

ALASKA LEGISLATURE COMMITTEE FILES 1905-1906 HOUSE

3384

HJUD

HB 679

266



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James O. Smith  
Signature of Camera Operator

7/25/89  
Date

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STATE OF ALASKA  
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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907-465-3800

May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

1:30 pm

House Judiciary

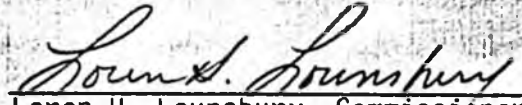
5/1/86



Department of Commerce  
& Economic Development / **POSITION PAPER**

CSHB 679: "An Act relating to the purchase of Alaska products and providing for an effective date."

The Department of Commerce and Economic Development strongly supports this bill. Fostering economic diversification in the state requires incubating local manufacturing and helping it to grow. This bill which would mandate the use of Alaska products and provide a bidder preference for products constructed and/or purchased with state money will do much to encourage and stimulate Alaska manufacturing.

  
Loren H. Lounsbury, Commissioner  
Department of Commerce & Economic  
Development

Date: 4/14/86

Offered: 4/23/85  
Referred: Rules

Original sponsors: Grussendorf, Sund,  
Szymanski, et al

1 IN THE HOUSE BY THE STATE AFFAIRS COMMITTEE  
2 SENATE CS FOR CS FOR HOUSE BILL NO. 50 (State Affairs) am S  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 FOURTEENTH LEGISLATURE - FIRST SESSION  
5 A BILL

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

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

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

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

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

18 (A) a bid shall be awarded to an Alaska bidder if the  
19 bid is not more than 10 [FIVE] percent higher than the lowest  
20 nonresident bidder's; and

21 \* Sec. 3. AS 37.05.230(5) is repealed and reenacted to read:

22 (5) in this section, "Alaska bidder" means a person who  
23 (A) holds a current Alaska business license;  
24 (B) does more than \$1,000,000 worth of annual business  
25 in the state or performs more than 20 percent of the person's  
26 annual business in the state, whichever is less;  
27 (C) certifies under penalty of perjury that the bidder  
28 will employ Alaska residents in the performance of the contract  
29 unless resident laborers are unqualified or unavailable;

STATE OF ALASKA 1986 LEGISLATIVE SESSION  
FISCAL NOTE

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

**REQUEST**

Bill/Resolution No.: CSHB 679  
 Title: An Act relating to the  
purchase of Alaska products

Sponsor: State Affairs  
 Requester: \_\_\_\_\_  
 Date of Request: \_\_\_\_\_

**FISCAL DETAIL**

Agency Affected: Commerce and Economic Dev.  
 BRU: Economic Development

Components: \_\_\_\_\_

**EXPENDITURES / REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	0-	-0-
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**FUNDING: (Thousands of dollars)**

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

**POSITIONS:**

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

**ANALYSIS:** Attach a separate page if necessary.

Prepared by: Joan Brown, Director  
 Division: Division of Administrative Services

Phone: 465-2505

Date: April 14, 1986

Approved by Commissioner: *Donna H. Gonsky*  
 Agency: Commerce and Economic Development

Date: April 14, 1986

Distribution (by Agency preparing fiscal note):

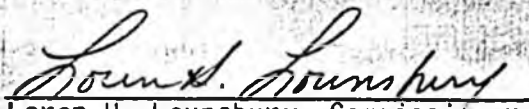
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

# **CORRECTION**

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

CSHB 679: "An Act relating to the purchase of Alaska products and providing for an effective date."

The Department of Commerce and Economic Development strongly supports this bill. Fostering economic diversification in the state requires incubating local manufacturing and helping it to grow. This bill which would mandate the use of Alaska products and provide a bidder preference for products constructed and/or purchased with state money will do much to encourage and stimulate Alaska manufacturing.

  
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Department of Commerce & Economic  
Development

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STATE OF ALASKA 1986 LEGISLATIVE SESSION  
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CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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**FUNDING: (Thousands of dollars)**

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FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

**POSITIONS:**

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PARTTIME						
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Prepared by: Joan Brown, Director  
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22 (5) in this section, "Alaska bidder" means a person who  
23 (A) holds a current Alaska business license;  
24 (B) does more than \$1,000,000 worth of annual business  
25 in the state or performs more than 20 percent of the person's  
26 annual business in the state, whichever is less;  
27 (C) certifies under penalty of perjury that the bidder  
28 will employ Alaska residents in the performance of the contract  
29 unless resident laborers are unqualified or unavailable;

1 (D) has maintained a permanent place of business in  
2 the state for a period of six months immediately preceding the  
3 date of the bid; and

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

6 \* Sec. 4. AS 37.05.230(7) is repealed and reenacted to read:

7 (7) the Alaska bidder provisions of this section do not  
8 apply to contracts estimated to exceed \$500,000; notwithstanding this  
9 section, the commissioner of transportation and public facilities or  
10 the commissioner of administration may waive an Alaska bidder prefer-  
11 ence when mandatory federal requirements that prohibit an Alaska  
12 bidder preference apply to a contract covered by this section;

13 \* Sec. 5. AS 37.05.230 is amended by adding a new paragraph to read:

14 (12) if a provision of this section, or the application of  
15 this section to a person or circumstance is held invalid, the remain-  
16 der of this section and the application to other persons or circum-  
17 stances is not affected.

18 \* Sec. 6. AS 37.05.315 is amended by adding a new subsection to read:

19 (e) If a contract for a project that is funded in whole or in  
20 part by a state grant is competitively bid, the municipality must  
21 comply with AS 37.05.230(1)(A).

Offered: 2/10/86  
Referred: Rules

Original sponsors: Kerttula  
and Eliason

1 IN THE SENATE BY THE FINANCE COMMITTEE  
2 HOUSE CS FOR CS FOR SENATE BILL NO. 57 (Finance)  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 FOURTEENTH LEGISLATURE - SECOND SESSION  
5 A BILL  
6 For an Act entitled: "An Act relating to preferential use of Alaska agri-  
7 cultural or fisheries products; and providing for an  
8 effective date."  
9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:  
10 \* Section 1. AS 36 is amended by adding a new chapter to read:  
11 CHAPTER 16. PREFERENTIAL USE OF ALASKA AGRICULTURAL  
12 OR FISHERIES PRODUCTS.  
13 Sec. 36.16.010. USE OF LOCAL AGRICULTURAL AND FISHERIES PRODUCTS  
14 REQUIRED IN PURCHASES WITH STATE MONEY. (a) When agricultural prod-  
15 ucts are purchased using state money, only agricultural products  
16 harvested in this state shall be purchased whenever competitively  
17 priced available, and of like quality compared with agricultural  
18 products harvested outside the state.  
19 (b) When fisheries products are purchased using state money,  
20 only fisheries products harvested or processed within the jurisdiction  
21 of the state shall be purchased whenever competitively priced, avail-  
22 able, and of like quality compared with fisheries products harvested  
23 or processed outside the jurisdiction of the state.  
24 (c) As used in this section, "agricultural products" includes  
25 timber and lumber harvested in the state and products manufactured in  
26 the state from timber and lumber that has been harvested in the state.  
27 Sec. 36.16.020. INSERTION OF CLAUSE IN CALLS FOR BIDS AND IN  
28 CONTRACTS. A clause containing the substance of the relevant sub-  
29 section of AS 36.16.010 shall be inserted in all calls for bids and in

1 all contracts awarded that involve agricultural or fisheries products.  
2 \* Sec. 2. This Act takes effect immediately in accordance with AS 01.-  
3 10.070(c).

Sectional Outline CSHE 679  
Alaska Products

Section 1.

This section amends AS 36.15.010 by requiring the use of Alaska forest products for public construction projects unless the Commissioner of Commerce and Development certifies notice was given to manufacturers to supply the products and none were able to supply the forest products at a cost within 7 percent of the cost for non-Alaska forest products.

Section 2.

AS 36 15.030 requires the use of Alaska products including forest products, where practical, for state public construction projects and state funded municipal and school district public construction projects.

AS 36.15.040 allows the inclusion of language in contract specifications granting a preference in bid evaluation if designated Alaska products are used. This section is not applicable to forest products.

AS 36.15.050 allows the designation of specific Alaska products for use in a specific public construction project. The section is applicable to forest products.

AS 36.15.060 allows the reduction of bids for the purposes of evaluation when designated Alaska products are used. This section does not include forest products in the preference scheme.

AS 36.15.070 requires a penalty be applied to contractors who designate the use of Alaska products in their bids and fail to use them for reasons within their control. The amount of the penalty is the amount of the preference given plus 1 percent. If a person has this penalty applied twice within a three year period, he is deemed a non-responsive bidder. Contracting authorities will report these violations to the Department of Commerce and Economic Development which shall maintain a list of bidders deemed non-responsive.

AS 36.15.080 requires the Department of Commerce and Economic Development to adopt regulations for establishing the value added in Alaska for products.

Value added in the state of more than 25 percent and less than 50 percent renders the product a Class I product, if value added is more than 50 percent but

less than 75 percent it is a Class II product and 75 percent or more it is a Class III product.

The three classes of products receive the following preferences in bid evaluation.

Class I	3 percent preference
Class II	5 percent preference
Class III	7 percent preference

AS 36.20.10 through 36.20.060 parallel the provisions of the language proposed above as AS 36.20.030 through AS 36.20.080. These statutes have application to all state funded procurement except public construction projects.

#### Section 3.

AS 36.20.010 is amended to require a preference for the use of Alaska products by state agencies as well as municipalities and REAA's funded in whole or part with state money.

#### Section 4.

AS 36.20.020 parallels AS 36.15.030.

AS 36.20.030 parallels AS 36.15.040.

AS 36.20.040 parallels AS 36.15.050.

AS 36.20.050 parallels AS 36.15.060.

AS 36.20.050 parallels AS 36.15.070.

AS 36.15.060 parallels AS 36.15.080.

**Section 5.**

This section amends AS 36.95.010 by stating definitions critical for the working of the bill. The terms defined are "Alaska product," "product," and "produced or manufactured."

**Section 6.**

This section amends AS 37.05.230 to make the Alaska products preference subject to the Alaska bidder's preference.

Section 7.

This section amends 37.05.260 by relation of its provisions to the Alaska products preference under AS 36.15.020.

Section 8.

The effective date for this bill is January 1, 1987.



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

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

April 8, 1986

MEMORANDUM

TO: Representative Dick Shultz

ATTN: Dave Stancliff

FROM: Brad Pierce *BP*  
Legislative Analyst

RE: Use of Alaska Wood Products in Public Construction  
Research Request 86-150

You requested this agency to provide information on the quantity and value of domestically produced wood products used in public construction projects in Alaska. Additionally, you asked that we examine proposed legislation designed to encourage the use of Alaska wood products in public construction projects involving State funding to identify the probable effects of incentives contained in the bills. You asked us to come up with some other ideas for encouraging the use of domestically produced wood products.

To fulfill your request, we contacted some of the important players in the Alaska wood products industry and policymakers in State government. A list of our contacts with their titles and phone numbers is attached to this memorandum. We have been able to answer your request to a large extent. The proposed domestic producer preference legislation describes Alaska wood products in general terms. We have attempted to tie our analysis to specific wood products and a realistic assessment of the opportunities available to domestic timber operators.

Use of Domestically Produced Wood Products in Public Construction

We contacted Lauren Rasmussen, Chief of Design, Construction and Maintenance Standards, Department of Transportation and Public Facilities, about the present use of Alaska wood products in public construction projects. He confirmed that virtually no domestically produced forest products are currently used in public construction projects within the state. There are several reasons for this which are explored below. We have attached a memorandum produced by this agency in 1980 on State

Representative Shultz  
April 8, 1986  
Page Two

use of Interior Alaska lumber (Research Memorandum 80-025). The basic situation has changed somewhat since then, but the memorandum provides useful information on the uses of domestically produced spruce lumber.

There are not as many public construction projects currently being planned or built as there were four or five years ago. Those projects that are being constructed are mostly built of concrete, which is formed with plywood and surfaced softwood dimension lumber imported from British Columbia and the Pacific Northwest. There are no plywood mills in Alaska. Canadian spruce-pine-fir (SPF) dimension lumber which is kiln-dried, surfaced and graded to national building code standards has become the standard framing material used in Alaska construction while Douglas fir from the lower 48 is used for high strength applications such as floor and ceiling joists.

Most Alaska lumber producers do not manufacture products that meet building code specifications for public construction. They sell primarily rough-cut, air-dried and nongraded (to national standards) dimension lumber, houselogs, and posts to the cash and carry market, and timbers mainly to the North Slope. There are only three small lumber mills in Alaska--in Kodiak, Fairbanks and Tok--which produce air-dried dimension lumber which is surfaced and graded to national standards. The lumber products from these mills are priced competitively with imported lumber though the mill operators tend to make most of their profit on specialty products.<sup>1</sup>

Most domestic producers find it nearly impossible to compete pricewise with Canadian imports of (SPF) framing lumber, which is turned out in enormous quantities from state-of-the-art mills in British Columbia. A 79 cent Canadian dollar further enhances B.C. competitiveness. In dimensions of 6" x 6" and over, domestic producers are price competitive.

Because of the marginal nature of most sawmill operations in the state, it is not economical for operators to produce kiln-dried, surfaced and graded softwood dimension lumber. It is unlikely that domestic producers can become competitive on a pure price basis as suppliers to public construction projects without some State assistance beyond the statutory requirement (AS 36.15.010 which has been State law since 1949) that locally produced lumber be used "wherever practicable."

One idea that has been repeatedly expressed by State and university forest products experts is for a cooperative kiln drying and grading facility in the Railbelt. Given current State budget constraints, a

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<sup>1</sup>Source: Calvin Kerr, Kerr and Associates, personal conversation April 3, 1986.

Representative Shultz  
April 8, 1986  
Page Three

drying kiln is probably not economical at present but a grading program for air dried lumber might be feasible. The Matsu Loggers Association has made a proposal to the Department of Commerce and Economic Development (DCED) Office of Forest Products to provide seed money for a trained lumber inspector from the Pacific Northwest Lumber Inspection Bureau to make quarterly inspections of green and air-dried, surfaced and roughcut lumber produced by sawmill operators in the association. The bureau inspector would also establish a program to train local inspectors. Another idea would be to set up the lumber inspector program through the state community college vocational/technical curriculum.

The initial cost of the proposed inspection program would be approximately \$3,000 to bring an inspector in, and \$40-\$50 thousand over three years to get the inspection and training program established. After the program was firmly in place, the various wood products associations in the state would gradually assume the cost. A statewide lumber inspection program would enable domestic producers to offer dimension lumber products identical to Canadian imports, and allow them to compete on the basis of quality and immediacy of service and lower transportation costs, if not on price.

Alaska timber operators do not currently produce treated products for applications such as guardrail posts, nor do they produce structural panel products such as plywood, which make up a large proportion of the wood materials used in public construction projects. The Alaska market is simply not large enough to justify investment in a structural panel products facility. Pacific Rim export markets for panel products are unproven and protected by tariffs and other trade barriers. In addition, a new waferboard plant is being built in Dawson Creek, British Columbia, which should begin production in 1987 and will probably capture a large share of the Alaska structural panel products market. (Waferboard is used for the same applications as plywood and is particularly competitive in areas like Alaska where shipping costs make up a significant proportion of the retail product price.)

There is a good possibility that much of an investment in a wood treatment facility could be justified to supply public construction projects. The Alaska Railroad Corporation has recently solicited proposals from domestic wood products producers to supply their replacement requirements for wood cross ties over the next five years. According to John Reynolds, Procurement Manager, the railroad will need approximately 31,200 standard softwood ties annually. Standard ties sell for \$20-\$28 FOB Anchorage, so a five-year contract would amount to \$624-\$874 thousand. Investment costs for a pressurized creosote treatment facility run \$300-\$450 thousand.

Representative Shultz  
April 8, 1986  
Page Four

Wrangell Forest Products (WFP) supplied about 25 percent of the railroad's 1985 cross tie requirements and has bid on the 1986 requirement. We contacted Mark Edy, Sales Representative for Wrangell Forest Products, who explained that his company currently cuts ties at its Wrangell sawmill, ships them to Seattle for treatment, and then on to the railroad in Anchorage. Even with all of this shipping, WFP has managed to provide competitively priced ties. If the company can negotiate a multi-year contract with the railroad, it is considering investment in a pressurized treatment facility.

The Alaska Department of Transportation and Public Facilities (DOT/PF) uses treated guardrail posts for road maintenance work. Any contract let by DOT/PF for highway or harbor work could include an Alaska product preference clause. Department of Transportation and Public Facilities does not keep a record of the number of guardrail posts it uses each year, but the numbers are not large in any case. Most major highway projects in the state involve federal funds and thus cannot include an Alaska producer preference in the bid specifications under U.S. law. Under federal rules, it is up to the individual contractor to decide whether to use steel or wood guardrail posts. Other treated products such as utility poles and pilings must conform to national specifications and are usually made from Douglas fir; they do not appear to be much of a near-term market opportunity.

There are a couple of State-funded capital construction projects scheduled to be built in the near future which could use substantial quantities of locally produced lumber products. The Eklutna water project and the Bradley Lake hydro project both involve long tunnels where rough green timbers for lagging and shoring are used. As we mentioned previously, domestic producers are very price competitive in these products and the State can insist that locally produced timbers be used under existing law.

There are a number of domestically produced hardwood products which could be used in public construction projects. Currently there are three hardwood kilns in operation in Alaska. These operators produce birch and cottonwood paneling for retail markets and hardwood boards (1"-2") for wholesale markets; which in turn are locally manufactured into window facings, door frames, cabinet stock, moulding and flooring. These products are cheaper than imported birch, oak and maple which should make them attractive to contractors regardless of domestic producer preference clauses in public construction contracts.

Representative Shultz  
April 8, 1986  
Page Five

### Domestic Producer Preference Policy

There are several current pieces of legislation and statements of policy which include preferential use of domestically produced wood products which are identified and summarized below:

Governor Sheffield's Administrative Order 87, dated March 15, 1986, states that it is the policy of State government to encourage the use of Alaska agricultural, seafood and timber products. When these products are competitively priced, available, and of like quality compared to imports, each agency of State government shall try to encourage the purchase of domestic products and insert a clause that requires domestically produced products in all State contracts and invitations for bids on State contracts. The Commissioner of the Department of Administration (DOA) is charged with enforcing this order and the Commissioner of Commerce and Economic Development is charged with providing DOA with a list of domestic products and suppliers.

Senate Resolution 8 (am) calls for insertion of a domestic producer preference clause in all calls for bids by State and local agencies that routinely purchase wood or initiate the purchase of wood products. The Department of Commerce and Economic Development is encouraged to undertake an education program to make the public aware of the overall advantages of using Alaska wood. Private and public owners of forest land are encouraged to meet the domestic demand for forest products by supplying adequate volumes of timber for local processors and manufacturers.

House Bill 306 would establish an Alaska Forest Products Marketing Institute along the lines of Alaska Seafood Marketing Institute (ASMI) to stimulate consumer identification of Alaska forest products, expand the range of forest products produced in the state, improve product quality, encourage consumers to buy Alaska forest products, and provide an assessment schedule to finance a joint marketing effort by the State and domestic forest products producers.

House Bill 679 would amend AS 36.15 (Forest Products Preference section) to include: Sec. 36.15.030 which further defines public construction projects financed in whole or part with State money and specifically includes DOT/PF and other State agencies, the Alaska Power Authority, the Alaska State Housing Authority, the University of Alaska, and projects constructed by municipalities or school districts financed by municipal grants or state reimbursed municipal debt. Section 36.15.040 establishes contract specifications that include a bidder preference for those who designate the use of Alaska products. Section 36.15.050 allows public entities letting contracts to identify specific Alaska products to be used in construction. Section 36.15.060 specifies that bids which include the use of Alaska products are decreased by an

Representative Shultz  
April 8, 1986  
Page Six

appropriate percentage of the value of those Alaska products when all bids are evaluated. Alaska Statute 36.15.070 sets penalties for failing to use Alaska products when available for public construction projects by reducing payments to a contractor by specific percentage amounts. Section 36.15.080 classifies Alaska products and sets appropriate percentage preferences on the value of the product. Alaska wood products fall under the Class III designation (highest) which gives bidders a seven percent preference on the value of the domestic wood materials used in construction.

We have presented a summary of the substance of the measures listed above, though we believe the most important points are covered. The two House bills, if adopted, combined with the governor's Administrative Order provide fairly powerful tools for encouraging the use of domestically produced wood products. A statewide lumber grading program would add substantially to the effectiveness of the measures cited above. An additional idea would be to include some type of interest rate incentive clause in AHFC loans for new housing construction or remodeling if substantial amounts of domestic wood products were used, i.e. framing lumber, flooring, cabinets, paneling, etc.

It is possible that the recent publicity surrounding the measures listed above and the interest shown by the executive and legislative branches in promoting domestic wood products has already had a significant effect. We spoke with Greg Bell, owner of the Valley Sawmill in Anchorage, who recently received an order from the Department of Fish and Game (DF&G) for rough cut dimension lumber to build outbuilding. He attributes this order to the fact that DF&G procurement personnel have recently become aware of State policy favoring the use of locally supplied lumber. The solicitation of in-state bidders to supply ties to the Alaska Railroad came about in the same way when Frank Turpin, Railroad Manager, was informed of the Title 36 Forest Products Preference statutes and had his procurement officer search for potential domestic suppliers.

The basic difficulty in expanding usage of Alaska forest products is to overcome established contractor purchasing habits. The measures outlined above appear to provide sufficient incentive for contractors to seriously consider using domestic wood products when they are available. Thyes Shaub, Director of the Office of Forest Products, is working up a list of Alaska wood products suppliers, the products they produce and their production capacity to give out to bidders as specified in the governor's Administrative Order. (House Bill 679 requires suppliers to apply to the Department of Labor for inclusion on their Alaska producers list.) A statewide lumber grading program would allow domestic producers to supply material meeting design specifications for public construction. Funding for a grading program might be considered as a part of the overall legislative package.

Representative Shultz  
April 8, 1986  
Page Seven

In any case, it is likely that the effects of the measures discussed here will be long-term and will have the greatest impact in the Railbelt and Southeast, where domestic producers have a comparative advantage on shipping costs. The Eklutna water project and Bradley Lake dam will provide major tests of the state's resolve to enforce domestic producer preference policies.

We hope we have provided sufficient information for your purposes. I would be happy to come and talk with you on any of these ideas and recommend other knowledgeable individuals and sources of information. Please feel free to call me if you have any questions

BP

Attachments

#### SOURCES OF INFORMATION

1. Lauren Rasmussen, Chief of Design, Construction and Maintenance Standards, Alaska Department of Transportation & Public Facilities, 465-2960.
2. Thyes Shaub, Director of the Office of Forest Products, Alaska Department of Commerce and Economic Development, 465-2094.
3. John Reynolds, Manager of the Procurement Division, Alaska Railroad Corporation, 265-2418.
4. Calvin Kerr, President, Kerr and Associates, 346-3141/346-1624.
5. Mark Edy, Sales Representative, Wrangell Forest Products, (206)467-1878.
6. Greg Bell, President, Valley Sawmill, 563-3436.
7. Bill Cummings, Assistant Attorney General, Alaska Department of Law, 465-3603.

BILL SHEFFIELD  
GOVERNOR



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

February 19, 1986

The Honorable Ben Grussendorf  
Speaker of the House  
Alaska State Legislature  
P.O. Box V  
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill requiring that, whenever practicable, Alaska products be used in construction projects financed with state money. This bill also provides an economic incentive for contractors who promise to use Alaska products as components in these construction projects.

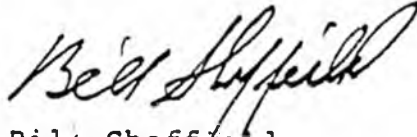
The language in this bill is patterned after statutes enacted in Hawaii. The Department of Law believes that this bill is a reasonable response to the state's interest in ensuring maximum participation by Alaskans in the state's public works projects.

Under new AS 36.15.060, a bidder who designates the use of certain Alaska products is given a preference over bidders who do not intend to use Alaska products, through a percentage reduction in the amount of the bid. The percentage rates are set out in new AS 36.15.080, which also provides for classification of Alaska products. Penalties for subsequent failure to use the designated Alaska products are set out in new AS 36.15.070.

AS 37.05.230(1) is amended in sec. 4 of the bill to make clear that, in determining whether an Alaska bidder should be awarded a contract, the determining factor is the amount of the bid offered by the bidder, not the amount arrived at by calculation of the Alaska product preference under AS 36.15.060.

The bill has a number of very desirable results. First, and foremost, it will ensure, at reasonable cost, that jobs generated in connection with supplying materials for public works projects will be in Alaska. It will also encourage the growth of local industry. Consequently, I encourage passage of the bill.

Sincerely,

A handwritten signature in cursive script, reading "Bill Sheffield".

Bill Sheffield  
Governor

# STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

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

**REQUEST**

Bill/Resolution No. : \_\_\_\_\_  
 Title : An Act Relating to the Purchase of Alaska Products; and Providing for an Effective Date  
 Sponsor : Honorable Bill Sheffield, Governor  
 Requestor : \_\_\_\_\_  
 Date of Request : February 13, 1986

**FISCAL DETAIL**

Agency Affected : DOT&PF  
 BRU : Regional Design & Construction Engineering & Operations Scds.  
 Components : \_\_\_\_\_

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES	24.0	12.0	12.0	12.0	12.0	12.0
TRAVEL	0					
CONTRACTUAL	10.0					
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>34.0</b>	<b>12.0</b>	<b>12.0</b>	<b>12.0</b>	<b>12.0</b>	<b>12.0</b>

CAPITAL	17.5	17.5	17.5	17.5	17.5	17.5
---------	------	------	------	------	------	------

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

**FUNDING : (Thousands of Dollars)**

GENERAL FUND	51.5	29.5	29.5	29.5	29.5	29.5
FEDERAL FUNDS	0					
OTHER	0					
<b>TOTAL</b>	<b>31.5</b>	<b>29.5</b>	<b>29.5</b>	<b>29.5</b>	<b>29.5</b>	<b>29.5</b>

**POSITIONS :**

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

**ANALYSIS :** Attach a separate page if necessary

SEE ATTACHED.

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

Phone : 465-2960  
 Date : 2/15/86

Approved by Commissioner : [Signature]  
 Agency : DOT&PF

Date : 2/15

Distribution (by Agency preparing fiscal note) :

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

Purchase of Alaska Products  
Items to Consider in Fiscal Note

- (A) Projects financed with State money (36.15.030)
  - (1) DOT&PF
  - (2) Municipalities (grants)
  - (3) School Construction (grants and debt retirement)
  - (4) University of Alaska
  - (5) All State Agency's Including:
    - (a) Alaska Power Authority
    - (b) Alaska State Housing Authority
  
- (B) Development of Specifications (36.15.040)
  
- (C) Identifying Alaska Products in a Project (36.15.040)
  
- (D) Bid Evaluations
  
- (E) Penalty for Failing to Use (36.15.070)
  - Non-Responsible Bidders List
  
- (F) Classification of Alaska Products (DOC) (36.15.080)
  - 1. Added Value - Regulations
  - 2. Lists of Products
  
- (G) Consideration for Legal Costs

FISCAL NOTE  
(DOT&PF Only)

ALASKA PRODUCTS

(A) DOT&PF projects financed with State money

\$35,000,000 (From FY87 Executive Budget pg. 132)

From brief discussions with Hawaii it appears that their products law effects about 1% of their bids. For analysis purpose, DOT&PF will assume the same. We would also assume the average percentage preference of 5%. The following products would also be assumed to be the type which would be produced in Alaska - from our discussions with Hawaii.

1. Reinforced concrete culvert, storm drain, sewer pipe and manhole sections.
2. Precast - reinforced or prestressed concrete.
3. Prestressed beams, piling and panels.
4. Reinforcing steel bars.
5. regulatory, traffic and construction signs.
6. Forest products.

C.I.P.

$$\begin{array}{rcl} 35,000,000 \times .01 \times .05 & = & \$17,500 \\ \text{(assumed for all years)} & & \\ \text{(\$ not inflated for} & & \\ \text{future years)} & & \end{array}$$

(B) Development of Specifications

Range 21 Technical Engineer

$$\text{Assume } \frac{2 \text{ man mo.} \times \$72,000}{12} = \$12,000$$

(Only required in the first year)

(C) Identifying Alaska Products

$$\text{Assume } \frac{1 \text{ man mo.} \times \$72,000}{12} = \$6,000$$

(D and E) Bid Evaluation and Control  
During Construction

$$\text{Assume } \frac{1 \text{ man mo.} \times \$72,000}{12} = \$6,000$$

(F) Classification of Products

Minimal Effect on DOT&PF

(G) Consideration for Legal Costs \$10,000  
SUBTOTAL \$34,000

\* No new positions were included because the new work load is divided between the divisions.

SUMMARY OF GOVERNOR'S FY 87 CAPITAL BUDGET  
(stated in \$ thousands)

AGENCY	GENERAL FUND	FEDERAL	OTHER	TOTAL
Office of the Governor	\$ -	\$ -	\$ -	\$ -
Administration	4,530.1	-	750.0	5,280.1
Law	-	-	-	-
Licenses	77.6	-	5.7	83.3
Education	34,108.7	672.4	-	34,781.1
Health and Social Services	12,989.0	-	-	12,989.0
Labor	50.0	380.0	916.5	1,346.5
Commerce and Economic Development	59,237.5	-	4,188.2	63,425.7
Military and Veterans' Affairs	1,000.0	300.0	-	1,300.0
Natural Resources	6,063.0	2,190.0	-	8,253.0
Fish and Game	2,019.0	600.0	850.0	3,469.0
Public Safety	3,008.7	-	-	3,008.7
Transportation and Public Facilities	35,268.3	253,074.2	34,950.0	323,292.5
Environmental Conservation	23,926.9	-	-	23,926.9
Community and Regional Affairs	5,775.0	4,725.8	-	10,500.8
Corrections	1,000.0	-	-	1,000.0
University of Alaska	18,845.4	1,600.0	-	20,445.4
Legislature	-	-	-	-
Court System	1,115.0	-	-	1,115.0
Municipal Grants	139,394.9	-	2,155.0	141,549.9
Grants to Unincorporated Communities	<u>806.7</u>	<u>-</u>	<u>-</u>	<u>806.7</u>
GRAND TOTAL	<u>\$349,215.8</u>	<u>\$263,542.4</u>	<u>\$43,815.4</u>	<u>\$656,573.6</u>

# STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

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

**REQUEST**

Bill/Resolution No. : \_\_\_\_\_  
 Title : An act relating to the purchase  
of Alaska products.  
 \_\_\_\_\_  
 Sponsor : Governor  
 Requestor : \_\_\_\_\_  
 Date of Request : 2/14/86

**FISCAL DETAIL**

Agency Affected : Labor  
 BRU : Administrative Services  
 \_\_\_\_\_  
 Components : Special Services  
 \_\_\_\_\_

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		27.6	9.2	9.2	9.2	9.2
TRAVEL		.8				
CONTRACTUAL		7.0	1.0	1.1	1.2	1.3
SUPPLIES		.4	.2	.3	.4	.5
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>		<b>35.8</b>	<b>10.4</b>	<b>10.6</b>	<b>10.8</b>	<b>11.0</b>

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

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

**FUNDING : (Thousands of Dollars)**

GENERAL FUND		35.8	10.4	10.6	10.8	11.0
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>		<b>35.8</b>	<b>10.4</b>	<b>10.6</b>	<b>10.8</b>	<b>11.0</b>

**POSITIONS :**

FULL-TIME						
PART-TIME		1.0	1.0	1.0	1.0	1.0
TEMPORARY						

**ANALYSIS :** Attach a separate page if necessary

See Attached

Prepared by : Judy Knight Phone : 465-2720  
 Division : Administrative Services Date : 2/15/86

Approved by Commissioner : Jim Robison Date : 2/15/86  
 Agency : Labor

Distribution (by Agency preparing fiscal note):

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

# CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. \_\_\_\_\_

"An act relating to the purchase of Alaska products; and providing for an effective date."

This legislation requires the adoption of regulations to establish the value added in the state for materials and supplies produced or manufactured in Alaska that are used in state and/or local construction projects, and a list of the products will be published annually. The assumptions are as follows:

1. A part time Labor Economist I will be hired to develop this program between July 1, 1986 and March 30, 1987. A part time Labor Economist I will maintain and update the list annually between October and December.
2. Hearings will be held in the fall of 1986 to collect public input on regulations developed for the collection of value added information.
3. Departmental staff will determine available supplies and materials that meet the value added criteria; and determine the value added of these supplies and materials by each of three classes.
4. The first list of supplies and materials will be published by January 1, 1987.
5. The Department of Labor will maintain the list of contractors penalized under this bill; but the Department of Labor has no direct role in monitoring compliance of firms who say they will use Alaska products.

The costs to implement this bill include personal services for a part time (9 mo.) Labor Economist, and travel (\$800) to Anchorage and Fairbanks for public hearings on the regulations. Contractual services include toll phone and postage (\$2,000), printing and advertising (\$1,000), legal fees (\$2,000) and other miscellaneous items (\$1,500). Office supplies will cost \$400. Future years will require 3 months of a part time Labor Economist and miscellaneous contractual services and commodities.

Position Title <b>Labor Economist I</b>			No. of Positions <b>1</b>	Range/Step <b>4A</b>	Bag Unit <b>GGU</b>	Gov	Appor.	Unapp																																							
Time Status <b>PPT</b>	Staff Months <b>9</b>	RP Number	Location <b>Juneau</b>		Election District	Leg.																																									
<table border="1"> <thead> <tr> <th>Type of Expenditure</th> <th></th> <th>Amount</th> </tr> <tr> <th>1</th> <th>2</th> <th>3</th> </tr> </thead> <tbody> <tr> <td>Salary</td> <td><b>21,978</b></td> <td></td> </tr> <tr> <td>Benefits</td> <td><b>7,335</b></td> <td></td> </tr> <tr> <td>Premium Pay</td> <td></td> <td></td> </tr> <tr> <td>Other</td> <td></td> <td></td> </tr> <tr> <td colspan="2">Total Personal Services</td> <td><b>29,313</b></td> </tr> <tr> <td>Travel</td> <td></td> <td></td> </tr> <tr> <td>Contractual</td> <td></td> <td><b>2,000</b></td> </tr> <tr> <td>Commodities</td> <td></td> <td><b>400</b></td> </tr> <tr> <td>Equipment</td> <td></td> <td></td> </tr> <tr> <td>Other</td> <td></td> <td></td> </tr> <tr> <td colspan="2">Total Cost</td> <td><b>31,713</b></td> </tr> </tbody> </table>			Type of Expenditure		Amount	1	2	3	Salary	<b>21,978</b>		Benefits	<b>7,335</b>		Premium Pay			Other			Total Personal Services		<b>29,313</b>	Travel			Contractual		<b>2,000</b>	Commodities		<b>400</b>	Equipment			Other			Total Cost		<b>31,713</b>	<p>Justification</p> <p>This position will determine the value added associated with products produced or manufactured in Alaska and used in state and/or local construction projects. In addition, this position will have primary responsibility for the development, maintenance and publication of a list of these materials and supplies. Specifically the duties would include:</p> <ol style="list-style-type: none"> <li>1. Coordinating the preparation and implementation of regulations associated with this bill.</li> <li>2. Creating a data base containing supplier information, products, and value added statistics.</li> <li>3. Determine the value added associated with construction supplies and categorize the supplies into the three product classifications.</li> <li>4. Determine the validity of value added related statistics provided by suppliers.</li> <li>5. Prepare and coordinate the publication of the annual list of Alaska produced products.</li> </ol> <p>The costs specific to this position include contractual service costs for toll phone and postage (\$1,000) and other miscellaneous items (\$1,000).</p>					
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<p>For B&amp;M Use Only</p> <p>Key Number _____</p>																																															

**Request For  
New Position**

Agency Labor  
 BRU Administrative Services  
 Component Special Services

Page 1 of 1  
 Revised Date \_\_\_\_\_

**FY 87**



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

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

May 5, 1983

MEMORANDUM

TO: Representative Barbara Lacher  
Attention: Sarah Robinson

FROM: David Teal *Teal*  
Research Staff

RE: Alaska Bidders' Preference  
Research Request 33-130

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

Clarity of the Law

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

---

<sup>1</sup>The relevant language is found in AS 37.05.230.

Representative Lacher  
May 5, 1983  
Page 3

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

#### Constitutional Challenge

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

#### Ways to Reduce Vulnerability to Legal Challenge

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

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

Representative Lacher  
May 5, 1983  
Page 5

#### Cost of the Bidders Preference Statute

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

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

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

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

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

# **CORRECTION**

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



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

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

May 5, 1983

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---

<sup>1</sup>The relevant language is found in AS 37.05.230.

Representative Lacher  
May 5, 1983  
Page 2

### Practical Application of the Law

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

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

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

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

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

### Supreme Court Interpretation of the Law

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

Representative Lacher  
May 5, 1983  
Page 3

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

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Representative Lacher  
May 5, 1983  
Page 4

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

#### Actions that may Increase Vulnerability to Legal Challenge

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

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

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

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

Representative Lacher  
May 5, 1983  
Page 5

#### Cost of the Bidders Preference Statute

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

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

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

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

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

Representative Lacher  
May 5, 1983  
Page 6

#### Potential Impact of the Bidders Preference

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

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

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

#### Additional Information

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

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

Representative Lacher  
May 5, 1983  
Page 7

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

\* \* \*

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

DT

Attachments

# MEMORANDUM

# State of Alaska

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

DATE: August 5, 1982

FILE NO:

TELEPHONE NO: 465-2250

THRU: Bob Link

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

SUBJECT: FY 82 Purchasing  
Action

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

## PURCHASE REQUISITIONS RECEIVED DURING FY 82

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

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

BIDS PUBLISHED FY 82

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

TOTAL ANCHORAGE AND JUNEAU - 942

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

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

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

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

PURCHASE ORDERS ISSUED TO MAJOR STATE METROPOLITAN AREAS - FY 82

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

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

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

TOTAL - 658

TOTAL - \$ 65,241,064.46

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

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

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FIVE PERCENT BID PREFERENCE ANALYSIS  
FISCAL 82

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

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

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

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

JM/je  
5/0805-04/GSS1

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

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

FY'82

BREAKDOWN OF \$ AMOUNT OF PO'S:

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

SUMMARY CHART - FISCAL YEAR 81 vs FISCAL YEAR 82

PURCHASING SECTION ACTIVITY

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

CONTRACT AWARDS

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

PURCHASE ORDERS

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

LEASES

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

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

COMMENT

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

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

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

INTERSTATE VARIATIONS IN PREFERENCE LAWS

*Basic Classifications*

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

percent

1. The wide variety of preference laws could be categorized more narrowly or more broadly. For example, statutes which may impose burdens on non-resident contractors other than in bid evaluations, such as additional bonding or prequalification requirements, are not discussed in this Comment. See *Garden State Dairies of Vineland, Inc. v. Sills*, 46 N.J. 349, 217 A.2d 126 (1966), on remand, 96 N.J. Super. 109, 236 A.2d 176 (1967), rev'd, 53 N.J. 71, 248 A.2d 427 (1968).

the contract. At least twelve states,<sup>2</sup> Guam,<sup>3</sup> Puerto Rico,<sup>4</sup> and the Virgin Islands<sup>5</sup> have statutes providing for such preferences, and percentages range from two<sup>6</sup> to nineteen percent.<sup>7</sup> At present Hawaii has the most elaborate statute,<sup>8</sup> but a recently enacted New York law has the potential for even greater administrative complexity.<sup>9</sup>

*tie bid*

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

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

2. ALA. CODE tit. 55, § 506 (Supp. 1973); ALASKA STAT. § 37.05.270 (1) (1976); ARIZ. REV. STAT. §§ 34-241, 242, 243 (1974); ARK. STAT. ANN. §§ 14-119, 14-6142 (Supp. 1977); HAW. REV. STAT. §§ 103-41 to 103-45, 103-53.5 (1968); IDAHO CODE § 60-103-b (Supp. 1977); LA. REV. STAT. ANN. §§ 48:2251, 48:2255 (West 1968); MONT. REV. CODES ANN. §§ 52-1137 (1966), 52-1924 (Supp. 1975); N.M. STAT. ANN. §§ 6-5-32-A, B, and C (1974); N.Y. STATE FIN. LAW §§ 163-174 (McKinney Supp. 1977-78); W. VA. CODE § 5A-3-44 (Supp. 1977); WYO. STAT. §§ 9-664, 9-667, 9-669 (1977).

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

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

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

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

7. HAW. REV. STAT. §§ 103-41 to 43 (1976). Although the maximum preference under these sections is ten percent, Section 103-51 (1976) provides a fifteen percent preference for public printing. Finally, Section 103-53-5 requires that an extra four percent be added to the bids of all non-residents. The four percent addition is justified as an adjustment for a retail excise tax, but such a tax is not assessed in sales to the state. Thus, it appears that the total preference would be nineteen percent for printing, and fourteen percent for many other goods and services.

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

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

10. ALA. CODE tit. 55, §§ 502, 514 (Supp. 1973); ALASKA STAT. § 36.20.010 (1973); ARK. STAT. ANN. § 14-221 (1968); CAL. GOV'T CODE § 4331 (West 1966); COLO. REV. STAT. § 24-30-40(1) (1973); FLA. STAT. ANN. § 287.02 (West 1973); GA. CODE ANN. §§ 40-1903, 1920 (1975); 40-1934 (Supp. 1977); IDAHO CODE § 67-5718 (Supp. 1977); IOWA CODE ANN. § 73.2 (West 1973);

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

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

*general*

*absolute*

KAN. STAT. § 75-3740 (1969); LA. REV. STAT. ANN. § 38:2184 (West 1968); ME. REV. STAT. tit. 5, § 1816.8 (1964); MICH. STAT. ANN. § 3.395 (1977); MISS. CODE ANN. § 31-7-15 (1972); MO. ANN. STAT. §§ 34.070 (Vernon 1969), 71.140 (Vernon 1949); N.Y. STATE FIN. LAW § 163 (McKinney 1974); N.C. GEN. STAT. § 143-59 (Supp. 1975); N.D. CENT. CODE § 61-21-25 (Supp. 1977); OKLA. STAT. ANN. tit. 61, § 6 and 9 (West 1963); OR. REV. STAT. § 279.021 (1975); S.C. CODE § 1-25 (Supp. 1975); TEX. CIV. CODE ANN. tit. 664-2, § 1 (Vernon 1964); UTAH CODE ANN. § 63-2-50 (1968). Five states, Connecticut, Illinois, Indiana, Nebraska, and New Hampshire, reported that they had tie bid preferences in COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL PURCHASING Appendix A at A.1 to A.9 (1975). Even without statutory authority, such preferences could be created by administrative regulation or informal practices.

11. IOWA CODE ANN. §§ 18.6 (West Supp. 1977-78), 384.99 (1976); KY. REV. STAT. § 57.253 (Baldwin 1975); LA. REV. STAT. ANN. § 39.173 (West 1968); MASS. ANN. LAWS ch. 7, § 22:17 (Michie Law Co-op 1973); MINN. STAT. ANN. § 16.34 (West 1977); MISS. CODE ANN. § 19-13-107 (1972); MO. ANN. STAT. § 5.250 (Vernon 1969); MONT. REV. CODES ANN. § 82-1926 (Supp. 1977); NEV. REV. STAT. § 333.160-2 (1973); N.J. STAT. ANN. § 52:25-23 (West Cum. Supp. 1977-78); N.Y. STATE FIN. LAW § 164.9 (McKinney Supp. 1976-77); N.D. CENT. CODE §§ 48-02-10 to 10.2 (1960); OKLA. STAT. ANN. tit. 74, §§ 5.5:74 (West 1965), tit. 74, § 85.3 (West Cum. Supp. 1977-78); S.C. CODE ANN. §§ 1-21, 22 (1962); S.D. COMPILED LAWS ANN. § 5-19-1 (1974); TENN. CODE ANN. §§ 12-348, 349 (Supp. 1977), 12.501 (1973); VT. STAT. ANN. tit. 29, § 2903(a) (1970); VA. CODE § 2.1-284 (1973); WIS. STAT. ANN. § 16.75(1)(a) (West Cum. Supp. 1977-78); WYO. STAT. § 9-606 (1957); see also P.R. LAWS ANN. tit. 3, § 918a (1), (1965).

12. E.g., IOWA CODE ANN. § 18.6 (West Supp. 1977-78); MONT. REV. CODES ANN. § 82-1926 (1947).

13. E.g., IOWA CODE ANN. § 384.99 (West 1976); VT. STAT. ANN. tit. 29, § 2903(a) (1970); see also N.Y. STATE FIN. LAW § 163-a (McKinney Supp. 1977-78) where such language was the justification for an addition to the statute which authorized as much as a 10% preference.

14. E.g., KY. REV. STAT. § 57.253 (Baldwin 1975); LA. REV. STAT. ANN. § 39.173 (West 1968); NEV. REV. STAT. § 333.160-2 (1973); VA. CODE § 2.1-252 (1973).

15. FLA. STAT. ANN. §§ 283.03, 287.102 (West 1975); IND. CODE ANN. § 4-13-4-8 (Burns 1974); MONT. REV. CODE ANN. § 18-1230 (1947); NEV. REV. STAT. § 268.070 (1975); N.J. STAT. ANN. § 52:36-3 (West 1955); OHIO REV. CODE ANN. § 125.56 (Page 1978); OR. REV. STAT. § 252.210(1) (1975).

16. ALASKA STAT. § 36.10.010 (1973); ARK. STAT. ANN. § 14-607 (1968); COLO. REV. STAT. § 43-2-208 (1973); CONN. GEN. STAT. ANN. §§ 31-52(a), 52a (1955); DEL. CODE tit. 29, § 6913 (1974); IOWA CODE ANN. § 73.3 (West Supp. 1977-78); LA. REV. STAT. ANN. § 38:2185 (West 1968); MISS. CODE ANN. §

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

*reciprocal*  
*interesting*  
*Foreign??*

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

#### *Diversity in Application*

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

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

17. ALASKA STAT. § 36.13.010 (1973) (timber and lumber products used in state-financed projects must be grown or produced in Alaska); N.M. STAT. ANN. § 6-6-5 (1953) (public works contractors must use materials from New Mexico unless there is evidence of price fixing); R.I. GEN. LAWS § 37-2-5 (1956) (food products grown in Rhode Island must be purchased for state institutions at prevailing market prices); S.D. COMPILED LAWS ANN. § 5-23-2 (1974) (all state purchasing or leases of motor vehicles must be from dealers licensed in the state).

18. ILL. ANN. STAT. ch. 127, § 132.6e (Smith-Hurd Supp. 1977); KAN. STAT. § 75-3740a (Supp. 1976); LA. REV. STAT. ANN. § 39:2221A (West Cum. Supp. 1977); MINN. STAT. ANN. § 16.365-1 (West 1977); MISS. CODE ANN. § 31-7-47 (1972); NEB. REV. STAT. § 73-101.01 ('943); N.D. CENT. CODE § 44-08-01 (Supp. 1977); OKLA. STAT. ANN. tit. 61, § 14 (West Cum. Supp. 1977-78), tit. 74, § 85.17 (West 1965); PA. STAT. ANN. tit. 71, § 203 (Purdon 1962); S.D. COMPILED LAWS ANN. § 5-19-3 (1974); VA. CODE § 11-20-1 (1973); WASH. REV. CODE ANN. § 39-16-005 (Supp. 1976); WIS. STAT. ANN. § 35-012 (West Supp. 1977-78); WYO. STAT. § 9-667 (1957).

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

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

21. E.g., COLO. REV. STAT. § 24-30-404.1 (1973); NEB. REV. STAT. § 73-101.01 (1943).

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

Many preferences are extended to businesses which are residents of the state,<sup>24</sup> but an almost equal number apply only to products manufactured or produced, or services performed in the state.<sup>25</sup> Some extend to either or both.<sup>26</sup> Definitions of residency and domestic production vary widely, and often reflect an effort to curb the ingenuity of those who seek to evade such laws.<sup>27</sup>

*resident vs. product*

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

#### THE EFFECT OF IN-STATE PREFERENCES

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

##### *Burden on Interstate Commerce*

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

22. E.g., MD. ANN. CODE art. 41, § 231-1 (1957); N.Y. STATE FIN. LAW § 163-a (McKinney Supp. 1977-78).

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

24. E.g., COLO. REV. STAT. § 24-30-404(1) (1973); KAN. STAT. §§ 75-3740 (1969), 37-10a (Supp. 1976); WYO. STAT. §§ 9-664 to 667 (1957).

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

26. E.g., MONT. REV. CODES ANN. § 82-1920 (Supp. 1977); NEV. REV. STAT. § 113-00 (1975); N.Y. STATE FIN. LAW § 163-a (McKinney Supp. 1977-78).

27. E.g., MONT. REV. CODES ANN. § 82-1923 (Supp. 1977) provides that a business will be prima facie eligible for a preference after one year in the state, but it may be disqualified if the public procurement official finds that the business is a wholly owned subsidiary of a foreign corporation, or if it was formed for the purpose of circumventing the residency requirement.

28. E.g., COLO. REV. STAT. § 24-30-404(1) (1973); ME. REV. STAT. tit. 5, § 1816 (1964).

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

30. E.g., IOWA CODE ANN. § 73.1 (West 1973) (coal produced in Iowa must be used by state government); VT. STAT. ANN. tit. 19, § 27 (1968) (trucks used in Vermont must be used in highway construction).

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

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

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

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

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

33. *Id.*

34. Although it is difficult if not impossible to precisely calculate to what extent interstate commerce would be increased if such trade barriers in governmental procurement were eliminated, the amount is surely at least several billion dollars per year. In a closely related area, it has been estimated that the federal government's policy of procuring from domestic firms (the "Buy American policy") reduced expected imports in the public sector by \$0-\$57. Lowinger, *Discrimination in Government Procurement of Foreign Goods in the U.S. and Western Europe*, 42 S. ECON. J. 451 (1976). Although most in-state preferences are not as strong as the 50% preference reportedly imposed by the Department of Defense during this period, there is normally far more trade between states than there is with other countries. The burden on commerce is diminished to the extent that public officials, particularly at the local level, may be unaware of statutory requirements; but misunderstanding may also result in overapplication of the preference. See D. MINGE, *EFFECT OF LAW ON COUNTY AND MUNICIPAL EXPENDITURES* 119 (1975). Criminal penalties for an infraction probably encourage broader interpretations, especially when the preference laws are ambiguous in the first place. A majority of the states provide criminal penalties for

level than on the state level,<sup>15</sup> adding further to the impact on interstate commerce.

The impact of in-state preferences may also be manifested in subtle ways. A strong policy of favoring local bidders could encourage a procurement official to reject all bids when an outsider submits the lowest one.<sup>16</sup> If the contract is rebid, a nonresident may simply become discouraged and withdraw from the competition. The frustration of competing against residents who are protected by an in-state preference practice will cause some contractors to stop bidding entirely for contracts in that state. In addition, a combination of such factors might induce the procurement official to be less aggressive in soliciting bids from out-of-state. Thus, the total impact on commerce may be far greater than statutory provisions would indicate.

Finally, preference laws may generate animosity between states that extends beyond public procurement. The commercial feud between the states is even older than the union<sup>17</sup> and preference laws may only be another battle in that war. Reciprocal preferences are an overt form of counterattack.

#### *Costs and Benefits to Individual States*

Despite widespread disparagement by purchasing organizations and others,<sup>18</sup> there are many supporters of preference laws, often

procurement officials who do not honor local preference statutes. E.g., ARIZ. REV. STAT. § 34-246 (1974); ARIZ. STAT. ANN. § 14-225 (1968).

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

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

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

18. See COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL PURCHASING 9-4 (1975); Linde, *Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State*, 40 WASH. L. REV. 10, 49-67 (1965); Comment, *Competitive Bidding on Public Works in Wyoming: Determinations of Responsibility and Preference*, 11 LAND & WATER L. REV. 243 (1976); Comment, *Home-State Preferences in Public Contracting: A Study in Economic Balkanization*, 32 IOWA L. REV. 576 (1973). A large number of preference laws and related trade barriers were enacted during the depression, and a flurry of criticism was generated in the late thirties and early forties. See COUNCIL OF STATE GOVERNMENTS, TRADE BARRIERS AMONG THE STATES: PROCEEDINGS OF THE NATIONAL CONFERENCE ON INTERSTATE TRADE BARRIERS (1939); J. JOHNSON, INTERSTATE TRADE BARRIERS (1940); E. MELDER, STATE AND LOCAL BARRIERS TO INTERSTATE

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

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

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

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COMMERCE IN THE UNITED STATES (1957). Trade publications uniformly condemn such laws. E.g., R. FORBES, GOVERNMENTAL PURCHASING 178-80 (1929); C. JENNINGS, STATE PURCHASING 96-7 (1909); NATIONAL ASSOCIATION OF STATE PURCHASING OFFICIALS, COMMITTEE ON COMPETITION IN GOVERNMENTAL PURCHASING, IN-STATE PREFERENCES IN PUBLIC PURCHASING 1 (1970). "A policy of in-state preference in public purchasing is a bad policy, a shortsighted policy, and worse, bad governmental purchasing." The Council of State Governments and The National Association of State Purchasing Officials have been strongly and actively opposed to preference laws for many years. They have recently been joined by the National Governors Conference through a policy statement denouncing preference laws as anticompetitive and inefficient. N.G.C. POLICY POSITIONS (1976-77).

39. In *National Oil and Supply Co., Inc. v. Gray*, Civ. No. F.S.-76-75-C (W. D. Ark., filed May 3, 1975) (voluntarily dismissed in 1977 after statutory change), the Arkansas five percent preference was to have been constitutionally challenged. The Arkansas Chapter of Associated General Contractors of America, Inc. successfully intervened as a defendant on April 5, 1977. Labor and management testimony generally favored proposals to strengthen the federal counterpart to preference laws, the "Buy American Act," 41 U.S.C. § 10a (1970). *Proposed Amendments to the Federal "Buy American Act," Hearings on H. R. 13293 and Related Bills Before the Subcom. on Public Buildings and Grounds of the House Comm. on Public Works, 92d Cong., 2d Sess. (1972).*

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

41. *People v. Crane*, 214 N.Y. 154, 108 N.E. 427 (1914) (Justice Cardozo), *aff'd*, 239 U.S. 195 (1915); *Atkin v. Kansas*, 191 U.S. 207, 222-23 (1903).

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

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

As noted previously, in-state preference laws have economic and competitive effects almost identical to tariffs. Also, trade between the states is similar in many respects to trade among nations. Thus, the well-developed economic theory of tariffs is helpful in evaluating the effectiveness<sup>44</sup> of preference laws. Although protectionism continues to have its vocal supporters, economists are virtually unanimous in advocating free trade, except in certain very narrow circumstances.<sup>45</sup> At the heart of their conviction is the theory of comparative advantage.<sup>46</sup>

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

43. At the federal level, it was estimated that each dollar of domestic federal expenditures would yield thirty-six cents in taxes from that transaction alone. *Proposed Amendments to the Federal "Buy American Act": Hearings on H.R. 13253 and Related Bills Before the Subcomm. on Public Buildings and Grounds of the House Comm. on Public Works, 92d Cong., 2d Sess. 22-24 (1972)*. According to this analysis, even more tax revenue would be generated through market suppliers and their employees and shareholders. The intuitive appeal to this line of reasoning is summed up by a statement sometimes attributed to Abraham Lincoln: "I don't know much about the tariff. But I do know that when I buy a coat from England, I have the coat and England has the money. But when I buy a coat in America, I have the coat and America has the money." See P. SAMUELSON, *ECONOMICS* 694 (10th ed. 1977).

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

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

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

See also P. SAMUELSON, *ECONOMICS* 679-80 (10th ed. 1977); R. WYKSTRA, *INTRODUCTORY ECONOMICS* 650-57 (1971).

46. The theory was originally stated in 1776 by Adam Smith in II *THE WEALTH OF NATIONS* 29-60 (1909 reprint by Oxford University Press). It has been refined and expanded upon by David Ricardo, *PRINCIPLES OF POLITICAL ECONOMY* (3d ed. 1821); John Stuart Mill, *PRINCIPLES OF POLITICAL ECONOMY*, Book III, Ch. XVIII (1848); and countless economists since their time.

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

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

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

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

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within the United States, such as transportation costs and restrictive local regulations. Thus, economists agree that the theory of comparative advantage applies to trade between the states. See L. LLOYD, *TARIFFS: THE CASE FOR PROTECTION* 73 (1975); H. NOLWE, *REGIONAL ECONOMICS* 155-60, 226-36 (1968); H. SIEBERT, *REGIONAL ECONOMIC GROWTH: THEORY AND POLICY* 84-94 (1967).

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

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

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

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

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

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

cost  
not here - if not at 5% ceiling, \$100  
going to 15% will have 10% added.

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

*Proposed Amendments to the Federal "Buy American Act": Hearings on H. R. 13253 and Related Bills Before the Subcomm. on Public Buildings and Grounds of the House Comm. on Public Works, 92d Cong., 2d Sess. 68 (1972).*

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

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

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

The primary reason for such a surprising result is that the protection of a preference law may raise domestic prices in private markets as well as in the public sector. Out-of-state prices could then be forced down to compete in the public sector. As a result, private purchasers may buy the less expensive imports, offsetting or even negating any reduction in imports from governmental purchases. See *id.* at 220-230. Ironically, the laws will increase interstate commerce to the extent that this effect occurs.

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

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

In-state preferences also may indirectly produce anticompetitive practices such as bid-rigging and other forms of collusion. Because the laws function essentially as a barrier to entry into the marketplace<sup>54</sup> and will reduce the pool of bidders in other ways,<sup>55</sup> a smaller number of firms will be competing for public contracts. The smaller the number of competitors, the more likely they will engage in collusive or oligopolistic behavior.<sup>56</sup> Indeed, laws which require services, such as public printing, to be performed in a particular county may lead to a single source of supply not unlike a "natural monopoly."<sup>57</sup>

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

#### THE CONSTITUTIONALITY OF IN-STATE PREFERENCE LAWS

##### *The Commerce Clause*

In-state preference laws may be unconstitutional as unreasonable burdens on interstate commerce. As discussed above,<sup>59</sup> preference laws have a significant adverse impact on interstate commerce. Their economic effect is the same as a tariff, and the commerce clause<sup>60</sup>

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

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

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

56. See McLachlan, *Monopoly and Collusion in Public Procurement: A Survey of Recent American Experience*, 8 ANTITRUST L. AND ECON. REV. 69, 75-9 (1976).

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

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

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

60. U.S. CONST. art. I, § 8, cl. 3.

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

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

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

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

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61. See *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533-35 (1949); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824); F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 1-10 (1937). As Madison wrote:

The practice of many states in restricting the commercial intercourse with other states and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the Federal Articles, is certainly adverse to the spirit of the union, and tends to beget retaliating regulations, not less expensive and vexacious to themselves than they are destructive of the general harmony.

Letter by James Madison (1757) (urging that a constitutional convention be called), reprinted in Bane, *Interstate Trade Barriers*, 16 IND. L.J. 121 (1940).

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

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

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

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

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

64. *E.g.*, *Edwards v. California*, 314 U.S. 160 (1941); *Best and Co. v. Maxwell*, 311 U.S. 453 (1940); *Hale v. Bimco Trading Inc.*, 306 U.S. 375 (1939).

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

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

67. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

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

69. *Denver v. Bossie*, 83 Colo. 329, 266 P. 214 (1928); *In re Grammill*, 20 Idaho 732, 119 P. 298 (1911); *State ex rel. Collins v. Senatobia Blank Book and Stationary Co.*, 115 Miss. 251, 76 So. 258 (1917); *Allen v. Lapsap*, 188 Mo. 692, 87 S.W. 926 (1905); *Pasche v. South St. Joseph Town-Site Co.*, 190 S.W. 30 (Mo. App. 1916); *Hersey v. Nelson*, 47 Mont. 132, 131 P. 36 (1913).

70. A rare exception was *People ex rel. Treat v. Coler*, 108 N.Y. 144, 59 N.E. 776 (1901), where a statute requiring all stone purchased by New York to be worked in the state was held invalid as a violation of the commerce clause. Unfortunately, the court's language was overbroad, and there was little sound analysis of the commerce problem. Because of language in *Atkin v. Kansas*, 191 U.S. 207 (1903), which was also probably overbroad, *Coler* has not been followed. *See* *People v. Crane*, 214 N.Y. 154, 105 N.E. 427 (1915), *aff'd*, 230 U.S. 195 (1915).

71. *See* *Tribune Printing and Binding Co. v. Barnes*, 7 N.D. 591, 597, 75 N.W. 901, 906 (1898).

72. In 1902, state and local governments spent only \$1.1 billion, and half of that sum was for personal services. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 2 *Historical Statistics of the United States* 1127 (1975). The total had risen to \$28 billion by 1950, *id.*, but is currently in excess of \$247 billion per year. *See* note 92 *infra*.

Early decisions justified a departure from established commerce clause doctrine by distinguishing between "governmental" and "proprietary" powers of government.<sup>73</sup> Governmental functions were those in traditional areas of government, such as police and fire protection, and the regulation of private business. On the other hand, proprietary functions were similar to the actions of individuals or businesses, such as hiring or firing employees, and entering into contracts. This distinction had been a fiction of limited usefulness in the areas of sovereign immunity from tort liability<sup>74</sup> and the power to make long-term contracts.<sup>75</sup> The doctrine has nevertheless continued to serve as a shield for in-state preference laws.<sup>76</sup> Early cases used unpersuasive reasoning in asserting that such state action was immune from constitutional scrutiny altogether, but they were often cited by subsequent courts without discussion.<sup>77</sup> The few discussions that were made simply relied on the proprietary function rationale. Subsequent cases clearly demonstrate that proprietary functions of government are state action and thus subject to the same constitutional limitations as other functions.<sup>78</sup> The proper question should have been whether the burden on commerce imposed by preference laws was of such a nature or degree to constitute a commerce clause violation.

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

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

74. *Bailey v. Mayor of New York*, 3 Hill 531 (N.Y. 1842); *Hodgins v. Bay City*, 156 Mich. 687, 121 N.W. 274 (1909). Although the distinction is still followed in some jurisdictions, it has been sharply criticized by scholars. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, § 131 at 979-83 (4th ed. 1971).

75. E.g., *City of High Point v. Duke Power Co.*, 120 F.2d 566 (4th Cir. 1941).

76. See *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972); *City of Phoenix v. Super. Ct.*, 109 Ariz. 533, 514 P.2d 454 (1973); *Schrey v. Allison Steel Mfg. Co.*, 75 Ariz. 282, 255 P.2d 601 (1952).

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

78. See, e.g., *Elrod v. Burns*, 427 U.S. 347 (1976); *Sugarman v. Dougall*, 413 U.S. 634 (1973).

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

the commerce clause."<sup>80</sup> Although many recent Supreme Court cases would indicate per se invalidity for such an overt discrimination,<sup>81</sup> the court held that federalism considerations mandated greater discretion for states in their internal operations. Thus, it held that in-state preferences<sup>82</sup> should be judged by a reasonableness standard rather than a per se rule of invalidity; the inquiry in such cases would be whether the burden was "undue" or unmanageable.<sup>83</sup>

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

80. 46 N.J. at 358, 217 A.2d at 150.

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

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

*Id.* at 526.

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

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

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

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

The United States Supreme Court has never issued an opinion on the validity of preference laws.<sup>88</sup> A summary analysis of the recent case of *Hughes v. Alexandria Scrap Corp.*,<sup>89</sup> however, might indicate that in-state preference laws would be found constitutionally valid. The Supreme Court upheld a special program in Maryland which encouraged faster processing of abandoned or wrecked automobile "hulks" in the state. An important element in the success of the program was a provision for clearing titles to the automobiles. A 1974 amendment to the Act<sup>90</sup> withdrew part of the special title clearing device from out-of-state processors. As a result, they challenged the validity of the amendments on commerce clause and equal protection grounds. Since the case involved a state expenditure program with the effect of favoring resident processors, it resembled in-state procurement preference laws. Indeed, the issues were framed in terms of state "purchases,"<sup>91</sup> especially by the dissenters.

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

86. FLA. STAT. ANN. § 253.03 (West 1975).

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

88. *But see* *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972). The Supreme Court can be expected to give little weight to *Askew*, particularly since it was not fully argued or briefed. See *Endelman v. Jordan*, 415 U.S. 651, 671 (1974) (Court's holding contrary to the results of three summary affirmances in previous four years); *cf.* *Hicks v. Miranda*, 422 U.S. 332 (1975). *Askew* has not been followed by other courts. See *Image Carrier Corp. v. Bearne*, 430 F. Supp. 379, 382 (S.D.N.Y. 1977).

89. 428 U.S. 794 (1978).

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

91. At one point the Court noted that:

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

428 U.S. at 808.

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

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

#### *The Equal Protection Clause*

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

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

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

94. See note 91 *supra*. The dissenters accurately pointed out that the decision was a retreat from established commerce clause doctrine, 426 U.S. at 317-19, but their concern that the Court was abrogating its role in preserving nationalism and interstate cooperation was overstated. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 315, 329 (1977) (unanimous decision striking down a discriminatory New York tax on commerce clause grounds).

The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Dean Milk Co. v. Madison*, 340 U.S. 349, 355 (1951).

See also *Great Atlantic and Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1975).

95. E.g., *American Yearbook Co. v. A-kew*, 539 F. Supp. 719 (M.D. Fla.), aff'd mem., 409 U.S. 904 (1972); *City of Phoenix v. Super. Ct.*, 102 Ariz. 535, 514 P.2d 454 (1973); *Schrey v. Allison Steel Mfg. Co.*, 75 Ariz. 282, 255 P.2d 604 (1952).

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

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

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

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

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96. See *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972); *City of Phoenix v. Super. Ct.*, 109 Ariz. 533, 514 P.2d 454 (1973); *Tribune Printing and Binding Co. v. Barnes*, 7 N.D. 591, 75 N.W. 904 (1895).

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

98. 339 F. Supp. at 721. The only case cited for the proposition that proprietary functions are specially protected, *Atkin v. Kansas*, 191 U.S. 207 (1903), involved a limitation on congressional power to regulate internal state policies, and not fourteenth amendment issues.

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

100. For example, in *Image Carrier Corp. v. Benne*, 430 F. Supp. 579, 583 (S.D.N.Y. 1977), the court saw "no justification in the case law, the language of the Amendment, or in reason for restricting the reach of the equal protection clause. Indeed, such a course would be fought with danger to the very principles underpinning the Amendment." The court rejected the *Askew* approach and declared that a New York City practice of not contracting with non-union printers constituted an equal protection violation.

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

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

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

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

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

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

102. *Id.* at 1111.

103. *Id.* at 1112.

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

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

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

citizenship.<sup>107</sup> Two recent cases<sup>108</sup> have declared such laws unconstitutional through the use of a strict scrutiny standard of review. That standard was held to be appropriate because a durational residency requirement may violate the penumbral "right to travel,"<sup>109</sup> and a citizenship requirement may discriminate against resident aliens.<sup>110</sup> Both courts held that the states could still require public contractors to employ only bona fide residents, as long as duration of residency and citizenship were not factors. The rights of the parties before those courts might be adequately protected under such a ruling, but public contractors from other states could be severely harmed.<sup>111</sup> An employer may be able to successfully challenge a resident employment preference under the equal protection clause, but he could not vicariously assert the rights of his employees to obtain a higher standard of review.

#### *The Privileges and Immunities Clause*

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

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

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

107. See note 15 *supra*.

108. *Hicklin v. Orbeck*, 365 P.2d 159 (Alaska 1977), *probable jurisdiction noted*, 46 U.S.L.W. 3293 (Oct. 31, 1977); *People ex rel. Holland v. Bleigh Constr. Co.*, 61 Ill.2d 258, 335 N.E.2d 469 (1975).

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

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

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

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

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

114. S. C. CODE ANN. § 3379 (1947).

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

In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with citizens of that State.<sup>115</sup>

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

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

#### *The Foreign Affairs Theory*

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

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

116. 334 U.S. at 396.

117. It makes no difference that the government is purchasing the goods rather than private businesses. In this area the wisdom of our Nation's founders is amply supported by the latest economic theories. See text accompanying notes 45-55 *supra*.

118. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948); *but see* *People ex rel. Holland v. Bleigh Constr. Co.*, 61 Ill.2d 258, 335 N.E.2d 469 (1975), where reducing unemployment was found to be a valid state interest under both the equal protection and the privileges and immunities clauses. Although such a goal appears even more compelling on its surface than the "retention" of tax dollars, in principle it is the same. Reducing unemployment is surely an important state interest, but doing it at the expense of jobs in other states is an activity that the privileges and immunities clause was intended to prohibit.

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

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

119. U.S. CONST. art. I, § 8, cl. 3.

120. E.g., *Parker v. Brown*, 317 U.S. 341 (1943); *Aldens, Inc. v. LaFollette*, 352 F.2d 745 (7th Cir. 1977).

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

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

123. Exec. Order No. 10582, 19 Fed. Reg. 3963 (1952).

124. Memorandum from Cyrus Vance to Assistant Secretary of Defense, (March 7, 1964), reprinted in Trainor, *The Buy American Act: Examination, Analysis, and Comparison*, 64 MLL. L. REV. 101, 120 n.129 (1974). In 1976, defense spending for procurement and other contracting amounted to almost 70% of all federal expenditures other than for personal services. DEPT. OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, 57 *Survey of Current Business* No. 9 (Sept. 1977).

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

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

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

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

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

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

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

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

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

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

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

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

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

#### PREEMPTION

Even if in-state preference laws are not found unconstitutional, federal power over commerce might be invoked to supercede, or preempt, them. Because public contracting is often considered an internal state function, however, federalism considerations and the tenth amendment<sup>131</sup> may limit the reach of the commerce power in such a situation.

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

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

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130. Many of the practices are informal, unwritten policies of state procurement officials. See Note, *State "Buy American" Policies—One Vico, Many Voices*, 32 GEO. WASH. L. REV. 384, 386 (1964). Also, foreign contractors could be effectively excluded through restrictive bid specifications, excessive bonding requirements, unfair inspections, licensing restrictions and inadequate advertising of bids.

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

132. 426 U.S. 833 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)). *National League of Cities* involved a 1974 amendment to the Fair Labor Standards Act which expanded the definition of "employer" to include most state and local governmental agencies. Pub. L. No. 93-259, § 8(a)(1), (5), (6), 88 Stat. 38 (1974) (codified at 29 U.S.C. § 203(d), (s)(5), (k) (1970)). This had the effect of making the entire Act applicable to those activities, but the only extension at issue was that of the minimum wage and overtime provisions. 29 U.S.C. §§ 206, 207 (1970).

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

*Cities* is broad enough to preclude virtually all federal regulation of state activities.<sup>134</sup> Its actual holding appears to be much narrower. Contrary to the fears expressed in Justice Brennan's dissent,<sup>135</sup> the case has not been expanded beyond the narrow factual situation it involved. It has been held that the equal pay provisions of the Fair Labor Standards Act<sup>136</sup> could still be justified under the commerce power since the intrusions are less significant and discrimination cannot be considered an "essential governmental function."<sup>137</sup> Also, the application of Title VII of The Civil Rights Act<sup>138</sup> to the states was upheld by the Court without dissent under section five of the fourteenth amendment.<sup>139</sup> Under such an analysis, discrimination against those from other states could be considered an illegitimate governmental purpose under the commerce clause, the privileges and immunities clause, and perhaps even under the equal protection clause.<sup>140</sup> Thus, the reach of the commerce clause should extend far enough to preempt in-state preference laws.<sup>141</sup>

134. *E.g.*, 426 U.S. at 852:

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

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

136. 29 U.S.C. §§ 208(d)(1) (1970).

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

138. 42 U.S.C. § 2000e-2(a) (1970).

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

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

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

## CONCLUSION

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

Donald E. Jordan

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ceedings or investigations are underway which would effectively invalidate state prohibitions of advertising by sellers of prescription drugs, veterinarians and the eyeglass industry, and the commentators uniformly advocate F.T.C. jurisdiction over anticompetitive state practices. See Badal, *Restrictive State Laws and the Federal Trade Commission*, 29 ADMIN. L. REV. 239 (1977); Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1978 DUKE L.J. 213; Note, *The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act*, 59 HARV. L. REV. 715 (1978).

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

State v. Kruchten, 101 Ariz. 186, 417 P.2d 510 (1966), cert. denied, 385 U.S. 1043, 87 S.Ct. 734, 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. Eymar*, 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. Cuffio*, 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.



100 Ariz. 333

**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 act — 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 $\approx$ 54

Constitutional Law  $\approx$  211

Municipal Corporations  $\approx$  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 $\approx$ 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 $\approx$ 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 $\approx$ 1010.1(6)

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

cited 151 A.L.R. 781, 796. In *Liberty Mutual Insurance Company v. Jones*, 344 Mo. 2, 130 S.W.2d 945, 125 A.L.R. 1149 (1939), notated 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. Gruin 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.

HOUSE RESEARCH AGENCY  
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MEMORANDUM

January 30, 1980

TO: Representative Vernon Hurlbert

FROM: Susan Brody, Issues Analyst

RE: State Use of Interior Alaska Lumber  
Research Request No. 25

INTRODUCTION

The use of lumber produced in Interior Alaska for local construction projects might be substantially increased if a number of obstacles can be overcome. Neither the Uniform Building Code nor State statutes and regulations appear to present any major deterrents to use of locally produced lumber in Interior Alaska. Instead, the problems tend to arise from design practices and building construction specifications which are not geared to the use of local lumber products. Other important obstacles also exist, including lumber supply problems, undeveloped local markets, and an absence of lumber drying facilities and more sophisticated processing equipment.

The use of Interior Alaska lumber has been of interest to a variety of people and agencies for many years. In 1969-70, a series of reports was sponsored by the U. S. Forest Service and the Federal Field Committee for Development Planning on the feasibility of utilizing timber products from the upper Kuskokwim and middle Yukon Rivers for local construction projects. More recently, the Kuskokwim Corporation, in cooperation with the U. S. Forest Service, has initiated a land use management planning process which includes an assessment of forest resources and market potential.

White spruce is the commonest tree of Interior Alaska. It is considered the most important commercial tree in Canada, and its workability, strength, weight, and insulating qualities make it a good wood for construction projects. Locally produced white spruce house logs and rough cut lumber have been used for some time for private housing construction projects in Interior Alaska, but have seldom been used for any public projects such as schools or public safety buildings. This memorandum

describes the primary deterrents to use of this lumber for public projects and identifies possible solutions to some of the problems. Our sources of information include interviews with the U. S. Forest Service, the Department of Transportation and Public Facilities, the Kuskokwim Corporation, the Department of Housing and Urban Development, the Bureau of Land Management, the Bureau of Indian Affairs, and Guinn Lumber Company in Bethel. Previous reports on the subject were also extremely helpful because many of the problems that prevented use of the lumber in 1970 still exist today.

I would be happy to meet with you and clarify any of the findings presented in this memorandum.

#### CURRENT POLICIES AND PRACTICES IN ALASKA

The use of local forest products for public projects is clearly encouraged by State statute.

Sec. 36.15.010. In a project financed by state money in which the use of timber, lumber, and manufactured lumber products is required, only timber, lumber, and manufactured lumber products originating in this state from local forests shall be used wherever practicable. (emphasis added)

Sec. 36.15.020. A clause containing the substance of Section 10 of this chapter shall be inserted in all calls for bids and in all contracts awarded.

Despite this policy, lumber produced in Interior Alaska has been used only rarely for State funded construction projects.

The primary State agency overseeing construction projects in Interior Alaska is the Department of Transportation and Public Facilities (DOTPF). DOTPF is responsible for construction of schools, airports, roads, detention facilities, and other structures. Almost all of the design work for DOTPF is contracted out to private sector architects. Those