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SPRINGFIELD

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FILE NO. 85-013

STATE MATTERS:
Constitutionality of Preferences to
Resident Bidders

Richard H. McClure, Director
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715 Stratton Office Building
Springfield, Illinois 62706

Dear Mr. McClure:

This responds to a letter from your predecessor, wherein he inquired whether the resident bidder preference provided in subsection 6e of The Illinois Purchasing Act (Ill. Rev. Stat. 1985 Supp., ch. 127, par. 132.6) is constitutional, and therefore, required to be included in purchasing rules and regulations promulgated by State agencies. For the reasons hereinafter stated, it is my opinion that subsection 6e of The Illinois Purchasing Act is constitutional, and a resident bidder preference as specified therein must be included in the rules and regulations governing purchases by State agencies.

Section 5 of The Illinois Purchasing Act (Ill. Rev. Stat. 1984 Supp., ch. 127, par. 132.5) provides in pertinent part:

> "All purchases, contracts or other obligation or expenditure of funds by any State agency shall be in accordance with rules governing procurement practices and procedures promulgated by the Department of Central Management Services unless a State agency adopts additional rules governing procurement practices and procedures for that agency. * * *
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> * * * "

Section 6 of The Illinois Purchasing Act provides in pertinent part:

> "The rules and regulations required by Section 5 of this Act may provide that prospective bidders be prequalified to determine their responsibility, as required by this Act, and shall provide, among other matters which are not in conflict with the policies and principles herein set forth:
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> a. That all purchases, contracts and expenditure of funds shall be awarded to the lowest responsible bidder considering conformity with specifications, terms of delivery, quality, and serviceability except as provided in paragraphs e., f. and g. of this Section.
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> e. <u>When a public contract is to be awarded to the lowest responsible bidder a resident bidder must be allowed a preference as against a non-resident bidder from any state which gives or requires a preference to bidders from that state.</u> The preference is to be equal to the preference given or required by the state of the non-resident bidder.

> f. 'Resident bidder' as used in this Section means a person authorized to transact business in this State and having a bona fide establishment for transacting business within this State at which it was actually transacting business on the date when any bid for a public contract is first advertised or announced, including a foreign corporation duly authorized to transact business in this State which has a bona fide establishment for transacting business within this State at which it was actually transacting business on the date when any bid for a public contract is first advertised or announced.
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> g. Paragraphs e. and f. of this Section do not apply to any contract for any project as to which federal funds are available for expenditure when such paragraphs may be in conflict with Federal Law or Federal Regulation." (Emphasis added.)

Subsection 6e thus requires that when a contract is to be awarded by a State agency, resident bidders, as defined in subsection 6f, must be allowed a preference as against nonresident bidders, but only when the nonresident bidder is from a State which grants a preference to its resident bidders.

It is my opinion that subsection 6e of The Illinois Purchasing Act does not unconstitutionally impair interstate commerce protected under the Commerce Clause (U.S. Const., art. I. § 8, cl. 3). In White v. Massachusetts Council of Construction Employers (1983), 460 U.S. 204, the United States Supreme Court upheld the constitutionality of an executive order of the mayor of Boston which required that all construction projects funded in whole or in part by city funds or Federal funds

administered by the city, be performed by a work force consisting of at least fifty percent residents of Boston. The Supreme Court stated therein:

" * * *

> We were first asked in Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), to decide whether state and local governments are restrained by the Commerce Clause when they seek to effect commercial transactions not as 'regulators' but as 'market participants.' In that case, the Maryland legislature, in an attempt to encourage the recycling of abandoned automobiles, offered a bounty for every Maryland-titled automobile converted into scrap if the scrap processor supplied documentation of ownership. An amendment to the Maryland statute imposed more exacting documentation requirements on out-of-state than in-state processors, who in turn demanded more exacting documentation from those who sold the junked automobiles for scrap. As a result, it became easier for those in possession of the automobiles to sell to in-state processors. 'The practical effect was substantially the same as if Maryland had withdrawn altogether the availability of bounties on hulks delivered by unlicensed suppliers to licensed non-Maryland processors.' 426 U.S., at 803, n. 13. In upholding the Maryland statute in the face of a Commerce Clause challenge, we said that '[n]othing in the purpose animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.' Id., at 810 (footnotes omitted). Because Maryland was participating in the market, rather than acting as a market regulator, we concluded that the Commerce Clause was not 'intended to require independent justification,' id., at 809, for the statutory bounty.
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> We faced the question again in Reeves, Inc. v. Stake, 447 U.S. 429 (1980), when confronted with a South Dakota policy to confine the sale of cement by a state operated cement plant to

residents of South Dakota. We underscored the holding of Hughes v. Alexandria Scrap Corp., saying:

> 'The basic distinction drawn in Alexandria Scrap between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. [Citation omitted]. There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.' 447 U.S., at 436-437.

We concluded that South Dakota, 'as a seller of cement, unquestionably fits the "market participant" label' and applied the 'general rule of Alexandria Scrap.' Id., at 440.

Alexandria Scrap and Reeves, therefore, stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause. As we said in Reeves, in this kind of case there is 'a single inquiry: whether the challenged "program constituted direct state participation in the market."' Id., at 436, n. 7. We reaffirm that principle now.

* * * "

(White v. Massachusetts Council of Construction Employers (1983), 460 U.S. 204, 206-08.)

There is no question that subsection 6e of The Illinois Purchasing Act applies only to the State as a "market participant". The Act does not purport to regulate commerce within the State, but merely specifies statutory procedures which govern the State and its agencies when acting in a proprietary function; that is, when purchasing goods or

services in the open market for the use of the State. Thus, as a market participant, the State is not subject to the restraints of the Commerce Clause and, therefore, is not prohibited from favoring its citizens over others.

Furthermore, it is my opinion that subsection 6e of The Illinois Purchasing Act does not violate the Equal Protection Clauses of the United States and Illinois Constitutions (U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 2.) In American Yearbook Company v. Askew (D.C. Fla. 1972), 339 F. Supp. 719, aff'd, 409 U.S. 904 (1972), it was alleged that certain Florida statutes and regulations which required that all public printing of the State of Florida be performed in Florida denied equal protection of the laws to printers with no printing facility located within the State. The district court held that the creation of two classes of persons, residents and nonresidents, for purposes of performing public printing contracts, did not deny equal protection of the laws to nonresidents, stating:

" * * *

> * * * [I]n framing specifications for its printing work, the state performs a proprietary function and stands in the shoes of a private party who is entitled in most instances to choose where and by whom his printing will be done. In that posture the state is like a trustee; the citizens are the beneficiaries. It may be necessary for the state to adopt discriminatory purchasing policies, such as those questioned here, to insure that the interest of the people

> is best served. In fact it is conceivable that the failure to do so would constitute a breach of the state's duty to its residents. In a case such as this, it is not for the Court to question the wisdom of the Legislature in discharging that trust obligation.
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> * * *
>
> (American Yearbook Company v. Askew (D.C. Fla. 1972), 339 F. Supp. 719, 722-23.)"

Subsection 6e of The Illinois Purchasing Act is clearly analogous to the provisions addressed in American Yearbook Company, and for the reasons expressed therein, does not deny equal protection to nonresident bidders.

It is also my opinion that subsection 6e of The Illinois Purchasing Act does not contravene the Privileges and Immunities Clause of the United States Constitution (U.S. Const., art. IV, § 2). The Privileges and Immunities Clause prohibits discrimination against citizens of other States solely on the basis of citizenship. (Toomer v. Witsell (1948), 334 U.S. 385, 396.) The distinction between market participant and market regulator relied upon by the Supreme Court to dispose of the Commerce Clause challenge in White v. Massachusetts Council of Construction Employees is not dispositive of a challenge under the Privileges and Immunities Clause. (See United Building and Construction Trades v. Mayor and Council of the City of Camden, (1984), ___ U.S. ___, 104 S. Ct.

1020, 1028.) The fact that a State is merely setting conditions on its expenditures for goods and services in the marketplace is a crucial factor to be considered, but it does not preclude the possibility that those conditions violate the Privileges and Immunities Clause. United Building and Construction Trades v. Mayor and Council of Camden (1984), ___ U.S. ___, 104 S. Ct. 1020, 1028-29; Hicklin v. Orbeck (1978), 437 U.S. 518, 529.

The Privileges and Immunities Clause, however, is not an absolute bar to differentiation in treatment by a State between its residents and those of another State. (Toomer v. Witsell (1947), 334 U.S. 385, 396.) A State may discriminate against citizens of other States without violating the Constitution where there is a substantial reason for the difference in treatment and where the degree of discrimination is closely related to that reason. (Toomer v. Witsell (1948), 334 U.S. 385, 396.) In order for a discriminatory statute to be justified, nonresidents must be shown to constitute a peculiar source of the evil at which the statute is aimed. United Building and Construction Trades v. Mayor and Council of the City of Camden (1984), ___ U.S. ___, 104 S. Ct. 1020, 1030; People ex rel. Bernardi v. Leary Construction Company, Inc. (1984), 102 Ill. 2d 295, 299-300.

Subsection 6e of the Illinois Purchasing Act is a retaliatory statute (see Metropolitan Life Insurance Co. v.

Boys (1921), 296 Ill. 166), which grants resident bidders a preference on State contracts only against bidders from other States which grant their own residents a similar preference against Illinois bidders. The purpose of the statute is to equalize opportunities available to Illinois businesses bidding on governmental contracts in Illinois and elsewhere. Clearly, nonresident bidders who receive a preference in their home States enjoy an economic advantage over Illinois bidders. By granting a retaliatory preference, Illinois can protect its businesses while influencing other States to abandon practices which discriminate against Illinois business. This is a valid State interest which is reasonably accomplished by means of the preference provided under subsection 6e of The Illinois Purchasing Act. See Toomer v. Witsell (1948), 334 U.S. 385, 396.

In my opinion, this conclusion does not conflict with the Illinois Supreme Court's recent decision in People ex rel. Bernardi v. Leary Construction Company, Inc. (1984), 102 Ill. 2d 295, wherein the court held unconstitutional "AN ACT to give preference in the construction of public works, etc." (Ill. Rev. Stat. 1983, ch. 48, par. 269 et seq.). That Act required that contractors working on Illinois public works projects employ only Illinois laborers unless resident laborers were not available or were incapable of performing the work involved.

The court held that the Act violated the Privileges and Immunities Clause because there was no showing that nonresident laborers constituted a particular source of the problem of unemployment. Thus, the Act did not bear a substantial relationship to the evil to be remedied.

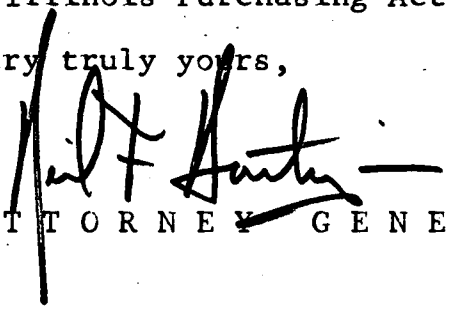
Unlike "AN ACT to give preference in the construction of public works, etc.", section 6e of the Illinois Purchasing Act does not authorize a preference to be given as against nonresidents in general. The preference may be granted only against nonresident bidders who are entitled to a preference against Illinois bidders in their home State. Bidding preferences by other States favoring their residents clearly constitute a specific source of economic disadvantage to Illinois businesses. Given the retaliatory nature of this provision, its narrow scope, and the fact that it applies only to contracts for the expenditure of State funds, it is my opinion that subsection 6e of the Illinois Purchasing Act does not violate the Privileges and Immunities Clause of the United States Constitution.

I am aware that in 1973, subsection 6e of The Illinois Purchasing Act was held unconstitutional by the Circuit Court of Cook County in the case of Metal Stamping Corporation v. Burris (Docket No. 73 L 2737). However, the appeal to the Supreme Court in that case was dismissed without an opinion,

and the order of the circuit court does not set forth the constitutional provision which subsection 6e was said to have violated. Circuit court decisions are not binding on other courts of this State (Village of Northbrook v. Cannon (1978), 61 Ill. App. 3d 315, 322), and furthermore, are not binding upon the parties to the action except to those matters which have been litigated. (In re Hutul (1973), 54 Ill. 2d 209, 213, cert. denied, 414 U.S. 1040 (1973), reh. denied, 414 U.S. 1147 (1974); C.I.S., Inc., v. Kann (1979), 76 Ill. App. 3d 109, 110-11.) Thus, I do not believe that Metal Stamping Corporation v. Burris is dispositive of the question you have posed.

In summary, it is my opinion that subsection 6e of The Illinois Purchasing Act is constitutional, and pursuant to section 5 of that Act, the rules and regulations of the Department of Central Management Services and all State agencies must provide a preference to resident bidders as specified in subsections 6e and 6f of The Illinois Purchasing Act.

Very truly yours,



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