

**OPINION
45-135**

September 7, 1945 (OPINION)

HIGHWAY CONTRACTS

RE: Bids for Equipment

This will acknowledge the receipt of your letter of August 28, 1945, in which you say that Attorney Vernon Johnson of Wahpeton, North Dakota, representing August Vagts, a contractor, whose residence is Breckenridge, Minnesota, contends that his client is entitled to the award of a contract for furnishing gravel on a state highway in Pembina County designated as SAP441A and 338 Cpt. You say that Mr. Johnson bases his contention on the fact that Mr. Vagts was the low bidder when bids were opened August 17, 1945.

You further say that the question arises: "Does Mr. Vagts meet the requirements of the 5 percent preference law by maintaining an office in North Dakota and paying workmen's compensation on his employees in North Dakota as alleged by his attorney? Also, there is the question with regard to 90% of his employees being residents of North Dakota for at least one year as stipulated in the law."

You say further:

"The second low bidder was Butler Construction Company of Grand Forks with \$22,963.50. The question as to the residence of 90% of his employees also would be pertinent inasmuch as Grand Forks is a border city, and it is entirely possible that several of his employees may not have resided in North Dakota for at least one year."

Section 24-1201 of the Revised Code of 1943 provides:

"In the letting of any road or bridge, road work, or for road material or culvert, by the state highway department or by any political subdivision of the state, preference to the extent of 5 percent shall be given to all bona fide contractors who have been continually in business and have resided in the State of North Dakota for a period of at least one year prior to filing his bid, if at least 90 percent of the employees of such contractor engaged in highway construction and maintenance shall have been residents of the State of North Dakota for at least one year, and shall be citizens of the United States or shall have declared their intention to become such. Such preference shall not apply to federal aid projects."

The original act giving preference to resident road contractors was enacted in 1931. Chapter 154 of the Session Laws of that year provided that in the event of approximately equal bids, the bid submitted by a contractor or bidder who had maintained a residence and place of business in this state "continuously for a period of more than one year prior to the filing of such bid" should be deemed and held to be the lowest bidder and that the contract should be awarded accordingly.

In 1933, the Legislature amended chapter 126 of the Session Laws of 1931 by providing that in order to obtain the 5 percent preference therein provided "that at least ninety (90) percent of the employees engaged in highway construction and maintenance shall have been residents of the State of North Dakota for one year, and shall be citizens of the United States or have declared their intention to become such."

The requirement that at least 90 percent of the employees engaged in highway construction and maintenance shall have been residents of the State of North Dakota for one year, etc., was undoubtedly embodied in chapter 126 of the Session Laws of that year because of the acute depression and widespread unemployment then prevailing.

In 1985, the Legislature enacted chapter 218 of the Session Laws of that year. That act required state departments, offices, and bureaus, and local governmental units and local officials when purchasing goods, merchandise, supplies, or equipment of any character to give preference to bidders or sellers "resident in North Dakota," utility, fitness and quality being equal. In 1943 chapter 198 of the Sessions Laws of that year was enacted. This measure amended chapter 218 of the Sessions Laws of 1935 so as to require a 5 percent preference in favor of North Dakota residents. Chapter 198, Laws of 1943, is embodied in chapter 44-08 of the Revised Code of 1943 under section 44-0802. Section 44-0802 of the Revised Code (chapter 198, Laws 1943) defines the term "resident North Dakota bidder or seller" as follows:

"The term 'a resident North Dakota bidder or seller' when used in this chapter unless the context thereof clearly provides otherwise, shall mean a bidder or seller who shall have maintained a bona fide place of business within this state for at least one year prior to the date on which a contract was awarded."

It will be noted that the definition of the above phrase "resident North Dakota bidder or seller" applies only to bidders and sellers mentioned in chapter 44-08 of the Revised Code. It does not apply to contractors mentioned in section 24-1201. Section 24-1201 provides for a five-percent preference to a contractor "who has been continuously in business and has resided in the State of North Dakota for a period of at least one year prior to the filing of his bid, if at least 90 percent of the employees of such contractor---shall have been residents of the State of North Dakota for at least one year and shall be citizens of the United States, or shall have declared their intention to become such."

In view of the fact that Mr. August Vagts is a resident of Breckenridge, Minnesota, it is my opinion that, under the provisions of section 24-1201 of the Revised Code, he is not a contractor who is entitled to any preference when bids are opened and considered by the State Highway Commissioner.

The question as to whether or not 90 percent of the employees employed by the Butler Construction Construction Company of Grand Forks have been residents of the state for at least one year and are

citizens of the United States or have declared their intention to become citizens is not a question of law. It is a question of fact which must be determined by the Highway Commissioner upon evidence or proof furnished by the Butler Construction Company. But if the Commissioner shall find that 90 percent of the employees of this company have not been residents of North Dakota for at least one year, then this company is not entitled to preferential consideration. In that case the status of the Butler Construction Company and Mr. Vagts as bidders would be the same and Mr. Vagts being the lowest responsible bidder would be entitled to be awarded the contract in question.

I assume that corporations are sometimes contractors, and that as such they submit bids for highway construction work in competition with individual contractors. Under the laws of North Dakota, a foreign corporation which has a certificate of authority to transact business in this state, and which maintains an agent and an office there, is, under the provisions of section 10-1712 of the Revised Code, entitled to the "same rights and privileges that a domestic corporation would possess if organized for the purposes set forth in the Articles of Incorporation of the foreign corporation---." Hence, a foreign corporation entitled to do road construction work in North Dakota would be entitled to the same consideration as a bidder for a contract to perform such work as a domestic corporation, assuming that 90 percent of the employees of both have been residents of North Dakota for at least one year, etc.

This proposition presents an anomalous situation. For then a foreign corporation, entitled to do business in this state, and maintaining an office here, is entitled to the five-percent preference conferred under section 24-1201, whereas, Mr. Vagts, who resides in Breckenridge, Minnesota, but who maintains an office in Wahpeton, North Dakota, and who is also entitled to perform work as a contractor, is not entitled to such preferential consideration.

In view of this situation, we are confronted with the serious question as to whether section 24-1201 contravenes the following questions of the Federal Constitution.

1. Section 2 of Article IV of the Federal Constitution provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."
2. Article XIV of Amendments to the Federal Constitution which provides: "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."
3. Section 11 of our State Constitution provides: "All laws of general nature shall have a uniform operation."
4. Section 20 of our State Constitution provides: "No special privileges or immunities shall ever be granted which may

not be altered, revoked or repealed by the Legislative Assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."

5. Section 13 of our State Constitution provides that no person may be deprived of his property without due process of law.

It is a familiar principle or rule of law that the discretion of the Legislature is very broad in the exercise of the police power, both in determining what the interests of the public require and what means and measures are reasonably necessary for the protection of such interests. But the enactment of section 24-1201 of the Revised Code can hardly be characterized as an exercise of police power. It may be conceded that the Legislature by enacting section 24-1201 intended to promote the public welfare because when chapter 154 of the Session Laws of 1931 and chapter 126 of the Laws of 1933 (the provisions of which are embodied in section 24-1201 of the Revised Code) were enacted when drought and economic depression had caused widespread unemployment.

But it cannot be successfully maintained that under the guise of providing employment on public works unconstitutional class legislation may be enacted. For classification must be based upon some natural principle of public policy and a fundamental principle in classification is that a law shall affect alike all persons in the same class and under similar circumstances. 12 Am. Jur., sec. 478, p. 144.

Courts have repeatedly held that "if persons under the same circumstances and conditions are treated differently there is arbitrary discrimination and not classification." 12 Am. Jur., sec. 480, p. 149. However, it is generally conceded that the Legislature may discriminate between classes in regulating a business, where discrimination is based on a reasonable distinction involving the public welfare, and the statute is applicable to all who come within the classification.

Numerous authorities and state and federal court decisions hold to the same effect. The following are representative.

"A legislative classification, in order to be valid, must not be artificial, arbitrary, and unreasonable." Ex parte DeKoltz, 98 Neb. 861, 155 N.W. 240.

"Const. article 6, sec. 18, prohibiting the passage of any law granting to any citizen, class, or corporation privileges or immunities which on the same terms shall not equally belong to all citizens or corporations, requires that every prescribed rule shall have substantially the same operation as to all persons or corporations in substantially the same situation." Morrow v. Wipf, 22 S.D. 146, 115 N.W. 1121.

"Statute granting one class of persons, property, occupations, or industries rights or privileges denied to another, under same or substantially similar conditions, denies equal

protection of law." In re Christoph (Wisconsin) 237 N.W. 134.

"Legislature may classify persons and objects for purpose of legislation, if classification is based on justifiable distinctions;---" (Const. U.S. Amend. 14, Const. N.D. sec. 13. Bratberg v. Anderson-Fumley Thresher Co. (N.D.) 238 N.W. 552.

"Act No. 212 Public Acts section 5 (Mich.) providing for the examination and licensing of barbers, and that no person shall receive a certificate who at the time of his examination is an alien, is repugnant to the U.S. Const. Amend. 14, insofar as it discriminates on account of citizenship." (Mich.) Templar v. Michigan, State Board of Examiners of Barbers, 90 N.W. 1058, 100 Am. St. Rep. 160.

"S.D. Laws 107, p. 414, chap. 194, sec. 2, requiring agents of nonresidents nurserymen selling nursery stock in S.D. grown in other states or territories to carry a duplicate permit issued by the state board of agriculture, is invalid as a discrimination between resident and nonresident dealers." Ex parte Hawley, 115 N.W. 22 S.D. 23, 15 L.R.A. (N.S.) 138.

"'Privileges and immunities' within constitutional provisions entitling the citizens of each state to all privileges and immunities of citizens in the several states are words of comprehensive meaning and protect the rights of a citizen of one state to pass into another state for purpose of engaging in lawful business without molestation, to acquire personal property, to hold real estate, to maintain action in the courts of the state, and to be exempt from any higher taxes than are imposed by the state upon its own citizens." U.S.C.A. Const. Article 4, sec. 2--Ward v. State of Maryland, 79 U.S. 418, 20 L. ed. 449.

"The privileges and immunities clause of the Federal Constitution prohibits legislation by one state against the citizens of another state and secured to them the equal protection of its laws and the same freedom possessed by its own citizens in the acquisition and enjoyment of property." Williams v. Bruffy, 90 U.S. 176, 24 L. ed. 716.

"The object of the second section of article 4 of the Federal Constitution, declaring that citizens of each state shall be entitled to all privileges and immunities of citizens of the several states, is directed against state action and its object is to place the citizens of each state upon the same footing with citizens of other states and inhibit discriminating legislation against them by other states." U.S. v. Harris, 106 U.S. 629, 27 L. ed. 290.

"The constitutional provision that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states prevents a state from discriminating against citizens of other states in favor of its own citizens." U.S.C.A. Constitution Article 4, sec. 2. Hauge v. Committee for Industrial Organization, 307 U.S. 496, 84 L. ed. 1423.

"Discrimination against resident aliens under Anti-Alien Labor Law (Arizona) renders the statute invalid under U.S. Constitution Amendment 14, as denying equal protection of the laws." *Truax v. Raich*, 239 U.S. 33, 60 L. ed., 131, L.R.A. 1916 D, 545.

In view of the decisions of state courts and of the Supreme Court of the United States, one might naturally conclude without further consideration and without further search of authorities that section 24-1201 of the Revised Code of North Dakota and status of like nature and effect are unconstitutional. But the courts have also held in numerous cases that the constitutional provisions of the United States Constitution and of our State Constitution have no application to the actions of individuals in making contracts, etc. In other words, an individual contractor in his private capacity can generally hire whom he pleases and can determine the qualifications of his employees. In his private business an individual can discriminate between citizens of his own state and the citizens of another state. In fact he can discriminate on the basis of color, race, creed or any other individual preference.

In the case of *Helm v. McCall*, 36 S. Ct. 78, 299 U.S. 175, 60 L. ed. 206, Ann. Cas. 1917 B 287, the United States Supreme Court held that privileges and immunities of citizens are not abridged contrary to Article 4, section 2 of the United States Constitution by section 14, chapter 31 of the Consolidated Laws of the State of New York providing that only citizens of the United States may be employed in public work and that citizens of New York must be preferred.

Although the constitutionality of section 24-1201 is very doubtful, notwithstanding the decision of the Supreme Court of the United States in the case of *Helm v. McCall*, supra, it is my opinion that the doubt must be resolved in favor of its validity. This act is presumed to be constitutional. And in view of the decision of the United States Supreme Court in the case cited, there is a probability that our state Supreme Court would hold that section 24-1201 of the Revised Code is not violative of the Federal Constitution or of our State Constitution, because as a proprietor the State may control the construction of its own projects and the distribution of its own money. For in the awarding of contracts, or any other state undertakings, the Legislature has broad powers in its determination of public policy, and in order to promote the welfare of its citizens may impose such conditions as it shall deem reasonably necessary.

NELS G. JOHNSON

Attorney General