ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

3723 HSTA HB 679

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02-519 (REV 8/78)

HB

679

Sectional Outline CSHB 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.

Bradley
4/16/86

Original sponsor: Rules/Governor

IN THE HOUSE BY THE STATE AFFAIRS COMMITTEE

CS FOR HOUSE BILL NO. 679 (State Affairs)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the purchase of Alaska products; and providing for an effective date."

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

* Section 1. AS 36.15.010 is amended to read:

Sec. 36.15.010. USE OF LOCAL FOREST PRODUCTS REQUIRED IN PROJECTS FINANCED BY PUBLIC MONEY. In a project involving public construction described in AS 36.15.030 [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 may [SHALL] be used unless the commissioner of commerce and economic development certifies that

(1) the manufacturers and suppliers that have notified the commissioner of commerce and economic development of their willingness to manufacture or supply Alaska forest products have been given reasonable notice of the forest product needs of the project; and

(2) the manufacturers and suppliers who have notified the commissioner of commerce and economic development of their willingness to manufacture or supply Alaska forest products are unable to supply the products to the project at a cost that is within seven percent of the price offered by a manufacturer or supplier of non-Alaska forest products [WHEREVER PRACTICABLE].

* Sec. 2. AS 36.15 is amended by adding new sections to read:

Sec. 36.15.030. USE OF ALASKA PRODUCTS. (a) In a project involving public construction as defined in AS 36.95.010 that is

financed in whole or in part with state money, Alaska products shall be used whenever practicable. As used in this section, a project involving public construction that is financed with state money means a project constructed by an agency of the state, by a municipality of the state under AS 14.11.020 or 14.11.100, AS 29.89, or AS 35.15.080, or by a regional educational attendance area under AS 14.11.020.

(b) The provisions of AS 36.15.040 and 36.15.060 - 36.15.080 do not apply to forest products required in projects involving public construction. The use of Alaska forest products in public construction is required by AS 36.15.010 - 36.15.020.

Sec. 36.15.040. CONTRACT SPECIFICATIONS. Contract specifications for a project described in AS 36.15.030 must include a provision that a bidder that designates in a bid the use of Alaska products identified in the specifications to the bid will receive the preference granted under AS 36.15.060 in the evaluation of the bid if the designated Alaska products meet the contract specifications.

Sec. 36.15.050. IDENTIFICATION OF ALASKA PRODUCTS. An agency of the state, a municipality of the state, and a regional educational attendance area may identify specific Alaska products for use in the construction of a specific public construction project.

Sec. 36.15.060. GRANT OF PREFERENCE. (a) In the evaluation of a bid, a bid that designates the use of Alaska products identified in the contract specifications and designated as Class I, Class II, or Class III state products under AS 36.15.080(a) and (b) is decreased by the percentage of the value of the designated Alaska product under AS 36.15.080(a) and (b).

(b) After determining the preference under (a) of this section, the contract shall be awarded to the bidder submitting the lowest total bid unless a different bidder must be awarded the contract under

AS 37.05.230(1).

(c) The contract amount of a contract awarded is the amount of the bid offered by the bidder.

(d) This section does not apply to a public construction project that is financed in whole or in part with federal money or aid if the preference is contrary to a federal law or regulation.

Sec. 36.15.070. PENALTY FOR FAILING TO USE DESIGNATED PRODUCTS. (a) If a successful bidder who designates the use of an Alaska product in a bid fails to use the designated product for a reason within the control of the successful bidder, each payment under the contract shall be reduced according to the following schedule:

(1) for a Class I designated Alaska product - four percent;

(2) for a Class II designated Alaska product - six percent;

(3) for a Class III designated Alaska product - eight percent.

(b) A person is not a responsible bidder if, in the preceding three years, the person has twice designated the use of an Alaska product in a bid for a public construction project and has each time failed to use the designated Alaska product for reasons within the control of the bidder.

(c) An agency of the state, a municipality of the state, and a regional educational attendance area using state money for a project involving public construction shall report to the commissioner of commerce and economic development each contractor penalized under (a) of this section. The commissioner of commerce and economic development shall maintain a list of contractors determined not to be responsible bidders under (b) of this section.

Sec. 36.15.080. CLASSIFICATION OF ALASKA PRODUCTS. (a) The commissioner of commerce and economic development shall adopt

regulations establishing the value added in the state for materials and supplies produced or manufactured in the state that are used in a construction project and shall publish a list of the products annually. A supplier may request inclusion of its product on the appropriate list.

(b) Materials and supplies with value added in the state that are

(1) more than 25 percent and less than 50 percent of the manufacturer's quoted price is a Class I product;

(2) 50 percent or more and less than 75 percent of the manufacturer's quoted price is a Class II product; and

(3) 75 percent or more of a manufacturer's quoted price is a Class III product.

(c) In a bid evaluation under AS 36.15.060,

(1) a Class I product is given a three percent preference;

(2) a Class II product is given a five percent preference; and

(3) a Class III product is given a seven percent preference.

* Sec. 3. AS 36.20.010 is amended to read:

Sec. 36.20.010. PREFERENCE FOR [OF PRODUCERS OR DEALERS IN] ALASKA PRODUCTS. In making a purchase [PURCHASES] or awarding a contract [CONTRACTS] for supplies, commodities, or materials for an office or institution of this state that is financed in whole or in part with state money, preference shall be given, whenever practicable, to Alaska products [PRODUCERS AND DEALERS IN THE STATE], price and quality being equal. A purchase is made and a contract for supplies, commodities, or materials is awarded under this section whenever the purchase or award is made by an agency of the state, a

municipality of the state, or a regional educational attendance area.

* Sec. 4. AS 36.20 is amended by adding new sections to read:

Sec. 36.20.020. CONTRACT SPECIFICATIONS. Contract specifications for a purchase or a contract award described in AS 36.20.010 must include a provision that a bidder that designates in a bid the use of Alaska products identified in the specifications to the bid will receive the preference granted under AS 36.20.040 in the evaluation of the bid if the designated Alaska products meet the contract specifications.

Sec. 36.20.030. IDENTIFICATION OF ALASKA PRODUCTS. An agency of the state, a municipality of the state, and a regional educational attendance area may identify specific Alaska products for use in making a purchase or awarding a contract under AS 36.20.010.

Sec. 36.20.040. GRANT OF PREFERENCE. (a) In the evaluation of a bid, a bid that designates the use of Alaska products identified in the contract specifications and designated as Class I, Class II, or Class III state products under AS 36.20.060(a) and (b) is decreased by the percentage of the value of the designated Alaska product under AS 36.20.060(a) and (b).

(b) After determining the preference under (a) of this section, the contract shall be awarded to the bidder submitting the lowest total bid unless a different bidder must be awarded the contract under AS 37.05.230(1).

(c) The contract amount of a contract awarded is the amount of the bid offered by the bidder.

(d) This section does not apply to a purchase made or a contract awarded that is financed in whole or in part with federal money or aid if the preference is contrary to a federal law or regulation.

Sec. 36.20.050. PENALTY FOR FAILING TO USE DESIGNATED PRODUCTS.

(a) If a successful bidder who designates the use of an Alaska product in a bid fails to provide the designated product for a reason within the control of the successful bidder, each payment under the contract shall be reduced according to the following schedule:

(1) for a Class I designated Alaska product - four percent;

(2) for a Class II designated Alaska product - six percent;

(3) for a Class III designated Alaska product - eight percent.

(b) A person is not a responsible bidder if, in the preceding three years, the person has twice designated the use of an Alaska product in contract awarded under AS 36.20.010 and has each time failed to provide the designated Alaska product for reasons within the control of the bidder.

(c) An agency of the state, a municipality of the state, and a regional educational attendance area using state money to make a purchase or award a contract under AS 36.20.010 shall report to the commissioner of commerce and economic development each contractor penalized under (a) of this section. The commissioner of commerce and economic development shall maintain a list of contractors determined not to be responsible bidders under (b) of this section.

Sec. 36.20.060. CLASSIFICATION OF ALASKA PRODUCTS. (a) The commissioner of commerce and economic development shall adopt regulations establishing the value added in the state for materials and supplies produced or manufactured in the state that are used in making purchases and awarding contracts under AS 36.20.010 and shall publish a list of the products annually. A supplier may request inclusion of its product on the appropriate list.

(b) Materials and supplies with value added in the state that are

(1) more than 25 percent and less than 50 percent of the manufacturer's quoted price is a Class I product;

(2) 50 percent or more and less than 75 percent of the manufacturer's quoted price is a Class II product; and

(3) 75 percent or more of a manufacturer's quoted price is a Class III product.

(c) In a bid evaluation under AS 36.20.040,

(1) a Class I product is given a three percent preference;

(2) a Class II product is given a five percent preference; and

(3) a Class III product is given a seven percent preference.

* Sec. 5. AS 36.95.010 is amended by adding new paragraphs to read:

(9) "Alaska product" means a product produced or manufactured in the state if the value added in the state is not less than 25 percent of the quoted price of the manufacturer;

(10) "product" means materials or supplies but does not include gravel and asphalt;

(11) "produced or manufactured" means processing, developing, or making an item into a new item with a distinct character and use through the application within the state of materials, labor, skill, or other services.

* Sec. 6. AS 37.05.230(1) is amended to read:

(1) a contract for construction and repairs, or a purchase of and contract for supplies, materials, equipment, and contractual services must be based on competitive bids; an award shall be made to the lowest responsible bidder after advertising for bids, except that

(A) <u>notwithstanding an Alaska product preference determined under AS 36.15.060 or AS 36.20.040,</u> a bid shall be

awarded to an Alaska bidder if the bid price offered by a bidder is not more than five per cent higher than the lowest bid price offered by a nonresident bidder [BIDDER'S]; and

(B) competitive bids need not be required

(i) for contractual services where no competition exists;

(ii) for sales involving fair trade items;

(iii) when, in the judgment of the purchasing agent, food, clothing, or medical supplies, or materials for use in laboratory and experimental studies may be purchased otherwise to the best advantage of the state;

(iv) where rates are fixed by law or ordinance;

(v) for items traded in on like items; or

(vi) for professional services;

* Sec. 7. AS 37.05.260 is amended to read:

Sec. 37.05.260. PREFERENCE FOR ALASKA PRODUCTS. This chapter does not modify, amend, or alter AS 36.15.010 and 36.15.020 regarding preference for Alaska forest products, AS 36.15.060 regarding a preference for Alaska products, or AS 36.20.010 regarding preference to producers or dealers in Alaska except as provided in AS 37.05.230(1).

* Sec. 8. This Act takes effect 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
Legislativce 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 Rassmussen, 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

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.[1]

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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[1]Source: Calvin Kerr, Kerr and Associates, personal conversation April 3, 1986.

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 tarrifs 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 possiblity 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.

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.

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

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 outbuildings. 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.

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 Rassmussen, 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.

HOUSE RESEARCH AGENCY
Pouch Y - State Capitol
Juneau, Alaska 99811
465-3991

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

architects design a structure which DOTPF then sends out for bid. The construction contract is usually awarded to the lowest bidder, all other factors being equal. All DOTPF contracts contain a clause recommending use of local lumber as required by State statute.

In some cases, State funds are passed through to municipalities or REAAs, who then do their own contracting for projects. For example, the Lower Kuskokwim School District is supervising the construction of 17 new schools in that area. The REAAs have somewhat greater flexibility than DOTPF in their contracting procedures. AS 35.15.080 allows a local school board to assume all of DOTPF's responsibilities for planning, design, and construction of an educational facility. At least one REAA has even chosen to act as its own general contractor on some school contruction projects.

The Alaska State Housing Authority (ASHA) is another State agency that has actively sponsored construction projects in rural areas, primarily housing. An ASHA housing project in Lower Kalskag in the 1960's utilized some local materials on an experimental basis, but extensive use was discouraged by the general unavailability of the material. A study was undertaken in 1969 to ascertain the feasibility of using Kuskokwim River lumber for the construction of ASHA subsidized housing units in Bethel, but it was found that local supply problems and the requirements for dry, surfaced, and graded lumber were major obstacles. (Kuskokwim Forest Resources Committee, Feasibility of Utilizing Kuskokwim Forest Resources at the Bethel Housing Project, 1969, attached)

ASHA is no longer active in the design and construction of rural housing. Instead, they encourage and provide funds to various regional housing authorities who then oversee their own projects. A large percentage of the funds available for rural housing projects are from the federal Department of Housing and Urban Development (HUD). At the request of a regional housing authority, HUD recently funded a construction project for 20 homes in Nenana which used locally produced logs. HUD official, Jack Smodey, indicated that he considered the project an experimental one. He still had some reservations about the insulation value of log construction.

Other federal agencies also provide construction funds in Interior Alaska. For example, the BIA oversees a variety of construction projects and has utilized locally produced lumber on a limited basis in the past. The

design, contracting, and construction management of many federally-funded construction projects are now being managed at the local level. For example, the Association of Village Council Presidents oversees projects for health clinics, utility systems, and housing in the Bethel region.

OBSTACLES TO USE OF LOCAL LUMBER PRODUCTS

The primary obstacles to use of locally produced lumber products include agency design specifications, an undependable supply, and underdeveloped local markets. Each of these obstacles is described below.

Design Specifications

The design and construction specifications for a structure influence whether local materials can be used. Wood material specifications that call for kiln-dried, standard graded and dressed lumber make it difficult to utilize locally produced materials. In addition, the building design may call for lumber lengths of over 20 feet that cannot be manufactured by local sawmills.

Architects and engineers who currently design houses, schools, or other public buildings for Interior Alaska seldom adjust their designs to accommodate the use of white spruce lumber. The use of three-sided house logs might be substituted for typical 2 x 4 framed walls. Spans or dimensions could also be changed to allow for any difference in the design stress of white spruce. For example, some of the structural carrying members such as joists and rafters might require larger dimensions to compensate for any lower stress rating of white spruce.

Before lumber can be used in a State or federally funded construction project, it must meet certain normal specifications such as dryness, surfacing, strength, grading and proper manufacture.

1. Dryness

Design drawings for all State buildings specify the maximum moisture content allowed in the lumber to be used in the structure. Less than 19 percent moisture content is a typical requirement. To meet this standard, lumber must be either kiln or air dried. Sometimes the building design will specifically call for kiln dried lumber. Neil Atkinson of the General Design section of DOTPF estimates that 99 percent of the lumber used in State projects is kiln dried.

Air drying takes 3 months or more depending on the thickness of the wood and the desired moisture content. It requires an area where the lumber can be properly stacked and covered. Kiln drying, on the other hand, can usually be accomplished in a matter of hours or days, but requires a steady supply of fuel and an initial investment for the structure. Kiln dried lumber is not necessarily better than air dried lumber if they are both dried to the same moisture content. Very little lumber drying is currently practiced by sawmill operators along the Kuskokwim and Yukon Rivers. No kilns exist and timber is usually sold green. As green (wet) lumber tends to warp and shrink, its use in buildings may cause major problems.

2. Strength and Other Properties

Contractors and designers may not be fully aware of the construction quality of white spruce. According to the U. S. Forest Service (Kuskokwim Corporation, Timber Resource Assessment, 1979, attached), white spruce is excellent structural wood for use in construction. It has an exceptionally high strength to weight ratio.

It holds nails well, does not tend to split, planes and glues easily, and takes paint well. Extremely resilient, it has excellent dimensional stability, dries easily, and has small tight knots. White spruce has strength characteristics that make it suitable for posts, poles, and piling in both utility and con struction applications. When used in contact with the ground, preservative treatment is necessary for maximum durability.

Locally produced white spruce lumber is not grade marked. Grading is a measure of lumber quality that takes into account defects in the wood such as knots, splits, worminess, etc. Grading is generally done by a person certified by the West Coast Lumber Association who personally inspects and rates the lumber as it comes off the machine. The federal Department of Housing and Urban Development requires that grade marked lumber be used in all HUD financed housing projects. Construction grade or better is required for all horizontal members such as joists. Lower grade lumber (standard or utility) is allowed for the vertical members of a building. The Uniform Building Code, Section 2505, also requires that lumber be identified by a grade mark or a certificate of inspection issued by an approved agency.

3. Surfacing

Sawmills on the Yukon and Kuskokwim Rivers produce only rough-sawn lumber or house logs. Much of the current demand, however, is for dressed (surfaced) lumber. A planing machine, which is required to produce surfaced lumber, is a major investment that most sawmill operators are not able to afford given their current pro duction levels.

Dependability of Supply

Most construction in rural Alaska is performed by private contractors and their willingness to use local lumber is directly affected by the dependability of supply. A contractor must be assured that sufficient amounts of good quality lumber are readily available; especially for large projects where significant delays can drastically increase project cost.

In 1969, interviews were held with Mel Braud, of Braud, Inc. the local contractor for a major housing project of over 200 houses in the City of Bethel, to determine the feasibility of using lumber produced along the Kuskokwim River for all or part of his construction needs. At that time, Mr. Braud indicated that he would require a very positive guarantee of delivery of the locally produced lumber. He also preferred to have the local suppliers bonded so that the cost of bringing the lumber in from another area would be covered if the local sawmills were unable to satisfactorily fill the orders.

Dependability of supply is affected by any river transportation problems. River transportation is the only economical method that a forest products industry along the Kuskokwim or Yukon Rivers can use to bring in supplies such as fuel and machinery, and to ship finished products to market. The two primary river transportation problems are the availability of adequate barge service and the short ice-free season during which commercial barges can operate. The Kuskokwim River is only open 5 to 6 months a year, and during several of these months the river is often too low to travel. In addition, only one major barge company, United Transport, is currently operating on the river. Under current conditions it might be difficult to bring a large volume of lumber up or down the river within a guaranteed time frame.

Local Markets

Perhaps the best potential use for white spruce logs and lumber is schools and housing projects. However, without a detailed survey of anticipated building needs, it is difficult to predict the amount of lumber that might be required for this type of construction.

One of the primary marketing problems may be a lack of adequate information about the characteristics and dependability of white spruce as a building material. Another marketing problem is the difficulty of meeting consumer specifications for graded and surfaced lumber without first investing in additional equipment and processing techniques. To justify the cost of this new equipment, the sawmill operators would need to have some assurance of a steady market.

In addition, before large amounts of processed lumber can be produced and marketed from the Yukon and Kuskokwim River areas, certain land status issues will need to be resolved. The Bureau of Land Management is in the process of conveying land to the Native corporations. Land in the Aniak to Stony River area is scheduled to be conveyed in 1981. In the McGrath area, conveyance decisions have already been made, but these are currently being appealed in court. It will be up to the various regional and village corporations to pursue timber harvest and processing options once the land conveyances are finalized. These corporations will probably find it desirable to undertake studies to determine what kinds of markets exist for white spruce and other species.

ALTERNATIVES FOR STATE ACTION

There are a number of possible actions that the State might consider to overcome the obstacles that exist to use of Interior lumber. Some of the suggestions enumerated here are based on recommendations made by the Kuskokwim Forest Resource Committee in an earlier report. (Feasibility of Utilizing Kuskokwim Forest Resources, Second Report, 1970, attached).

State Use of Interior Lumber

Although AS 36.15.010 requires use of local lumber products in State funded construction projects whenever feasible, the State might consider additional ways to carry out the intent of this statutory provision. For example, when the Department of Transportation and Public Facilities hires an architectural firm, it might specifically request that the structure be designed to accommodate the use of white spruce logs or processed lumber, and that a minimum moisture content for the wood be specified rather than requiring kiln dried lumber.

Another possibility is to give some preference in the awarding of bids to contractors who offer to use local lumber products. This would require

a change in the statutory provisions which require the award of contracts to the lowest bidder (AS 35.15.050). It is important to note, however, that AS 35.15.020 allows the Department of Transportation and Public Facilities to provide the materials and supplies for a project if it so chooses. This might allow the Department to acquire locally produced lumber for a construction project and provide it to the contractor.

If the State or a contractor to the State chooses to utilize local forest products for a major local project, early ordering of materials will be essential. The sawmill operators must have sufficient lead time to gear up to supply the volume and specifications required.

Market Information

A study to determine the local market demand for lumber was sponsored in 1970 by the Federal Field Committee for Development Planning and the U. S. Forest Service. Data was collected from agencies, village councils, store owners and sawmill operators for the areas from Medfra to Bethel on the Kuskokwim River and from Kaltag to Ruby on the Yukon River. The study collected information on the volume, specifications and prices of timber products being purchased in the areas, the status of sawmills along the Kuskokwim and Yukon, the modes and costs of transporting logs and other timber products from sawmill sites to primary local markets, and the future plans of federal and State agencies for local timber utilization (Koweluk, Local Market Demand for Timber Products in the Middle Yukon and Upper Kuskokwim Rivers, 1970, copy attached).

An update of this study might be a useful first step in developing local markets. Especially important would be a realistic assessment of the quantity of lumber that may be required by State or municipal construction projects in the next five to ten years. For example, the Bethel region is growing rapidly and there is likely to be a continuing strong demand for school and housing construction. Of the total quantity of lumber required, an estimate of the percentage that might be supplied by local sawmills should be prepared, based on several different assumptions about the processing equipment and transportation options available to the producers. In conjunction with a study such as this, better information about the construction properties of the wood, its availability and cost, could be made available to potential consumers. As regional

housing authorities and REAAs are becoming more involved in the design and construction management of State and federally funded projects, they represent an important potential consumer of locally produced lumber.

Jan Fredericks, General Manager of the Kuskokwim Corporation, has indicated a strong interest in marketing research and emphasized the willingness of the corporation to cooperate in any studies of this kind. The State Department of Commerce and Economic Development might be a good agency to undertake such a research project.

River Transportation

A dependable and continuous river barging service is necessary to supply a forest industry and to carry its products to market. More barge equipment than currently exists may be required, such as a small shallow draft, self-powered barge for lumber only. The timber owners themselves might be able to acquire a barge for this purpose if markets were strong enough to justify the initial capital cost and operating expenses.

In 1970, the Kuskokwim Forest Resource Committee (KFRC) made the following recommendation regarding barge service:

> The present barge operators have already voiced opposition to any subsidized competing barge service. The KFRC certainly feels that the existing private barge companies should first have the opportunity to show that they can develop the barging service needed. If they do not do this within a reasonable time, then some other, possibly subsidized, transport should be considered.

It is unclear what the State's role might be in ensuring more dependable barge service for the sawmill operators, although some kind of State grant or loan might be possible.

Facilities and Equipment

If sawmill operators are to produce lumber that is surfaced, graded and dried, they will require additional equipment, facilities and personnel including a planing machine, an air-drying yard, and a certified lumber grader. This kind of investment is likely to be beyond the means of the

existing sawmill operators. Both State and federal loans might help to ease the financial burden of equipment acquisition. Another possibility is to dry lumber at a yard shared by a number of sawmill operators. For example, an air drying facility and retail lumber yard might be established in Bethel if steady markets could be developed in that area.

SB/bf

SOURCES OF INFORMATION

1. Dick Armstrong, Ed Thompson, Division of General Design, Department of Transportation and Public Facilities, Anchorage.

2. Neil Atkinson, Division of General Design, Department of Transportation and Public Facilities, Juneau.

3. Harry Goldbar, Executive Director, Alaska State Housing Authority, Anchorage.

4. Jay Gage, Jack Smodey, U. S. Department of Housing and Urban Development, Anchorage.

5. Bob Arnold, Bureau of Land Management, Anchorage.

6. Hank Hays, Area Planning and Development, U. S. Forest Service, Anchorage.

7. Jan Fredericks, General Manager, Kuskokwim Corporation, Anchorage.

8. John Guinn, Guinn Lumber Company, Bethel.

HOUSE RESEARCH AGENCY
Pouch Y - State Capitol
Juneau, Alaska 99811
465-3991

MEMORANDUM

January 31, 1980

TO: Representative Vernon Hurlbert

FROM: Susan Brody, Issues Analyst SB

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

I just received this memorandum from Ed Thompson of the State Department of Transportation and Public Facilities. It contains some additional useful information on the potential for State use of Alaska spruce wood products. Please call me if you have any questions.

SB/bf
Rncl.

STATE of ALASKA

MEMORANDUM

TO: Susan Brodie
House Research Agency
Pouch Y
State Capitol
Juneau, Alaska 99811

DATE: January 28, 1980

FILE NO: 220H-4000

TELEPHONE NO: 266-1580

FROM: Edwin B. Thompson, A.I.A.
Chief, Technical Design Services
Division of General Design
& Construction
Department of Transportation
& Public Facilities
Anchorage

SUBJECT: Use of Alaska Spruce
Wood Products

RECEIVED
JAN 31 1980

HOUSE RESEARCH AGENCY

In response to your request of January 23, 1980 to R. S. Armstrong, Director, we forward the following observations on use of local lumber (Alaska Spruce) for construction of state facilities.

1) AS 36.15.010 requires the use of local forest products in projects financed by public money wherever practicable. AS 36.15.020 requires insertion of a clause containing the substance of AS 36.15.010 in all calls for bids and in all contracts awarded. This division's General Conditions, Construction Contracts, Section 00703, I (attached) complies with the statuatory requirements.

2) This division has adopted the Construction Specifications Institute (CSI) format for facility design specifications. The Construction Specifications Institute is a nationally recognized organization of members representing all aspects of the construction industry. The CSI format represents the first successful effort to establish a flexible industry-wide standard for organizing specification nomenclature. It has been adopted by many governmental and private agencies including the General Services Administration and is endorsed by and subscribed to by the Associated General Contractors, The American Institute of Architects and Professional Engineers in Private Practice, etc. A sample of the CSI guide specification for Rough Carpentry is enclosed. Quality Assurance for grading materials indicates that the West Coast Lumber Inspection Bureau probably applies to Alaska Spruce - but does specifically identify Sitka Spruce. Lumber materials meeting their requirements are each grade stamped to indicate symbol of grading agency certified by Board of Review, American Lumber Standards Committee.

3) Alaska Statutes require that facilities in excess of 1,500 square feet and residences in excess of four-plexes must be designed by architects and/or engineers registered by the State. Design professionals therefore reference uniformly accepted standards, regulations and institute requirements for materials specified in their documents in order to minimize their liability for design and to establish a level of

7) Regarding school districts that use "force account" procedures to build some of their facilities and purchase materials locally - I understand Aleutian Chain REAA, Kuspuk REAA, Lake and Peninsula REAA and Northwest Arctic have done this. Perhaps they have utilized Alaska spruce in their programs.

I apologize for the length of this memo, but I trust it will adequately reflect the status quo. I feel sure that if all parties could get together and understand the requirements each needs, perhaps a viable approach could be identified to accommodate all and encourage the industry.

Enclosure: a/s

Bi:

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
Research Staff

RE: Alaska Bidders' Preference
Research Request 83-130

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

Clarity of the Law

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

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[1]The relevant language is found in AS 37.05.230.

Practical Application of the Law

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

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

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

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

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

Supreme Court Interpretation of the Law

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

giving a preference to an Alaska business can be fullfilled 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 Vunerability 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 probablility 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

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

Actions that may Increase Vulnerability to Legal Challenge

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

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

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

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[2]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.

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 Tyee 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.

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 t'ere 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

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

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

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

BIDS PUBLISHED FY 82

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

TOTAL ANCHORAGE AND JUNEAU - 942

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

(1) Total number of PURCHASE ORDERS issued to IN-STATE vendors -

TOTAL - 1002

(2) Total DOLLAR VALUE of PURCHASE ORDERS issued to IN-STATE vendors -

TOTAL - $ 24,372,083.25

(3) Total number of PURCHASE ORDERS issued to OUT-OF-STATE vendors -

TOTAL - 406

(4) Total DOLLAR VALUE of PURCHASE ORDERS issued to OUT-OF-STATE vendors -

TOTAL - $ 9,993,085.68

(5) Total COST of AWARDS made as a direct result of 5% BIDDERS PREFERENCE LA

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 then $ 1,000. The awards base 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 competetive 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	-	127 PO's	=	$ 4,732,420.19
SUB-TOTAL	-	941 PO's		$ 23,619,456.53
Other Areas	-	61 PO's	=	$ 752,626.72
TOTAL	-	1,002 PO's		$ 24,372,083.25

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

CONTRACT AWARDS ISSUED DURING FY 82

NO. OF CONTRACT AWARDS	DOLLAR VALUE
TOTAL - 658	TOTAL - $ 65,241,064.46

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

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

JM/je
5/0805-05/GSS1

FIVE PERCENT BID PREFERENCE ANALYSIS
FISCAL 82

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

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

5% Bid Preference: TOTAL - $ 22,753.79

GRAND TOTAL DOLLAR VOLUME - $ 4,883,543.22

JM/je
5/0805-04/GSS1

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

	Non-Alaska Vendors		Alaska Vendors		Total	
	No.POs	Amount	No.POs	Amount	No.POs	Amount
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	0	0	2	1,875.75	1	1,875.75
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:

	How many PO's	$ Amount
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
	1,434	$34,365,168.93

SUMMARY CHART - FISCAL YEAR 81 vs FISCAL YEAR 82

PURCHASING SECTION ACTIVITY

DOCUMENTS PROCESSED	NUMBER RECEIVED & ISSUED FY-81 TOTAL	NUMBER RECEIVED & ISSUED FY-82 TOTAL	AVERAGE TRANSACTION TIME FY-81 TOTAL	AVERAGE TRANSACTION TIME FY-82 TOTAL	AVERAGE - P.A. PER MONTH FY-81 TOTAL	AVERAGE - P.A. PER MONTH FY-82 TOTAL
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

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

PURCHASE ORDERS

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

LEASES

	FY-82 TOTAL	TOTAL VALUE FY-82 TOTAL
NO. LEASES ISSUED:	100	$25,492,240.62

	FISCAL 1981	FISCAL 1982
GRAND TOTAL DOLLAR AMOUNT:	$67,239,071.77	$125,098,474.00

DM/dlr

Colorado Law Review – Volume 49

COMMENT

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

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

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

Interstate Variations In Preference Laws

Basic Classifications

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

1. The wide variety of preference laws could be categorized more narrowly or more broadly. For example, statutes which may impose burdens on nonresident 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,[2] Guam,[3] Puerto Rico,[4] and the Virgin Islands[5] have statutes providing for such preferences, and percentages range from two[6] to nineteen percent.[7] At present Hawaii has the most elaborate statute,[8] but a recently enacted New York law has the potential for even greater administrative complexity.[9]

tie bid

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

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

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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, 103-55.5 (1968); IDAHO CODE § 60-103 b) (Supp. 1977); LA. REV. STAT. ANN. §§ 38:2251, 38:2255 (West 1968); MONT. REV. CODES ANN. §§ 82-1137 (1966), 82-1921 (Supp. 1975); N.M. STAT. ANN. §§ 6-5-32-A, B, and C (1974); N.Y. STATE FIN. LAW §§ 163-174 (McKinney Supp. 1977-78); W. VA. CODE § 5A-3-44 (Supp. 1977); WYO. STAT. §§ 9-664, 9-667, 9-669 (1957).

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

4. P. R. LAWS ANN. tit. 3, § 918h (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 103-53 (1976) provides a fifteen percent preference for public printing. Finally, Section 103-55.5 requires that an extra four percent be added to the bids of all non-residents. The four percent addition is justified as an adjustment for a retail excise tax, but such a tax is not assessed in sales to the state. Thus, it appears that the total preference would be nineteen percent for printing, and fourteen percent for many other goods and services.

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

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

10. ALA. CODE tit. 55, §§ 502, 514 (Supp. 1973); ALASKA STAT. § 36.20.010 (1973); ARK. STAT. ANN. § 14-221 (1968); CAL. GOV'T CODE § 4331 (West 1966); COLO. REV. STAT. § 24-30-404(1) (1973); FLA. STAT. ANN. § 287.082 (West 1975), 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.[11] Depending on specific language and administrative interpretations, the preference could range from a tie bid preference to a relatively large percentage preference. Terms such as "comparable,"[12] "in the best interests of the state,"[13] and "as far as may be practicable"[14] are often used in these statutes.

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

KAN. STAT. § 75-3740 (1969); LA. REV. STAT. ANN. § 38:2184 (West 1968); ME. REV. STAT. tit. 5, § 1816.8 (1964); MICH. STAT. ANN. § 3.393 (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. § 57.285 (Baldwin 1975); LA. REV. STAT. ANN. § 39.173 (West 1965); 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. § 8.280 (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, § 85.3.7 (West 1965), tit. 74, § 85.3 (West Cum. Supp. 1977-78); S.C. CODE § 1-21. 22 (1962); S.D. COMPILED LAWS ANN. § 5-19-1 (1974); TENN. CODE ANN. §§ 12-348, 349 (Supp. 1977), 12.501 (1973); VT. STAT. ANN. tit. 29, § 903(a) (1970); VA. CODE § 2.1-284 (1973); WIS. STAT. ANN. § 16.75(1)(a) (West Cum. Supp. 1977-78); WYO. STAT. § 9-666 (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, § 903(a) (1970); *see also* N.Y. STATE FIN. LAW § 163-a (McKinney Supp. 1977-78) where such language was the justification for an addition to the statute which authorized as much as a 10% preference.

14. *E.g.*, KY. REV. STAT. § 57.285 (Baldwin 1975); LA. REV. STAT. ANN. § 39:173 (West 1968); NEV. REV. STAT. § 333.160-2 (1973); VA. CODE § 2.1-282 (1973).

15. FLA. STAT. ANN. §§ 281.03, 287.102 (West 1975); IND. CODE ANN. § 4-13-4-8 (Burns 1974); MONT. REV. CODE ANN. § 16-1230 (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. § 282.210(1) (1975).

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

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

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

Diversity in Application

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

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31-5-17 (1972); N.D. CENT. CODE § 43-07-20 (Supp. 1977); S.D. COMPILED LAWS ANN. § 5-19-6 (1974); TEX. REV. CIV. STAT. ANN. art. 9674p, § 1 (Vernon 1977); VT. STAT. ANN. tit. 19, § 27 (1968); WYO. STAT. § 9-680-3 (Supp. 1977).

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

18. ILL. ANN. STAT. ch. 127, § 132.6e (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 (1943); N.D. CENT. CODE § 44-08-01 (Supp. 1977); OKLA. STAT. ANN. tit. 61, § 14 (West Cum. Supp. 1977-75), 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. § 33-012 (West Supp. 1977-78); WYO. STAT. § 9-667 (1957).

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

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

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

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

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

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.[28] Many preference statutes, however, apply to all public contracts entered into by all levels of government.[29] A few statutes, on the other hand, apply only to very narrow categories of public procurement.[30]

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-I (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), 3740a (Supp. 1976); Wyo. Stat. §§ 9-664 to 667 (1957).

25. *E.g.*, Fla. Stat. Ann. § 287.082 (West 1975); Wyo. Stat. § 9-669 (1957). For simplicity, the term "resident" will be used to refer to both types of preferences.

26. *E.g.*, Mont. Rev. Codes Ann. § 82-1920 (Supp. 1977); Nev. Rev. Stat. § 333.400 (1973); N.Y. State Fin. Law § 163-a (McKinney Supp. 1977-78).

27. *E.g.*, Mont. Rev. Codes Ann. § 82.1925 (Supp. 1977) provides that a business will be prima facie eligible for a preference after one year in the state, but it may be disqualified if the public procurement official finds that the business is a wholly owned subsidiary of a foreign corporation, or if it was formed for the purpose of circumventing the residency requirement.

28. *E.g.*, Colo. Rev. Stat. § 24-30-404(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.[31] The size of a percentage preference would be the amount of the tariff. Similarly, an absolute preference is the functional equivalent of an embargo on foreign goods. Tie bid preferences are rarely used in contract awards, but widespread enaction of tie bid preference laws may indicate a substantial total impact on commerce. Although the impact on interstate commerce will vary depending on the degree of potential competition from businesses in surrounding states, the impact will be more severe when a stronger preference is in effect.

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

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

32. Department of Commerce, Bureau of Economic Analysis, 57 Survey of Current Business No. 9 (Sept. 1977).

33. *Id.*

34. Although it is difficult if not impossible to precisely calculate to what extent interstate commerce would be increased if such trade barriers in governmental procurement were eliminated, the amount is surely at least several billion dollars per year. In a closely related area, it has been estimated that the federal government's policy of procuring from domestic firms (the "Buy American policy") reduced expected imports in the public sector by $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. Misce, Effect of Law on County and Municipal Expenditures 119 (1973). Criminal penalties for an infraction probably encourage broader interpretations, especially when the preference laws are ambiguous in the first place. A majority of the states provide criminal penalties for

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

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

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

Costs and Benefits to Individual States

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

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procurement officials who do not honor local preference statutes. *E.g.*, ARIZ. REV. STAT. § 34-246 (1974); ARK. STAT. ANN. § 14-625 (1968).

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

36. Most states give purchasing officials discretionary power to reject all bids, even for reasons such as "when in the best interests of the state," which makes that discretion virtually unlimited. *E.g.*, LA. REV. STAT. ANN. § 38:2255 (West Supp. 1977); VT. STAT. ANN. tit. 29, § 903 (1970). The practice can easily be exercised in a manner which will effectively exclude non-local suppliers. *Cf.* IDAHO CODE ANN. § 63-2-50 (1953) (residents are given a second opportunity to underbid non-residents in certain circumstances).

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

38. *See* COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL PURCHASING 9.4 (1973); 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*, 58 IOWA L. REV. 576 (1973). A large number of preference laws and related trade barriers were enacted during the depression, and a flurry of criticism was generated in the late thirties and early forties. *See* COUNCIL OF STATE GOVERNMENTS, TRADE BARRIERS AMONG THE STATES: PROCEEDINGS OF THE NATIONAL CONFERENCE ON INTERSTATE TRADE BARRIERS (1939); J. JOHNSON, INTERSTATE TRADE BARRIERS (1940); E. MELDER, STATE AND LOCAL BARRIERS TO INTERSTATE

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

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

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

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

39. In National Oil and Supply Co., Inc. v. Gray, Civ. No. F.S.-76-75-C (W. D. Ark., filed May 3, 1975) (voluntarily dismissed in 1977 after statutory change), the Arkansas five percent preference was to have been constitutionally challenged. The Arkansas Chapter of Associated General Contractors of America, Inc. successfully intervened as a defendant on April 5, 1977. Labor and management testimony generally favored proposals to strengthen the federal counterpart to preference laws, the "Buy American Act," 41 U.S.C. § 10a (1970). *Proposed Amendments to the Federal "Buy American Act:" Hearings on H. R. 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 SUBSTANTIVE COMMITTEE ON SOCIO-ECONOMIC POLICIES OF THE COORDINATING COMMITTEE ON A MODEL PROCUREMENT CODE OF THE AMERICAN BAR ASSOCIATION, MODEL PROCUREMENT CODE SOCIO-ECONOMIC PROVISIONS INDEX (1977).

41. People v. Crane, 214 N.Y. 154, 108 N.E. 427 (per Justice Cardozo), *aff'd.* 239 U.S. 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. Those factors are indeed important for some contracts, but they can be required in bid specification and applied in a non-discriminatory manner in such cases.

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

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

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

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

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

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

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

See also P. SAMUELSON, ECONOMICS 679-80 (10th ed. 1977); R. WYESTHA, 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.[47] This point is illustrated by positing a man who is the best lawyer and the best typist in town.[48] If he can charge clients more for his legal work than for his typing, this hypothetical worker can make the most money by spending all his time practicing law, and by hiring someone else to do his typing. In much the same way, trade will occur between states in situations where production costs for any particular traded good would be lower in a single state, but where it is unable to produce enough of the commodity to supply the entire nation.

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

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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. NOURSE, REGIONAL ECONOMICS 155-60, 226-36 (1968); H. SIEBERT, REGIONAL ECONOMIC GROWTH: THEORY AND POLICY 84-94 (1969).

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

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

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

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

found that the income of in-state businesses overall may actually be *reduced*.[31] 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.[32] 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.

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

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

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

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

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

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

The Constitutionality of In-State Preference Laws

The Commerce Clause

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

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 analagous 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, 78-9 (1976).

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

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

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

60. U.S. Const. art. I, § 8, cl. 3.

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

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

> Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing being transported. . . . [I]mposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. . . . [I]f New York in order to promote the economic welfare of her farmers, may guard them against competition with cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation. . . .
>
> Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief 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.[63]

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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 (1787) (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., 294 U.S. 511, 521-23 (1935).

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

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

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

64. *E.g.*, Edwards v. California, 314 U.S. 160 (1941); Best and Co. v. Maxwell, 311 U.S. 454 (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* Gremmill, 20 Idaho 732, 119 P. 298 (1911); State *ex rel.* Collins v. Senatobia Blank Book and Stationary Co., 115 Miss. 254, 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. 30 (1913).

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

71. *See* Tribune Printing and Binding Co. v. Barnes, 7 N.D. 591, 597, 75 N.W. 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 1930, *id.*, but is currently in excess of $247 billion per year. See note 82 *infra*.

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

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

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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 868 (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.[80] Although many recent Supreme Court cases would indicate per se invalidity for such an overt discrimination,[81] the court held that federalism considerations mandated greater discretion for states in their internal operations. Thus, it held that in-state preferences[82] should be judged by a reasonableness standard rather than a per se rule of invalidity; the inquiry in such cases would be whether the burden was "undue" or unreasonable.[83]

Under the *Sills* standard, statutes which only involved minor interference with commerce, such as tie bid preferences, would be upheld. At the same time percentage preferences probably would be invalid because of their larger direct and indirect burdens on interstate commerce. Absolute preferences surely would be declared invalid as a prohibition of trade between states. Reciprocal preference laws would present the 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.[84]

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80. 46 N.J. at 338, 217 A.2d at 130.

81. *E.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Polar Ice Cream and Creamery Co. v. Andrews, 375 U.S. 361 (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 274, 293 A.2d 711 (1972).

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

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

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

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

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

88. *But see* American Yearbook Co. v. 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* Edelman 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. Beame, 430 F. Supp. 579, 583 (S.D.N.Y. 1977).

89. 426 U.S. 794 (1976).

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

91. At one point the Court noted that:

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

426 U.S. at 808.

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

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

The Equal Protection Clause

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

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

> The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

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

95. *E.g.*, American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 901 (1972); City of Phoenix v. Super. Ct., 109 Ariz. 533, 514 P.2d 454 (1973); Schrey v. Allison Steel Mfg. Co., 75 Ariz. 252, 255 P.2d 604 (1952).

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

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

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

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

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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 (1898).

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. Beame, 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."[102] The state had attempted to justify the act on a variety of bases, including enhancement of the state's economy and an eventual increase in tax revenues. The court replied, however, that:

> The trouble with that proposition is that its truth is not self-evident, and there is no evidence before us tending to show that the preference has in fact served the fiscal interests of State and local government in Arkansas in any significant way or that it is likely to do so in the future.
>
> On the other hand, it is clear to us what Act 264, including its criteria, is reasonably calculated to 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 holdiing.[103]

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

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

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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 nonresident workers because retaliation in their home state would be their only other effective remedy.

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

The Privileges and Immunities Clause

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

The case of *Toomer v. Witsell*[113] considered the validity of a group of South Carolina statutes with many similarities to in-state preference laws. One of the sections imposed an annual license fee of $25.00 on shrimp boats owned by residents, and $2,500.00 on nonresidents who were engaged in shrimping off the North Carolina coast.[114] As with preference laws, such statutes discriminate overtly against businesses from other states. Most significant in the opinion is the Court's restatement of the underlying values 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, 565 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* Graham v. Richardson, 403 U.S. 365 (1971).

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

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

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

114. S. C. Code Ann. § 3379 (1947).

> was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation . . . .
>
> In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with citizens of that State.[115]

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

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

The Foreign Affairs Theory

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

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

116. 334 U.S. at 396.

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

118. Toomer v. Witsell, 334 U.S. 385, 398 (1945); *but see* People *ex rel.* Holland v. Bleigh 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,[119] state activities in the two areas are governed by very different standards. An important and legitimate state interest may justify even substantial burdens on interstate commerce;[120] but in the area of foreign affairs, state regulation which could embarrass or interfere with federal policy is prohibited regardless of the state's interest.[121]

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

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119. U.S. CONST. art. I, § 8, cl. 3.

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

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

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

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

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

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

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

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

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

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

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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, 130 N.J. Super. 523, 376 A.2d 203 (Super. Ct. 1977) (dictum), *aff'd on other grounds*, 151 N. J. Super. 218, 376 A.2d [illegible] (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 243, 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-Lima-Hamilton Corp. v. Superior Court, 208 Cal.App.2d 803, 25 Cal. Rptr. 798 (1962); K. S. B. Technical Sales v. No. New Jersey Dist. Water Supply Comm'n, 151 N.J. Super. 218, 376 A.2d 960 (1977). *See* Note, *California's Buy-American Policy: Conflict with GATT and the Constitution*, 17 STANFORD L. REV. 119 (1964).

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

PREEMPTION

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

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

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

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

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

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

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

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

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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 858-500, 875.

136. 29 U.S.C. §§ 206(d)(1) (1970).

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

138. 42 U.S.C. § 2000e-2(a) (1970).

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

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

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

Conclusion

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

Donald E. Jordan

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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*, 1976 Duke L. J. 225; Note, *The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act*, 89 Harv. L. Rev. 715 (1976).

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

State v. Kruchten, 101 Ariz. 186, 417 P.2d 510 (1966), cert. denied, 385 U.S. 1045, 87 S.Ct. 784, 17 L.Ed.2d 687 (1967).

[6, 7] The fact that Savoy was not present during the replaying of the tapes is not reversible error. Bustamante v. Eyman, 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. Cufic, 12 Ariz.App. 461, 471 P.2d 763 (1970) holding that unless prejudice is shown the error is harmless. No prejudice was shown here.

Affirmed.

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

109 Ariz. 533

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

v.

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

No. 11094.

Supreme Court of Arizona.
In Banc.
Sept. 20, 1973.

Special action to prevent the enforcement of the decision of Superior Court which ordered the award of certain construction contract by the city to certain contractor. The Supreme Court, Holohan, J., held, inter alia, that the statute requiring that a contract for public work which would be paid from public funds be let to contractor who has paid certain state and county taxes in case a better bid from nonqualified contractor is less than 5% lower is not unconstitutional as denying equal protection of the laws or as violating the commerce clause of the Federal Constitution.

Relief sought denied.

1. **Commerce ⇐54**
Constitutional Law ⇐211
Municipal Corporations ⇐327

Statute providing, in letting of contracts for expenditure of public funds, for granting of 5% preference to contractors who had paid county and state taxes for two successive years immediately prior to making of bid is not unconstitutional as violating the equal protection provision of the Fourteenth Amendment and the commerce clause of the Federal Constitution. A.R.S. § 34-241, subd. B; U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

2. **Municipal Corporations ⇐336(1)**

Proceeds of revenue bonds for construction of water treatment plant to supply water for city constituted "public [illegible]" 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 ⇐219(1)**

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

4. **Appeal and Error ⇐1010.1(6)**

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

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

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

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

We conclude and hold that an adjuster for an insurance company, under the circumstances 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.

Department of Commerce & Economic Development / POSITION PAPER

CSHB 67?: "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

lt0241k

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-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

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: Joan K. Lounsbury
Agency: Commerce and Economic Development
Date: April 14, 1986

Distribution (by Agency preparing fiscal note):
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10/25/85

lt0201k

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,

Bill Sheffield
Governor