ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672 367
4795 HLAB HB 45

SUMMARY OF IN-STATE PREFERENCE PRACTICES
JANUARY 9, 1985

State	% Preference	Reciprocal Law	Scope of Preference and Conditions
Alabama	None	No	
Alaska	5%	No	Preference applies to State level for commodities and services. Vendor must claim preference. Does not apply to DOT, public facilities, or highway construct.
Arizona	5%	No	Preference applies to State level for construction. Vendor need not claim preference.
Arkansas	5% (15%)	No	Preference applies to State, Counties, and Municipalities for commodities. Vendor must claim pref. 15% pref. against out-of-State prison industry bids.
California	5% (Additional Pref. up to 4% based on number of CA employees).	No	Preference applies to State level for commodities and services over $100,000 in Distressed Areas and Enterprise Zones of California. Vendor must claim preference.
Colorado	None	No	
Connecticut	None	No	
Delaware	None	No	Repealed.
Florida	None	Yes	Preference applies to Counties, Municipalities, school districts, and other political subdivisions. Does not apply to State purchases.
Georgia	None	No	
Hawaii	Class I - 3% Class II - 5% Class III - 10%	No	Preference applies to State level for commodities produced, manufactured, grown, mined, or excavated in values as follows: Class I - 25-50%, Class II - 50-75%, and Class III - 75% or more.

SUMMARY OF IN-STATE PREFERENCE PRACTICES (CONTINUED)

State	% Preference	Reciprocal Law	Scope of Preference and Conditions
Idaho	10% Printing Only	Yes Construction Only	
Illinois	None	No	
Indiana	None	No	
Iowa	None	Yes	Preference applies to State, Counties, Municipalities, and other political subdivisions for commodities, services, and construction (including highways). Vendor need not claim preference.
Kansas	None	Yes	Preference applies to State, Counties, Municipalities, and other political subdivisions for commodities, services, and construction (including highways). Vendor need not claim preference.
Kentucky	None	Yes	Preference applies to State level for commodities and services.
Louisiana	5%	No	Preference applies to State level for commodities, manufactured, grown, or harvested in Louisiana.
Maine	None	No	Repealed.
Maryland	None	Yes	Preference applies to State level for commodities, services, and construction (including highways). Vendor need not claim preference.
Massachusetts	2-5%	No	Preference applies to State level for commodities. Vendor need not claim preference.
Michigan	None*	No	* All printing is set aside for Michigan printers only unless In-State printers are unable to supply.
Minnesota	None	No	Repealed.

SUMMARY OF IN-STATE PREFERENCE PRACTICES (CONTINUED)

State	% Preference	Reciprocal Law	Scope of Preference and Conditions
Mississippi	None	Yes	Preference applies to State level for commodities, services, and construction.
Missouri	None	Yes	Applies only to State level for commodities. Vendor need not claim pref.
Montana	3%	No	Preference applies to State, Counties, Municipalities, and other political subdivisions for commodities, services, and construction.
Nebraska	None	Yes	Preference applies to state level for commodities, services, and construction.
Nevada	None	No	Pref. applies to State level for commodities & services. Used with tie-bids.
New Hampshire	None	No	
New Jersey	None	No	Printing also not subject to any preference.
New Mexico	5%	No	Preference applies to State, Counties, Municipalities, and other political subdivisions for commodities, services, and construction. Vendor must claim preference.
New York	None	No	A law to take effect 4/1/85, being re-studied. This law would give preference to purchases of foods, the ingredients of which are produced and processed in New York or where the manufacturing facility is in New York. The percentage of each class of commodity shall be determined by the Commissioner of General Services with assistance from the Commissioner of Agriculture and Markets.
North Carolina	None	No	
North Dakota	None	Yes	Preference applies to State, Counties, Municipalities and other political subdivisions for commodities. Vendor need not claim preference.

SUMMARY OF IN-STATE PREFERENCE PRACTICES (CONTINUED)

State	% Preference	Reciprocal Law	Scope of Preference and Conditions
Ohio	5%	No	Preference applies to State level for commodities, construction, and insurance. Out-of-State vendors can qualify if they have 25% of Ohio in-put. Border states of Ohio are exempt unless they give a preference. The 5% is adopted by Regulation. Vendor must claim preference.
Oklahoma	5% (Not to exceed)	Yes (If over 5%)	Preference applies to State, Counties, Municipalities, and other political subdivisions for commodities, produced or manufactured in Oklahoma.
Oregon	None	No	Preference applies to State level for commodities. and services. Used in tie bid situations.
Pennsylvania	None	Retaliatory Law	
Rhode Island	None	No	
South Carolina	2% (under $2.5 million) 1% (over $2.5 million)	No	Preference applies to State, Counties, Municipalities, and other political subdivisions for commodities, and services. Preference does not apply when the price of a single unit exceeds $10,000.
South Dakota	None	Yes	
Tennessee	None	No	Preference applies to State and Schools for commodities (meat products, coal and natural gas only). Used in tie bid situations.
Texas	None	No	Preference applies to State level for commodities used in tie bid situations.
Utah	5%*	No	* To get preference, the Utah vendor must be within 5% of the lowest responsible out-of-State bidder. If so, Utah vendor has 72 hours to consent in writing to meet the price of the lowest responsive out-of-State bidder.
Vermont	None	No	
Virginia	None	Yes	Preference applies to State level for commodities, services, and construction (including highways). Vendor need not claim preference.

SUMMARY OF IN-STATE PREFERENCE PRACTICES (CONTINUED)

State	% Preference	Reciprocal Law	Scope of Preference and Conditions
Washington	None	Reciprocal	Preference applies to State level for commodities, services, and construction. Vendor need not claim preference.
West Virginia	2%	No	Preference applies to State level for commodities, services, and construction. A 5% temporary preference expired on 12/31/84. Vendor must claim preference.
Wisconsin	None	No	
Wyoming	5%-Commodities 10%-Services	Yes*	* Highway construction projects are reciprocal.

Note: All States have either a law or adopt as policy to give a preference to in-State vendors over out-of-State vendors in tie-bid situations.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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

May 9, 1984

MEMORANDUM

TO: Representative John Cowdery

FROM: Jonathan Sherwood
Legislative Analyst

RE: Bidders Preference Statutes in Other States
Research Request 84-098

Betty Clark of your staff requested that we provide examples of bidders preference statutes in other states along with an explanation of how these laws function. Some bidders preference laws cover state construction and public works projects, others deal only with commodities purchases and some apply to both types of contracting procedures. I have focused primarily on bidders preference laws which apply to construction contracts; however, the content of these laws differs very little from laws designed to provide preference in purchasing.

Other States' Bidders Preference Laws

Bidders preference statutes can be placed in three broad categories: general preference laws, percentage differential preference laws, and retaliatory preference laws.

General Preference Laws. These statutes use residency or location of business as a criteria for distinguishing between bids which are otherwise equal or comparable. Under a general preference law, when two or more bidders submit bids which are substantially the same, the state gives preference to the in-state bidder. Some general preference statutes give the state broad discretion in determining what constitutes an equivalent or comparable bid.

General preference laws, sometimes referred to as "first among equals" or "tie bid" preference laws, are the most common type of bidders preference used by states. A 1983 survey of states found 20 states with some kind of general preference statute, although in some cases these statutes apply only to commodities purchases.[1] I have attached

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[1]Emily Shapiro, State Domestic Preference Laws, Minnesota House of Representatives Research Department, October 1983, p. 5.

examples of general preference statutes from Florida, Kansas, and Virginia (see attachment A).

Percentage Differential Preference. Percentage differential preference statutes provide in-state bidders with a financial advantage over out-of-state bidders. These laws require states to award contracts to in-state bidders if their bids are within a certain range of the lowest bid. Under such a law, the contract is awarded to the lowest in-state bidder that is within a fixed percentage of the lowest bidder's bid; e.g., in Alaska, the lowest in-state bidder is awarded the contract if its bid is within 5 percent of the low bid.

The most common differential in use by states is 5 percent. However, among the states, differentials range from 2 percent in Arkansas to 10 percent in Minnesota. Some states apply a lower differential for construction contracts than for commodities contracts. In other states, the differential is reduced as the value of the contract increases. Fourteen states apply a differential preference to at least some of their competitively bid contracts. At least 4 states, Alaska, Arkansas, Minnesota, and Wyoming, apply differential preference for awarding construction or building contracts.[2] Statutes of the latter three states are attached to this memorandum (see Attachment A).

Retaliatory (or Reciprocal) Preference Laws. These laws are designed to retaliate against other states which impose bidders preference laws. Such laws apply to contract awards only when there are out-of-state bidders from states which have a percentage differential preference law, are applied only when comparing bids between those out-of-state bidders and local bidders, and apply the same in-state preference as is applied in that other state.

Retaliatory preference laws may also be used in conjunction with a general preference law or a percentage differential preference law. Twelve states have a retaliatory preference law for at least some contract award proceduces.[3] I have attached retaliatory preference statutes from Idaho, Mississippi, and South Dakota (see Attachment A).

Residency Requirements. There is a great variety in the way in which bidders preference statutes define residency. Some states have very loose requirements for resident status. A business may simply have to maintain an office within the state. Other states may base residency

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[2] Ibid, pp. 5-7.

[3] Ibid, p. 5.

determinations on tax collection; firms which have paid state taxes for one or two years prior to bidding are eligible for the preference. Hawaii's preference law gives firms a differential preference according to the extent to which the product's value is attributable to domestic labor.[4]

* * *

I have attached the bidders preference statutes of Arkansas, Florida, Idaho, Kansas, Minnesota, Mississippi, South Dakota, Virginia, and Wyoming. I have also obtained a report from the Minnesota House Research Department on domestic preference laws (this category includes local hire laws and more general in-state purchasing laws in addition to bidders preference); the report contains a comprehensive survey of domestic preferences laws in the fifty states (see Attachment B).

I have attached a research memorandum done by this agency last year which contains a discussion of the constitutional questions surrounding Alaska's bidders preference statute.[5] It appears that Alaska's bidders preference law, similar to bidders preference laws in several states, may violate the equal protection provision in the Alaska Constitution, which is stronger than the equal protection provision of the federal Constitution. It is not clear that bidders preference statutes used in other states would be any more secure from constitutional challenge than Alaska's present statute. Also, please note that accompanying the attached memorandum is a Colorado Law Review article addressing the issue of bidders preference.

Should you have any questions, or if you would like us to obtain bidders preference statutes from additional states, please do not hesitate to contact us.

JS

Attachments

Several State Bidders Preference Statutes
Minnesota House Research, "State Domestic Preference Laws"
House Research Agency, "Alaska Bidders' Preference"

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[4] Ibid, p. 7.

[5] David Teal, "Alaska Bidders' Preference" Research Request 83-130, House Research Agency, May 5, 1983, pp. 3-4. (Attachment C.)

14-614.2. **Preference for certain bidders.** — In awarding contracts covered by the provisions of Act 159 of 1949, as amended(,) by Act 183 of 1957 [§§ 14-611 — 14-614], bids of contractors who have satisfactorily performed prior contracts, and who have paid taxes for not less than two (2) successive years immediately prior to submitting a bid under The Arkansas Employment Security Act, and amendments thereto [§§ 81-1101 — 81-1108, 81-1111 — 81-1121], and either The Arkansas Gross Receipts Act and amendments thereto [§§ 84-1901 — 84-1904, 84-1906 — 84-1919] or The Arkansas Compensating Tax Act and amendments thereto [§§ 84-3101 — 84-3128], on any property used or intended to be used for or in construction or in connection with the contractors construction business, and further within the two (2) year period have paid any taxes to one (1) or more counties [school districts, or municipalities] of the State of Arkansas on either real or personal property used or intended to be used in performance of or in connection with construction contracts, shall be deemed a better bid than the bid of a competing contractor who has not paid such taxes, whenever the bid of the competing contractor is less than three percent (3%) lower, and the contractor making a bid as provided by this Act [§§ 14-614.2 — 14-614.6] which is deemed the better bid, shall be awarded the contract. [Acts 1977, No. 102, § 1, p. 127.]

Compiler's Notes. The comma enclosed in parentheses was so enclosed by the compiler as surplusage.

The words enclosed in brackets so appeared in the law as enacted.

14-614.3. **Subletting of contracts.** — No contract awarded under the provisions of this Act [§§ 14-614. 2 — 14-614.6] shall be sublet to a contractor required to be listed as a sub-contractor as provided by Act 159 of 1949, as amended(,) by Act 183 of 1957 [§§ 14-611 — 14-614] who has not paid taxes as required by this Act. [Acts 1977, No. 102, § 2, p. 127.]

Compiler's Notes. The comma enclosed in parentheses was so enclosed by the compiler as surplusage.

14-614.4. **Conflict with federal law.** — If any provision or condition of this Act [§§ 14-614.2 — 14-614.6] conflicts with any provision of federal law or any rule or regulation made under federal law pertaining to federal aid contracts, such provision or condition shall not apply on federal aid contracts to the extent that the conflict exists, but all provisions or conditions of this Act with which there is no conflict shall apply to federal aid contract [contracts]. [Acts 1977, No. 102, § 3, p. 127.]

Compiler's Notes. The bracketed word "contracts" was inserted by the compiler.

14-614.5. **Written claim for preference.** — Any contractor claiming a preference under this Act [§§ 14-614.2 — 14-614.6] shall so state in writing at the time of submitting his or its bid and shall list the owner or owners

of prior construction projects which support his or its claim for the preference and the nature of any and all taxes paid by the contractor which supports his or its claim for the preference. [Acts 1977, No. 102, § 4, p. 127.]

14-614.6. Definitions. — "Satisfactorily performed prior contracts" shall mean performance of (1) or more contracts within the State of Arkansas within two (2) years of the date bids are to be submitted and on which the contractors substantially completed performance [so that no surety, bonding company, or owner, either governmental or private, was required to take over performance and complete the contract]. [Acts 1977, No. 102, § 5, p. —.]

Compiler's Notes. As enacted the section heading of this section read, "Definition."

The words enclosed in brackets so appeared in the law as enacted.

Emergency. Section 6 of Acts 1977, No. 102 read: "WHEREAS, passage of this Act will aid and increase the collection of the enumerated taxes; and whereas, passage of this Act will encourage contractors to do business within the State of Arkansas and compete for public projects, and this Act being necessary to preserve the public peace, health and safety, and emergency is hereby declared to exist and this Act shall be in full force and effect immediately after its passage and approval." Approved February 7, 1977.

14-615. Construction or repair of state buildings — Bids — Bond — Financing. [Repealed.]

Repeal. This section (Acts 1953, No. 41, Art. 11, § 1) was repealed by Acts 1955, No. 412, § 28.

14-616 — 14-621. Minimum wages by public works contractor. [Unconstitutional.]

Compiler's Notes. Sections 14-616 — 14-621 (Acts 1955, No. 115, §§ 1-9) were held unconstitutional as an unconstitutional delegation of legislative authority and as being local or special in effect. See Crowly v. Thornbrough, 226 Ark. 768, 294 S.W.2d 62 (1956).

NOTES TO DECISIONS

Analysis

Application.
Constitutionality.
Validity of rules and regulations.

Application.

A local improvement district was not a "taxing agency" within the meaning of §§ 14-616 — 14-621 as its levies are special assessments or matured assessments of benefits and interest thereon and it is not a subordinate political agency of the State, so such a district is not bound by statutory provisions for minimum prevailing wages to be paid on works of a "taxing agency." Wood v. Henderson, 225 Ark. 180, 280 S.W.2d 226 (1955).

Constitutionality.

Sections 14-616 — 14-621 providing for minimum prevailing wages to be paid on certain state, county, municipal or other taxing agency public construction projects according to wages determined by the secretary of labor of the United States for corresponding classes of laborer and mechanics on projects of similar character in the area where the work is to be performed is unconstitutional in that it fails to establish a standard or formula by which a wage scale may be formulated but rather delegates to the United States secretary of labor the right to fix the minimum wage scale to be paid in a particular area without control by the state, this being an unconstitutional delegation of legislative authority to an agency of the United States government. Crowly v.

CHAPTER 255

PUBLIC PROPERTY AND PUBLICLY OWNED BUILDINGS

255.01 Proceeds of insurance may be used to replace property destroyed.—When any state, county, municipal, or other public property of this state is destroyed or partially destroyed, by fire or otherwise, upon which there is insurance, the proceeds of such insurance, when collected, may be used by the officer having the supervision of the property destroyed, for the purpose of construction to replace such property, or for the repair thereof.

History.—s. 1, ch. 6184, 1911; RGS 1203; CGL 1680.
cf.—ch. 284, pt. I Florida Fire Insurance Trust Fund.

255.02 Boards authorized to replace buildings destroyed by fire.—The Department of General Services, the Board of Regents of the Department of Education, or any other board or person having the direct supervision and control of any state building or state property, may have rebuilt or replaced, out of the proceeds from the fire insurance on such buildings or property, any buildings or property owned by the state, which may be destroyed in whole or in part by fire.

History.—s. 1, ch. 6518, 1913; RGS 1204; CGL 1681; s. 2, ch. 63-204; ss. 11, 22, 35, ch. 69-106.
cf.—ch. 284, pt. I Florida Fire Insurance Trust Fund.

255.03 Proceeds of insurance to be paid into State Treasury; disbursement of funds.—

(1) The proceeds from the insurance of any state building or state property covered by insurance which may be destroyed in whole or in part by fire or other damage, shall be paid into the State Treasury and constitute a fund for the rebuilding or replacing of such property; and the Comptroller may draw his warrant on the State Treasurer for such amounts, not to exceed the proceeds so paid in, as may be approved by the board or persons having the direct supervision and control of such buildings or property for the purpose of rebuilding or replacing the same.

(2) The provisions of this section shall not apply to proceeds received from insurance carried by a lessee of a donated building which was under lease at the time of donation and is not to be replaced. Such proceeds received by a board or agency of the state may be used by that board or agency for any purpose or function authorized by law.

History.—s. 2, ch. 6518, 1913; RGS 1205; CGL 1682; s. 1, ch. 61-140.
cf.—ch. 284, pt. I Florida Fire Insurance Trust Fund.

255.04 Preference to home industries in building public buildings.—Every official board in the state, whether of the state, a county, or a municipality, which may be charged with the duty of erecting or constructing any public administrative or institutional building shall give preference, in the purchase of material and in letting contracts for the construction of such building, to materialmen, contractors, builders, architects, and laborers who reside within the state, whenever such material can be purchased or the services of such materialmen, contractors, builders, architects, and laborers can be employed at no greater expense than that which would obtain if such purchase was made from, or contract let or employment given to, a person residing beyond

the limits of the state; however, this section in no way prohibits the right of any such official board to compare the quality of materials proposed for purchase and to compare the qualifications, character, responsibility, and fitness of materialmen, contractors, builders and architects proposed for employment in its consideration of the purchase of materials or employment of persons. Notwithstanding the foregoing, no county official, board of county commissioners, school board, city council or city councilmen, or other public official, state board, or state agency charged with the letting of contracts or purchase of materials for the construction, modification, alteration, or repair of any publicly owned facility may specify the use of materials or systems by a sole source.

History.—s. 1, ch. 9146, 1923; CGL 1686; s. 2, ch. 63-266.

255.041 Separate specifications for building contracts.—Every officer, board, department, commission or commissions charged with the duty of preparing specifications or awarding or entering into contract for the erection, construction or altering of buildings for the state, when the entire cost of such work shall exceed $10,000, may have prepared separate specifications for each of the following branches of work to be performed:

(1) Heating and ventilating and accessories.
(2) Plumbing and gas fitting and accessories.
(3) Electrical installations.
(4) Air conditioning, for the purpose of comfort cooling by the lowering of temperature, and accessories.

All such specifications may be so drawn as to permit separate and independent bidding upon each of the classes of work enumerated in the above subdivisions. All contracts hereafter awarded by the state or a department, board, commissioner, or officer thereof, for the erection, construction or alteration of buildings, or any part thereof, may award the respective work specified in the above subdivisions separately to responsible and reliable persons, firms or corporations regularly engaged in their respective line of work; provided, however, that all or any part of the work specified in the above subdivisions may be awarded to the same contractor.

History.—s. 1, ch. 25397, 1949.

255.042 Shelter in public buildings.—

(1) It shall be the policy of the state that fallout protection be incorporated to the fullest practical extent in all public buildings of the state and its political subdivisions, which would have a floor area capable of sheltering 100 or more persons in order to provide protection against radiation hazards for the greatest number of persons, including employees of state and local government, in the event of nuclear attack.

(2) Every officer, department, board, agency or commission of the state, or of the political subdivisions thereof, responsible for the preparation of, or contracting for, plans and specifications for new public buildings, or for the substantial modification of or additions to existing public buildings, may require that the architect, architect-engineer firm, or other person or persons involved in the design of such buildings, provide a minimum protection factor of 40-to-1 or such protection as is possible within available funds in such design, or provide for consideration at the same time as the basic plan, alternate plans affording this protection.

(3) The Department of Community Affairs shall, in those cases in which the architect-engineer firm does not possess the specialized training required for the inclusion of fallout protection in building design and upon request from the architect-engineer concerned or the responsible state or local agency, provide, at no cost to the architect-engineer or agency, professional development service to increase fallout protection through shelter slanting and cost-reduction techniques.

(4) Nothing in this act shall be construed as establishing a mandatory requirement for the incorporation of fallout shelter in the construction of, modification of, or addition to the public buildings concerned. It is mandatory, however, that the incorporation of such protection be given every consideration through acceptable shelter slanting and cost-reduction techniques. The responsible state or local official shall determine whether cos or other related factors, precludes or makes impracticable the incorporation of fallout shelter in public buildings. Further, the Department of Community Affairs may waive the requirement for consideration of shelter in those cases where presently available shelter spaces equal or exceed the requirements of the area concerned.

(5) Nothing in this act shall apply to school buildings erected by the school board.

History.—s. 1, ch. 67-88; ss. 18, 35, ch. 69-106; s. 1, ch. 69-300; s. 25, ch. 81-167; s. 23, ch. 83-55.

cf.—ch. 252 Emergency management.

255.043 Art in state buildings.—

(1) Each appropriation for the original construction of a state building which provides public access shall include an amount of up to 0.5 percent of the total appropriation for the construction of the building to be used for the acquisition of works of art produced by, but not limited to, Florida artists or craftsmen. Those works of art acquired shall be displayed for viewing in public areas in the interior or on the grounds or exterior of the building and not in private offices or areas with limited public access.

(2) The Department of General Services shall, in consultation with the Florida Arts Council, determine any construction projects which may be exempt from the provisions of this section and shall determine the amount to be made available for purchase of works of art for each project. Payments therefor shall be made from funds appropriated for fixed capital outlay according to law.

(3) The selection and commissioning of artists or craftsmen, the reviewing of design, and the acceptance of works of art shall be the responsibility of the Florida Arts Council.

(4) This section shall not apply to any funds for the construction of public buildings if the funds were appropriated prior to July 1, 1979.

History.—s. 1, ch. 79-188; s. 125, ch. 83-217.

67-2348. Preference for Idaho domiciled contractors on public works. — To the extent permitted by federal laws and regulations, whenever the state of Idaho, or any department, division, bureau or agency thereof, or any city, county, school district, irrigation district, drainage district, sewer district, highway district, good road district, fire district, flood district, or other public body, shall let for bid any contract to a contractor for any public works, the contractor domiciled outside the boundaries of Idaho shall be required, in order to be successful, to submit a bid the same percent less than the lowest bid submitted by a responsible contractor domiciled in Idaho as would be required for such an Idaho domiciled contractor to succeed over the bidding contractor domiciled outside Idaho on a like contract being let in his domiciliary state. [I.C., § 67-2348, as added by 1982, ch. 232, § 1, p. 613.]

CHAPTER 26

DEPARTMENT OF SELF-GOVERNING AGENCIES

67-2601. Department created — Organization — Director — Bureau of occupational licenses created. — (1) There is hereby created the department of self-governing agencies. The department shall, for the purposes of section 20, article IV of the constitution of the state of Idaho, be an executive department of the state government.

(2) The department shall consist of the following:

(a) agricultural commodity commissions: Idaho apple commission, as provided by chapter 36, title 22, Idaho Code; Idaho bean commission as provided by chapter 29, title 22, Idaho Code; Idaho beef council, as provided by chapter 29, title 25, Idaho Code; Idaho cherry commission, as provided by chapter 37, title 22, Idaho Code; Idaho dairy products commission, as provided by chapter 31, title 25, Idaho Code; Idaho pea and lentil commission, as provided by chapter 35, title 22, Idaho Code; Idaho potato commission, as provided by chapter 12, title 22, Idaho Code; Idaho prune commission, as provided by chapter 30, title 22, Idaho Code; and the Idaho wheat commission, as provided by chapter 33, title 22, Idaho Code; and,

(b) professional and occupational licensing boards: Idaho state board of certified public accountancy, as provided by chapter 2, title 54, Idaho Code; board of architectural examiners, as provided by chapter 3, title 54, Idaho Code; office of the state athletic director, as provided by chapter 4, title 54, Idaho Code; board of barber examiners, as provided by chapter 5, title 54, Idaho Code; board of commissioners of the Idaho state bar, as provided by chapter 4, title 3, Idaho Code; board of chiropractic examiners, as provided by chapter 7, title 54, Idaho Code; Idaho board of cosmetology, as provided by chapter 8, title 54, Idaho Code; Idaho counselor licensing board, as provided by chapter 34, title 54, Idaho Code; state board of dentistry, as provided by chapter 9, title 54, Idaho Code; state board of engineering

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68-407 to 68-410.

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the state or who has failed to perform on a previous contract with the state. In any case where competitive bids are required and where all bids are rejected, new bids shall be called for as in the first instance, unless otherwise expressly provided by law. Before the awarding of any contract for a building or the making of repairs upon any building, the director of purchases shall see that the bids conform with the plans and specifications prepared by the director of architectural services, so as to avoid error and mistake on the part of the contractors; and in all cases where material described in a contract can be obtained from any state institution, the director of purchases shall exclude the same from the contract. All bids with the names of the bidders and the amounts thereof, together with all documents pertaining to the award of a contract, shall be made a part of a file or record and retained by the director of purchases for five (5) years, unless reproduced as provided in K.S.A. 75-3737, and shall be open to public inspection at all reasonable times.

History: L. 1953, ch. 375, § 40; July 1.

Source or prior law:
76-101, 76-101a, 76-101b, 76-101c, 76-103.

75-3740a. Contracts for purchases with nonresident bidders. To the extent permitted by federal law and regulations whenever the state of Kansas or any agency thereof or any municipality of the state shall let bids for contracts for any purchases, the contractor domiciled outside the state of Kansas, to be successful, shall submit a bid the same percent less than the lowest bid submitted by a responsible Kansas contractor as would be required of such Kansas domiciled contractor to succeed over the bidding contractor domiciled outside Kansas on a like contract let in his or her domiciliary state.

History: L. 1972, ch. 336, § 1; July 1.

75-3741. Buildings, major repairs or improvements; competitive bids; duties of director of architectural services and administrative heads. Subject to the applicable provisions of K.S.A. 75-3739 and 75-3740, all contracts for the construction of buildings, major repairs, or improvements specifically authorized by the legislature for the use and benefit of any state agency shall be let by the director of purchases to the lowest responsible bidder based on plans and specifications prepared or approved and submitted by the director of architectural services and approved by the administrative head of the state agency concerned.

The director of purchases under the supervision of the secretary of administration shall have charge of the erection of all such buildings, major repairs or improvements, except that the inspection and interpretation of plans and specifications shall be the responsibility of the director of architectural services, and except that the original construction contracts may be changed only by the director of purchases with the consent of the administrative head of the state agency concerned: *Provided,* The director of purchases, if he or she believes there is collusion and combination, may reject any and all such bids and let the work by private contract, on condition, however, that the cost thereof shall not exceed the lowest responsible bid that had been offered. In the event of a disagreement between the director of architectural services and the administrative head of the state agency concerned in carrying out the provisions of this section, the secretary of administration shall submit the matter to the finance council and its decision shall be final.

The provisions of this section shall not be construed to prohibit the administrative head of any state agency from making any improvement or improvements when the same can be made by institutional labor or the use of material manufactured in any state institution.

History: L. 1953, ch. 375, § 41; July 1.

Source or prior law:
76-101, 76-103.

Revisor's Note:
Referred to in 75-1207.

CASE ANNOTATIONS

1. Cited; duty of finance council hereunder not constitutionally permissible; violative of inherent constitutional doctrine of separation of powers; such duty devolves upon governor. State, *ex rel.*, v. Bennett, 219 K. 285, 295, 547 P.2d 786.

75-3742. Same; plans and specifications. At the request of the director of purchases or the director of the budget, the director of architectural services shall assist in all matters relating to the preparation of plans and specifications for prospective buildings, major repairs and improvements

(1) All contracts for construction and repairs, and all purchases of and contracts for supplies, materials, equipment and contractual services shall be based on competitive bids, and sales of property shall be to the highest responsible bidder, at an advertised public auction or after advertising for sealed bids in the same manner provided for purchase of property herein as may be determined by the director of purchases, except that competitive bids need not be required: (A) For contractual services where no competition exists; or (B) sales in an established market; or (C) when, in the judgment of the director of purchases, chemicals and other material for use in laboratories, shop and like experimental studies by state educational institutions may be purchased to the best advantage of the state, or where rates are fixed by law or ordinance; or (D) for items traded in on like items; or (E) when, in the judgment of the director of purchases, an agency emergency requires immediate delivery of supplies, materials or equipment, or immediate performance of services. The director of purchases shall make a report to the state finance council in such detail and with such frequency as it shall require of all emergency purchases under subsection (E), except that such report shall be made to the state finance council at least once in each three-month period.

(2) If the amount of the purchase or sale is estimated to exceed approximately five thousand dollars ($5,000), sealed bids shall be solicited by notice published once in the official state paper not less than ten (10) days before the date stated therein for the opening of such bids. The director of purchases may also designate a trade journal for such publication. The director of purchases shall also solicit such bids by sending notices by mail to all active prospective bidders known to him or her. All bids shall be sealed when received and shall be opened in public at the hour stated in the notice.

(3) All purchases or sales estimated to exceed approximately two thousand dollars ($2,000) but not more than five thousand dollars ($5,000), shall be made after receipt of sealed bids following at least three days' notice posted on a public bulletin board in the office of the director of purchases. The director of purchases may also solicit sealed bids by mail in such cases in like manner as provided in subsection (2) of this section.

(4) All purchases or sales estimated to be approximately two thousand dollars ($2,000) or less may be made either upon competitive bids or in the open market, in the discretion of the director of purchases but, so far as practicable, shall be based on at least three competitive bids and recorded as provided in K.S.A. 75-3740, except that authorization may be given to any state agency to make emergency purchases or small purchases of less than five hundred dollars ($500) on the open market.

(5) Contracts and purchases shall in all cases be based on specifications fixed by the director of purchases.

(6) Notwithstanding anything herein to the contrary, all contracts with independent construction concerns for the construction, improvement, reconstruction and maintenance of the state highway system and the acquisition of rights-of-way for state highway purposes shall be advertised and let as now or hereafter provided by law.

History: L. 1953, ch. 375, § 39; L. 1968, ch. 311, § 2; L. 1975, ch. 450, § 1; April 18.

Source or prior law:
74-20a07, 75-1004a, 75-2105, 75-2106, 75-2107, 75-3022, 75-3209, 76-101.

Cross References to Related Sections:
State highway contracts, see 68-407 to 68-410.

Research and Practice Aids:
States ⇐98.
C.J.S. States § 116.

75-3740. Same; award of contracts and purchases; record. All contracts and purchases made by or under the supervision of the director of purchases or any state agency for which competitive bids are required shall be awarded to the lowest responsible bidder, taking into consideration conformity with the specifications, terms of delivery, and other conditions imposed in the call for bids. The director of purchases shall have power to decide as to the lowest responsible bidder for all purchases, but in cases where contracts and purchases can be awarded to the lowest responsible bidder from within the state equal in all respects to the lowest responsible bidder from without the state, the same shall be so awarded. Any or all bids may be rejected, and a bid shall be rejected if it contains any material alteration or erasure. The director of purchases may reject the bid of any bidder who is in arrears on taxes due

§ 16-6-104. Preference for state labor and materials; public contracts.

Resident Wyoming laborers, workmen and mechanics shall be used upon all work enumerated in W.S. 16-6-102 whenever possible and any contract let shall so provide. Wyoming materials and products of equal quality and desirability shall have preference over materials or products produced outside the state. (Laws 1939, ch. 50, § 3; C.S. 1945, § 22-509; W.S. 1957, § 9-666; W.S. 1977, § 9-8-304; Laws 1982, ch. 62, § 3.)

Am. Jur. 2d, ALR and C.J.S. references. — Requirement of Buy American Act (41 USCS §§ 10a-10d) that American made articles be preferred in government contract, 58 ALR Fed 312.

§ 16-6-105. Same; public purchases; exception for articles of inferior quality; cost differential.

Every board, commission or other governing body of any state institution, and every person acting as purchasing agent for the board, commission or other governing body of any state institution or department, and every county, municipality, school district and community college district, shall prefer in all purchases for supplies, material, equipment, machinery and provisions to be used in the maintenance and upkeep of their respective institutions, supplies, materials, equipment, machinery and provisions produced, manufactured or grown in this state, and supplies, materials, equipment, machinery and provisions supplied by a resident of the state, competent and capable to provide service for the supplies, materials, equipment, machinery and provisions within the state of Wyoming. Preference shall not be granted for articles of inferior quality to those offered by competitors outside of the state, but a differential of not to exceed five percent (5%) may be allowed in cost on the Wyoming materials, supplies, equipment, machinery and provisions of quality equal to those of any other state enforcing or having a differential [for] "out-of-state" materials, supplies, equipment, machinery and provisions. (Laws 1931, ch. 50, § 1; R.S. 1931, § 108-301; C.S. 1945, § 19-1501; W.S. 1957, § 9-667; Laws 1969, ch. 188, § 1; W.S. 1977, § 9-8-305; Laws 1982, ch. 62, § 3.)

§ 16-6-106. Same; statement of preference in requests for bids and proposals.

All requests for bids and proposals for materials, supplies, equipment, machinery and provisions for the construction, maintenance and upkeep of every state, county, municipal, community college district or school district institution shall contain the words "preference is hereby given to materials, supplies, equipment, machinery and provisions produced, manufactured, supplied or grown in Wyoming, quality being equal to articles offered by the competitors outside of the state". (Laws 1931, ch. 50, § 2; R.S. 1931, § 108-302; C.S. 1945, § 19-1502; W.S. 1957, § 9-668; Laws 1969, ch. 188, § 2; W.S. 1977, § 9-8-306; Laws 1982, ch. 62, § 3.)

CHAPTER 6

Public Property

Article 1. Public Works and Contracts

ARTICLE 1. PUBLIC WORKS AND CONTRACTS

§ 16-6-101. Definitions.

(a) As used in this act [§§ 16-6-101 through 16-6-118]:

(i) "Resident" means:

(A) Any person who has been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract;

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

C. Any public body may extend the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term of the contract.

D. An industrial development authority may enter into contracts without competition with respect to any item of cost of "authority facilities" or "facilities" as defined in § 15.1-1374 (d) and (e) of this Code.

E. The Department of Alcoholic Beverage Control may procure alcoholic beverages without competitive sealed bidding or competitive negotiation. (1982, c. 647.)

§ 11-46. Prequalification. — Prospective contractors may be prequalified for particular types of supplies, services, insurance or construction, and consideration of bids or proposals limited to prequalified contractors. Any prequalification procedure shall be established in writing and sufficiently in advance of its implementation to allow potential contractors a fair opportunity to complete the process. (1982, c. 647.)

§ 11-46.1. Debarment. — Prospective contractors may be debarred from contracting for particular types of supplies, services, insurance or construction, for specified periods of time. Any debarment procedure shall be established in writing for state agencies and institutions by the agency or agencies the Governor may designate, and for political subdivisions by their governing bodies. Any debarment procedure may provide for debarment on the basis of a contractor's unsatisfactory performance for a public body. (1982, c. 647.)

§ 11-47. Preference for Virginia products and firms. — A. In the case of a tie bid, preference shall be given to goods, services and construction produced in Virginia or provided by Virginia persons, firms or corporations, if such a choice is available; otherwise the tie shall be decided by lot.

B. Whenever any bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a preference, a like preference may be allowed to the lowest responsible bidder who is a resident of Virginia. (1982, c. 647.)

§ 11-48. Participation of small businesses and businesses owned by women and minorities. — All public bodies may establish programs consistent with all provisions of this chapter to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions. Such programs shall be in writing, and may include cooperation with the State Office of Minority Business Enterprise, the United States Small Business Administration, and other public or private agencies. (1982, c. 647.)

§ 11-49. Use of brand names. — Unless otherwise provided in the invitation to bid, the name of a certain brand, make or manufacturer does not restrict bidders to the specific brand, make or manufacturer named; it conveys the general style, type, character, and quality of the article desired, and any article which the public body in its sole discretion determines to be the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted. (1982, c. 647.)

§ 11-50. Comments concerning specifications. — Every public body awarding public contracts shall establish procedures whereby comments concerning specifications or other provisions in Invitations to Bid or Requests for Proposal can be received and considered prior to the time set for receipt of bids or proposals or award of the contract. (1982, c. 647.)

CHAPTER 6

Public Property

ARTICLE 1. PUBLIC WORKS AND CONTRACTS

§ 16-6-101. Definitions.

(a) As used in this act [§§ 16-6-101 through 16-6-118]:

(i) "Resident" means:

(A) Any person who has been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract;

(B) A partnership or association, each member of which has been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract;

(C) A corporation which has been organized under the laws of the state and has been in existence in the state for one (1) year or more immediately prior to bidding upon the contract and which has its principal office and place of business within the state.

(ii) "This act" means W.S. 16-6-101 through 16-6-118. (Laws 1939, ch. 50, § 4; C.S. 1945, § 22-510; W.S. 1957, § 9-663; Laws 1961, ch. 152, § 1; W.S. 1977, § 9-8-301; Laws 1982, ch. 62, § 3.)

Editor's notes. — There is no subsection (b) in this section as it appears in the printed acts.

Applied in Harding v. State, 478 P.2d 64 (Wyo. 1970).

Quoted in Galesburg Constr. Co. v. Board of Trustees, 641 P.2d 745 (Wyo. 1982).

§ 16-6-102. Preference for resident contractors; limitation with reference to lowest bid.

Whenever a contract is let by the state, any department thereof, or any county, city, town, school district or other public corporation of the state for the erection, construction, alteration or repair of any public building, or other public structure, or for making any addition thereto, or for any public work or improvements, the contract shall be let, if advertisement for bids is not required, to a resident of the state. If advertisement for bids is required the contract shall be let to the responsible resident making the lowest bid if the resident's bid is not more than five percent (5%) higher than that of the lowest responsible nonresident bidder. (Laws 1939, ch. 50, § 1; C.S. 1945, § 22-507; W.S. 1957, § 9-664; W.S. 1977, § 9-8-302; Laws 1982, ch. 62, § 3.)

Section is rationally related to the advancement of a legitimate state interest of encouraging local industry. Galesburg Constr. Co. v. Board of Trustees, 641 P.2d 745 (Wyo. 1982).

And constitutional. — This section does not violate art. 1, § 3, Wyo. Const., art. 1, § 6, Wyo. Const., art. 1, § 34, Wyo. Const., or U.S. Const., amend. 14. Galesburg Constr. Co. v. Board of Trustees, 641 P.2d 745 (Wyo. 1982).

Applied in Harding v. State, 478 P.2d 64 (Wyo. 1970).

Law reviews. — For comment, "Competitive Bidding on Public Works in Wyoming: Determination of Responsibility and Preference," see 11 Land & Water L. Rev. 243 (1976).

Am. Jur. 2d, ALR and C.J.S. references. — Labor conditions or relations as factor in determining whether public contract should be let to lowest bidder, 110 ALR 1406.

Determination of amount involved in contract within statutory provisions requiring public contracts involving sums exceeding specified amount to be let to lowest bidder, 3 ALR2d 498.

§ 16-6-103. Limitation on subcontracting by resident contractors.

A successful resident bidder shall not subcontract more than twenty percent (20%) of the work covered by his contract to nonresident contractors. (Laws 1939, ch. 50, § 2; C.S. 1945, § 22-508; W.S. 1957, § 9-665; W.S. 1977, § 9-8-303; Laws 1982, ch. 62, § 3.)

§ 16-6-104. Preference for state labor and materials; public contracts.

Resident Wyoming laborers, workmen and mechanics shall be used upon all work enumerated in W.S. 16-6-102 whenever possible and any contract let shall so provide. Wyoming materials and products of equal quality and desirability shall have preference over materials or products produced outside the state. (Laws 1939, ch. 50, § 3; C.S. 1945, § 22-509; W.S. 1957, § 9-666; W.S. 1977, § 9-8-304; Laws 1982, ch. 62, § 3.)

Am. Jur. 2d, ALR and C.J.S. references. — Requirement of Buy American Act (41 USCS §§ 10a-10d) that American made articles be preferred in government contracts, 58 ALR Fed 312.

§ 16-6-105. Same; public purchases; exception for articles of inferior quality; cost differential.

Every board, commission or other governing body of any state institution, and every person acting as purchasing agent for the board, commission or other governing body of any state institution or department, and every county, municipality, school district and community college district, shall prefer in all purchases for supplies, material, equipment, machinery and provisions to be used in the maintenance and upkeep of their respective institutions, supplies, materials, equipment, machinery and provisions produced, manufactured or grown in this state, and supplies, materials, equipment, machinery and provisions supplied by a resident of the state, competent and capable to provide service for the supplies, materials, equipment, machinery and provisions within the state of Wyoming. Preference shall not be granted for articles of inferior quality to those offered by competitors outside of the state, but a differential of not to exceed five percent (5%) may be allowed in cost on the Wyoming materials, supplies, equipment, machinery and provisions of quality equal to those of any other state enforcing or having a differential [for] "out-of-state" materials, supplies, equipment, machinery and provisions. (Laws 1931, ch. 50, § 1; R.S. 1931, § 108-301; C.S. 1945, § 19-1501; W.S. 1957, § 9-667; Laws 1969, ch. 188, § 1; W.S. 1977, § 9-8-305; Laws 1982, ch. 62, § 3.)

§ 16-6-106. Same; statement of preference in requests for bids and proposals.

All requests for bids and proposals for materials, supplies, equipment, machinery and provisions for the construction, maintenance and upkeep of every state, county, municipal, community college district or school district institution shall contain the words "preference is hereby given to materials, supplies, equipment, machinery and provisions produced, manufactured, supplied or grown in Wyoming, quality being equal to articles offered by the competitors outside of the state". (Laws 1931, ch. 50, § 2; R.S. 1931, § 108-302; C.S. 1945, § 19-1502; W.S. 1957, § 9-668; Laws 1969, ch. 188, § 2; W.S. 1977, § 9-8-306; Laws 1982, ch. 62, § 3.)

16.072 PREFERENCE FOR MINNESOTA CONTRACTORS, LABOR, AND MATERIALS.

Subdivision 1. **Definitions.** For the purposes of this section, the following terms have the meanings given them:

(a) "Municipality" has the meaning assigned to it in section 471.345, subdivision 1;

(b) "Public agency" includes all state agencies, the University of Minnesota, the state university board, and the state board for community colleges;

(c) "Resident" means:

(1) any individual who has been a resident of Minnesota for one year or more immediately prior to bidding on or performing work under the contract;

(2) any partnership or association whose members have been residents of Minnesota for one year or more immediately prior to bidding on or performing work under the contract; and

(3) a corporation, incorporated in Minnesota, which has been in existence for one year or more immediately prior to bidding on or performing work under the contract, or which has its principal place of business in Minnesota; and

(d) "State agency" means an agency as defined in section 14.02, subdivision 2.

Subd. 2. **Resident contractors preferred.** Notwithstanding any other law to the contrary, any contract awarded by a public agency for the engineering services, erection, construction, alteration, or repair of any public building or structure, or for any public work or improvement for which competitive bidding is not required by law, must be awarded to a Minnesota resident. If competitive bidding is required by law, the contract must be awarded to the resident making the lowest responsible bid if the resident's bid is not more than ten percent higher than the lowest responsible nonresident bid. A successful resident bidder may not subcontract more than 20 percent of the work covered by the contract to nonresident subcontractors.

Subd. 3. **Minnesota labor preferred.** All contracts subject to subdivision 2 must require that, wherever possible, resident laborers, workers, and mechanics be used to perform all work covered by the contract.

Subd. 4. **Preference subject to federal law.** The provisions of this section are subject to applicable laws of the United States and regulations of federal agencies governing the use and payment of funds granted or advanced by the United States in connection with public works contracts.

History: *1983 c 336 s 1*

NOTE: This section, as added by Laws 1983, chapter 336, section 1, is repealed effective June 30, 1985. See Laws 1983, chapter 336, section 3.

16.0721 PREFERENCE FOR MINNESOTA AND AMERICAN-MADE MATERIALS.

Subdivision 1. **Definitions.** As used in this section, the following terms have the meanings given them:

(a) "Public agency" has the meaning assigned to it in section 16.072, subdivision 1, clause (b) and includes any contractor acting pursuant to a contract with a public agency;

(b) "Materials" means any goods, supplies, equipment or any other tangible products or materials, including foods;

(c) "Manufactured" means mined, grown, produced, manufactured, fabricated or assembled;

DECISIONS

the fact that the instruction was a correct statement of the law. The court should not have given it without further explaining how Mississippi law relates to the federal offense of mail fraud, since the violation of Mississippi law did not ipso facto constitute a violation of the federal mail fraud statute. United States v Washington (1982, CA5 Miss) 688 F2d 953.

:h 496, § 1; 1975, ch. 331; 1978, ıws, 1980, ch 440, § 28, eff from

-37. Repealed by Laws, 1980, :er January 1, 1981.

group purchase programs by

trustees of any hospital owned ·ly or jointly by one or more districts or election districts, or ize by resolution the organizaticipation in, a group purchase state hospitals and/or institupitals that are exempt oreganizof the United States Internal or designation as such under evenue Code, for the purchase it appears to said board of program could or would affect rations. Hospitals participating purchasing supplies and equipbe in compliance with section

507; 1980, ch. 440, § 11; 1982, ch. proved April 6, 1982).

r supplies and equipment purchased ns, see § 31-7-13.

426 § 1; 1974, ch. 541, § 1; 191; 1977, ch 423; 1980, ch. ch. 440, § 28, eff from and

§ 31-7-41. [Am Laws, 1975, ch. 470 § 2] Repealed by Laws, 1980, ch. 440, § 28, eff from and after January 1, 1981.

§ 31-7-43. [Am Laws 1975, ch. 470 § 3] Repealed by Laws, 1980, ch. 440, § 28, eff from and after January 1, 1981.

§ 31-7-45. Repealed by Laws, 1980, ch. 440, § 28 eff from and after January 1, 1981.

§ 31-7-47. Preference to resident contractors.

In the letting of public contracts, preference shall be given to resident contractors, and a nonresident bidder domiciled in a state having laws granting preference to local contractors shall be awarded Mississippi public contracts only on the same basis as the nonresident bidder's state awards contracts to Mississippi contractors bidding under similar circumstances. Resident contractors actually domiciled in Mississippi, be they corporate, individuals or partnerships, are to be granted preference over nonresidents in awarding of contracts in the same manner and to the same extent as provided by the laws of the state of domicile of the nonresident.

SOURCES: Laws, 1980, ch. 440, § 12, eff from and after January 1, 1981.

Editor's Note—
Section 29 of Chapter 440, Laws, 1980 provides as follows:
SECTION 29. This act shall take effect and be in force from and after January 1, 1981.

Cross references—
As to authorization to contract with industries with respect to solid or hazardous waste treatment projects, see §§ 17-17-105, 17-17-121.

§ 31-7-48. [En, Laws, 1973, ch. 426, § 1] Repealed by Laws, 1980, ch. 440, § 28, eff from and after January 1, 1981.

§ 31-7-49. Purchases under contract.

In placing orders for purchases under bids received and contracts awarded under the provisions of this chapter, the governing authority, by orders entered on its minutes, may authorize its members, or agents designated by its order, to place orders for the purchase of such supplies and materials from time to time during the period covered by the contract, as such supplies and materials are needed. Claims for such supplies so ordered by an individual board member or other duly authorized agent shall not be allowed and paid by the board until such claims shall have been approved in writing by the individual board member or agent who ordered such supplies.

5-19-1 PUBLIC PROPERTY, PURCHASES AND CONTRACTS

CROSS-REFERENCE

State purchases, residential preference in, § 5-23-13.

5-19-1. Preference for South Dakota products in public purchases.—Every commission, board, committee, officer, or other governing body of this state or of any county, township, school district, city or town, and every person acting as contracting or purchasing agent for any such commission, board, committee, officer or other governing body shall provide in its specifications for material, products and supplies a specification for the furnishing of such materials, products and supplies which are found, produced or manufactured within the state of South Dakota and bids shall be received, under such specification, for such materials, products and supplies which are found, produced or manufactured within the state of South Dakota.

Source: SL 1939, ch 241, § 1; SDC Supp 1960, § 65.0706.

Collateral References.

65 AmJur 2d, Public Works and Contracts, § 202.

Aliens, constitutionality of enactment or regulation forbidding or restricting employment of aliens in public employment or on public works, 38 ALR 3d 1213.

5-19-2. Brand names not to be used in specifications for purchases—Notice of preference in bids and requests.—All requests hereafter made for bids and proposals for materials, products, or supplies to be purchased at public expense shall be made in general terms and by general specifications and not by brand, trade name, or other individual mark. All such requests and bids shall contain therein a paragraph in easily legible print reading as follows: "By virtue of statutory authority preference will be given to materials, products, and supplies found or produced within the state of South Dakota."

Source: SL 1939, ch 241, § 2; SDC Supp 1960, § 65.0706.

5-19-3. Residential preference in contracts for public works, improvements or purchases—Percentage differential.—Whenever a contract is let by the state or department thereof, or any county, city, town, school district, or other public corporation of the state of South Dakota for the erection, construction, alteration or repair of any public building or other structure or for making any addi-

tion thereto, or for any public work or improvement or for the purchase of any goods, merchandise, supplies or equipment of any character, such contract shall be let to the lowest responsible resident bidder, provided that a resident bidder may be allowed a preference on any such contract as against the bid of any bidder from any other state enforcing or having a preference for resident bidders equal to such preference.

Source: SL 1951, ch 473, § 1; 1957, ch 501; SDCSupp 1960, § 65.0707.

Commission Note.

The code commission has deleted from this section a reference to high school districts. Under Chapter 13-5, as amended by ch 125, SL 1974, there is only one type of school district.

Opinion of Attorney General.

Responsibility of bidder and quality of materials used to be considered, Report 1965-66, p. 128.

5-19-4. Persons entitled to residential preference.—As used in this chapter, the word "resident" means any person who shall have been a bona fide resident of the state for one year or more immediately prior to bidding upon the contract; a partnership or association the majority of the members of which shall have been bona fide residents of the state for one year or more immediately prior to bidding upon the contract; a corporation organized under the laws of the state of South Dakota; a nonresident corporation duly licensed to do business within the state of South Dakota, and all of which persons, partnerships, associations, corporations and foreign corporations licensed to do business within the state of South Dakota shall have maintained a substantial and bona fide place of business and shall have conducted business therefrom within this state for at least one year prior to the date on which a contract was awarded.

Source: SL 1951, ch 473, § 4; SDC Supp 1960, § 65.0710.

5-19-5. Restrictions on subcontracting to nonresidents.—A successful bidder, resident or nonresident, shall not subcontract more than twenty per cent of the work covered by his contract to nonresident subcontractors, provided that resident subcontractors are available and at competitive prices.

Source: SL 1951, ch 473, § 2; SDC Supp 1960, § 65.0708.

Opinion of Attorney General.

Noncompliance by contractor, complaint made by party wronged, Report 1959-60, p. 44.

5-19-6. Contracts to prefer South Dakota labor and materials.—Resident South Dakota laborers, workmen, and mechanics shall be used upon all work mentioned in § 5-19-3 wherever possible, and any contract let shall so provide, provided further that South Dakota materials and products of equal quality and desirability

§ 16-6-107. Same; construction or maintenance of public structures; exception for materials of inferior quality; cost differential.

All public buildings, courthouses, public school buildings, public monuments and other public structures constructed in this state shall be constructed and maintained by materials produced or manufactured in Wyoming if Wyoming materials are suitable and can be furnished in marketable quantities. Preference shall not be granted for materials of an inferior quality to those offered by competitors outside of the state, but a differential of not to exceed five percent (5%) may be allowed in cost of Wyoming materials of equal quality as against materials from states having or enforcing a preference rule against "out-of-state" products. (Laws 1931, ch. 50, § 3; R.S. 1931, § 108-303; C.S. 1945, § 19-1503; W.S. 1957, § 9-669; W.S. 1977, § 9-8-307; Laws 1982, ch. 62, § 3.)

Repealing clauses. — Section 4, ch. 50, Laws 1931, repeals all laws and parts of laws in conflict with that act.

Effective dates. — Section 5, ch. 50, Laws 1931, makes the act effective from and after passage. The act became law without the signature of the governor on February 17, 1931.

§ 16-6-108. Governing of federal funds by federal law.

The operation of this act [§§ 16-6-101 through 16-6-118] upon the letting of any public works contract above mentioned, in connection with which, funds are granted or advanced by the United States of America, shall be subject to the effect, if any, of related laws of the United States and valid rules and regulations of federal agencies in charge, governing use and payment of the federal funds. (Laws 1939, ch. 50, § 5; C.S. 1945, § 22-511; W.S. 1957, § 9-670; W.S. 1977, § 9-8-308; Laws 1982, ch. 62, § 3.)

Severability. — Section 6, ch. 50, Laws 1939, reads: "If any provision of this act, or the application thereof to any person or circumstances, is held invalid, the remainder of this act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

Repealing clauses. — Section 7, ch. 50, Laws 1939, repealed all laws and parts of laws in conflict with that act.

Effective dates. — Section 8, ch. 50, Laws 1939, makes the act effective from and after passage. Approved February 15, 1939.

§ 16-6-109. Use of insurance for rebuilding fire-destroyed state structures.

When buildings belonging to the state are destroyed by fire, the insurance on the buildings shall be collected by the state treasurer. The governing board of the state institution suffering the loss by fire may draw on the state treasurer for the amount of money collected and use the insurance money for the rebuilding of the structure destroyed by fire if, in the opinion of the governing board, the structure should be rebuilt. (Laws 1925, ch. 12, § 1; R.S. 1931, § 108-201; C.S. 1945, § 22-512; W.S. 1957, § 9-671; W.S. 1977, § 9-8-309; Laws 1982, ch. 62, § 3.)

HOUSE RESEARCH

Research Report

State Domestic Preference Laws

This report analyzes state laws that require state agencies to give preference to home-state businesses in the awarding of state construction or purchasing contracts.

Emily Shapiro, Legislative Analyst

October 1983

Minnesota House of Representatives . Research Department . 17 State Capitol

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INTRODUCTION

In 1983, the Minnesota Legislature enacted a number of laws aimed at encouraging economic growth and job creation in the state. Among these was a law requiring state agencies to give preference to resident contractors in the awarding of state construction contracts, and to Minnesota and American manufacturers in the procuring of goods and materials.

Following the 1983 session, the House Research Department undertook a research project to develop information on domestic preference laws in Minnesota and in other states. Specifically, the project involved a review of the available literature and public policy arguments on the subject of domestic preference laws, and a survey and analysis of the provisions of domestic preference laws in the various states.

The results of this research project are presented in this Research Report in three parts.

- The first part identifies and describes different types of domestic preference laws, and summarizes the basic public policy arguments for and against the enactment of such laws.
- The second part discusses in detail the provisions of the Buy Minnesota law.
- The last part consists of a table summarizing the provisions of domestic preference laws in other states, together with an analysis of the type and frequency of preference schemes employed in other states.

I. DOMESTIC PREFERENCE LAWS: DEFINITIONS AND RATIONALES

A. Definitions

A domestic preference law is a law which either requires or encourages state agencies to purchase goods from or enter into public works contracts with residents of the home state.

The preference is accomplished in various ways, depending upon the particular scheme adopted by the state. The following list defines the most common types of state preference laws:

"First among equals" general preference law: A law which requires the state agency to give preference to any in-state supplier whose bid is the same or substantially the same as that of any out-of-state supplier. Under such a statutory scheme, the domestic supplier is, in effect, "first among equals" to receive state contract awards.

Percentage differential preference law: A law which requires the state agency to award a contract to a domestic supplier whose bid, though higher than that of a nonresident supplier, is within a certain range permitted by law--typically 5%. Such "percentage differential" preference laws give domestic suppliers an explicit financial advantage over nonresident suppliers.

Domestic labor preference law: A law which requires state agencies awarding public works or construction contracts to give preference to businesses that are either located in the state or that promise to employ mainly domestic laborers on the project. These "domestic labor" laws range from those which merely require that domestic firms be given a preference to those that allow only the use of domestic laborers on state construction and public works projects.

Retaliatory preference law: A law which requires state agencies to give domestic suppliers preference when they bid against suppliers from states that have domestic preference laws. The amount of preference given by the retaliatory law is identical to that of the state against which the retaliation is directed. Thus, a retaliatory preference law is activated only by the existence of a preference law elsewhere and only when a supplier who enjoys the protection of a preference law at home seeks to do state business in the retaliating state.

Specific commodity preference law: A law which requires state agencies to give preference to purchasing specific domestic commodities that constitute an important part of the state's economy, such as agricultural or forestry products or indigenous minerals.

B. Pro and Con Arguments

The following policy arguments are commonly made in support of the enactment of domestic preference laws:

- State government, when acting as a market participant, has an obligation to favor its own citizens in order to further the state's general welfare.

- Even if it costs more money to enter into a contract with a domestic business instead of an out-of-state business, this short-term loss will be more than offset by long-term gains in the state's improved economy and employment rate, resulting in more dollars added to the state's tax base and fewer dollars spent for unemployment compensation and welfare programs.

- Domestic preference laws serve to correct the competitive disadvantage that local small businesses suffer at the hands of large national and international businesses and, therefore, enhance rather than hinder the free enterprise system.

In contrast, opponents of domestic preference laws commonly argue that such laws should not be enacted for the following reasons:

- Domestic preference laws prevent suppliers from bidding on an equal basis, thereby inhibiting competition and limiting the ability of the state and its taxpayers to procure the best possible goods and services for the lowest possible price.

- Domestic preference laws, by themselves, do not have a measurable long-term impact on the state's economy; only a nation-wide economic recovery can truly bolster the state's economy by helping to create jobs, increase tax revenues and reduce unemployment and welfare costs.

- The enactment of a domestic preference law by one state causes other states to retaliate by passing their own protectionist legislation, resulting in the restriction of interstate trade, reduced markets for goods and services and, ultimately, lost profits for domestic businesses. Protectionist legislation, therefore, not only makes little economic sense; it makes little political sense in a nation founded on principles of economic cooperation and free trade.

II. LAWS 1983, CHAPTER 336: THE "BUY MINNESOTA" LAW

In 1983, the Minnesota Legislature enacted Laws 1983, chapter 336, known colloquially as the "Buy Minnesota" law. Chapter 336 may be characterized both as a "percentage differential" and a "domestic labor" preference law, because it uses both of these statutory schemes simultaneously to achieve its objective.

Specifically, chapter 336 consists of two main sections: the first deals with state construction and public works projects and the second with state procurement of products and materials.

- Section 1 requires state agencies to award to Minnesota residents all construction and public works contracts for which competitive bidding is not required by law. Generally, these contracts consist of projects costing $5,000 or less. If competitive bids are required by law, the state agency must give Minnesota residents a 10% preference; that is, the contract must be awarded to a Minnesota resident unless the resident's bid exceeds the bid of a nonresident by more than 10%. Furthermore, successful resident bidders must employ domestic labor wherever possible, and may not subcontract more than 20% of the work covered by the contract to nonresident subcontractors. To qualify as a resident under the Buy Minnesota law, an individual, partnership or association must have resided in this state for at least one year immediately prior to bidding on the state contract. A corporate bidder must have been incorporated in Minnesota and either been in existence for at least a year or have its principal place of business in this state.

- Section 2 of Chapter 336 requires state agencies who award procurement contracts to give products and materials that are manufactured in Minnesota or in the United States a 10% preference. In other words, the state agency must purchase Minnesota or American-made products and materials even if their price is up to 10% higher than that of foreign-made products or materials of similar quality.

Because the provisions of Chapter 336 were considered by the legislature to be experimental, a two year "sunset" provision was included in the bill. Therefore, unless the legislature acts to extend the provisions of the "Buy Minnesota" law prior to its "sunset" date, the law will be repealed on June 30, 1985.

III. OTHER STATE DOMESTIC PREFERENCE LAWS

In order to determine the number and scope of domestic preference laws in the remainder of the country, the House Research Department conducted a survey of state statutes in all 50 states and the District of Columbia.

The survey revealed that of the 51 jurisdictions surveyed, 41, about 80%, have one or more of the five domestic preference schemes described in Part 1 of this report. The table beginning on page 7 describes in greater detail the domestic preference schemes adopted by these 41 states.

The breakdown of domestic preference schemes by type is as follows:

"First among equals"	20
Percentage differential	14
Retaliatory preference	12
Domestic labor	22
Specific commodities	11

While no state has adopted all five preference schemes, more than half of them (25), including Minnesota, utilize two or more of the schemes at once to realize their domestic preference objectives.

Of the 12 states which have retaliatory preference laws, three also have percentage differential preferences, seven prefer their own domestic laborers, six have "first among equals" preference laws, and one gives preference to specific domestic commodities. It would appear, therefore, that a state which retaliates against another on account of the other state's domestic preference law may not simply be reacting defensively, but, rather, may itself be using the same type of system to protect its own domestic products and labor.

This research shows that domestic preference laws of one variety or another are fairly common nationwide. Domestic preference laws appear to be well-established state policy. However, from a practical standpoint, the domestic preference laws adopted in many of the states are largely symbolic. For example, many states have only a "first among equals" preference law; meaning that domestic residents or laborers only receive a preference when all aspects of their bids or employment, including price and quality, are equal to nonresident bids.

Additionally, in a number of states, the term "resident" is loosely defined to include anyone who has a place of business in the state. In such states, any business which sells goods or services there on a regular basis would qualify as a resident, even if its employees and facilities are located elsewhere. It is difficult, therefore, to compare such states' preference laws to those of other states, where the definition of "resident" is very narrow.

STATE DOMESTIC PREFERENCE LAWS

	GENERAL	% DIFFERENTIAL	RETALIATION	LABOR	SPECIFIC COMMODITIES
ALABAMA	Preference to state vendors of commodities produced in-state (§§41-16-27; 41-16-57)				
ALASKA	Preference to state producer/dealers (§36.20.010)	5% preference over non-resident (§37.05.230)		95% domestic employment (§30.10.010)	Domestic forestry products preferred in public projects 36.15.010
ARIZONA		5% preference for materials produced/mfgd. in-state (§34-242)			
ARKANSAS		5% preference on bids for purchases (§14-293) 2-3% preference for building contractors (§14-614) 3% preference allowed in county purchases (§17-1605)			
CALIFORNIA	Preference to supplies mfgd. in-state (Gov. 4331)	5% preference (Gov. 4334)			
COLORADO	Domestic preference (§8-18-101)			80% domestic employment (§8-17-101)	
CONNECTICUT				Preference to state laborers (§31-52a)	

House Research Department, October 1983

STATE DOMESTIC PREFERENCE LAWS

	GENERAL	% DIFFERENTIAL	RETALIATION	LABOR	SPECIFIC COMMODITIES
DELAWARE				Preference to state labor on public works contracts (§29-6913)	
FLORIDA	Preference to domestic industries in public building contracts (§255.04) Preference to commodities mfgd. in-state (§287.082)				Domestic lumber & timber preferred (§255.20)
GEORGIA	Preference to domestic materials, supplies, equipment & agricultural products (§50-5-61: 40-19-54)				Domestic forestry products preferred in construction contracts (§50-5-63: 91-1101)
HAWAII		3-10% preference depending on how much of product's value is attributable to domestic labor (§103-43)		Mechanic/laborer on public work must be state citizen (§103-57)	
IDAHO			Retaliatory preference for state contractors on public works (§67-2348)	95% domestic employment (§44-1001)	
ILLINOIS			Retaliatory preference for resident bidders (127 §132.6)	Preference for state residents on public works projects (48 §269 et seq.)	

IOWA	Preference for products grown and coal produced in Iowa (§73.1)			Domestic labor preferred in construction of public works (§73.3)	Coal (§73.1)
KANSAS	Preference to in-state bidders (§75-3740)		Retaliation permitted (§75-3740(a))		
KENTUCKY					
LOUISIANA	Preference for supplies, materials or equipment produced/offered by LA citizens (§38:2184) Preference to firms doing business in LA (§38:2253)	5% preference for products produced, grown or harvested in LA (§38:2251)	Retaliation permitted (§38:2225) excludes contracts for construction, maintenance or repair of highways and streets (§39:1595.1)		
MAINE		Preference for in-state producers of food 1980-5% diff. 1981-4% diff. 1982-3% diff. (§7.202)		Domestic labor preferred on public works (§26.1301)	Food (§7.202)
MARYLAND			2% retaliatory preference permitted (21§8-301)		
MASSACHU-SETTS	Preference for supplies & materials mfgd./sold in MA (Ch.7 §22(17))			Preference to citizens in public works employment (§149.26)	

House Research Department, October 1983

STATE DOMESTIC PREFERENCE LAWS

	GENERAL	% DIFFERENTIAL	RETALIATION	LABOR	SPECIFIC COMMODITIES
MICHIGAN				Contractor must employ minimum 50% residents on state building contracts (§18:13)	
MINNESOTA		10% differential for Minnesota and American products (§16.0721); 10% differential for Minnesota residents in award of construction contracts (§16.072) repealed on 7/1/85	Retaliatory preference to resident bidders on public contracts (16.365)	Domestic labor must be used wherever possible; 80% of subcontractors must be Minnesota residents; repealed on 7/1/85 (§16.072)	
MISSIS-SIPPI	State products must be used in public works projects(§31-5-23) Preference for state commodities (§31-7-15) and resident contract-ors (§31-7-47)		Retaliatory preference to resident contractors in public works (31-7-47)	Resident labor used on public works projects (§31-5-17)	Paint, varnish & lacquer containing tung oil, ester gum or modified resin, & turpentine produced in-state to be used on public works projects (§31-5-23)
MISSOURI	Preference given to domestic products purchased by the state (§34.070); Cities & towns (§71.140); Counties (§50.750); and Townships (§65.400).			Preference to domestic labor in construction/ repair of public buildings (§8.280)	Preference for domestic coal (§34.808) and products of domestic mines, quarries & forests (§8.280)

MONTANA		3% preference given to domestic commodities in state procurement (§18-1-102(2))		Preference for domestic labor in public works projects (§18-2-403)
NEBRASKA			Retaliatory preference for resident bidders (§73-101.01)	
NEVADA	Preference given first to resident bidders; second, to domestic products and third, to resident dealers (§333.300)			Citizens given preference for employment on public works projects (§338.130)
NEW HAMPSHIRE				
NEW JERSEY				
NEW MEXICO		5½% preference for resident businesses and mfgrs. in purchasing (§13-1-21)		Preference for state contractors in construction/repair of public buildings; must subcontract to domestic residents whenever practicable (§13-4-1)
NEW YORK				

House Research Department, October 1983

STATE DOMESTIC PREFERENCE LAWS

	GENERAL	% DIFFERENTIAL	RETALIATION	LABOR	SPECIFIC COMMODITIES
NORTH CAROLINA	Preference for state products, citizens, and articles mfgd. by state agencies (§143-59)				
NORTH DAKOTA	Material produced in-state given preference for use in public buildings (§48-02-10)		Retaliatory preference to state bidders/sellers in purchasing (§44-08-01)	Preference for domestic labor (§43-07-20)	
OHIO					
OKLAHOMA	Preference for state labor & materials in construction/repair of state institutions (61§10)	5% domestic preference (61§103.1)	Retaliatory preference to domestic contractors on public works (61 §103.1)	Preference for State contractors (61§103.1)	
OREGON	Goods/services mfgd/produced in-state preferred in public contracts (§279.021)				
PENNSYL-VANIA					
RHODE ISLAND					Domestic foodstuffs preferred when purchased by state institutions (§37-2-5)

SOUTH CAROLINA		State products preferred; 2% preference for procurements under $2.5 million; 1% preference for procurements over $2.5 million (§11-35-1520)		
SOUTH DAKOTA			Retaliatory preference in contracts for public works, improvements or purchases. (§5-19-3)	Contractor cannot subcontract more than 20% of work to non-resident subcontractor (§5-19-5) Domestic labor preferred (§5-19-6)
TENN.				Preference to in-state meat producers (§12-3-121 & 122; §12-2-809 & 810)
TEXAS				
UTAH				
VERMONT				Agricultural products given preference if grown/produced in-state (6§4601)
VIRGINIA	Preference for domestic products & firms in case of tie bid (§11-47(A))		Retaliatory preference allowed for resident contractors (§11-47(B))	

House Research Department, October 1983

STATE DOMESTIC PREFERENCE LAWS

	GENERAL	% DIFFERENTIAL	RETALIATION	LABOR	SPECIFIC COMMODITIES
WASHINGTON				Public works: 95% domestic labor required if 40 or fewer persons employed; 90% if more than 40 persons employed (§39.16.005)	
WASHINGTON D.C.					
WEST VIRGINIA		2% preference for resident vendors in purchase of commodities (§5A-3-44)			Domestic aluminum, glass, & steel products must be used in public works contracts to $50,000; 20% to 30% differential permitted (§5-19-2)
WISCONSIN	Preference for materials, supplies, equipment & contractual services of state producers, distributors, suppliers & retailers (§16.75)				
WYOMING	Preference for state labor & materials generally (§9-8-304)	5% preference allowed for resident construction contract bids (§9-8-305) State commodities prices (§9-8-305) and domestic materials used in public works projects (§9-8-307)		Resident laborers must be employed on public works projects whenever possible; not more than 20% of subcontractors may be nonresidents (§9-8-303; 304)	

House Research Department, October 1983 .

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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

March 11, 1985

MEMORANDUM

TO: Representative Marco Pignalberi

FROM: Sharman Haley
Legislative Analyst

RE: Bidders' Preference in Other States
Research Request 85-202

You asked about State contracts, especially Department of Transportation and Public Facilities (DOT/PF) contracts, awarded to out-of-state firms. More specifically, you wanted us to determine what states these firms are from and what bid preference laws exist in those states.

I compared a list of 214 DOT/PF contract awards from FY 84 and FY 83 with Division of Occupational Licensing records of addresses for licensed contractors. Approximately one-fifth of contract awards are to firms which use an out-of-state address for licensing-related correspondence. (Many of these firms might still qualify as Alaska firms for purposes of bidders preference.) Three-quarters of these out-of-state firm addresses are in Washington State. Oregon, California and Nebraska lag far behind, each representing less than five percent of out-of-state contract awards. The remaining firm addresses are widely scattered across the states.

The Department of Administration is unable to provide any information about their contract awards without pulling and examining each file. As this would require several days worth of work spread out over several weeks, I did not pursue it, awaiting further direction from you. Bob Scofield, Contracting and Facilities Manager, did offer his impression that a significant number of bidders are from Washington State.

Of the four states contacted, neither Washington, Oregon nor California give bid preference to resident firms on construction contracts. Nebraska has a reciprocal bid preference law (described below) which applies to purchasing and only those construction projects in which no federal money will be jeopardized. The states do have affirmative action preferences such as minority business set-asides or contract provisions requiring some subcontracting with minority businesses. For

purchasing, Washington and Nebraska each have reciprocating laws, exercising a penalty against firms from states giving resident bid preference.[1] The penalty is the same percentage as the preference the firm would enjoy in its home state. Thus an Alaska firm provided a five percent preference in Alaska would face a five percent penalty in Washington. The current penalties for other states are as follows: Arkansas--5%; California--5%; Hawaii--3%; Maine--2%; Montana--3%; New Mexico--5%; Ohio--5%; South Carolina--2%; Utah--5%; West Virginia--2%; Wyoming--5%. Oregon and California give residents preference only in the case of tie bids.[2]

California's "Buy California" act was declared unconstitutional by the state attorney general in the wake of a court ruling declaring the analogous "Buy America" act unconstitutional.[3] California retains a five percent bidders' preference for California based small businesses and a preference for firms which provide employment in depressed areas of the state.[4] Oregon has a set-aside program for minority businesses and allows negotiated purchase contracts with qualified rehabilitation facilities.

Attached please find Research Requests 84-098 which discusses bid preference statutes in other states and 80-57 which reviews Alaska contract awards. Also, Jim Stevenson, purchasing officer for the State of Illinois, is conducting a nationwide study of all kinds of purchasing preferences, which he estimates will be completed next summer. Meanwhile he would be glad to discuss the issue (and express his opinion that preferences are a bad idea) with you or anyone interested. He may be reached at (217)782-4705.

* * * * *

If we can provide any further research assistance, please contact us.

SH

Attachments

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[1]Revised Code of Washington 43.19.702; Nebraska Statutes §73-101.01.

[2]Oregon Statutes 279.021; California preference in case of tie bids is policy and not in statute.

[3]California Code Government §§4300-4305 and §§4330-4334.

[4]California Code Government §§4530-4535.3 and §§14835-14843.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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

March 19, 1985

MEMORANDUM

TO: Representative Marco Pignalberi

FROM: Sharman Haley
Legislative Analyst

RE: Bidders' Preference in Other States
Research Request 85-202 (supplemental information)

In my previous memorandum I reported that approximately one-fifth of Department of Transportation and Public Facilities contract awards are to firms with out-of-state addresses. Additional calculations show that nearly one-third of the dollar value of the contracts is awarded to firms with out-of-state addresses.

If you require further information please contact me.

SH

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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

April 12, 1985

MEMORANDUM

TO: Representative Don Clocksin

FROM: Sharman Haley
Legislative Analyst

RE: Alaska Bidder Preference and Local Hire
Research Request 85-257

You asked for information on the current legal status of bidder preference and for copies of statutes from other states with a bid preference of ten percent or more. You later supplemented the request to include a discussion of the legal status of local hire. In short, the legal status of both bid preference and local hire is not clear. They appear to be most vulnerable on equal protection grounds. The legal status of each is briefly summarized below and key decisions are attached. Copies of bid preference statutes from Hawaii, Idaho and Wyoming are also attached.

Commerce Clause

Recent decisions by the U.S. Supreme Court suggest that the commerce clause of the federal Constitution would not be a bar to either resident hire or bidder preference. The seminal case, Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810, 49 L Ed 2nd 220, 96 S Ct 2488 (1976), firmly established the market-participant doctrine that when the state is acting as a market participant, rather than as a market regulator, the commerce clause does not limit its activities. In Reeves, Inc. v. Stake, 447 US 429,438-439, 65 L Ed 2nd 244, 100 S Ct 2271 (1980), the Court upheld a South Dakota policy of restricting the sale of cement from a state-owned plant to state residents, citing "the long recognized right of trader or manufacturer, engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal." And in White v. Massachusetts Council of Construction Employers, Inc., 460 US 204, 75 L Ed 2nd 1, 103 S Ct 1042 (1983), the Court sustained a local hire policy on city-funded projects by the City of Boston. The scope of the market-participant doctrine is just emerging. In White supra the court recognized that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government

transacts business." In the local hire case, the Court found that the limits were not reached because the covered workers were "in a substantial if informal sense, 'working for the city.'" A plurality opinion in Southcentral Timber Dev. v. Wunnicke, __ US __, 81 L Ed 2d 71, 104 S Ct, held that Alaska's primary processing requirement on State timber sales reaches beyond the market in which the State participates and therefore is invalid.

Equal Protection

Since no fundamental rights or suspect classifications are at issue for either local hire or bidder preference, the rational basis test is used for federal equal protection analysis--does the discrimination bear a rational relation to a legitimate state interest? In Alaska, a sliding scale analysis is used weighing the rights at issue against the state's interest being advanced. Both in Alaska and federally, the courts have found that discrimination between residents and nonresidents solely for the purpose of benefiting one economically at the expense of the other is illegitimate. Lynden Transport Inc. v. State, 532 P.2d 700 (Alaska 1975); Metropolitan Life Ins. Co. v. Ward, __ U.S. __, (March 25, 1985). A concurring minority of the Alaska Court has found Alaska's bidder preference statute AS 37.05.230 to be unconstitutional on this basis. Irby-Northface v. Com. Elec. Co., 664 P.2d 557 (Alaska 1983); (copy attached).

Residency discrimination might yet stand if it can be shown that it rationally furthers other state interests which are legitimate. In Metropolitan Life supra, the justices were almost evenly divided on this point. Four justices dissented from the majority opinion that an Alabama tax statute discriminating against out-of-state insurance companies violated equal protection. The minority found that domestic insurers provided policies better suited to the needs of rural Alabamans and that domestic insurers were easier to regulate, thus justifying the statutory tax differentials favoring domestic companies. In Western and Southern Life Ins. Co. v. State Board of Equalization of California, 451 U.S. 648 (1981), the Court upheld a retaliatory tax discrimination scheme on a finding that the purpose of the statute was to promote interstate business of domestic insurers by deterring other states from enacting discriminatory taxes. In 1982, the Wyoming Supreme Court upheld a five percent bidder preference statute, finding that it furthered the legitimate state interest of encouraging local industry. Galesburg Construction Co. v. Board of Trusteees, 641 P.2d 745 (Wyo. 1982); (copy attached). The Court noted that money paid out to resident contractors was more likely to remain in the state.

Privileges and Immunities

Local hire is also analyzed under the privileges and immunities clause of the U.S. Constitution. The privileges and immunities clause bars discriminatory treatment against citizens of other states except to the extent that the noncitizens constitute "a peculiar source of evil" to which the discriminatory statute is addressed. Toomer v. Whitsell, 334 U.S. 385, 92 L Ed 1460, 68 S Ct 1156 (1948).

The former Alaska Hire statute was invalidated on the grounds that the State failed to show that nonresident hire was a substantial cause of Alaska unemployment or that an across-the-board hiring preference for Alaskans, regardless of employment status, was sufficiently tailored to address the problem. Furthermore, the scope of the statute applying to all employment resulting from oil and gas leases went beyond the scope of the State's proprietary interests to which greater judicial deference would be given. Hicklin v. Orbeck, 437 US 518, 57 L Ed 2nd 397, 98 S Ct 2482 (1978). In United Bldg. & Constr. Trades v. Mayor of Camden, __ US __, 79 L Ed 2d 249, 104 S Ct __ (1984), the Court held that where local hire is confined to public works projects "states should have considerable leeway in analyzing local evils and in prescribing appropriate cures," but are not to be exempted from inquiry under the privileges and immunities clause as to whether the degree of discrimination is reasonable.

The Wyoming Supreme Court took the analysis one step further and found that the Wyoming hiring preference statute was sustainable. The Wyoming Court found that the statutory mechanism by which contractors must check with the state unemployment office to see if qualified residents are available prior to hiring nonresidents for public works projects was closely tailored to the legitimate state purpose of alleviating unemployment among Wyoming construction workers. State v. Antonich, 694 P.2d 60 (Wyo. 1985); (copy attached).

Whether Alaska's resident hiring preference on public works projects is valid is currently on appeal to the Alaska Supreme Court in Robison v. Francis. Superior Court Judge Johnstone ruled that the present Alaska Hire Law, AS 36.10.010, violates the privileges and immunities clause because the State failed to show that nonresident construction workers are a peculiar source of unemployment in the state or that there is a substantial reason to discriminate against them.

Bid Preference Statutes

Attached are copies of statutes from other states which give a resident bidder preference of ten percent. Hawaii law creates three domestic content categories of products with a minimum of 25 percent Hawaii

domestic content. In bids for government purchases, Class I products are given a three percent bid preference, Class II products are given a five percent bid preference, and Class III products are given a ten percent bid preference. Idaho and Wyoming each grant a ten percent bid preference to resident firms on state printing contracts.

* * * * *

If you have any questions or if our agency can provide any further research assistance, please call.

SH

Attachments

APPENDIX—Continued

gency situation which ultimately developed before the patient died. These conclusions are amply supported in the record.

[20] The hearing officer filed almost thirty pages of detailed, accurate factual findings and balanced, thoughtful conclusions which are more than adequate to survive the substantial evidence test. As to the Board's ultimate decision to revoke Dr. Storrs' license, and the expertise of the Board members, on the basis of which Dr. Storrs apparently would have me either (1) substitute my judgment because of an inability to detect "the earmarks of thoroughness and fairness," or (2) reverse for failure of the record to establish a reasonable basis for the decision, or (3) reverse for lack of substantial evidence, I can only say that the record shows the procedures below were thorough, comprehensive and fair. The findings and conclusions are supported by substantial evidence, and the decision clearly has a reasonable basis.

Dr. Storrs' appellate presentation is somewhat confusing in its melding of concepts of arbitrary and capricious action, reasonable basis, and substantial evidence. If he is arguing for reasonable basis review, it is clear the record meets this test as well as the substantial evidence standard, since the Board's procedures, findings, conclusions and ultimate decision have a reasonable basis in law and fact, and fall far short of being unreasonable, arbitrary and capricious. *See Alaska Public Utilities Commission v. Chugach Electric Association*, 580 P.2d 687, 694 (Alaska 1978); *Jager v. State*, 537 P.2d 1100, 1107 (Alaska 1975). If, on the other hand, Storrs' argument as to the reasonable basis of the Board's decision is merely an extension of his constitutional argument, that argument has been rejected in section I of this opinion.

CONCLUSION

After a review of the record and the briefs, and after oral argument in this case, I affirm the decision of the State Medical Board to revoke Dr. Storrs' license to practice medicine.

IRBY-NORTHFACE, a joint venture, Appellant,

v.

COMMONWEALTH ELECTRIC COMPANY, Harrison Western Corporation-Newbery Alaska, Inc., a joint venture d/b/a Susitna Constructors and the Alaska Power Authority, Appellees.

HARRISON WESTERN CORPORATION-NEWBERY ALASKA, INC., a joint venture d/b/a Susitna Constructors, Cross-Appellant,

v.

COMMONWEALTH ELECTRIC COMPANY and the Alaska Power Authority, Cross-Appellees.

Nos. 7632, 7649.

Supreme Court of Alaska.

April 29, 1983.

Joint venture appealed from a judgment of the Superior Court, Third Judicial District, Anchorage, Karl S. Johnstone, J., ruling that joint venture should be treated as a nonresident bidder for a public construction project. The Supreme Court, Compton, J., held that the proper interpretation of the Alaska bidder preference statute is that a joint venture must be given preference if one of the venturers qualified individually for the preference.

Reversed.

Rabinowitz, J., concurred and filed opinion in which Burke, C.J., joined.

States ⇐98

Proper interpretation of Alaska bidder preference statute, which requires that state contracts for construction projects must be awarded to the "lowest responsible bidder," with exception that "a bid shall be

awarded to an Alaska bidder if his bid is not more than five percent higher than the lowest nonresident" bid, is that a joint venture must be given preference if one of the venturers qualifies individually for the preference. AS 37.05.230, 37.05.230(5).

Stephen M. Ellis, William E. Moseley and Marc D. Bond, Delaney, Wiles, Hayes, Reitman & Erubaker, Inc., Anchorage, for appellant Irby-Northface.

Robert J. Dickson, Atkinson, Conway, Bell & Gagnon, Anchorage, for appellee/cross-appellee Com. Elec. Co.

Donald W. McClintock and Ross A. Kopperud, Asst. Attys. Gen., Anchorage, and Norman C. Gorsuch, Atty. Gen., Juneau, for appellee/cross-appellee the Alaska Power Authority.

Richard L. Wagg and Lawrence T. Feeney, Faulkner, Banfield, Doogan & Holmes, Anchorage, for appellee/cross-appellant Harrison Western Corp. Newbery Alaska, Inc.

OPINION

Before BURKE, C.J., RABINOWITZ, MATTHEWS and COMPTON, JJ., and DIMOND, Senior Justice.*

COMPTON, Justice.

The single issue that must be addressed to resolve this appeal and cross-appeal is whether a joint venture qualifies as an Alaska bidder under the Alaska bidder preference statute, AS 37.05.230, when only one of its venturers would individually qualify as an Alaska bidder. For the reasons set forth below, we conclude that such a joint venture does qualify.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 25, 1982, the Alaska Power Authority ("APA") issued invitations to bid on Transmission Line Construction Contract # 1 for the Anchorage-Fairbanks Intertie. The bids received by the APA that are at issue in this case were as follows:

Irby-Northface	$ 28,437,328.00
Susitna	$ 28,931,030.00
Commonwealth (original)	$ 30,877,773.00
Commonwealth (amended)	$ 28,777,773.00

The Alaska bidder preference statute, AS 37.05.230, specifies that state contracts for construction projects must be awarded to the "lowest responsible bidder," with the exception that "a bid shall be awarded to an Alaska bidder if his bid is not more than five per cent higher than the lowest nonresident" bid. AS 37.05.230(5) defines an Alaska bidder as a person who:

> (A) holds a current Alaska business license,
>
> (B) submits a bid for goods or services under the name as appearing on his current Alaska business license, [and]
>
> (C) has maintained a place of business within the state for a period of six months immediately preceding the date of his bid.

Irby-Northface is a joint venture entered into by Irby Construction Co. and Northface Construction, Inc. It does not have an Alaska business license and did not maintain a place of business within the state for the six months preceding its bid submission. Northface, however, has been a licensed general contracting business in Alaska since 1977. Irby, on the other hand, is not licensed to conduct business in Alaska. It specializes in the construction of electrical transmission line systems and has built such systems in over thirty-nine states.

Susitna is a joint venture entered into by Harrison Western Corp. and Newbery Alaska, Inc. The joint venture obtained an Alaska business license before bidding on this contract. The joint venture did not, however, maintain a place of business in the state for the six months preceding its bid. Nonetheless, both corporations were licensed in Alaska and had maintained a place of business in Alaska for the six

* Dimond, Senior Justice, sitting by assignment made pursuant to article IV, section 11, of the Constitution of Alaska.

months preceding the submission of their joint bid.

The Commonwealth Electric Corp. is licensed to do business in Alaska and maintained a place of business in the state for the six months preceding its bid. Accordingly, it is the only indisputably qualified "Alaska bidder" under the statute, although it does not conduct its business exclusively in this state.

Before Irby-Northface prepared its bid, it received assurance from the APA that it qualified as an Alaska bidder on the basis that Northface individually qualified. On February 16, 1983, the sealed bids were opened and the APA subsequently issued a notice of intent to award the contract to Irby-Northface, the apparent low bidder. Susitna then commenced this action in the superior court, challenging the intended award. It argued that Irby-Northface does not qualify as an Alaska bidder because the *joint venture* does not have an Alaska business license and did not maintain a place of business in the state for the six months preceding its bid. Furthermore, the joint venture is composed of two businesses, one of which could not qualify individually as an Alaska bidder. Susitna contended that it qualifies as an Alaska bidder, even though its joint venture did not maintain a place of business in the state for the six months preceding its bid, because each of its two venturers would individually qualify as an Alaska bidder. Finally, Susitna argued that Commonwealth's bid amendment was made improperly and was therefore ineffective. Susitna's bid was lower than Commonwealth's initial bid and was within five percent of Irby-Northface's bid; Susitna therefore concluded that the contract should be awarded to it.

Commonwealth joined in Susitna's suit. It agreed with Susitna that Irby-Northface should not be treated as an Alaska bidder. It argued, however, that its bid amendment was proper and effective. Its amended bid was lower than Susitna's bid and it therefore concluded that the contract should be awarded to it.

Irby-Northface responded with several arguments. The only one relevant to this appeal is the argument that Irby-Northface does qualify as an Alaska bidder under the statute.

The parties stipulated to the facts and agreed that there are no material issues of fact precluding the court from resolving the case on summary judgment. The parties also waived any further appeal rights from the administrative decision of the APA so that the superior court's judgment would be binding.

The superior court rejected all of Irby-Northface's arguments and agreed with Susitna and Commonwealth that Irby-Northface should be treated as a nonresident bidder. It therefore concluded that it would be an abuse of discretion for the APA to award the contract to Irby-Northface because the bid of Susitna and the amended bid of Commonwealth were within five percent of Irby-Northface's bid. The court further concluded that Commonwealth's bid amendment was proper and effective. Commonwealth's amended bid was lower than Susitna's bid and the court therefore ruled that Commonwealth was the lowest Alaska bidder.

Irby-Northface appeals from the superior court's judgment, repeating the arguments it made on the motion for summary judgment. Susitna cross-appeals, contending that the superior court was correct in ruling that Irby-Northface is a nonresident bidder, but erred in ruling that Commonwealth's bid amendment was proper. Commonwealth and the APA argue in response that the superior court's judgment was proper in all respects. The APA, however, has expressly declined to take any position before this court on the proper meaning of the term "Alaska bidder."

As explained below, we disagree with the superior court's ultimate conclusion. We hold that the APA's determination was correct: Irby-Northface qualifies as an Alaska bidder under the statute. It submitted the lowest bid and it therefore should be awarded the contract. We accordingly find it unnecessary to address the other argu-

ments raised by the parties because they cannot affect the outcome of the case.

IV. DISCUSSION

Commonwealth contends that, in order for a joint venture to qualify as an Alaska bidder, the joint venture itself must fulfill the requirements enumerated in AS 37.05.-230(5), which are: (1) hold a current Alaska business license, (2) submit its bid under the name appearing on the license, and (3) have maintained a place of business within the state for a period of six months immediately preceding the submission of its bid. Susitna contends that a joint venture may alternatively qualify as an Alaska bidder if each of the venturers would individually qualify. The superior court agreed with Susitna, stating:

> The Court recognizes that joint ventures are often formed for the purpose of making a bid on a particular job. Where principals of the joint venture have maintained a place of business within the state for a period of six months immediately preceding the date of the bid, this Court concludes that AS 37.05.230(5)(c) is substantially complied with. Furthermore, where the joint venture acquires a current business license in the joint venture name prior to award of the contract, and all members of the joint venture hold a current Alaska business license at the time of the bid, this Court concludes that AS 37.05.230(5)(a) and (b) are substantially complied with.

We agree with this much of the superior court's decision and similarly hold that a joint venture may qualify as an Alaska bidder if each of the venturers would individually qualify. The court further held, however, that "*all* principals of a joint venture or any other bidder applying for a preference must have maintained places of business within the State of Alaska for at least six months prior to the bid to be eligible for the Alaska Bidders Preference." (Emphasis added.) In accordance with this analysis, Irby-Northface could not qualify as an Alaska bidder because one of the two venturers, Irby Construction, did not have an Alaska business license and had not maintained a place of business within the state for the six months preceding the joint venture's bid submission.

Before it decided to submit a bid on the contract, Irby-Northface was uncertain whether its joint venture would qualify for bidder preference. The corporations accordingly inquired of the APA as to its policy. They were informed that the APA interpreted AS 37.05.230 as permitting a joint venture to qualify for preference if any of the venturers would qualify individually as an Alaska bidder. They were further informed that the APA has consistently granted preference to joint ventures when one of the venturers qualified individually as an Alaska bidder.

The parties dispute the amount of deference this court should give to the APA's interpretation of the statute. As we recently indicated, "The independent judgment standard is used when agency expertise or the determination of fundamental policies are not involved.... However, even under the independent judgment standard ... the court should give some weight to what the agency has done, especially where the agency interpretation is longstanding." *National Bank of Alaska v. State*, 642 P.2d 811, 815 (Alaska 1982) (citations omitted).

The APA's longstanding interpretation of the bidder preference statute is based upon three factors: first, this is the same interpretation given to the statute by the Department of Administration; second, it is in accordance with the purpose of the statute; and third, it is harmonious with the only Alaska statute addressing an analogous situation. As to the first of these factors, the Department of Administration has indicated by affidavit that it interprets the statute as requiring that preference be given to a joint venture when any one of the venturers qualifies as an Alaska bidder "in order to accomplish the objectives of insuring that Alaskan firms receive a preference." The Department notes that "a more literal interpretation would result in joint ventures of Alaskan firms not receiving the

bidder preference—a result clearly not intended by the statute."

Turning to the second factor relied upon by the APA, the purpose of the statute, it is clear that the statute's purpose is to give Alaskan businesses a competitive chance with nonresident businesses in the award of state contracts. We need not and do not decide whether this is a constitutional purpose and whether the statute is reasonably related to that purpose. We do hold, however, that the APA's interpretation of the statute is the most consonant with that purpose.

As a practical matter, an Alaskan business may be unable to bid on a contract by itself and may be unable to find another Alaskan business with which to associate on the bid. The Alaskan business may thus be compelled to associate with a nonresident bidder. The only means by which the legislative purpose of giving a preference to the Alaskan business can be fulfilled under these circumstances is by granting a preference to the entire joint venture. The mere fact that a nonresident bidder is accordingly also given preference does not make this interpretation unreasonable. When the bidder is a joint venture comprised of one corporation that would qualify for preference and another corporation that would not, a conflict in purpose arises. On the one hand, the legislature has indicated that nonresidents are not to be given preference, but on the other hand, it has also indicated that qualifying corporations are to be given preference. Under these circumstances, we believe the paramount interest is that qualifying corporations be given preference, which can only be accomplished by giving preference to the entire joint venture. As one commentator notes:

> Chancellor Kent made a classic observation that: "In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter...." If upon examination the general meaning and object of the statute is inconsistent with the literal import of any clause or section, such clause or section must, if possible, be construed according to that purpose.

2A C. Sands, Sutherland Statutory Construction § 46.05, at 57 (4th ed. 1973) (footnotes omitted). Accordingly, we conclude that the APA's interpretation of the statute is the proper one.

This conclusion is supported by the third factor relied upon by the APA. The APA notes that there is only one statute addressing an analogous situation, AS 08.18.011. This statute provides as follows:

> It is unlawful for a person to submit a bid or work as a contractor until that person has been issued a certificate of registration by the Department of Commerce and Economic Development. *A partnership or joint venture shall be considered registered if one of the general partners or venturers whose name appears in the name under which the partnership or venture does business is registered.*

(Emphasis added.) As indicated in this statute, contractors are not permitted to bid on state projects unless they are registered in this state. A situation analogous to the one posed by this case arises when a joint venture wishes to bid on a contract, but only one of the venturers is a registered contractor. The state legislature resolved this problem by holding that the joint venture may bid on the project as long as one of the venturers is a registered contractor. We believe that the legislature intends the same result to occur with respect to "Alaska bidders." We therefore conclude that the proper interpretation of the bidder preference statute is that a joint venture must be given preference if one of the venturers qualifies individually for the preference.

In its bid evaluation, the APA concluded that Irby-Northface qualified for preference, stating as follows:

> [Irby-Northface] submitted the bid on the appropriate forms, properly completed and signed, all addendums were acknowledged and bid security was furnished as required. Both joint venture partners are registered as Contractors in the State of Alaska. The bidder qualifies for Alas-

ka Bidders Preference based on the fact that one of the joint venture partners (Northface Construction) possesses a valid business license (BL # 048240) and has been in business for more than the required six months.

This evaluation is in accordance with the interpretation of AS 27.05.230 that we have made in the exercise of our independent judgment, giving some weight to the APA's longstanding interpretation. Accordingly, the contract should be awarded to Irby-Northface, the lowest responsive bidder.

The judgment of the superior court is REVERSED.

RABINOWITZ, Justice, with whom BURKE, Chief Justice, joins, concurring.

I agree with the majority's conclusion that Irby-Northface should be considered an Alaska bidder under AS 37.05.230 for the reasons stated in the opinion of the court.

I would, however, address the clear unconstitutionality of the bidder preference statute under our precedent of *Lynden Transport, Inc. v. State*, 532 P.2d 700 (Alaska 1975).[1] In *Lynden* we stated that:

> A discrimination between residents and nonresidents based solely on the object of assisting the one class over the other economically cannot be upheld under either the privileges and immunities or equal protection clauses.

Id. at 710. In this case, "it is clear that the statute's purpose is to give Alaskan businesses a competitive chance with nonresident businesses in the award of state contracts,"[2] as noted by the majority. Under Alaska's equal protection clause, such a purpose does not justify a statute which discriminates against nonresidents. *Lynden*, 532 P.2d at 711.[3]

1. Normally it is appropriate to avoid constitutional rulings unnecessary to the decision of a particular case. In the present context, however, the constitutional defect of AS 37.05.230 is manifest and, as the state notes in its amicus brief, the disruptive consequences of uncertainty in the law are considerable in the area of public construction. Thus, in this circumstance I think it appropriate to address the constitutional issue.

2. The state and Susitna argue that the real purpose of the preference statute is to strengthen the local economy. Such an argument was advanced and rejected in *Lynden*, 532 P.2d at 709.

3. *Lynden* was decided under the federal rational basis equal protection analysis. 532 P.2d at 707, *citing*, *Morey v. Doud*, 354 U.S. 457, 463–64, 77 S.Ct. 1344, 1348–1349, 1 L.Ed.2d 1485, 1490 (1957). Since *Lynden*, we have established that the lowest level of scrutiny to be employed under Alaska's equal protection clause is more stringent than the minimum federal standard. *Gilman v. Martin*, 662 P.2d 120 at 125 (Alaska, 1983); *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978); *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976).

STATE of Alaska, DEPARTMENT OF NATURAL RESOURCES and Northern Adjusters, Inc., Petitioners,

v.

Lee DUPREE, Respondent.

No. 6047.

Supreme Court of Alaska.

May 13, 1983.

Petition was filed seeking review of a decision of the Superior Court, Fourth Judicial District, Fairbanks, James R. Blair, J., which was made in a workers' compensation case. The Supreme Court, Burke, C.J., held that claimant's average weekly wage was not unfairly calculated merely because it exceeded her salary on the date of injury.

Affirmed.

Matthews, J., filed dissenting opinion in which Rabinowitz, J., joined.

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.

1. Constitutional Law ⇐48(1, 3)

When presented with a constitutionally based challenge to a statute, the Supreme Court presumes the statute to be constitutional unless the party mounting the challenge proves otherwise; any doubt in the matter must be resolved in favor of the statute's constitutionality.

2. Appeal and Error ⇐318

A constitutional question reserved to the Supreme Court from the district court is too important to be answered at random and it will not be answered unless fully presented and argued.

3. Constitutional Law ⇐213.1(2)

"Strict scrutiny," which is used when the statute in question employs a suspect classification or traverses a fundamental right, requires that before the statute can be upheld, the reviewing court must find that the statute serves some compelling state interest and that it is narrowly drawn so as to not unnecessarily interfere with a fundamental right or use a suspect classification. U.S.C.A.Const.Amends. 5, 14.

4. Constitutional Law ⇐225.4

Statute providing that public contracts shall be let, if advertisement for bids is not required, to a resident of the state, and that if advertisement for bids is required the contract shall be let to the responsible resident making the lowest bid if such resident's bid is not more than five percent higher than that of the lowest responsible nonresident bidder, did not warrant strict scrutiny analysis as applied to nonresident corporation challenging its constitutionality under the equal protection clause of the Fourteenth Amendment, 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 corporations. W.S. 1977, § 9–8–302; U.S.C.A.Const.Amends. 5, 14.

5. Courts ⇐89

Opinions of the Attorney General construing statutes are entitled to weight, particularly when they have been weathered by time and where the legislature has failed over a long period to make any change in the statute following its interpretation by the Attorney General.

6. Constitutional Law ⇐225.4
Public Contracts ⇐2

As applied to nonresident corporation bidding on public contract, statute providing that a public contract shall be let, if advertisement for bids is not required, to a resident of the state, and that if advertisement for bids is required the contract will be let to the responsible resident making the lowest bid if such resident's bid is not more than five percent higher than that of the lowest responsible nonresident bidder, 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. U.S.C.A.Const.Amend. 14; W.S.1977, § 9–8–302.

7. Constitutional Law ⇐38

Public policy is not a basis for declaring a statute unconstitutional.

8. Constitutional Law ⇐70.3(14)

Argument by nonresident corporation bidding on public contract that statute giving preference on public contracts to residents should be declared unconstitutional on a public policy basis would not be considered, because the legislature had announced the public policy with regard to the statute. W.S.1977, § 9–8–302.

Don W. Riske, Andrews, Andrews & Riske, P. C. (argued), Cheyenne, for plaintiff.

Steven F. Freudenthal, Atty. Gen., Bruce A. Salzburg, Senior Asst. Atty. Gen. (argued), and I. Vincent Soto, Jr., Douglas, for defendant.

Before ROSE, C. J., and RAPER, THOMAS, ROONEY and BROWN, JJ.

RAPER, Justice.

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

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

We shall uphold the statute.

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

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

1. Section 1–13–101, W.S.1977:
"When an important and difficult constitutional question arises in a proceeding pending before the district court on motion of either party or upon his own motion the judge of the district court may cause the question to be reserved and sent to the supreme court for its decision."

2. Article I, § 6, Wyoming Constitution:
"No person shall be deprived of life, liberty or property without due process of law."

3. Article I, § 3, Wyoming Constitution:
"Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction."

4. Section 1 of the Fourteenth Amendment to the United States Constitution:
"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
Article I, § 34, Wyoming Constitution is the Wyoming version of the right to equal protection:
"All laws of a general nature shall have a uniform operation."
Washakie County School District Number One v. Herschler, infra.

5. Section 9–8–301, W.S.1977:
"As used in this act [§§ 9–8–301 to 9–8–304, 9–8–308] the word 'resident' means any person who shall have been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract; a partnership or association, each member of which shall have been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract; a corporation which has been organized under the laws of the state of Wyoming and has been in existence therein for one (1) year or more immediately prior to bidding upon the contract and which has its principal office and place of business within the state of Wyoming."

it declared unconstitutional.[6] On October 7, 1981, the parties and the Wyoming Attorney General entered into a stipulation setting forth the uncontroverted facts and requesting that the question of the statute's constitutionality be reserved to this court. Pursuant to that request, the district judge filed his findings of fact and ordered that the constitutional question be reserved. The district court fully complied with the rule that all preliminary matters including factual questions must first be disposed of before the supreme court will consider a reserved constitutional question. *State v. Rosachi*, Wyo., 549 P.2d 318 (1976).

I

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

II

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

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

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

6. Galesburg's complaint stated in pertinent part:

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

"a. violates Article 1, Section 6 of the Constitution of the State of Wyoming by depriving the Plaintiff of its property rights without due process of law;

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

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

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

III

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

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

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

IV

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

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

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

8. Not all the cases cited were right on point. One, *York v. State*, 53 Hawaii 557, 498 P.2d 644 (1972), found a three-year residency requirement for public employment not to require strict scrutiny; however, the court struck it down anyway using only the rationally-related test. Another case cited not belonging here was *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948). That case was decided on the basis of the Privilege and Immunities Clause. However, that clause, which protects citizens of one state in regards to activities in another state, is not involved here because Galesburg is a Wyoming corporation trying to do business in Wyoming. We also can find no support for Galesburg's position in *Rayco Construction Company, Inc. v. Vorsanger*, 397 F.Supp. 1105 (ED Ark.1975). It held the statute in question discriminatory as to both domestic and foreign contractors and applied a strict construction test because of its criminal sanctions for violations. It did not hold that a proper preference may not be allowed and in fact intimated it could.

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

Viewing the statute, as it is applied to Galesburg, under the lower level of scrutiny, we must determine whether the statute serves a legitimate state interest and whether it is rationally related to the advancement of that interest. Previously it has been said that the purpose of § 9-8-302, supra, was "to encourage local industry." Opinions, Attorney General of Wyoming, No. 49, June 24, 1963, at page 240.[9] We agree that this appears to have been the legislature's likely intent. We further hold that this is definitely a legitimate state interest. Accordingly, the only question left is whether the statute as drawn is rationally related to the advancement of this state interest. We hold that it is.

By giving Wyoming corporations[10] a handicap in bidding on public contracts, the statute in essence increases the likelihood that a Wyoming corporation will be awarded the contract. When contracts are awarded to Wyoming corporations, as opposed to out-of-state corporations, local industry is encouraged. This contributes to, strengthens, and stabilizes the state and local economy—the primary interest is that of the public. *Equitable Shipyards, Inc. v. State*, 93 Wash.2d 465, 611 P.2d 396 (1980). A benefit to a particular person, be it corporate or natural, is only incidental and not lethal to constitutionality. The money payable under the contract is more likely to remain within the state, and enhance the tax base of state and local government.[11] Therefore, we conclude that, as applied to Galesburg, the statute does not run afoul of the Fourteenth Amendment.

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

V

[7, 8] The remaining portion of Galesburg's argument is to the effect that we should declare the statute unconstitutional on a public policy basis. As stated earlier, we have no authority to overturn statutes enacted by the legislature merely because we believe that they are against public policy. The legislature announces public policy by its enactments. Statutes are entitled to a presumption of constitutionality unless the challenging party clearly establishes that constitutional principles are violated by the statute. Public policy is not a basis for declaring a statute unconstitutional. Wisdom or expediency of statutes is for the legislature and not the courts. *Denny v. Stevens*, 52 Wyo. 253, 75 P.2d 378, 113 A.L.R. 1337 (1938). Courts must not usurp or encroach upon the legislative function.

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

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

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

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

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

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

ROONEY, Justice, dissenting.

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

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

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

"WHETHER W.S. 9–8–302, WHICH STATES:

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

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

It may be contended that I am assuming a fact not present—that the record does not reflect the plaintiff's stockholders to have been Wyoming residents for an extended period prior to incorporation. But the majority opinion makes a like assumption. The record does not reflect that such stockholders were *not* long-time residents of Wyoming. If this fact were necessary to resolve the constitutional question, the matter would not be ripe for answer to a reserved question. *State v. Rosachi*, Wyo., 549 P.2d 318 (1976). However, the intent of the legislature as indicated by the legislative history of § 9–8–301, W.S.1977 [1] was to preclude

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

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

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

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

It may also be contended that the reserved question concerns an inquiry about § 9–8–302, W.S.1977[2] and that we should not consider the constitutionality of § 9–8–301, W.S.1977. Such contention overlooks the fact that § 9–8–301 defines the terms used in § 9–8–302. The meaning and legislative intent as expressed in § 9–8–302 cannot be ascertained without reference to the validity of § 9–8–301. Whether or not § 9–8–302 is violative of the Constitutions depends upon the language thereof as defined by § 9–8–301. The word "resident" as used in § 9–8–302 makes the application of the section unconstitutional. Section 9–8–301 must be examined to determine the constitutionality of § 9–8–302. They must be considered *pari materia*.

> "It is a fundamental principle of statutory construction that to ascertain the meaning of a given law all statutes relating to the same subject or having the same general purpose shall be read in connection with it as constituting one law. They must be construed in harmony, else the law of the State would consist of disjointed and unharmonious parts with a conflicting and confusing result. * * *" *Stringer v. Board of County Commissioners of Big Horn County*, Wyo., 347 P.2d 197, 200 (1959). See *Kuntz v. Kinne*, Wyo., 395 P.2d 236 (1964); *Brinegar v. Clark*, Wyo., 371 P.2d 62 (1962).

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

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

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

place of business within the state of Wyoming."

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

71 Cal.2d 566, 79 Cal.Rptr. 77, 456 P.2d 645 (1969). See *Torao Takahashi v. Fish and Game Commission*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948).

I would answer the reserved question by holding the statute unconstitutional in denying equal protection to some persons to which it is applicable, i.e., those long-time Wyoming residents who have chosen to do business as a corporation within a year previous to the bids referred to in the statute.

STATE of Wyoming, Plaintiff,

v.

Roger ANTONICH, Defendant.

No. 84–35.

Supreme Court of Wyoming.

Jan. 10, 1985.

General superintendent of construction company was charged with violating Wyoming Preference Act. The County Court, Converse County, John Allan Holtz, J., dismissed charge on ground that Act violated privileges and immunities clause of Federal Constitution. State applied to file bill of exceptions. The Supreme Court, Rose, J., held that Wyoming Preference Act does not violate the privileges and immunities clause of the Federal Constitution.

Bill of exceptions sustained.

Thomas, C. J., filed specially concurring opinion.

1. Constitutional Law ⇐207(1)

Examination of a state enactment to determine its validity under the privileges and immunities clause involves a two-step analysis: first, reviewing court must determine whether statute burdens a fundamental right or activity, since only those "privileges" and "immunities" which bear upon the concept of interstate harmony fall within the scope and purpose of the clause; second, court must examine the reasons for the discriminatory treatment to determine their validity and their relation to the degree of discrimination imposed by the statute. U.S.C.A. Const. Art. 4, § 2, cl. 1.

2. Constitutional Law ⇐207(2)
States ⇐98

Wyoming Preference Act, which requires contractors to employ available qualified Wyoming laborers for public works projects in preference to nonresident laborers, does not violate the privileges and immunities clause of the Federal Constitution, notwithstanding the Act's infringement upon a recognized fundamental right, as the Act narrowly addresses goal of reduced unemployment among state's taxpayers by preferring available, qualified residents for government-funded positions. W.S. 1977, §§ 16–6–201 to 16–6–206; U.S.C.A. Const. Art. 4, § 2, cl. 1.

A.G. McClintock, Atty. Gen., Gerald A. Stack, Deputy Atty. Gen., John W. Renneisen, Sr. Asst. Atty. Gen., and Michael A. Blonigen, Asst. Atty. Gen., for plaintiff.

Daniel E. White, Cheyenne, for defendant.

Before THOMAS,* C.J., and ROSE, ROONEY,** BROWN and CARDINE, JJ.

ROSE, Justice.

We granted the State of Wyoming's application to file a bill of exceptions in order to address a single issue:

"Does the Wyoming Preference for State Laborers Act, Section 16–6–201, et seq., W.S. 1977, violate the privileges and immunities clause of the United States Constitution?"

We will hold that the challenged Act is narrowly tailored to fit a particular problem identified by the State and, therefore, does not impermissibly infringe the privileges and immunities of the citizens of states other than Wyoming.[1] Accordingly, we sustain the bill of exceptions filed by the State.

WYOMING PREFERENCE ACT OF 1971

In 1971, the legislature adopted the "Wyoming Preference Act," §§ 16–6–201 through 16–6–20 quires contractors ified Wyoming l projects in prefer ers. Section 16–6 the key provision "Every person duty of constru proving, enlargi any public work for the state or municipal corpo mental unit, sha laborers on the Every contract contain a provis ming labor be u may be used wh not available fo within the state perform the wo employment offi contract or cons tain a list of lab who are residen employment. W employment offi the requested n its own list, it s other state emp quest the names ers. Every per Wyoming labore est state emplo ployment needs. ment office cer need for laborer those listed as o tion is filed, then other than Wyon

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* Became Chief Justice January 1, 1985.

** Chief Justice at time of oral argument.

1. The United States Constitution, Art. IV, § 2, provides:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

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through 16–6–206, W.S.1977, which requires contractors to employ available qualified Wyoming laborers for public-works projects in preference to nonresident laborers. Section 16–6–203, W.S.1977, contains the key provision of the Act:

"Every person who is charged with the duty of construction, reconstructing, improving, enlarging, altering or repairing any public works project or improvement for the state or any political subdivision, municipal corporation, or other governmental unit, shall employ only Wyoming laborers on the project or improvement. Every contract let by any person shall contain a provision requiring that Wyoming labor be used except other laborers may be used when Wyoming laborers are not available for the employment from within the state or are not qualified to perform the work involved. The state employment office nearest the proposed contract or construction site shall maintain a list of laborers, classified by skills, who are residents and are available for employment. When the nearest state employment office is unable to provide the requested number of laborers from its own list, it shall immediately contact other state employment offices and request the names of other available laborers. Every person required to employ Wyoming laborers shall inform the nearest state employment office of his employment needs. If the state employment office certifies that the person's need for laborers cannot be filled from those listed as of the date the information is filed, then the person may employ other than Wyoming laborers."

On September 22, 1983, the Converse County prosecuting attorney charged Roger Antonich, general superintendent of Westates Construction Company, with violating § 16–6–203, supra. The information alleged that Antonich fired a Wyoming worker from a public-school construction project in order to hire out-of-state workers. The county court judge dismissed the charge on the ground that § 16–6–203, supra, violates the privileges and immunities clause of the federal constitution. The court relied on *Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), and recent cases from other jurisdictions in which the courts have invalidated statutory preferences for local workers. After examining these and similar opinions, we conclude that certain distinguishing features in Wyoming's Preference Act sufficiently limit its scope so as to satisfy the demands of the privileges-and-immunities clause.

PRIVILEGES-AND-IMMUNITIES CLAUSE ANALYSIS

[1] An examination of a state enactment to determine its validity under the privileges-and-immunities clause involves a two-step analysis. First, the reviewing court must determine whether the statute burdens a fundamental right or activity, since only those "privileges" and "immunities" which bear upon the concept of interstate harmony fall within the scope and purpose of the clause. *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, —— U.S. ——, ——–——, 104 S.Ct. 1020, 1027, 79 L.Ed.2d 249, 258–259 (1984); *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 383–388, 98 S.Ct. 1852, 1860–1862, 56 L.Ed.2d 354 (1978); *Toomer v. Witsell*, 334 U.S. 385, 395–396, 68 S.Ct. 1156, 1161–1162, 92 L.Ed. 1460 (1948). Second, the court must examine the reasons for the discriminatory treatment to determine their validity and their relation to the degree of discrimination imposed by the statute. This portion of the test was developed by the United States Supreme Court in *Toomer v. Witsell*, supra:

"Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. *Thus the inquiry in*

each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have consideration leeway in analyzing local evils and in prescribing appropriate cures." (Emphasis added.) 334 U.S. at 396, 68 S.Ct. at 1162.

The Toomer court established that classifications based on non-citizenship cannot stand

"* * * unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." 334 U.S. at 398, 68 S.Ct. at 1163

The State concedes that the discrimination against nonresidents under the Wyoming Preference Act burdens a fundamental right. In an early case, the United States Supreme Court held that the privileges-and-immunities clause protects the right of a citizen of one state to travel to another state for purposes of employment. *Ward v. Maryland*, 79 U.S. (12 Wall) 418, 430, 20 L.Ed. 449 (1870). The Supreme Court reaffirmed this principle in *Hicklin v. Orbeck*, supra, 437 U.S. at 525, 98 S.Ct. at 2487. Even more pertinent to the instant case, the Supreme Court recently held that an enactment preferring local workers for public construction projects burdens a fundamental right and, therefore, falls within the purview of the privileges-and-immunities clause. *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, supra, — U.S. at ———, 104 S.Ct. at 1027–1029, 79 L.Ed.2d at 258–261. Clearly, Wyoming's Preference Act offends the privileges-and-immunities clause unless a close link exists between valid reasons for the Act and the discrimination practiced.

The State, in its brief, identifies the purpose of the Act as the reduction in unemployment among the labor force which makes possible government projects through contributions to the public treasury. Stated conversely, the evil which the Wyoming Preference Act combats is

"* * * a resident remaining unemployed while a nonresident takes a job on a Wyoming public works project." (State's brief.)

Thus, the Wyoming Preference Act attempts to insure that government-created jobs benefit the State's citizens.

Without question, reduction in unemployment among Wyoming citizens constitutes a valid state goal. See *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, supra; *Hicklin v. Orbeck*, supra. We turn, therefore, to an examination of the relationship between this legitimate reason underlying the Wyoming Preference Act and the discrimination mandated against nonresidents.

Enactments to alleviate high unemployment levels through the hiring of residents in preference to nonresidents generally have swept too broadly to survive challenges brought under the privileges-and-immunities clause. The prime example of such legislation is the "Alaska Hire" Act at issue in *Hicklin v. Orbeck*, supra. That Act required the employment of qualified Alaska residents in preference to nonresidents for positions associated with

"* * * all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party * * *." 437 U.S. at 520, n. 2, 98 S.Ct. at 2485 n. 2.

The United States Supreme Court cited three bases for holding that the discrimination imposed by this statute failed to bear a close relation to the problem of high unemployment in Alaska. First, the state had made no showing that nonresidents were a peculiar source of widespread unemployment. Rather than the influx of nonresidents looking for work, the major cause of unemployment appeared to be the inade-

quate education and training and the geographical remoteness of many jobless residents—particularly the Eskimo and Indian residents. 437 U.S. at 526–527, 98 S.Ct. at 2487–2488. Secondly, the Court determined that Alaska Hire did not narrowly address the problem of unemployment, since the Act simply preferred all residents, regardless of their employment status, education or training. 437 U.S. at 527, 98 S.Ct. at 2488. Finally, the Supreme Court observed that the discriminatory effect of Alaska Hire extended well beyond those activities in which the state held a substantial proprietary interest:

"* * * In sum, the Act is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents. We believe that Alaska's ownership of the oil and gas that is the subject matter of Alaska Hire simply constitutes insufficient justification for the pervasive discrimination against nonresidents that the Act mandates." 437 U.S. at 531, 98 S.Ct. at 2490.

A number of state courts have adopted the foregoing rationale in invalidating enactments which grant an employment preference to local workers. *Laborers Local Union No. 374 v. Felton Construction Company*, 98 Wash.2d 121, 654 P.2d 67 (1982); *Massachusetts Council of Construction Employers, Incorporated v. Mayor of Boston*, 384 Mass. 466, 425 N.E.2d 346 (1981), rev'd under the commerce clause, 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983); *Salla v. County of Monroe*, 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878, cert. denied 446 U.S. 909, 100 S.Ct. 1836, 64 L.Ed.2d 262 (1979). We find, however, that Wyoming's Preference Act, unlike the enactments at issue in these cases and Alaska Hire, precisely fits the particular evil identified by the State.

As noted above, the act seeks to prevent a qualified Wyoming worker's remaining unemployed while a nonresident goes to work on a government-funded construction project. The statute makes no attempt to eradicate the general unemployment in this state which may be due to factors unrelated to nonresidents. Accordingly, the Act directs its discriminatory treatment toward the nonresident applicants for jobs on public-works projects—those individuals who constitute the peculiar source of the evil identified by the State.

Secondly, the Wyoming Preference Act specifically addresses the problem of unemployment among Wyoming construction workers. Section 16–6–203, supra, requires contractors to contact the local employment office to determine whether qualified resident workers are available. If the number of qualified residents listed with state employment offices is insufficient to meet employment needs, contractors are free to hire nonresident workers. An employer need not attempt to hire residents away from other jobs or to dismiss nonresidents and hire residents as they become available. Under the Act, an employer must deny nonresidents employment only when the state employment office provides a sufficient number of residents who are qualified and available to go to work.

Finally, we attach significance to the fact that the Wyoming Preference Act confines its discriminatory effects to projects constructed from public funds. The government's proprietary interest in the subject matter of the discriminatory statute constitutes a crucial factor in support of the statute's validity:

"* * * The fact that [the city] is expending its own funds or funds it administers in accordance with the terms of a grant is certainly a factor—perhaps the crucial factor—to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause. But it does not remove the [city] ordinance completely from the purview of the Clause." *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, supra,

— U.S. at ——, 104 S.Ct. at 1029, 79 L.Ed.2d at 260.

The Court elaborated in that case:

"Every inquiry under the Privileges and Immunities Clause 'must ... be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures.' *Toomer v. Witsell*, 334 U.S. 385, 396, 68 S.Ct. 1156, [1162], 92 L.Ed. 1460 (1948). This caution is particularly appropriate when a government body is merely setting conditions on the expenditure of funds it controls." — U.S. at ——, 104 S.Ct. at 1030, 79 L.Ed.2d at 261.

The Wyoming statute at issue in the present case requires merely that governmental funds, allocated to public-works projects, be used to hire qualified, available residents in preference to nonresidents. The statute does not effect the sort of wide-ranging discriminatory treatment fatal to Alaska Hire in Hicklin v. Orbeck, supra. Since the Wyoming Preference Act limits its discriminatory effect to government-created jobs, it presents minimal affront to the privileges and immunities of noncitizens. *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, supra.

[2] We hold that the Wyoming Preference Act does not violate the privileges-and-immunities clause of the federal constitution, notwithstanding the Act's infringement upon a recognized fundamental right. The Act narrowly addresses the goal of reduced unemployment among the state's taxpayers by preferring available, qualified residents for government-funded positions. Since the degree of discrimination bears a close relation to the state's valid reasons for discriminatory treatment, we affirm the Act's validity under the test established in *Toomer v. Witsell*, supra, and refined in subsequent cases.

Although not determinative of our decision here, we recently held in *Galesburg Construction Company, Inc. of Wyoming v. Board of Trustees of Memorial Hospital of Converse County*, Wyo., 641 P.2d 745 (1982), that Wyoming's preference for resident bidders on public-works contracts, § 9-8-302, W.S.1977, does not violate the equal-protection provisions of the state and federal constitutions. Our result in the instant case, upholding Wyoming's preference for resident workers on public-works projects, harmonizes with our decision in *Galesburg Construction Company, Inc. of Wyoming v. Board of Trustees of Memorial Hospital of Converse County*, supra.

The bill of exceptions is sustained.

THOMAS, Chief Justice, specially concurring.

I am in complete accord with the result reached by the majority in this case, but I have a concern about the adequacy of the record to support the nexus between the evil of "a qualified Wyoming worker's remaining unemployed while a nonresident goes to work on a government-funded construction project" and the statute in question. I agree that that is a possibility, but the record does not demonstrate it. The statutory language simply makes the state employment offices a repository of information, and does not limit the "list of laborers, classified by skills, who are residents" to the unemployed. It simply requires that they be "available for employment."

I am satisfied that on the basis of existing precedent the role of the State in connection with "constructing, reconstructing, improving, enlarging, altering or repairing any public works project or improvement for the state or any political subdivision, municipal corporation or other governmental unit" is that of a market participant pursuing essentially a proprietary function. It is inappropriate to invoke the Privileges and Immunities Clause to inhibit the State in that regard. Both *Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), and *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, — U.S. ——,

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of Converse County, su-

eptions is sustained.

ef Justice, specially con-

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Clause to inhibit the State
Both *Hicklin v. Orbeck*,
S.Ct. 2482, 57 L.Ed.2d 397
ited Building and Con-
es Council of Camden
inity v. Mayor and Coun-
of Camden, — U.S. —,
104 S.Ct. 1020, 79 L.Ed.2d 249 (1984), recognize that the proprietary interest of the State in the property with which the statute deals is often a crucial factor in determining whether a discriminatory statute against non-citizens violates the Privileges and Immunities Clause. I perceive that, without articulating such a concept, the Supreme Court of the United States has preserved a delicate balance between the Reservation of Powers Clause found in Amendment X to the Constitution of the United States of America and the Privileges and Immunities Clause. The line that is drawn is that between the governmental function of the State and the right of the State to participate in the marketplace, satisfy its proprietary functions, and contract freely with those with whom it chooses to contract.

In *Hicklin v. Orbeck*, supra, at 437 U.S. 531, 98 S.Ct. at 2490, the Supreme Court recognized what it described as a mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause, which it said stems from their origin in the Fourth Article of the Articles of Confederation. In *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980), the Court said:

> "* * * The State's refusal to sell to buyers other than South Dakotans is 'protectionist' only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. * * Such policies, while perhaps 'protectionist' in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State."

Conceding that the Court there was dealing with the application of the Commerce Clause, because of the mutually reinforcing relationship between the two clauses I find that concept applicable in this instance with respect to the Privileges and Immunities Clause.

It cannot be held objectionable for a sovereign state to adopt legislation which provides in essence that to the extent possible public works contracts benefit the citizens of the state whose contributions to the public treasury fund those projects. A state should not be foreclosed by the invocation of the Constitution of the United States of America from loyalty to interests of its own citizens. So long as a statute is narrowly drawn to protect only the right of the state to contract as it sees fit with respect to expenditures for public works projects which it owns and which it funds, I am satisfied that as a matter of law such a statute does not offend the Privileges and Immunities Clause found in Art. IV, § 2 of the Constitution of the United States of America. This, of course, makes it unnecessary for the court to pursue the remand technique invoked in *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, supra.

I would agree that the bill of exceptions should be sustained for the foregoing reasons.

CHEYENNE MINING AND URANIUM COMPANY, a Wyoming corporation, Appellant (Plaintiff),

v.

FEDERAL RESOURCES CORPORATION, a Nevada corporation, and American Nuclear Corporation, a Colorado corporation, a partnership doing business under the name Federal-American Partners, Appellees (Defendants).

No. 83–69.

Supreme Court of Wyoming.

Jan. 21, 1985.

Royalty owner under contract for purchase and sale of unpatented uranium min-

HAWAII

an amount in the highway fund sufficient to pay the State's share of the contract before the performance contracted for is completed. [L 1965, c 147, §1; Supp, §9-36.5]

§103-41 Definitions. Whenever used in sections 103-41 through 103-48:

(1) "Person" includes every individual, partnership, firm, society, unincorporated association, joint venture, group, hui, joint stock company, corporation, trustee, personal representative, trust estate, decedent's estate, trust, or other entities, whether the persons are doing business for themselves or in any agency or a fiduciary capacity.

(2) "Products" include materials, manufactures, supplies, merchandise, goods, wares, products, and foodstuffs.

(3) "Produced or manufactured" includes the processing, developing, and making of a thing into a new article with a distinct character and use through the application of input within the State including Hawaii products, labor, skill, or other services. This does not include the mere assembling or putting together of non-Hawaii products or material.

(4) "Hawaii products" include products which are mined, excavated, produced, manufactured, raised, or grown in the State by a person where the input stated in paragraph (3) above constitutes no less than twenty-five per cent of the manufactured cost. Where the value of the input constitutes twenty-five per cent or more but less than fifty per cent of the manufactured cost, the product shall be classified as Class I; where the value of the input constitutes fifty per cent or more but less than seventy-five per cent of the manufactured cost, the product shall be classified as Class II; where the value of the input constitutes seventy-five per cent or more of the manufactured cost, the product shall be classified as Class III.

(5) "Governmental agency" includes the State, municipal or county governments, or any department, bureau, division, agency, or political subdivision thereof and any board, committee, public officer, or employee thereof. [L 1939, c 260, pt of §1; RL 1945, pt of §355; RL 1955, §9-37; am L 1963, c 124, pt of §2; HRS §103-41; am L 1976, c 200, pt of §1]

Attorney General Opinions

Under prior law, "manufacture" included making new products out of existing materials. Att. Gen. Op. 63-6.

§103-42 Hawaii products list, bidding and advertisements. The state comptroller shall make rules and regulations for the establishment and administration of a Hawaii products list, including the various classifications of Hawaii products; for necessary procedures for qualifying and registering products for such list; for the annual revision of the list; and for such other purposes as may be necessary to carry out the intent of the preferences provided for in section 103-43.

The comptroller shall distribute copies of the list to the purchasing departments of the various governmental agencies.

The comptroller shall have the authority to examine and review the financial statements and such other reports as may be necessary, of any person, who desires

to have his products on the Hawaii products list, to determine whether the products meet the qualifications. All persons whose products are on the Hawaii products list shall be responsible for informing the comptroller of any change in the classifications of their products which have been originally registered with the Hawaii products list within two months of the change. In any event, such persons shall file annually with the comptroller such documents or information as may be required in determining any change in the classification of a Hawaii product under the rules and regulations to be established by the comptroller, within two months from the closing of their books, whether on a fiscal or calendar year.

Advertisement for bids by a governmental agency shall contain, if applicable, a notice referring to the preferences for Hawaii products and to section 103-43, and shall also contain a notice referring to the place where the Hawaii products list may be examined. [L 1939, c 260, pt of §1; am L 1941, c 308, §1(a); RL 1945, pt of §355; RL 1955, §9-38; am L 1963, c 124, pt of §2; am L 1967, c 89, §1]

Attorney General Opinions

Comptroller may refuse registration of products in Hawaii products list when they are not adequately described. Att. Gen. Op. 64-45.

Misrepresentation in application renders the registration of a product on the Hawaii products list a nullity ab initio. Att. Gen. Op. 64-48.

§103-43 Mandatory purchase of Hawaii products. In any expenditure of public funds, a governmental agency shall purchase any required product from the Hawaii products list established under section 103-42 where such products are available, provided the products meet the minimum specifications and the selling price f.o.b. jobsite; unloaded including applicable general excise tax and use tax does not exceed the lowest delivered price in Hawaii f.o.b. jobsite; unloaded including applicable general excise tax and use tax of a similar non-Hawaii product by more than three per cent, where Class I Hawaii products are involved, or five per cent where Class II Hawaii products are involved or ten per cent where Class III Hawaii products are involved.

Where a package bid or purchase contains both Hawaii and non-Hawaii products, then for the purpose of selecting the lowest bid or purchase price only, the price bid or offered for a non-Hawaii product item shall be increased by adding thereto three per cent, five per cent or ten per cent where similar Class I, Class II or Class III Hawaii product items have been bid or offered by another party pursuant to the preferences stated above. The lowest total bid, taking into consideration the above preferences, shall be awarded the contract but the contract amount of any contract awarded, however, shall be the amount of the bid or price offered, exclusive of such preferences.

Notwithstanding the provisions of the preceding paragraphs, an additional five per cent preference shall be applicable to Hawaii products manufactured by nonprofit corporations and public agencies operating sheltered workshops as certified by the department of labor and industrial relations for physically or mentally handicapped persons. The state comptroller shall adopt rules under chapter 91 to require a governmental agency to give an additional five per cent preference to the purchase of products manufactured by nonprofit corporations or public agencies operating sheltered workshops consistent with this section. [L 1939, c 260, pt of §1; am L 1941, c 308, §1(a), (b); RL 1945, pt of §355; RL 1955, §9-39; am L 1963, c 124, pt of §2; HRS §103-43; am L 1976, c 175, §3; am L 1978, c 89, §1]

Amendment Note

L 1978 amended first paragraph.

§103-44 Designation of products in bidding. All persons submitting bids based on non-Hawaii products to any governmental agency shall designate in their bids which individual product is to be supplied as a non-Hawaii product. All persons shall also list in their bid, the price of the non-Hawaii product as defined in section 103-43. [L 1939, c 260, pt of §1; am L 1941, c 308, §1(a); RL 1945, pt of §355; RL 1955, §9-40; am L 1963, c 124, pt of §2; HRS §103-44; am L 1978, c 89, §2]

Amendment Note

L 1978 amended section generally.

§103-45 Public works contract; specifications. In all public works and any repair or maintenance contracts, a governmental agency or any person employed by a governmental agency, including architects and engineers, shall describe in all specifications, products and their established classes listed in the Hawaii products list established under section 103-42 which may be used, where the products are available and meet the minimum specifications. [L 1941, c 308, §1(c); RL 1945, pt of §355; RL 1955, §9-41; am L 1959, c 118, §1; am L 1963, c 124, pt of §2; HRS §103-45; am L 1978, c 89, §3]

Amendment Note

L 1978 amended first paragraph and deleted second paragraph.

§103-46 Inapplicable when federal funds jeopardized. Sections 103-41 through 103-45, 103-47 and 103-48 shall not be applicable whenever their application will disqualify any governmental agency from receiving federal funds or aid. [L 1941, c 308, §1(d); RL 1945, pt of §355; RL 1955, §9-42; am L 1963, c 124, pt of §2]

§103-47 Violation voids contract. Any purchase made or any contract awarded or executed in violation of sections 103-41 through 103-45 shall be void and no payment shall be made by any governmental agency on account of the purchase or contract. [L 1939, c 260, pt of §1; RL 1945, pt of §355; RL 1955, §9-43; am L 1963, c 124, pt of §2]

§103-48 Penalty. Any officer of the State or of any municipality, county, or other political subdivision thereof, or any person acting under or for such officer, or any other person who violates any provisions of sections 103-22, 103-22.1, 103-23, 103-29, and 103-33 shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Any officer or employee of any governmental agency who violates any provisions of sections 103-41 through 103-47 shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Any person, or any officer or employee of any person, who violates any provisions of sections 103-41 through 103-47 shall be fined not more than $1,000 or imprisoned not more than one year, or both; and any person who is awarded a contract or given an order for purchase as a result of misrepresentation in his bid or makes a claim in his bid that he will purchase Hawaii products, but fails to do so shall, in addition, be fined the difference between the price of the products

IDAHO

TITLE 60

PUBLIC PRINTING AND OFFICIAL NOTICES

CHAPTER 1

CONTRACTS FOR PRINTING—PUBLICATION OF NOTICES

60-101. Contracts for state printing — Execution within state — Exception. — All printing, binding (excluding binding for state supported libraries), engraving and stationery work executed for or on behalf of the state, and for which the state contracts, or becomes in any way responsible, shall be executed within the state of Idaho, except as provided in section 60-103, Idaho Code. Provided, however, that this section shall not apply to any compilation, publication or codification of the laws of the state of Idaho. [1903, p. 333, § 1; reen. R.C. & C.L., § 1474; C.S., § 2335; I.C.A., § 58-101; am. 1939, ch. 196, § 1, p. 373; am. 1947, ch. 108, § 1, p. 225; am. 1980, ch. 56, § 1, p. 114.]

Compiler's notes. The words in parentheses so appeared in the law as enacted.

Section 2 of S.L. 1980, ch. 56 is compiled as § 60-103.

60-103. Exception in case of excessive charge — Exceptions for lack of production facilities on bids on state work. — (a) Whenever it shall be established that any charge for printing, engraving, binding (excluding binding for state supported libraries) or stationery work is in excess of the charge usually made to private individuals for the same kind and quality of work, then the state or county officer or officers having such work in charge shall have power to have such work done outside of said county or state, but nothing in this chapter shall be construed to oblige any of said officers to accept any unsatisfactory work.

(b) Any work referred to in section 60-101, Idaho Code, and which is to be executed for or on behalf of the state may be executed outside of this state in any case (1) where the execution of such work shall require the use of a technique or process which cannot be performed through the use of physical production facilities located within this state and the use of such technique or process is essential to a necessary function to be served by the printing, binding, engraving or stationery work required; (2) where, after requests for proposals or bids have been made or notice thereof has been given as

required by section 67-5718, Idaho Code, as amended, no bid or proposal is made thereon by any person, firm or corporation proposing to execute such work within this state, or (3) where, after requests for proposals or bids have been made or notice thereof given as required by section 67-5718, Idaho Code, the lowest bid from a person, firm or corporation proposing to execute such work within this state is more than ten percent (10%) more than the lowest bid from a person, firm or corporation proposing to execute such work outside this state. [1903, p. 333, § 3; reen. R.C. & C.L., § 1476; C.S., § 2337; I.C.A., § 58-103; am. 1929, ch. 196, § 2, p. 373; am. 1965, ch. 304, § 1, p. 805; am. 1977, ch. 171, § 1, p. 440; am. 1980, ch. 56, § 2, p. 114.]

Compiler's notes. The words in parentheses so appeared in the law as enacted.

Section 1 of S.L. 1980, ch. 56 is compiled as § 60-101.

60-105. Rates for official notices. — The rate to be charged for all official notices required by law to be published in any newspaper in this state, by any state, county, municipal official or other person, shall be as follows: four cents (4¢) for each pica in a column line for the first insertion and three cents (3¢) for each pica in a column line for each subsequent insertion. For table and figure matter, the rate shall be five cents (5¢) for each pica in a column line for the first insertion, and three cents (3¢) for each pica in a column line for each subsequent insertion. In the event that a column line ends in a one-half (½) pica measurement, the rate for such one-half (½) pica shall be one-half (½) the rate established for a full pica for the type of matter set forth herein. For purposes of this section, the type used shall not be smaller than 7 point nor greater than 8 point. [1907, p. 27, § 1; reen. R.C. & C.L., § 1477; C.S., § 2339; I.C.A., § 58-105; am. 1951, ch. 29, § 1, p. 41; am. 1955, ch. 135, § 1, p. 274; am. 1971, ch. 35, § 1, p. 80; am. 1980, ch. 124, § 1, p. 280; am. 1981, ch. 131, § 1, p. 220; am. 1984, ch. 224, § 1, p. 541.]

60-106. Qualifications of newspapers printing legal notices.

Sec. to sec. ref. This section is referred to in § 67-913.

60-109. Publication of notices — Number of publications required.

Sec. to sec. ref. This section is referred to in §§ 7-704, 23-301, 67-5203.

60-109A. Publication by first class mail. — Any notice required by law to be published by any regional board, commission, department or authority created by or pursuant to statute; any county, city, school district, special district, any joint district, or other political subdivision of the state of Idaho may be published by mailing such notice by first class mail, postage prepaid, to the residents of such jurisdiction; provided, however, that

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§ 16-6-205. Enforcement.

This Act [§§ 16-6-201 through 16-6-206] shall not be enforced in a manner which conflicts with any federal statutes or rules and regulations. (Laws 1971, ch. 207, § 5; W.S. 1957, § 9-680.5; W.S. 1977, § 9-8-405; Laws 1982, ch. 62, § 3.)

Cross references. — As to governing of federal funds by federal law, see § 16-6-108.

§ 16-6-206. Failure to employ state laborers; penalty.

A person who willfully or intentionally fails to use Wyoming laborers as required in this act [§§ 16-6-201 through 16-6-206] is guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed one hundred dollars ($100.00) or by imprisonment in the county jail for not to exceed thirty (30) days. Each separate case of failure to employ Wyoming laborers on public works projects constitutes a separate offense. (Laws 1971, ch. 207, § 6; W.S. 1957, § 9-680.6; W.S. 1977, § 9-8-406; Laws 1982, ch. 62, § 3.)

Effective dates. — Section 7, ch. 207, Laws 1971, makes the act effective 60 days after passage. Approved February 28, 1971.

ARTICLE 3. PUBLIC PRINTING CONTRACTS

Cross references. — As to public works and contracts generally, see art. 1 of this chapter.

§ 16-6-301. Preference for resident bidders; exception; "resident" defined; violation.

(a) Whenever a contract is let by the state or any department thereof, or any of its subdivisions, for public printing, including reports of officers and boards, pamphlets, blanks, letterheads, envelopes and printed and lithographed matter of every kind and description whatsoever, the contract shall be let to the responsible resident making the lowest bid if the resident's bid is not more than ten percent (10%) higher than that of the lowest responsible nonresident bidder. Any successful resident bidder shall perform at least seventy-five percent (75%) of the contract within the state of Wyoming. This section shall not apply to any contract for the compilation, codification, revision, or digest of the statutes or case law of the state.

(b) As used in this section, "resident" means any person, partnership, corporation or association who has been a bona fide resident of this state, for one (1) year or more immediately prior to bidding upon a contract, and who has an established printing plant in actual operation in the state of Wyoming immediately prior to bidding upon a contract.

AIECA

ALASKA
INDEPENDENT
ELECTRICAL
CONTRACTORS
ASSOCIATION

RECEIVED
3/4/85

The Honorable BEN GRUSSENDORF
Speaker of the House
Pouch V
Juneau, Alaska 99811

Dear Speaker Grussendorf, 21 February 1985

We write in support of HB 50, relating to Alaska Bidder's Preference.

Our organization represents the largest segment of the State's electrical contractors; the Independents. Most of us are long term Alaskans, who have been here winter after winter, surviving the crash after the pipeline completion and the like. We hire Alaskans, pay our Alaskan taxes, are licensed, bonded and insured in concert with State law.

In the past several years we have seen great quantities of "contractors" come up here from areas of dismal fiscal outlook, attempting to make a grab for some big construction money. Many do not bother to apply for registration, licensing or bonding, and numerous are the horror stories associated with their work.

Not only are they injuring Alaskans, both in the residential markets and in the commercial markets, but they are giving a bad name to a trade in which we take pride and try to support. We know of several parallels to the contractor difficulties noted above, involving suppliers doing business here from the states.

We support the increase in the Alaska Bidder Preference as a logical way to attempt to protect the people, companies and industries who are ALWAYS HERE, in bad winters, miserable breakups and poor economic climates.

We would be pleased to work with you during passage of this amendment; thank you in advance,

Don Tanner

DON TANNER
President

Charter Members: ALL PHASE ELECTRIC, B&E ELECTRIC, DINGBAT ELECTRIC, FUCHS ELECTRIC, HUSKY ELECTRIC, INDEPENDENT ELECTRIC, RAINBOW ELECTRIC, RAVEN ELECTRIC, RICHCREEK ELECTRIC, TANNER & SONS ELECTRIC, YELLOW ELECTRIC, LTD.

3605 Arctic Boulevard, Suite 1888, Anchorage, Alaska 99503

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 45
REQUEST Publish Date:

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

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

Prepared By: Bob Link Bob Link
Phone: 465-2250
Division: General Services & Supply
Date: February 4, 1987

Approved by Commissioner: Garrey Peska
Date: 2/10/87
Agency: Department of Administration

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

Rev. 9/16/86

8/11D2/0205-03

POSITION PAPER
HB 45

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

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

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

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

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

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

2/6/86
Date

Commissioner Garrey Peska
Department of Administration

2/10/87
Date

AIECA

FEB 9

ALASKA INDEPENDENT ELECTRICAL CONTRACTORS ASSOCIATION

The Honorable DAVE DONLEY
State House of Representatives
Post Office Box V
Juneau, Alaska 99811

Dear Representative Donley, 06 February 1987

We have reviewed HB 45 co-sponsored by you recently. We write to support it.

Our organization is a non-profit trade association, made up of Independent Electrical Contractors. ALL of our members are RESIDENTS, and have been for years. We ALL have policies of strong local hire. We ALL stay here every winter. We ALL have been very hard hit by the current economic downturn.

Our organization does NOT set wages nor negotiate contracts. Our purpose is simply to support and promote higher quality, safer and more efficient electrical wiring, both as a product for the consumer, and as an industry. We feel that the bill provides an important opportunity for Alaskans to perform the work that they are well capable of, where in the most recent past we've been by-passed often by "newcomers" from depressed areas of Washington, Oregon and California.

We'd also point out that if you really want to get the State its money's worth in capitol construction, you should re-introduce a bill this session to do away with the State's "Little Davis Bacon" law. That's the law that artificially raises the pay rates of employees on any project with State money in it.

We routinely perform civilian work for precisely HALF the rate for a similar facility under State contract. There is no reason in the world why the State should not benefit from the principals of the true market condition. There is no reason why the State cannot begin to enjoy the same benefits as the civilian economy, and receive at least THREE BUILDINGS FOR THE PRICE OF TWO.

We request that this letter be appended to the official Bill Docket for HB 45. You may release it in whole or in part to support the bill. Thank you,

BILL DAVIDSON
President

cy to: Grussendorf

Charter Members: ALL PHASE ELECTRIC, B & E ELECTRIC, DINGBAT ELECTRIC, FUCHS ELECTRIC, HUSKY ELECTRIC, INDEPENDENT ELECTRIC, RAINBOW ELECTRIC, RAVEN ELECTRIC, RICHCREEK ELECTRIC, TANNER & SONS ELECTRIC, YELLOW ELECTRIC LTD.

3605 Arctic Boulevard, Suite 1888, Anchorage, Alaska 99503

R & R COURT REPORTERS
810 N STREET
ANCHORAGE, ALASKA 99501
(907) 277-0572 OR (907) 277-0573

FEB 6 1987

FEB 9 1987

February 5, 1987

Representative Dave Donley
Pouch V
Juneau, Alaska

Dear Representative Donley,

I have noted with interest the introduction of House Bill 45. I wish to thank you and Speaker Grussendorf for initiating this most welcome legislation. I think it will go a long way toward insuring the greatest benefit to all Alaskans from the use of Alaskan revenues.

I have written Senate President Faiks indicating my support for you bill, and expressing my hope that similar legislation will be introduced in the Senate. If there is anything else I can do to aid your efforts in this matter please let me know, and please keep me informed of the progress of this legislation.

Again, thank you very much,

Sincerely yours,

Rosemary Rice

Rosemary Rice, Proprietor,
R & R Court Reporters