000	32,162,000
Equitable - A	17,309,000	32,296,000 *
Equitable - Base	17,490,000	32,660,000 *
Equitable - B	17,316,000	32,750,000 *
MP&E - Base	17,983,000	33,013,000

* incorporates 6 percent out-of-state "penalty"

** rounded to the nearest \$1,000.

The Commission resumed its public meeting on February 20, 1978, hearing additional testimony from both shipyards. February 21, the Commission selected MP&E alternate A as the proposal most advantageous to the state, ranking the remaining proposals in the order recommended in the naval architect's report of February 17th.

February 27, 1978, Equitable filed notice of appeal² in Thurston County Superior Court under RCW 47.60.650(6)(b), which provides in part:

The [Commission's] decision shall be conclusive unless appeal therefrom shall be taken by an aggrieved firm to the superior court of Thurston county within five days after receiving notice of the [Commission's] final decision. The appeal shall be heard summarily within ten days after the same is taken and on five days notice thereof to the [Commission]. The court shall hear any such appeal on the administrative record which was before the

2. According to Equitable's notice of appeal in Thurston County Superior Court, it filed a declaratory judgment action in the Western District of Washington on February 24, 1978. *Equitable Shipyards, Inc. v. Bulley*, No. C78-123. Equitable noted this contemporaneous federal proceeding and expressly reserved "the right to have all its constitutional claims and its claims arising under Federal Statutes heard and adjudicated" in federal court. The claims were enumerated as follows: (1) violation of the commerce clause (U.S. Const. art. 1, § 8); (2) deprivation of due process (Fourteenth Amendment); (3) deprivation of equal protection (Fourteenth Amendment); (4) abridgment of privileges and immunities; (5) violation of Equitable's civil rights; (6) granting of special

[Commission]. The court may affirm the decision of the [Commission] or it may reverse the decision if it determines the action of the [Commission] is arbitrary or capricious.

By consent of all parties, MP&E intervened in the proceedings. In its original notice of appeal, Equitable alleged that the Commission acted arbitrarily and capriciously by: (1) incorrectly applying the 6 percent preference; (2) violating the Open Public Meetings Act; and (3) violating the public records act.

March 3, 1978, in the trial court hearing, it was agreed the State would not enter into a contract with MP&E until motions had been heard. At a March 10th hearing, Equitable moved to obtain: (1) plans and specifications of MP&E; (2) prequalification files; and (3) all matters and documents considered by the commissioners.

The plans submitted by both shipyards had previously been placed in escrow. The State and MP&E resisted disclosure, asserting a protected proprietary interest. The trial court ruled that the plans and specifications were part of the record and permitted inspection under court supervision.

Regarding the prequalification files, the trial court ruled that the issue of prequalification was not presently reviewable. Under the prequalification process of RCW 47.60.660, Equitable, MP&E, and five other firms had been deemed prequalified. The trial court noted that the firms were entitled to rely on that determination and to proceed with preparation of proposals.³

privileges and immunities not belonging equally to all citizens and corporations; (7) creating special law granting corporate powers and privileges. Although the record on appeal contains no copy of the federal complaint, apparently that action alleges state as well as federal constitutional infractions. The federal case is pending.

3. RCW 47.60.660 provides an independent appeal process by which an "aggrieved party" may obtain review of prequalification. We need not determine whether Equitable had the right to challenge the prequalification of another "bidder" under this statute.

Equitable asserted that the issuance of the bid by MP&E (a) became an issue and thus the file which was relevant. The financial data file qualification determined viewed in camera was not at March 21st, the to examine MP.

Equitable's "c matters and documents March 10th hearing though there was between the court allotted time to prove inadequate vision in RCW appeal shall be 7 days," set trial fully continued to motion to present pret or supplement ord was denied.

The trial court constitutional claim 60.650(6)(b) limitation determination c arbitrary or cap however, that t. be raised in a d March 27th, the the issue of arb was argued. The issue regarding percent preference day, March 23rd

March 30th, following conclusion

4. Five requirements: fication: adequate necessary experience qualifications: performance s performance, and otherwise struct under RCW 47.60.66.

5. Other public awarding contract bidder." See.

Equitable asserted that the financial ability of MP&E (a prequalification criterion) became an issue at the Commission hearing, thus the file which evaluated such matters was relevant. The trial court ruled that financial data filed subsequent to the prequalification determination would be reviewed in camera; however, prequalification was not at issue. Subsequently, on March 21st, the court permitted Equitable to examine MP&E's prequalification file.

Equitable's "catchall" request for "all matters and documents" was rejected at the March 10th hearing as too general. Although there was a general consensus between the court and the parties that the allotted time for trial preparation might prove inadequate, the court, noting the provision in RCW 47.60.650(6)(b) that "[t]he appeal shall be heard summarily within ten days," set trial for March 23rd (subsequently continued to March 27th). Equitable's motion to present expert testimony to interpret or supplement the administrative record was denied.

The trial court refused to entertain the constitutional challenge because RCW 47.60.650(6)(b) limited the scope of review to a determination of whether the action was arbitrary or capricious. The court noted, however, that the constitutional issue could be raised in a declaratory judgment action. March 27th, the trial began. On that date, the issue of arbitrariness and capriciousness was argued. The statutory interpretation issue regarding proper application of the 6 percent preference was heard the following day, March 28th.

March 30th, the trial court entered the following conclusions of law: (1) the court

4. Five requirements were set forth for prequalification: adequate financial resources; necessary experience, organization and technical qualifications; ability to comply with required performance schedule; satisfactory record of performance, integrity, judgment, and skills; and otherwise qualified and eligible to construct under applicable laws and regulations. RCW 47.60.660.

5. Other public bidding statutes authorize awarding contracts to the "lowest responsible bidder." See, e. g., RCW 52.12.110 (fire protec-

tion district); RCW 56.09.070 (sewer district); RCW 43.19.1911 (state division of purchasing); RCW 35.23.352, 35.22.620 (cities and towns). When bidding is tendered on plans and specifications submitted by the bidders, statutes permit an award to the "best bidder submitting his own plans and specifications." See, e. g., RCW 53.08.130 (port district); RCW 54.04.080 (public utility district); RCW 57.09.050 (water district); RCW 70.14.140 (public hospital district). See also RCW 86.09.178 ("lowest and best responsible bidder").

lacked the power and capacity to hear and determine constitutional questions regarding the application of the statute in the instant proceeding because the court's jurisdiction was predicated solely on RCW 47.60.650(6)(b); (2) the court lacked power in this proceeding to determine if the State violated the Open Public Meetings Act; (3) under RCW 47.60, the court could not receive expert testimony to introduce facts outside the administrative record or to explain the record; (4) Equitable was not denied due process by being compelled to go to trial on March 27th; (5) the State properly construed and applied the 6 percent preference statute; and (6) based on the administrative record, the selection of MP&E was not arbitrary or capricious.

[1] The primary purpose of public bidding is to benefit the taxpayers by procuring the best work or material at the lowest price practicable. *Savage v. State*, 75 Wash.2d 618, 621, 453 P.2d 613 (1969). A secondary purpose of competitive bidding is to provide bidders with a fair forum for the award of public contracts. *Gostovich v. West Richland*, 75 Wash.2d 583, 587, 452 P.2d 737 (1969). See generally Comment, *Competitive Bidding—Public Construction Contracts In The State of Washington*, 39 Wash.L.Rev. 796 (1964).

The ferry procurement act, RCW 47.60.650-.670, contemplates a negotiated contract with selection of the contractor based upon competitive design proposals. The act has several distinctive characteristics: (1) provisions for prequalification;⁴ (2) solicitation of competitive design proposals; (3) contract award to proposal "most advantageous to state";⁵ (4) inclusion of three

evaluation factors: vessel price, life cycle costs, in-state preference; and (5) expedited judicial review from award provided.

In a negotiated procurement procedure, evaluation of proposals is more complex than simply to rank bids. After discussion, proposals may be modified, as in the instant case. Factors other than bid price may be used in selection, e. g., life cycle costs.

Equitable's most strenuous objections seem directed to the constitutionality and application of RCW 47.60.670, the preference statute. Before reaching the constitutional issue, however, we examine the trial court's determination that it had no jurisdiction to hear the constitutional claims in this statutory review proceeding.

We begin by noting RCW 47.60.650(6)(b) provides that upon appeal from the award of the ferry contract, the court "may affirm the decision of the [Commission] or it may reverse the decision if it determines the action of the [Commission] is arbitrary or capricious." Equitable argues: (1) the arbitrary or capricious standard includes constitutional review; and (2) the arbitrary or capricious standard cannot derogate the power of the court to decide constitutional issues. We disagree as to (1) and agree as to (2).

Even so, in this case, general rules regarding appeals are qualified by legislative concern for prompt resolution. See, e. g., RCW 47.60.650(6)(b) (appeals shall be heard "summarily" within 10 days). In this instance, the necessity for prompt determination cannot be gainsaid in light of the limited life (90 days) of the submitted offers, escalating costs, and the urgency of the state's ferry needs.

Arbitrary and capricious action has been consistently defined by this court as "willful and unreasoning action, without consideration and in disregard of facts or circumstances." *DuPont-Ford Lewis School Dist. 7 v. Bruno*, 79 Wash.2d 736, 739, 489 P.2d 171 (1971). The arbitrary or capricious standard has been applied to challenges to bidding procedures even though there is no statutory provision affording review. See, e. g., *Butler v. Federal Way School Dist.*

210, 17 Wash.App. 233, 562 P.2d 271 (1977); see also *Savage v. State*, *supra* (reviewed for abuse of discretion).

[2, 3] When applying the "arbitrary and capricious" standard of review, a reviewing court does not substitute its judgment for that of the agency. *Deaconess Hosp. v. State Highway Comm'n*, 66 Wash.2d 378, 403 P.2d 54 (1965). Where there is room for two opinions, action is not arbitrary or capricious if exercised honestly and upon due consideration even if the reviewing court believes an erroneous conclusion was reached. *DuPont-Ford Lewis School Dist. 7 v. Bruno*, *supra*. When contracts are to be awarded on terms "most advantageous to" or "in the best interest of" the state, as in this case, the discretion in making the award may be even somewhat broader. See 64 Am.Jur.2d. *Public Works and Contracts* § 68 (1972). It does not seem to us that a constitutional infirmity fits readily within our concept of arbitrary or capricious.

Further, in RCW 34.04.130(6), a section of the administrative procedure act, the legislature set forth the grounds for challenging agency decisions. Arbitrary or capricious and constitutional violation were listed as distinct and separate bases upon which to contest an agency ruling. We are reluctant, therefore, to infer a legislative intent to embrace constitutional challenges under the rubric of arbitrary or capricious where the legislature has indicated otherwise. See, e. g., *Butler v. Federal Way School Dist. 210*, *supra*. Nevertheless, we do not believe that in this case the legislature impermissibly precluded judicial review of constitutional questions.

[4] We agree with the trial court's appraisal that the act does not divest courts of jurisdiction to hear constitutional challenges. The declaratory judgment act, RCW 7.24, was available for assertion of such claims. Equitable was aware of the preference provision no later than its reception of the RFP. As a prequalified firm against whom the preference would operate, presumably it could have initiated a

declaratory action December 30, 1977, proposals.

Nonetheless, Equitable chose to submit rules and await was not selected declaratory judgment trial court challenge state and federal

In its original ston County Superior Court however, Equitable constitutional issues. constitutional issues and argued before the significance consider the preference

CONSTITUTIONAL PREFERENCE

Although its argument the Superior Court constitutional provisions asserts an equal protection Fourteenth Amendment federal equal protection state privileges (Const. art. 1, § 1 cal. *Olsen v. De* P.2d 324 (1956). considering the not raised by Equitable we believe the

In other contexts Supreme Court has like private individuals enjoys the unrestricted own supplies, to whom it will deal conditions upon "purchases." *Per* 310 U.S. 113, 127. (1940). See also 175, 191, 36 S.Ct.

The State assurances are state acts in its purchaser of government state courts state purchasing

declaratory action at least as early as December 30, 1977, when it submitted its proposals.

Nonetheless, knowing the rules, Equitable chose to submit a proposal under those rules and await a determination. When it was not selected, Equitable then filed a declaratory judgment action in federal district court challenging the preference on state and federal constitutional grounds.

In its original notice of appeal to Thurston County Superior Court 3 days later, however, Equitable failed to raise any constitutional issues. Nevertheless, as the constitutional issues were extensively briefed and argued before this court, and in view of the significance of the question, we will consider the preference complaint.

CONSTITUTIONALITY OF PREFERENCE STATUTE

Although its amended notice of appeal in the Superior Court referred solely to state constitutional provisions, Equitable now asserts an equal protection claim under the Fourteenth Amendment. We have held the federal equal protection clause and the state privileges and immunities clause (Const. art. 1, § 12) are substantially identical. *Olsen v. Delmore*, 48 Wash.2d 545, 295 P.2d 324 (1956). While the State objects to considering the equal protection claim as not raised by Equitable in the trial court, we believe the issue should be addressed.

In other contexts, the United States Supreme Court has stated that government, like private individuals and businesses, "enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127, 60 S.Ct. 869, 84 L.Ed. 1108 (1940). See also *Heim v. McCall*, 239 U.S. 175, 191, 36 S.Ct. 78, 60 L.Ed. 206 (1915).

The State asserts that equal protection guaranties are not applicable when the state acts in its proprietary capacity as a purchaser of goods. Relying on *Heim*, other state courts have upheld statutory in-state purchasing preferences against both

equal protection and commerce clause challenges. See, e. g., *Denver v. Bossie*, 83 Colo. 329, 266 P. 214 (1928) ("the state may buy of whom it will"); *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 76 So. 258 (1917) (rejecting equal protection challenge to a statute prohibiting state contracting with nonresident bidders).

While the vitality of the proprietary rationale is questioned from time to time, its use continues. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976) (invokes proprietary rationale to forego traditional commerce clause analysis). In 1972, the Supreme Court summarily affirmed a lower federal court ruling which (1) distinguished state purchases in its proprietary capacity from other state functions, and (2) upheld a statute requiring in-state government printing against commerce clause and equal protection challenges. *American Yearbook Co. v. Askew*, 339 F.Supp. 719 (M.D.Fla.), *aff'd*, 409 U.S. 904, 93 S.Ct. 230, 34 L.Ed.2d 168 (1972). The district court in *American Yearbook Co.* recognized the authority of states to prescribe conditions under which work of a public character will be performed. See also *Phoenix v. Superior Court, Maricopa County*, 109 Ariz. 533, 514 P.2d 454 (1973).

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

Equitable next attempts, relying on its out-of-state incorporation, to characterize itself as an alien. It uses this premise to assert that the preference statute's classification of in-state and out-of-state shipbuilding firms is based upon a suspect class, i. e., alienage. Therefore, the argument goes, the statute must be subjected to the rigors of strict scrutiny.

[5, 6] It is true, strict scrutiny is appropriate when a classification is based on a

suspect category or infringes upon a fundamental right. *Nielsen v. Washington State Bar Ass'n*, 90 Wash.2d 818, 585 P.2d 1191 (1978); see generally L. Tribe, *American Constitutional Law* § 16-22 (1978). It is also true, Equitable may be designated a "foreign corporation". Equitable, however, is not an "alien" for purposes of equal protection analysis. In the context of suspect categories, alienage refers to non-United States citizenship. *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). Further, nonresidency and out-of-state citizenship have not been deemed suspect classifications for equal protection purposes. See generally L. Tribe, *supra*, § 6-33 at 411.

[7-9] We conclude the preference statute is most closely allied with economic legislation requiring only rational basis scrutiny. See *Lynden Transp., Inc. v. State*, 532 P.2d 700 (Alaska 1975). The rational basis inquiry involves a three-part test: (1) Does the classification apply alike to all members within the designated class? (2) Does some basis in reality exist for reasonably distinguishing between those within and without the designated class? (3) Does the classification have a rational relation to the purpose of the challenged statute? *Yakima County Deputy Sheriff's Ass'n v. Board of Comm'rs for Yakima County*, 92 Wash.2d 831, 601 P.2d 936 (1979). There is a strong presumption of constitutionality in economic acts of the legislature and the burden of refutation is on the challenger. *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n*, 83 Wash.2d 523, 528, 520 P.2d 162 (1974).

[10] In considering whether the classification passes constitutional muster, we consider the purposes of the challenged statute. The plain object of the act is the procurement of ferries. It provides a procedure whereby public funds shall be expended for a public purpose. The primary interest is that of the public. An identifiable underlying policy is that of granting a preference to those who contribute to the economy through construction activities within the

state. RCW 47.60.670, as we interpret it, grants a preference for constructing vessels within the state.

Ferry construction activities are exempt from state sales tax and use tax. Laws of 1977, 1st Ex.Sess., ch. 166, §§ 6, 7, pp. 616, 620, amending RCW §2.08.030 and §2.12.030. Lost revenues from the tax exemption are partially offset if the shipbuilding activities occur within the state thereby generating secondary economic activity. The lower price preference partially compensates for the revenue loss if the vessels are constructed elsewhere. Finally, construction of ferries within the state strengthens state and local economies. Out-of-state construction results in increased inspection costs and greater potential for delay.

We are convinced that a rational relation exists between the purposes of RCW 47.60.670 and its classifications of in-state and out-of-state shipbuilding firms. See *Schrey v. Allison Steel Mfg. Co.*, 75 Ariz. 282, 255 P.2d 604 (1953); cf. *Lynden Transp., Inc. v. State*, *supra* (strikes down classification granting privilege to resident corporation with principal office and majority of shareholders in state). We find no violation of equal protection guaranties.

[11, 12] Equitable also asserts that RCW 47.60.670 is further constitutionally infirm in that it represents a "special" law "granting corporate powers or privileges" in violation of Const. art. 2, § 28(6). Under this constitutional prohibition, a special law is one which arbitrarily separates some person, place or thing from those upon which it would otherwise operate. The focus is upon what the law excludes. *YMCA v. Parish*, 89 Wash. 495, 154 P. 785 (1916). If nothing is excluded that should be included, the law is a general enactment. When the only limitation is a legitimate classification of the law's objects, it is a general law. *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n*, *supra*. As stated above, in our view, the preference classification is valid. Further, the preference statute relates to particular bidders as a class and not particular bidders of a class. Assuming Equitable has adequately raised and presented

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In light of unnecessary t 42.17.270 in : we do not fi tions were ei the time.

this assignment of error, RCW 47.60.670 does not separate out a particular person or entity for special treatment and does not fall within the proscription of the cited constitutional provision.

PUBLIC RECORDS

[13] The certified administrative record contains 77 items of evidence considered by the Commission in its award of the contract. Of those items, Equitable asserts that the Commission's refusal to disclose MP&E's plans and specifications violated the public records provisions in RCW 42.17-250-.340, and was therefore arbitrary and capricious. Under the circumstances of this case (a design/bid competition), we disagree that the Commission's refusal to disclose the plans and specifications of one competitor to another was arbitrary or capricious.

In any event, January 11, 1978, the plans and specifications of both contending firms were placed in escrow. After filing of the appeal, the trial court ordered that the plans be made available for inspection by representatives of both shipyards. This order was later modified to permit unrestricted use of the plans. Thus, Equitable had access to the plans and specifications under the court order and it took full advantage of that access.

Equitable makes no allegation that the Commission failed to give identical information to both competitors. It demonstrates no prejudice from the Commission's refusal to allow it to review the plans and specifications earlier. The only authority it cites for the proposition that a public agency seeking competitive design bids has a duty to reveal the plans of one competitor to another is RCW 42.17.270 (general provision authorizing inspection and copying of public records).

In light of the foregoing, we deem it unnecessary to construe the limits of RCW 42.17.270 in this instance. Suffice to say, we do not find that the Commission's actions were either arbitrary or capricious at the time.

PREQUALIFICATION FILES

[14] Equitable argues that the Commission acted arbitrarily in considering prequalification files and the trial court erred in refusing to review the prequalification issue. To the extent certain commissioners may have intimated some question concerning a prequalification criterion (financial responsibility), this did not deflect the focus of the meetings. Even assuming that Equitable should have been granted access to the prequalification file earlier, we fail to see where prejudice resulted. The concern about financial responsibility involved MP&E, not Equitable. Further, after examination was permitted, Equitable has yet to identify any portion of the file as objectionable or inaccurate. Again, the Commission's action was not arbitrary or capricious.

EXPEDITED HEARING

[15] Equitable also asserts that the provision for a hearing on appeal within 10 days violates due process and separation of powers doctrines. RCW 47.60.650(6)(b). Inability to adequately prepare for the hearing is the gravamen of Equitable's complaint. The trial court avoided an interpretation which might have been found to be an unconstitutional usurpation of judicial power. The court construed the statute as directory, not mandatory. The trial ultimately was held 1 month after the appeal was filed, not 10 days as the statute provided. Thus, we find no violation of separation of powers.

Under the circumstances, we also find no violation of due process when the trial court denied Equitable's motion for continuance. One case is cited for the alleged violation, *In re Petrie*, 40 Wash.2d 809, 246 P.2d 465 (1952). It was there held, in a proceeding to deprive a mother of parental rights that service of a summons at 2 p. m. on a legal holiday returnable the following day at 10 a. m. was insufficient time and constituted denial of due process. Equitable asserts it is in the same position as *Petrie* and since it "was not afforded a meaningful opportunity to prepare, it was denied due process of law."

[16] The hearing date selected in this instance reflected a conscientious effort by the trial court to afford Equitable a reasonable time to prepare, to allow the court to hear and decide the matter and still give some efficacy to RCW 47.60.650(4)(i) (90-day limitation on proposals). Under the circumstances, we are unable to conclude that the early hearing provision is invalid under the due process clause, particularly where, as here, Equitable was previously afforded an opportunity to be heard at an open public meeting and its appeal was heard approximately 1 month after it was filed. *Cf. Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972). A prompt and expeditious resolution of the matter was in the best interest of all parties.

OPEN PUBLIC MEETINGS ACT

[17] We recognize the statutory statement of purpose in RCW 42.30.010, the Open Public Meetings Act of 1971 (OPMA), employs some of the strongest language used in any legislation. See *Cathcart v. Andersen*, 85 Wash.2d 102, 530 P.2d 313 (1975). The trial court concluded that within the scope of this statutory appeal it lacked jurisdiction to determine whether the Commission violated the OPMA. RCW 42.30. Regardless of the correctness of the trial court's view of its jurisdiction, Equitable has neither alleged, argued nor demonstrated that: (1) it was denied the right to be present at the adjourned regular meetings of the Commission; (2) it was denied the right to be heard during deliberations; (3) a "secret" Commission meeting was held; or (4) the Commission met impermissibly in executive session. Equitable does make some contention that the denial of access of MP&E's plans and specifications converted the meetings into violations of the act because certain members of the Commission independently and individually examined the documents. We do not find such independent examination, assuming it occurred, to be violative of this act. Independent separate examination of the documents constituted neither an "action" nor a "meeting" under the act. See RCW 42.30.

020(3) and (4). The Commission took its "action" in an open public meeting following presentations by both firms, experts and the public.

APPLICATION OF PREFERENCE STATUTE

[18] Equitable's final assignment of error relates not to the constitutionality of the preference statute as discussed earlier, but to its application. The trial court rejected Equitable's interpretation, and we affirm. At issue are (1) the evaluation and selection process set forth in RCW 47.60.650(5) and (6), and (2) the application of the 6 percent preference under RCW 47.60.670.

Conflicting interpretation results, depending upon which statute is focused upon. Equitable construes RCW 47.60.670, a single sentence statute, as a mandatory directive to award the construction contract to an in-state shipyard unless the out-of-state competitor's bid plus preference penalty is less than the bid of the in-state firm. It is Equitable's contention that the contract award is to be determined solely by comparing the vessel price of the best in-state proposal with the vessel price of the out-of-state proposal as enhanced by the 6 percent preference penalty. Equitable asserts that life cycle cost evaluation is to be used only in selecting the most advantageous in-state proposal for the final comparison with the out-of-state proposal. Accordingly, Equitable argues life cycle costs are of no concern to it as an out-of-state firm, and such costs are not to be considered in making a selection between in-state and out-of-state competitors.

The State, on the other hand, construes RCW 47.60.650(6) to be the contract "award" statute. Under that construction, the bid, life cycle costs and 6 percent preference impact for each proposal are aggregated to determine the proposal most advantageous to the State. RCW 47.60.650(6) refers to the preference statute only to obtain the "measure" (6 percent) of the preference. Parenthetically, we note that the State's construction was known to Equi-

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It is our function or intent of *Daly*, 31 Wash (1972). Equitable consideration of the most advantageous. To so read the general language does not differ out-of-state proposal based upon cycle costs. Since rendered superior 89 Wash.2d 315 it is read and given 670, we find that the proposal to be correct.

Affirmed.

UTTER, C. J.
LINI, WRIGH'
OWITZ, DOLI
concur.

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STATE v. PONCE

Wash. 407

Cite as, Wash., 611 P.2d 407

table from the beginning, as it was set forth in the RFP.

It is our function to effectuate the objective or intent of the legislature. *Amburn v. Daly*, 81 Wash.2d 241, 245, 501 P.2d 178 (1972). Equitable's interpretation limits consideration of life cycle costs to selecting the most advantageous in-state proposal. To so read the statute is to disregard the general language of RCW 47.60.650, which does not differentiate between in-state and out-of-state proposals for purposes of evaluation based upon price preference and *life cycle costs*. Since this section may not be rendered superfluous (*Taylor v. Redmond*, 39 Wash.2d 315, 571 P.2d 1388 (1977)), when it is read and given effect with RCW 47.60.670, we find the State's method of evaluating the proposal and awarding the contract to be correct.

Affirmed.

UTTER, C. J., and STAFFORD, ROSELLINI, WRIGHT, BRACHTENBACH, HOROWITZ, DOLLIVER and WILLIAMS, JJ., concur.



93 Wash.2d 553

The STATE of Washington, Respondent,

v.

Antonio Rodriguez PONCE, Petitioner.

The STATE of Washington, Respondent,

v.

Heriberto OZUNA, Petitioner.

No. 45897.

Supreme Court of Washington,
En Banc.

May 15, 1980.

The Superior Court, Walla County, James B. Mitchell, J., found that motorists

were habitual traffic offenders, and suspended right of each to drive for five years, and they appealed. The Court of Appeals, 21 Wash.App. 277, 584 P.2d 482, affirmed, and petition for review was granted. The Supreme Court, Hicks, J., held that: (1) where no actual imprisonment was imposed for any of the traffic convictions sustained by defendant in habitual traffic proceedings, there was no constitutional violation by failure to advise indigent defendant of his right to counsel, and (2) traffic conviction which was constitutionally invalid for failure of accused, who was imprisoned, to have counsel may not be considered in subsequent traffic offender proceeding and such conviction is void and subject to collateral attack.

Affirmed as to one petitioner and reversed as to other petitioner.

Brachtenbach, J., filed opinion concurring in part and dissenting in part in which Williams, Wright, and Rosellini, JJ., concurred.

Jerome M. Johnson, J. pro tem., filed opinion concurring in part and dissenting in part.

1. Criminal Law \approx 641.2

Where no actual imprisonment was imposed for any of the traffic convictions sustained by defendant in habitual traffic offender proceeding, there was no constitutional violation by failure to advise indigent defendant of his right to counsel. West's RCWA 46.20.342, 46.52.020, 46.61.500, 46.61.515, 46.61.520, 46.65.010 et seq., 46.65.020; JCrR 2.11(a), (a)(1); U.S.C.A.Const. Amend. 6.

2. Criminal Law \approx 641.1

Under court rule, right to counsel extends to any cause punishable by loss of liberty. JCrR 2.11(a); U.S.C.A.Const. Amend. 6.

3. Judgment \approx 486(1)

Final judgment may be vacated during collateral proceeding only by demonstrating that it is void.

State v. Kruchten, 101 Ariz. 186, 417 P.2d 510 (1966), cert. denied, 385 U.S. 1043, 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 \Rightarrow 54
Constitutional Law \Rightarrow 211
Municipal Corporations \Rightarrow 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. 1, § 8, cl. 3; Amend. 14.

2. Municipal Corporations \Rightarrow 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 contractors 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 \Rightarrow 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 \Rightarrow 1010.1(6)

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

5. Appeal and Error

The Supreme Court's legal conclusions of

6. Statutes \Rightarrow 226

Since Arizona contractors from a decision interpreting

7. Licenses \Rightarrow 11(5)

The purpose of letting contractors is the public that of skill and ability work. A.R.S. § 3-

8. Licenses \Rightarrow 11(5)

Both a general contractor's license and construction license for construction of water building would have room, laboratory. A.R.S. § 32-1102,

Joe R. Purcell
Patrick E. Burke
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City of Mesa.

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5. Appeal and Error \S 842(2)

The Supreme Court is not bound by legal conclusions of trial court.

6. Statutes \S 226

Since Arizona took statutes governing contractors from California, California decision interpreting such statutes is persuasive.

7. Licenses \S 11(5)

The purpose of statute licensing building contractors is to provide protection for the public that contractors have requisite skill and ability to perform the required work. A.R.S. \S 32-1102, subds. 1, 2.

8. Licenses \S 11(5)

Both a general engineering contractor's license and a general building, heavy construction license were required for construction of water treatment plant, where building would have not only water treatment tanks but also offices, conference room, laboratory, shop area and lunchroom. A.R.S. \S 32-1102, subds. 1, 2.

Joe R. Purcell, Phoenix City Atty. by Patrick E. Burke, Asst. City Atty., Phoenix, for petitioners City of Phoenix and City of Mesa.

Monteleone & McCrory by Darrell P. McCrory, Los Angeles, Cal., Herbert Malamo, Phoenix, for petitioner Zurn Engineers.

Lewis & Roca by John P. Frank and Mary M. Schroeder, Phoenix, Robertson, Molloy, Fickett & Jones by John F. Molloy, Tucson, for respondent M. M. Sundt Const. Co.

Mariscal, Weeks, Lehman & Whitten by Phillip Weeks, Phoenix, for amicus curiae Wittman Contracting Co.

HOLOHAN, Justice.

Petitioners City of Phoenix and Zurn Engineers brought this Special Action to prevent the enforcement of the decision of the superior court which ordered the award of a certain construction contract by the City to Zurn Engineers set aside. Due

to the public importance of the questions presented we accepted jurisdiction, denied the request of the petitioners to set aside the order of the trial court, approved the findings of the superior court, and noted that a written decision would follow in due course.

The facts of the case are that the City of Phoenix advertised for bids for the construction of the Val Vista Water Treatment Plant to supply domestic water for the Cities of Phoenix and Mesa. The construction, supervision, operation and maintenance of the plant are to be within the exclusive control of the City of Phoenix, but the cost is to be borne in a percentage of 80% by the City of Phoenix and 20% by the City of Mesa. Petitioner, Zurn Engineers, submitted the lowest bid, with respondent, M. M. Sundt Construction Co. having the next lowest bid. Sundt protested the bid of Zurn Engineers, but the City of Phoenix accepted the Zurn bid. Sundt brought suit in the Superior Court of Maricopa County to restrain the City from allowing Zurn to proceed with the construction contract. Sundt also sought in the action to compel the City to award the bid to it as the lowest bidder under Arizona statutes.

Various grounds were offered by Sundt for invalidating the Zurn bid, but we need only consider those relied on by the superior court for its decision, namely, that Sundt was the lowest responsible bidder because A.R.S. \S 34-241 allows a 5% preference in this case to Sundt, and that Zurn did not have the proper contracting license to construct the project.

A.R.S. \S 34-241, subsec. B reads:

"B. In awarding the contract for work to be paid for from public funds, bids of contractors who have satisfactorily performed prior public contracts, and who have paid state and county taxes within the state for not less than two successive years immediately prior to submitting a bid on a plant and equipment such as is ordinarily required for performance of the contract for which

the bid is submitted, or on other real or personal property in the state equivalent in value to such plant, shall be deemed a better bid than the bid of a competing contractor who has not paid such taxes, whenever the bid of the competing contractor is less than five per cent lower, and the contractor making a bid, as provided by this section, which is deemed the better bid, shall be awarded the contract."

[1] Petitioners do not contend that Sundt does not qualify for the preference, nor do they claim that Zurn Engineers does qualify. Their contention is that the 5% preference is not applicable to the construction contract at issue because the statute granting the preference is unconstitutional as violating the equal protection provisions (Amendment XIV) and the commerce clause (Article I, Section 8) of the U. S. Constitution, and the contract in question does not involve the expenditure of public funds.

The "5% preference" statute was held constitutional by this Court in *Schrey v. Allison Steel Mfg. Co.*, 75 Ariz. 282, 255 P.2d 604 (1953). The Court held that there was a reasonable basis for the privilege granted, and the statute provided a classification which allowed not only a domestic contractor but also a foreign one to qualify. We continue to follow the holding in *Schrey*.

The constitutionality of a somewhat similar type of statute has been upheld in *American Yearbook Company v. Askew*, 339 F.Supp. 719, affirmed 409 U.S. 904, 93 S.Ct. 230, 34 L.Ed.2d 168 (1972) in which the U. S. Supreme Court affirmed the decision of a three-judge federal court which upheld the constitutionality of a Florida statute requiring all public printing of the state to be done in the state. The *Askew* decision upholds the authority of the state and its subdivisions to prescribe the conditions under which work of a public character will be done. The *Askew* decision supports our holding in *Schrey*.

Petitioners urge that "public funds" are not to be utilized in the present case because the project is to be financed by revenue bonds issued pursuant to A.R.S. § 9-521 et seq., and such bonds are not a general obligation of the City. A.R.S. § 9-526. Petitioners argue that a revenue bond financing plan cannot be considered as part of public funds because the proceeds from the sale of revenue bonds are in effect held in trust by the City for the specific project; therefore they are not owned by the City.

As authority for their position petitioners have cited *Cyr & Evans Contracting Co. v. Graham*, 2 Ariz.App. 196, 407 P.2d 385 (1966), in which the Court of Appeals held that a street paving contract financed through assessments and bonds pursuant to A.R.S. § 9-671 et seq. was not one utilizing "public funds" because the funds do not equitably belong to the city but are trust funds for the payment of the improvements.

It must be noted that in *Cyr* the improvements did not involve the total city but a district which might have had few property owners. In this sense the funds would not be used for the public but for the benefit of a few property owners of a given improvement district of the city.

We need express no opinion as to the holding in *Cyr* except to say that it is clearly distinguishable from the present case.

The funds in this case are held and to be expended for the benefit of the entire population of the City. Even if we accept the City's contention that the money is held in trust for the project, it is obvious that the project is for the benefit of the public.

Since *Board of Regents v. Sullivan*, 45 Ariz. 245, 42 P.2d 619 (1935) this Court has held that revenue bonds are not subject to the debt limitation of Section 5, Article IX of the Arizona Constitution, A.R.S., but the fact that such bond funds are not subject to the debt limitation does not

mean that the funds are not public funds. To the contrary, in *Phoenix*, 55 Ariz. 100, this Court held that revenue bonds must be used for a specific purpose.

There is, of course, no question as to the purpose of the bond funds in this case—the construction of a water treatment plant for the city of Phoenix. The funds to pay for the plant are to be paid by the City of Phoenix. The fact that these funds are for a specific purpose does not change their character as public funds. See *Bridge Commission v. Commonwealth*, 258 Ky. 846, 81 S.W.2d 475 (1964); 63 C.F.R. 475 (1964); 63 C.F.R. 475, § 1.

[2] We hold that the statute is constitutional for the construction of a water treatment plant. The case is public funds. The preference provided in the statute is applicable. The statute is entitled to the benefit of the low bidder on the contract.

The trial court's decision was affirmed because it is clearly distinguishable from the Register's decision. A.R.S. § 34-241 provides that public works must be done by a contractor in this case. The Register's decision is considered. Zurn is a General Contractor. Respondent's decision is sufficient to cover the project. It was necessary to have both a Class A and a Class B contractor, Heavy Construction.

The statute of the City of Phoenix is A.R.S. 34-241 and 2. The project is for the

mean that the funds are not public. To the contrary, in *Humphrey v. City of Phoenix*, 55 Ariz. 374, 102 P.2d 82 (1940), this Court held that the funds from revenue bonds must be expended for a public purpose.

There is, of course, no question but that the bond funds in this case are for a public purpose—the construction of a water treatment plant for the production of potable water for the residents of the two cities. The funds to pay for this project are held by the City of Phoenix to discharge the payment of a clearly public purpose, and the fact that these funds are pledged for a particular purpose does not alter their character as public funds. *Louisville Bridge Commission v. Louisville Trust Co.*, 258 Ky. 846, 81 S.W.2d 894 (1935); *Commonwealth v. Howard*, Ky., 379 S.W.2d 475 (1964); 63 Am.Jur.2d 394, Public Funds, § 1.

[2] We hold that expenditure of funds for the construction of the project in this case are public funds for which the preference provided in A.R.S. § 34-241, subsec. B is applicable. Respondent Sundt being entitled to the preference thereby becomes the low bidder and entitled to be awarded the contract.

The trial court ruled that Zurn Engineers did not qualify to construct the project because it lacked the proper license from the Registrar of Contractors. Under A.R.S. § 34-241, subsec. A a bidder on public works must be a duly licensed contractor in this state or his bid cannot be considered. Zurn Engineers holds a Class A General Engineering contractor's license. Respondent Sundt contended before the trial court that an A license was not sufficient to construct the project, and it was necessary that the contractor have both a Class A and Class B General Building, Heavy Construction license.

The statute defining the two types of contractors is A.R.S. § 32-1102, subsecs. 1 and 2. The principal distinction between

the types of contractors is that the general building contractor builds structures for the support, shelter and enclosure of persons, animals, and chattels, and the general engineering contractor builds fixed works requiring specialized engineering knowledge and skill. At first blush it would appear that a water treatment plant would fall within the general engineering category requiring a Class A license, but the evidence discloses that there is an administration building to be constructed as part of the project which is a multipurpose building. The building will have not only water treatment tanks but also offices, conference room, laboratory, shop area, and lunch room. It is clear that the building will shelter and enclose persons and chattels. The building will cost in excess of one million dollars, and some 25% of the structure is devoted to the administration function of the treatment plant.

[3] The Registrar of Contractors is charged with the duty of adopting rules and regulations classifying contractors and limiting their field and scope of operation. A.R.S. § 32-1105, subsec. A. In this case two experts from the office of the Registrar testified that both a Class A and Class B license would be required before a contractor could undertake construction of the water treatment project. Courts give great weight to the opinions of those charged with the duty of administering the regulation of a pursuit involving technical expertise. *Arnold Construction Company, Inc. v. Arizona Board of Regents*, 109 Ariz. 495, 512 P.2d 1229 (1973). The trial judge ruled that two licenses were required to construct the project, and, since Zurn did not have a Class B license, he was not qualified to perform the contract. A.R.S. § 34-241, subsec. A.

[4.5] This Court will not disturb the findings of the trial court when supported by substantial evidence. *Cantlay & Tanzola, Inc. v. Senner*, 92 Ariz. 63, 373 P.2d 370 (1962). We are, of course, not bound

