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H. 271: "Buy Ohio"

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I. INTRODUCTION

By January 1983, the nationwide economic recession had been deeply felt in Ohio. The unemployment rate was at a record high,[1] and the state had experienced a general economic deterioration unseen since the Great Depression.[2] The sagging economic environment prompted the state government to institute the remedial measures popularly known as "Buy Ohio." Governor Richard Celeste's first official proclamation was Executive Order 83-1, in which he required all state agencies to give preference to Ohio companies in their purchase of goods and services.[3] This program is intended to improve economic conditions in Ohio by creating employment opportunities and stimulating growth and development of the business climate within the state.[4]

Executive Order 83-1 was enacted into law on July 11, 1983, by Amended House Bill 271.[5] The bill reorganizes the competitive-bidding procedure for state contracts by favoring Ohio bidders over out-of-state bidders.

This note will focus on the procedural changes H. 271 makes in the state purchasing process, the potential substantive effect the bill will have on state purchasing, and its possible impact on Ohio's economy.

II. BACKGROUND

Through state purchasing, the taxpayers' money is used to equip, maintain, and construct the public facilities of the state. Because tax dollars are used, a primary goal of state purchasing is to protect the best interests of the public[6]—a goal that has long been assumed best served by the promotion of competition and the discouragement of favoritism.[7]

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1. In January 1983, the unemployment rate was 14.9%. OHIO BUREAU OF EMPLOYMENT SERVICES, OHIO DEP'T OF LABOR, OHIO LABOR FORCE ESTIMATES BY COUNTY (Jan. 1983).

2. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATE AND METROPOLITAN AREA DATA BOOK 519 (1982); Ohio Exec. Order No. 83-1 (Jan. 10, 1983) (on file with University of Dayton Law Review).

3. Ohio Exec. Order No. 83-1 (Jan. 10, 1983).

4. *Id.*

5. Act of July 11, 1983, 1983 Ohio Legis. Serv. 5-259 (Baldwin) (codified at OHIO REV. CODE ANN. §§ 125.01, 125.04, 125.08, 125.09, 125.11, 127.16, 153.012, 5513.02 (Page Supp. 1983)).

6. State *ex rel.* H.P. Clough & Co. v. Commissioners of Shelby County, 36 Ohio St. 326, 331 (1881).

7. United States Constructors and Consultants, Inc. v. Cuyahoga Metropolitan Hous.

To achieve these ends, the process of competitive bidding is required of all state purchases over $5,000.[8] Competitive-bidding procedures require all interested parties to make an offer to provide supplies and services by submitting a "bid." The bids are evaluated and the party submitting the "lowest and best" bid is then awarded the contract.[9]

The underlying purpose of competitive bidding suggests that it is not simply a procedure for awarding contracts. Rather, the competitive-bidding process, by giving "everyone an equal chance to bid, . . . fosters honest competition" and lessens the possibility of favoritism.[10] For this reason, the competitive-bidding requirements have always been interpreted as having been enacted for the benefit of the taxpayers, and not the bidders.[11]

Notwithstanding the fact that the goal of competitive bidding is to secure the lowest price, bid price has not been the only consideration in awarding state contracts. Since the 1800's, evaluation of bids has generally involved factors other than price.[12] The language of Ohio's previous competitive-bidding statute mandated awarding the contract to the "lowest and *best* bidder."[13] This language has been interpreted to confer a certain amount of discretion on those in charge of evaluating the bids.[14] The term "best" has thereby involved consideration of factors such as the financial stability of the bidder,[15] the ability of the bidder to perform the contract,[16] the past performance of the bidder,[17] and the

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Auth., 35 Ohio App. 2d 159, 163, 300 N.E.2d 452, 454 (1973).

8. OHIO REV. CODE ANN. § 125.07 (Page Supp. 1982).

9. *Id.* § 125.11 (Page Supp. 1982), *amended by* Act of July 11, 1983, 1983 Ohio Legis. Serv. 5-259 (Baldwin) (codified at OHIO REV. CODE ANN. §§ 125.01, 125.04, 125.08, 125.09, 125.11, 127.16, 153.012, 5513.02 (Page Supp. 1983)).

10. 35 Ohio App. 2d at 163, 300 N.E.2d at 454.

11. *Id.* As early as 1881, the Ohio Supreme Court considered the competitive-bidding requirements a means of serving the public. Accordingly, they "should be executed with sole reference to the public interest." 36 Ohio St. at 331. The central purpose of these statutes is the public interest because public tax dollars finance the contracts that are awarded. Therefore, competitive bidding ensures that the best product will be obtained for the lowest possible price. 35 Ohio App. 2d at 163, 300 N.E.2d at 454.

12. State *ex rel.* Mills & Co. v. Commissioners of Hamilton County, 20 Ohio St. 425, 430 (1870). Consideration of other factors was sanctioned despite language mandating award of the contract to the "lowest bidder." *Id. See also* Dayton *ex rel.* Scandrick v. McGee, 67 Ohio St. 2d 356, 423 N.E.2d 1095 (1981).

13. OHIO REV. CODE ANN. § 125.11 (Page Supp. 1982) (emphasis added).

14. State *ex rel.* Roger J. Au & Son v. Studebaker, 120 Ohio App. 68, 70, 201 N.E.2d 230, 232, *aff'd mem.*, 175 Ohio St. 222, 193 N.E.2d 84 (1963). The word "best" allows consideration of more than just the dollar figure. The public official is required to choose the "best" bid based upon an exercise of honest discretion of which bid is best. *Id.* at 70–71, 201 N.E.2d at 232.

15. Dalton v. Kunde, 31 Ohio Misc. 75, 87, 286 N.E.2d 483, 492 (C.P. Ct. Montgomery County 1971).

16. *Id.*

number of minority workers a contractor employs.[18]

The discretion to decide which bid is the "best" inevitably creates a potential for favoritism. However, since Ohio has conferred the discretion and the Ohio courts have sanctioned its use,[19] the only issue is the amount of discretion which will be tolerated. Ohio courts have declared that only where there is an abuse of discretion will the courts interfere with its exercise.[20] Abuse of discretion has been defined as behavior not governed by fixed standards which has an element of unreasonableness, arbitrariness, or unconscionability.[21] Consequently, if there are adequate guidelines which define and limit the ability of an official to exercise personal choice, there is no abuse of discretion.[22]

III. PROVISIONS OF H. 271

A. The Federal Counterpart

H. 271 is patterned after the federal "Buy America Act," which has been in effect since 1933.[23] "Buy America" was enacted by the United States Congress during the Depression as an economic measure aimed at protecting the United States economy from foreign competition.[24] The provisions of the federal law require that all purchases of public goods, including those used in construction and repair of public

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17. *Id.* at 94, 286 N.E.2d at 493.

18. Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969). In response to the Civil Rights Act of 1964, Governor Rhodes issued the Executive Order of June 5, 1967, which required public contractors to hire minority employees. Each contractor had to submit an affirmative-action plan guaranteeing employment of minorities. The Ohio Supreme Court has found this requirement to be a reasonable requirement of the "best-bidder" standard. *Id.* at 39, 249 N.E.2d at 910.

19. *See* 67 Ohio St. 2d at 360, 423 N.E.2d at 1098; State *ex rel.* Walton v. Hermann, 63 Ohio St. 440, 442, 59 N.E. 104, 105 (1900).

20. 67 Ohio St. 2d at 360, 423 N.E.2d at 1098; 19 Ohio St. 2d at 40, 249 N.E.2d at 911.

21. 67 Ohio St. 2d at 359, 423 N.E.2d at 1097; *see also* State *ex rel.* Shafer v. Ohio Turnpike Comm'n, 159 Ohio St. 581, 113 N.E.2d 14 (1953) (where the supreme court defined an abuse of discretion as more than erroneous judgment). According to the court in *Shafer*, there must be "a perversity of will, passion, prejudice, and partiality, or moral delinquency" to be an abuse of discretion. *Id.* at 590–91, 113 N.E.2d at 19.

22. In *Scandrick*, the supreme court found that the lack of announced standards for acceptance of bids made the actions of the official arbitrary. 67 Ohio St. 2d at 360, 423 N.E.2d at 1098. The case concerned a Dayton city-residency requirement. When reviewing the requirement, the supreme court indicated that a preference of residents was not objectionable. Rather, it was the lack of guidelines which caused a problem. *Id. See also* Dalton v. Kunde, 31 Ohio Misc. 75, 286 N.E.2d 483 (C.P. Ct. Montgomery County 1971) (where a Montgomery County Common Pleas Court used the same reasoning and found no abuse of discretion because there were sufficient guidelines to control the use of discretion).

23. Buy America Act of 1933, ch. 212, tit. III, §§ 1–3, 47 Stat. 1489, 1520 (codified as amended at 41 U.S.C. §§ 10a–10c (1976)).

24. 76 Cong. Rec. 1893–96 (1933).

buildings and public works, be of American-made products.[25] The result is that United States companies are secured an advantage over foreign companies in the federal bidding process. "Buy America" is implemented by an administrative agency of the United States government which has promulgated regulations supervising the "Buy America" program.[26]

The Buy America Act was consulted by the drafters of H. 271.[27] H. 271 actually implements the federal plan on the state level, in fact, as Ohio bid evaluators are specifically required to reject all bids offering goods not produced or mined in the United States.[28] However, H. 271 is more comprehensive than Buy America because Ohio bidders are favored over out-of-state bidders.[29] Consequently, "Buy Ohio" assures Ohio bidders in state contracts what "Buy America" assures American companies in federal contracts.

In the same manner as the federal Act, H. 271 will be implemented by an administrative agency. The Department of Administrative Services (D.A.S.) is required to promulgate regulations governing the Ohio preference system.[30] The regulations which D.A.S. enacts are to conform to "Buy America" to the extent possible.[31]

B. Overview of H. 271

H. 271 creates two separate preference systems to be used in awarding state contracts. The first preference system governs the purchase of supplies and equipment for all state agencies.[32] This provision secures an advantage in the bid evaluation procedure to bidders supplying Ohio products.[33] The second preference system applies to contracts for the construction and repair of public improvements.[34] Although not as broad as the preference system for goods, this preference ensures that contractors with their principal place of business in Ohio will receive preferential treatment over out-of-state contractors who receive a similar preference in their home state.[35]

Both of these provisions create specific changes in the competitive-bidding process. More significantly, H. 271 in its entirety substantially

25. 41 U.S.C. § 106 (1976).
26. *See* 41 C.F.R. §§ 1-6.100–.106 (1983).
27. *See* OHIO REV. CODE ANN. § 125.09(C) (Page Supp. 1983).
28. *Id.* § 125.11(B).
29. *Id.*
30. *Id.* § 125.09(C).
31. *Id.* § 125.09(C)(7).
32. *Id.* § 125.11(B).
33. *Id.*
34. *Id.* § 153.012.
35. *Id.*

alters the focus of state purchasing by changing the goal of competitive bidding from unfettered competition to protectionism.

C. *Preference of Ohio Products*

The first preference system, governing supplies and services, changes prior law in three areas: 1) the role of the Department of Administrative Services, 2) the procedure for submitting bids, and 3) the procedure for evaluating bids.

The first change gives more power to the D.A.S. in purchasing goods for state agencies. The real authority to implement "Buy Ohio" lies with the D.A.S., for it will determine all the criteria necessary to implement the preference system.[36] This is a substantial change from past procedure: under prior law, only those state agencies for which the D.A.S. did purchasing were bound by D.A.S. regulations.[37] Now, all state agencies must follow these regulations, regardless of who does the purchasing for them.[38]

The bill further facilitates the preference for Ohio products by making a change in the bid notification procedure. Under prior law, the D.A.S. was required to maintain a "bid notification list" which classified potential bidders by the product they supplied as well as the geographic area in which the bidder desired to work.[39] Anyone was entitled to have his or her name placed on the bid notification list by sending a written request to the D.A.S.,[40] and this list was consulted whenever the D.A.S. received a request from a state agency for supplies or equipment.[41] All potential bidders dealing in that product and area were then notified that bids were being accepted.[42]

In keeping with the old law, the D.A.S. is required to maintain a bid notification list.[43] However, H. 271 requires the D.A.S. to send notice that bids are being accepted *only* to Ohio enterprises[44] *unless* the director deems it to be "in the best interests of Ohio" to notify all enterprises on the list.[45] Depending upon the interpretation given "best interests of Ohio," the practical effect of this new procedure may be

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36. *Id.* § 125.09(C).

37. *Id.* § 125.04; OHIO LEGISLATIVE SERV. COMM'N, BILL ANALYSIS: AM. H.B. 271 (AS REPORTED BY THE SENATE) (1983).

38. OHIO REV. CODE ANN. § 125.04 (Page Supp. 1983); OHIO LEGISLATIVE SERV. COMM'N, *supra* note 37.

39. *Id.* § 125.08(A) (Page Supp. 1982).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* § 125.08(A) (Page Supp. 1983).

44. *Id.* The bill specifically includes Ohio prison industries. *Id.*

45. *Id.* For a discussion of interpretation of "best interests of Ohio," see *infra* notes 66–67 and accompanying text.

the routine exclusion of out-of-state bidders before the evaluation process begins.[46]

The cornerstone of the preference system is found in the evaluation process. H. 271 institutes a two-step decision procedure which eliminates all non-United States goods and effectively ensures the award of the contract to an Ohio producer. The bill provides that when all bids are received and the evaluation begins, the evaluators must first reject all bids offering goods that are not produced in the United States.[47] After non-United States goods have been rejected, the "lowest and best bid" will be selected from among the bids offering Ohio products.[48] In typical situations, out-of-state products will not be considered.[49]

D. Preference of Ohio Services

H. 271 also institutes a preference system for the awarding of contracts for the construction or repair of public improvements.[50] Its provisions are not as restrictive as the preference system governing the purchase of supplies and equipment; the preference system for construction contracts is actually a reciprocity requirement.

The bill provides that in any contract for the construction[51] of any public improvement[52] made by the state, preference must be given to contractors having their principal place of business in Ohio over bidders from a state which has a similar preference system.[53] Under these circumstances, the Ohio contractor is given the same advantage in Ohio as the out-of-state contractor receives in his or her home state.[54]

If any out-of-state bidder comes from a state that does not employ a similar preference, the Ohio preference provisions do not apply.[55] The present state of the law renders the use of this provision improbable, as no border state gives preference to its own contractors.[56]

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46. The coordinator of "Buy Ohio" maintains that the goal of H. 271 is not to have only Ohio enterprises on the bid notification list. Interview with Shvam Srivastava, coordinator of Buy Ohio, in Columbus, Ohio (Sept. 21, 1983) [hereinafter cited as Srivastava interview].

47. OHIO REV. CODE ANN. § 125.11(B) (Page Supp. 1983).

48. *Id.*

49. H. 271 is an attempt to declare that Ohio products are best. Address to Ohio Senate in support of House Bill 271 (on file with University of Dayton Law Review).

50. OHIO REV. CODE ANN. § 153.012 (Page Supp. 1983).

51. The bill states "construction, reconstruction, improvement, enlargement, alteration, repair, painting or decoration." *Id.*

52. The statute specifically includes highway improvements. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Contractors from border states are most likely to travel into Ohio to bid on construction contracts. A survey of the legislative provisions of neighboring states pertaining to state construc-

IV. ANALYSIS

A. *Language of the Bill*

The purpose of H. 271 is to improve the economic conditions within Ohio by encouraging small businesses.[57] And by securing an advantage to Ohio bidders, it is anticipated that there will be an increase in production which will lead to an increase in employment opportunities within the state.[58] In addition, there may be an increase in Ohio revenue as a result of larger profits due to increased demand for Ohio products.[59]

In theory, the bill should produce the desired effects. However, practical application may result in frequent circumvention of the bill's requirements, rendering it virtually useless. There are four undefined phrases in H. 271 which render it particularly susceptible to circumvention.

The first phrase, "significant economic presence," allows an out-of-state company to circumvent the restrictions of the bill if the company has a significant economic presence within Ohio.[60] This provision was not included in the original bill but was added only after legislators recognized that some large companies which had a substantial interest in Ohio and had been awarded contracts in the past would not qualify as offering "Ohio products."[61] The language was added to ensure that larger companies who contribute to Ohio's economy would not be foreclosed from state contracts in the future because the products they offered were not technically "Ohio products."[62]

The D.A.S. is charged with the responsibility of promulgating criteria for determining when an out-of-state company has a significant economic presence.[63] Although the bill itself gives no guidelines as to

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tion contracts reveals that no border state employs a preference of its own citizens over out-of-state bidders. *See* IND. CODE ANN. § 5-16-1-1.2 to 5-16-2.2 (West Supp. 1983); 200 KY. ADMIN. REGS. 5:306 (1983); MICH. COMP. LAWS ANN. § 830.412(i) (West 1982); PA. CONS. STAT. ANN. tit. 71, § 638 (Purdon Supp. 1982); W. VA. CODE § 5-6-7 (1979).

57. Interview with Clifford Skeen, Ohio state representative, in Columbus, Ohio (Sept. 21, 1983) [hereinafter cited as Skeen interview] (on file with University of Dayton Law Review); Srivastava interview, *supra* note 46.

58. Srivastava interview, *supra* note 46.

59. *Id.*

60. OHIO REV. CODE ANN. § 125.09(C)(5) (Page Supp. 1983).

61. The sponsor of the bill indicated that this was a problem with the original bill. Some large automotive companies expressed concern because they manufactured component parts in Ohio but the finished products were assembled in Canada and other states. Skeen interview, *supra* note 57. Those concerned feared exclusion as a result of the new system. Letter from William H. Eells, regional manager of Ford Motor Co., to Ohio State Senator Thomas E. Carney (June 3, 1983) [hereinafter cited as Ford letter] (on file with University of Dayton Law Review).

62. Skeen interview, *supra* note 57.

63. OHIO REV. CODE ANN. § 125.09(C)(5) (Page Supp. 1983).

how economic presence should be defined, the reason for incorporating the phrase into the bill indicates that the D.A.S. should consider such factors as Ohio taxes paid and employment of Ohio residents when deciding whether an out-of-state company has a significant economic presence.

Two other ambiguous phrases used in H. 271 are "disproportionately inferior product" and "excessive price." Each provides a basis for waiver of the preference provision.[64] There is no specific section charging the D.A.S. with promulgating a definition of these terms. However, the mandate that the D.A.S. conform to "Buy America" indicates that a standard will be developed to determine when a product is disproportionately inferior or excessively priced.[65]

The fourth undefined term, "in the best interests of Ohio," is used in the section containing the bid notification list and procedure.[66] Since the new requirements allow the director to send notice that bids are being accepted only to Ohio bidders *unless* it is "in the best interests of Ohio" to send notice to all bidders on the list,[67] the phrase could determine whether or not out-of-state bidders will be excluded without even a chance to reveal the product offered and the price.

There is no indication in the bill that any criteria will be established to define this phrase. Without further guidance, the director must use personal discretion when deciding if it is in the best interests of Ohio to notify all bidders.

B. Exceptions

There have been accusations that the provisions of Executive Order 83-1 have not been enforced and that "Buy Ohio" is nothing more than a political gimmick.[68] There is merit to this accusation be-

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64. *Id.* § 125.09(C)(6).

65. "Buy Ohio" uses the phrases "disproportionately inferior product" and "excessive price" in the same manner that "Buy America" uses "cost to be unreasonable" and "inconsistent with public interest." 41 U.S.C. § 10(a) (1976). The *Code of Federal Regulations* provides a standard procedure for making the determination that it is not in the best interests of the public or that the price is excessive. Under this standard, each foreign bid is evaluated against the domestic bids after 6% of the total foreign bid amount is added to the foreign bid (12% if the domestic competitor is a small business). If the foreign bid is still lower than the domestic bid, the domestic bid is deemed unreasonable or inconsistent with the public interest. If there is a tie, the domestic company is awarded the contract. 41 C.F.R. § 1-6.104-4 (1983).

66. OHIO REV. CODE ANN. § 125.08(A) (Page Supp. 1983).

67. *Id.*

68. Representative Michael Fox accused the Celeste administration of purchasing foreign products despite its commitment to Buy Ohio. The administration had ordered steel which was made in the Neitherlands when there were qualified Ohio producers available. M. Fox, Press Statement (Aug. 16, 1983). However, the Celeste administration quieted this accusation by rejecting a delivery of foreign-made steel bound for the Lebanon Correctional Institution. Graham, *Ohio Reverses Buy Ohio Policy*, Dayton Journal Herald, Aug. 27, 1983, at 3, col. 6.

cause—in addition to broad, undefined language—the bill contains four provisions which allow officials in charge of purchasing to bypass the preference requirement for goods and services. These exceptions allow companies that do not supply Ohio products to stand on an equal footing with companies supplying in-state products.

The first exception is that sufficient competition must be generated within Ohio before those evaluating the bids are required to choose an Ohio product.[69] The legislation has narrowed the exception, however, by designating that "sufficient competition" exists when two or more bidders offer Ohio products.[70]

The second exception is that non-Ohio bidders who have significant economic presence in Ohio stand on equal ground with Ohio bidders.[71]

The third exception is a reciprocity provision which allows bidders from neighboring states to qualify for award of contracts despite their out-of-state status.[72] Bidders from neighboring states are qualified if there is sufficient commerce between Ohio and the border state, and if the border state imposes no greater restrictions on Ohio bidders than H. 271 imposes on out-of-state bidders.[73] The current state of the law in neighboring states makes this a rule rather than an exception, as only one border state favors in-state products over out-of-state products.[74]

It is evident that the undefined language and the exceptions contained in the bill cover a wide variety of situations and have the potential to be frequently employed to bypass H. 271. If the D.A.S. does not narrow the scope of the language of the bill, the effect of H. 271 will amount to nothing more than public relations for the Celeste administration.

C. *The Effect on Discretion*

The most pervasive aspect of H. 271 may be its effect on the discretion vested in public officials. The provisions of H. 271 confer

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69. OHIO REV. CODE ANN. § 125.11(B) (Page Supp. 1983).

70. *Id.*

71. *Id.* § 125.09(C)(5). For a discussion of the interpretation of "significant economic presence" see *supra* notes 60–63 and accompanying text.

72. OHIO REV. CODE ANN. § 125.09(C)(4).

73. *Id.*

74. West Virginia employs a preference for resident vendors in state contracts for supplies and equipment. W. VA. CODE § 5A-3-44 (1979). However, if the resident bid exceeds the out-of-state bid by 2%, the preference does not apply. *Id.* No other border state employs such a preference. *See* IND. CODE ANN. § 5-17-1-2 (1982); KY. REV. STAT. § 424.260 (Baldwin 1983); MICH. COMP. LAWS ANN. § 17.28 (1981) (only if all factors are equal will preference be given to the in-state supplier); PA. CONS. STAT. ANN. tit. 71, § 1612 (1962).

greater discretion in three areas: the bid notification procedure, the evaluation procedure, and the waiver provision.

The first example of additional discretion is the new provision governing the bid notification list.[75] Notices to bid will be restricted to bidders offering Ohio products unless the director deems it to be in the best interests of Ohio to send notice to all bidders.[76]

The second instance of increased discretion is found in the bid evaluation procedure. The bill requires the awarding of the contract to the lowest and best bid offering an Ohio product.[77] The evaluator decides whether or not a bid offers an Ohio product.[78]

The waiver provision also confers greater discretion on public officials than under prior law.[79] H. 271 permits the bid evaluator to waive the preference requirement if he or she determines that favoring an Ohio bidder will result in "acquiring an inferior product" or paying an "excessive price."[80]

With all of these changes, the potential for favoritism is great. In each situation, a public official will be making an important choice affecting the preference system. Prior law has established that the choice will be subject to attack only if it is an abuse of discretion.[81] Consequently, any gray areas in the process of implementation will provide a framework within which the public official is free to exercise personal choice.

D. Constitutional Issues

Any state preference system has the chance of being invalidated on federal constitutional grounds. Several states have attempted to improve their own economic conditions by enacting such legislation. The legislation has been attacked either under the commerce clause[82] or the privileges and immunities clause.[83] These two constitutional provisions

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75. OHIO REV. CODE ANN. § 125.08(A) (Page Supp. 1983).

76. *Id.*

77. *Id.* § 125.11(B).

78. *Id.*

79. *Id.* § 125.09(C)(6).

80. *Id.* For a discussion of the interpretation of "disproportionately inferior product" and "excessive price," see *supra* text accompanying notes 64–65.

81. *See supra* notes 19–22 and accompanying text.

82. The motivation behind the commerce clause was to create and foster development of a common market among the states and prevent internal trade barriers. *See* THE FEDERALIST NO. 42, at 268 (J. Madison) (Mod. Libr. ed. 1961).

83. The clause relied on by petitioners has been article IV, § 2. For a discussion of the distinction between these privileges and immunities and 14th amendment privileges or immunities, see The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). The purpose of the privileges and immunities clause illustrates that the Framers of the Constitution specifically sought to prevent favoritism on the part of each state. *See* THE FEDERALIST NO. 80, at 477–78 (A. Hamilton)

have been a source of successful challenge, often resulting in repeal of state preference systems.

The success of a challenge under the commerce clause is dependent upon the purpose of the legislation as well as what the legislation restricts.[84] If the purpose of the legislation is to favor state goods and services, the necessary effect is a restriction on incoming commerce. Since this is a potential violation of the commerce clause, the United States Supreme Court would take an active role in reviewing state legislation which in any way favors in-state goods and services over out-of-state counterparts.[85]

The standard of review employed by the Supreme Court is that where the state legislation requires private industry to exclude out-of-state products in order to favor local industry for economic reasons, the legislation violates the commerce clause.[86] In this situation, the state acts as a "market regulator."[87]

However, where the purpose of the legislation is to favor state products and services but the restriction is imposed only upon state agencies when acting in their purchasing capacity, a commerce clause challenge will fail. The United States Supreme Court has reviewed legislation mandating the award of state contracts to local industry and concluded that this situation differs from the regulation of private industry.[88] When a state purchases for its own agencies, it is entering the market as a "market participant."[89] The commerce clause is violated only where the state regulates private industry and not when it enters the market as a participant.[90] Consequently, although the practical ef-

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(Mod. Libr. ed. 1961); THE FEDERALIST No. 42, at 270 (J. Madison) (Mod. Libr. ed. 1961).

84. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 256–60 (1978).

85. *Id.* at 259.

86. *See generally* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

87. White v. Massachusetts Council of Constr. Employers, 51 U.S.L.W. 4211, 4212 (U.S. Feb. 28, 1983).

88. *Id.*

89. *Id.*

90. *Id.* The Supreme Court reaffirmed two prior cases dealing with this same issue. In Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), the Supreme Court upheld Maryland legislation governing recycling of abandoned automobiles. The statute required documentation of ownership before a bounty could be collected. Documentation requirements were more exacting for out-of-state processors than for in-state processors. The Court stated "[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. In Reeves, Inc. v. Stake, 447 U.S. 429 (1980), the Court noted that the commerce clause does not limit the ability of the states themselves to operate freely in the free market. *Id.* at 436–37. The Supreme Court also noted that restraint in this area is also counselled by considerations of state sovereignty, the role of each state "as guardian and trustee for its people." Heim v. McCall, 239 U.S. 175, 191 (1915) (quoting Atkins v. Kansas, 191 U.S. 207, 222 (1903)).

fect may be to restrict the inflow of commerce, the United States Supreme Court has established that the commerce clause does not pose a barrier to this type of state action.[91]

H. 271 will clearly withstand a commerce clause challenge. Since the restriction is placed only upon state agencies, the state will be considered a market participant. Consequently, the commerce clause is not violated despite the restriction of incoming commerce.

One specific type of preference system has suffered increased vulnerability under the privileges and immunities clause. The United States Supreme Court has declared that legislation mandating the award of state contracts to contractors who employ a minimum percentage of state residents over those contractors who employ out-of-state residents violates the privileges and immunities clause.[92] In *Hicklin v. Orbeck*, the United States Supreme Court, after concluding that the situation was one in which the protection of the clause could be invoked,[93] subjected Alaska's residency requirement to a two-part test. The Court first inquired whether there was a substantial reason for the discrimination—that is, something to indicate that nonresidents were a peculiar source of evil at which the statute was aimed.[94] Secondly, the Court required that there be a reasonable relationship between the danger presented by the nonresidents and the discriminatory practice.[95] The Court held that the nonresidents were not a peculiar source of the high unemployment rate Alaska designated as an evil to be eliminated.[96] Several state courts have followed the reasoning of the Supreme Court and invalidated state preference systems enacted by their legislatures.[97]

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91. The market-participant rationale has been questioned in the situation where the state action has given preference to companies which employ residents of the state. Justice Blackmun, dissenting in *White*, suggested that where the legislation required that state contracts be let only to companies that employ a minimum percentage of state residents, the practical effect was market regulation. Blackmun reasoned that companies which customarily bid on state contracts will hire only state residents in order to qualify for bid awards. Since these companies will work on private contracts as well as state contracts, the legislation is actually regulating the market. 51 U.S.L.W. at 4214–15 (Blackmun, J., dissenting). However, the only court to specifically consider this issue held that the legislation was within the framework of a market participant. United Bldg. & Constr. Trades Council v. Mayor of Camden, 88 N.J. 317, 338, 443 A.2d 148, 159 (1982).

92. Hicklin v. Orbeck, 437 U.S. 518 (1978).

93. The right to ply one's trade has been held to be within the privileges and immunities clause since the 1800's. *See* Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1871).

94. 437 U.S. at 525.

95. *Id.* at 526.

96. *Id.*

97. Neshaminy Constructors, Inc. v. Krause, 181 N.J. Super. 376, 437 A.2d 733 (1981), *modified*, 187 N.J. Super. 174, 453 A.2d 1359 (1982), invalidated New Jersey's residency requirement, rejecting the justification of the depression in the construction industry absent a special showing of specific danger caused by the nonresidents. *Id.* at 385, 437 A.2d at 738. In Salla v.

Challenge to H. 271 under the privileges and immunities clause also has little chance of success. The first preference system in H. 271 applies to products themselves, as opposed to the employees who produce those products.[98] The United States Supreme Court has declared that corporations cannot invoke the protection of the privileges and immunities clause.[99] Therefore, a privileges and immunities challenge will fail unless the out-of-state bidder denied the contract is an individual producer of goods.

The possibility of challenge to the preference system governing construction contracts is likely nonexistent under present law. Since no border state has a preference system for construction contracts, the preference system in H. 271 will not apply.[100]

V. CONCLUSION

Supporters of H. 271 maintain that the bill was enacted primarily to improve economic conditions within the state. Yet an analysis of the provisions of the bill along with its necessary effect illustrates that "Buy Ohio" falls far short of its purported goal.

The theory of the bill is in conflict with the basic principle of a common market among the states.[101] By instituting a preference for local industry, "Buy Ohio" advocates a trade barrier and invites similar economic retaliation from other states. Although the bill requires bid evaluators to recognize the level of commerce between Ohio and neighbor states, "Buy Ohio" is basically a protectionist measure.

In addition, the bill is in conflict with the primary objects of competitive bidding. The structure of H. 271 will increase discretion on the part of public officials involved in the state purchasing process in spite of the long-standing object of competitive bidding as a guard against

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County of Monroe, 48 N.Y.2d 514, 399 N.E.2d 909 (Ct. App. 1979), a New York court held that New York's residency requirement violated the privileges and immunities clause. *Id.* at 518, 399 N.E.2d at 913. The court rejected the idea that the nonresidents were a peculiar source of the high unemployment rate New York designated as an evil. *Id.* at 523, 399 N.E.2d at 914. In Laborers Union Local No. 374 v. Felton Constr. Co., 98 Wash. 2d 121, 654 P.2d 67 (1982), the Washington Supreme Court invalidated Washington's residency requirement, holding that the state's justification of strengthening the economic welfare of state and local economies could not satisfy the two-part test because the state did not have evidence to prove that nonresidents were a peculiar source of evil. *Id.* at 129, 654 P.2d at 70. *But see* People *ex rel.* Holland v. Bleigh Constr. Co., 61 Ill. 2d 258, 335 N.E.2d 469 (1975), where the Illinois Supreme Court upheld a residency requirement in the face of a privileges and immunities clause challenge. *Id.* at 273, 335 N.E.2d at 478–79.

98. OHIO REV. CODE ANN. § 125.11(B) (Page Supp. 1983).

99. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 170 (1869). The United States Supreme Court held that a corporation is not a "person" for purposes of the privileges and immunities clause. *Id.* at 177.

100. *See supra* note 5.

101. THE FEDERALIST No. 42, at 268 (J. Madison) (Mod. Libr. ed. 1961).

favoritism. Another long-standing object of competitive bidding has been the acquiring of the best product. H. 271 distorts that goal to acquisition of the best "Ohio product."

Finally, the mechanics of H. 271 render achievement of its goal improbable. Although the bill purports to require preference of Ohio products and services, its provisions are vague and provide possibilities for frequent circumvention. In fact, the reciprocity provisions ensure limited enforcement of "Buy Ohio" until a border state employs a similar protectionist measure.

As a result of the problems in theory and in practice, H. 271's most effective feature is the public relations benefit it provides for the Celeste administration.

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Code Sections Affected: To amend sections 125.01, 125.04, 125.08, 125.09, 125.11, 127.16, 153.012, and 5513.02.

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Sponsor: Skeen (H)

Committees: Commerce and Labor (S)
Commerce and Labor (H)