

Report on
IN-STATE PREFERENCE POLICY
in State Procurement

PURSUANT TO
SECTION 9 OF PUBLIC ACT 11-229



DONALD DEFRONZO
Commissioner
Department of Administrative Services

January 1, 2012

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Honorable Governor Dannel P. Malloy and Distinguished Chairs of the Labor and Public Employees Committee, Pursuant to the provisions of section 9 of Public Act 11-229, the Department of Administrative Services (DAS), in consultation with the Commissioner of Labor, the President of the University of Connecticut, the Commissioner of Public Works (now the Department of Constructive Services – DCS) and the Commissioner of Transportation, or their designees, collectively referred to below as the “Working Group”, has completed the accompanying report entitled “In State Preference Policy in State Procurement”.

In order to ensure the widest possible involvement in this study on the part of contracting state agencies, the Judicial Department, the Office of Legislative Management and the Connecticut State University and Community College systems were invited to participate and consented to do so.

This constitutes the final report of the Commissioner of Administrative Services concerning the questions presented and the requirements of the report under section 9 of Public Act 11-229.

The Working Group examined Connecticut’s current efforts and potential initiatives to maximize use of in-state contractors in the areas of construction services, commodities and other services.

This report:

- Analyzes the scope and effectiveness of existing state preferences in Connecticut law;
- Quantifies the degree to which Connecticut contracting agencies utilize Connecticut contractors and providers;
- Examines preference practices in other states;
- Identifies and analyzes Constitutional, legal and practical impediments to in state preference legislation and policy; and
- Identifies opportunities to improve the level of in-state contracting through policy changes or legislative action here in Connecticut.

I would like to thank the members of the Working Group, whose names are listed separately, for their participation in this process. This high level of interagency cooperation has led to the preparation of a substantive and comprehensive report. I hope that in the months ahead the content of this document will be useful to decision makers and legislative leaders as they explore policy changes in the area of in-state contracting.

Sincerely,

A handwritten signature in blue ink that reads 'Donald J. DeFronzo'.

Donald J. DeFronzo
Commissioner

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Introduction

During any given year the state has approximately \$1.5 billion to \$2 billion dollars worth of construction projects in some stage of development. In addition, State Executive Branch Agencies currently hold contracts for the purchase of goods and services valued at approximately \$2 billion dollars. To the extent that these dollars can be invested in Connecticut companies, or companies that employ state residents, local businesses are supported, jobs are created and greater economic opportunity is provided throughout the state. For these reasons, it is desirable that efforts be made to provide that, to the extent allowable by law, state contracting dollars remain in Connecticut.

Toward that goal, the Connecticut General Assembly approved Public Act 11-229, section 9 of which calls for the Department of Administrative Services (DAS), in consultation with the Department of Labor, the President of the University of Connecticut, and the Commissioners of Construction Services and Transportation, to prepare a report analyzing the degree to which the State of Connecticut currently contracts with Connecticut businesses and what measures or steps may be employed to maximize state contracting with in-state businesses.

Section 9 of **Public Act 11-229** provided the following:

(a) On or before January 1, 2012, the Commissioner of Administrative Services, in consultation with the Labor Commissioner, the president of The University of Connecticut and the Commissioners of Public Works and Transportation, or their designees, shall submit a report, in accordance with the provisions of section 11-4a of the general statutes, to the Governor and the joint standing committee of the General Assembly having cognizance of matters relating to labor. Such report shall include (1) an analysis of any law or economic factor that results in a resident bidder being at a disadvantage to a nonresident bidder in submitting the lowest responsible qualified bid, (2) the reason any enacted law designed to give preference to state citizens for employment on public works projects is not being enforced, and (3) recommendations for administrative or legislative action, within the confines of clause 3 of section 8 of article 1 of the United States Constitution, to increase the number of state contracts awarded to resident bidders through an in-state contract preference or otherwise.

(b) On or before July 1, 2012, the Commissioner of Administrative Services shall develop and implement a program to increase the number of state contracts awarded to resident bidders through an in-state contract preference or other method selected by the commissioner, provided such program shall not violate clause 3 of section 8 of article 1 of the United States Constitution. In developing such program, the commissioner shall consider the findings contained in the report made in accordance with subsection (a) of this section.

In approaching the topic of in-state preferences, it must be acknowledged that Connecticut procurement goals involve two, sometimes competing, objectives:

- The need to ensure fair and open competition while acquiring goods and services at the lowest possible costs, and
- The desire to acquire those goods and services from local in-state providers.

Striking the right balance and providing state agencies with clear direction on how these competing interests are to be reconciled is an inherent challenge in this analysis and will be addressed later as recommendations are developed.

I. The Current Status of Connecticut In-state Contracting

In considering the charge of the public act, the question occurs as to how to define an “in-state” business. There is no uniform definition of that term, nor is there any common understanding among the states as to the precise meaning of that term. There are a couple of different Connecticut statutes on the topic, which are described in this report. Precisely defining the term might well be useful in establishing a workable and comprehensive procurement preferences policy.

It is a threshold question as to what extent a business has to be “in” this state for it to be considered as maximizing economic benefits to the state and its citizens. Put another way, how much of a “presence” does a company need to have in order for its participation in a State contract to represent a maximization of state contracting dollars in this state.

State contractors (whether in-state or out-of-state) may employ state residents or state sub-contractors or may purchase goods or services from in-state businesses in connection with a state contract. Connecticut state or local tax revenue may be generated due to all or part of the economic activity that is undertaken pursuant to a state contract. In terms of the economic benefits to the state, there may well be little or no difference in many cases as to whether the state contractor business happens to be an in-state company or not.

In section 4a-59 (c), C.G.S., the law requires that for DAS contracting “[a]ll other factors being equal, preference shall be given to supplies, materials and equipment produced, assembled or manufactured in the state and services originating and provided in the state.”

There is another relevant statutory definition that has to be considered in this discussion: section 4e-48 of the general statutes, the reciprocal preference penalty provision, defines an in-state business (“resident bidder”) as “a business that submits a bid in response to an invitation to bid by a state contracting agency and that has paid unemployment taxes or income taxes in this state during the twelve calendar months immediately preceding submission of such bid, has a business address in the state and has affirmatively claimed such status in the bid submission....”

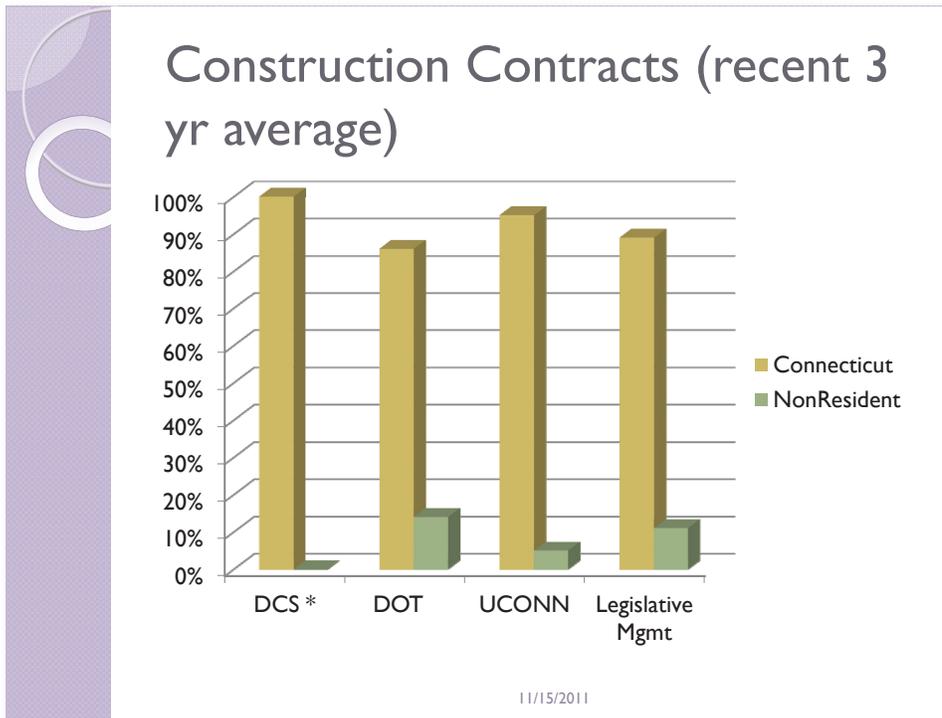
Detailed information concerning contractors’ presence in this state is not generally collected as part of the contracting process. This leaves a gap in understanding the extent to which the state already uses in-state contractors, as well as appreciating the in-state economic impact of state contracting generally. We do not have comprehensive data on the extent to which state contractors are headquartered in Connecticut, have other offices in Connecticut or the extent to which they employ Connecticut residents, pay state payroll taxes or are assessed local property taxes. Such information may be useful in the future in making a determination as to the economic impact of state contracting and any proposed policy changes in this area.



For purposes of this report, another clarification is needed. The scope of this report is limited to the procurement of goods and services by the state itself, for its own public purposes. These contracts constitute direct state agency-vendor relationships where the state agency has procured the service or commodity. The issue of contracting pursuant to economic development projects that use state funds or school construction grants was raised in the discussion group as a possible avenue for policy initiatives that might also have the effect of increasing in-state contractors or vendors. In such cases, the contractors are generally selected by the private owner of the property being developed or by a municipality and the contracts are held by such owner or municipality. Such a discussion raises a different set of issues that are beyond the scope of this report. Those issues would likely need to be more fully vetted with the participation of relevant state economic development authorities.

The following pages contain charts that indicate the extent to which Connecticut state agencies utilize in-state contractors for construction projects and for the acquisition of goods and services. The charts in this report that indicate percentages of contracts held by in-state businesses generally refer either to those businesses (1) with an in-state address for remittance of purchase orders, payments or other relevant contract correspondence or (2) whose principal business office is generally known by the contracting agency to be in this state. Of course, a company whose principal office, and even most if it assets, may be out-of-state can maintain an in-state office for purposes of administering a contract with the State or may simply have an office or assets here as part of their overall business.

A. CONSTRUCTION



**The Department of Construction Services (DCS) oversees construction contracts for the Judicial Branch and the Community College and Connecticut State University systems.*

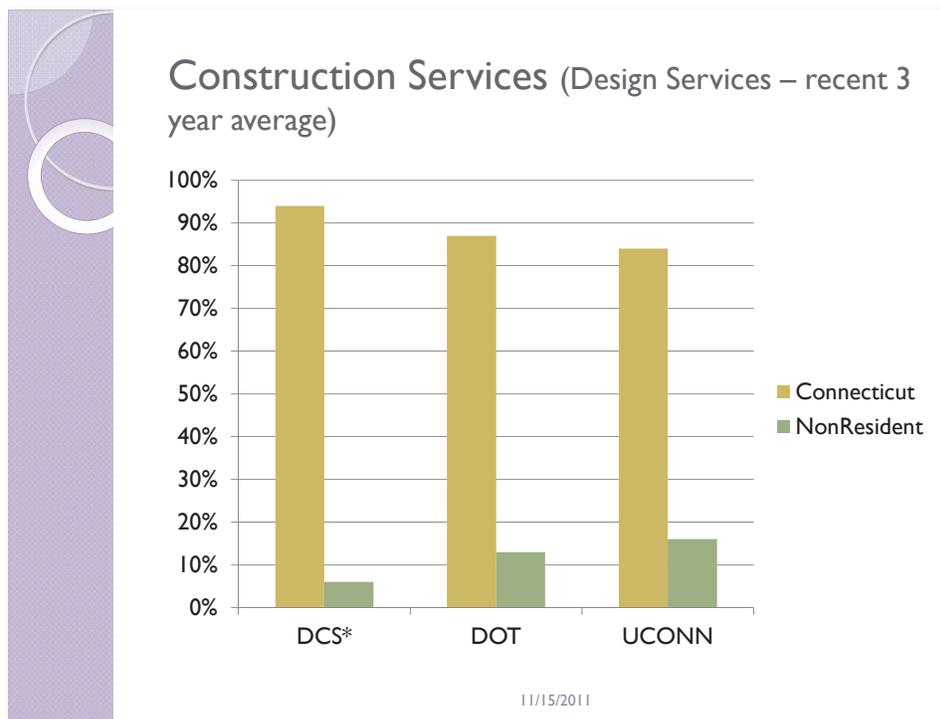
Statistics assembled from agencies engaged in construction management demonstrate that in the last three years construction contracts were awarded to Connecticut companies to the following extent: 100% by the Department of Construction Services, 95% by the University of Connecticut, 86% by the Department of Transportation (DOT) and 89% by the Office of Legislative Management. While the amount of in-state work as a percentage of all construction contracts is relatively high, the value of the contracts as a percent of total contract value may be significantly less in some areas.

DOT reports that its awards to out-of-state construction firms have increased recently. In Fiscal Year (FY) 2010, that percentage was 14%, up from only 4% in FY 2008. In terms of dollars, the FY '10 figure represented 59% of the amount expended, up from 27% in FY '08. One reason given for the difference is that large contract offerings draw the interest of large out-of-state construction entities; companies that operate on a national stage.

In 2008, only 2 out-of-state firms won contracts, resulting in a roughly 4% occurrence. However, one of those contracts was valued at \$137 million. (The other was statistically insignificant for this measurement). The overall value of the work bid that year was roughly \$500 million total resulting in a 27% share. The large contract was associated with the I-95 corridor construction in New Haven. In 2010, one extremely large contract went to an out of state firm for over \$400 million, again associated with the New Haven I-95 program and was the same contractor that bid aggressively for very large contracts.

DOT does point out that, despite these restrictions, it has been successful in providing Connecticut companies with more equitable bidding opportunities by, where feasible, breaking down large construction projects into smaller, more competitive bid packages. This approach, while falling within the federal guidelines, has served to level the playing field by providing Connecticut companies with expanded opportunities to compete for state work.

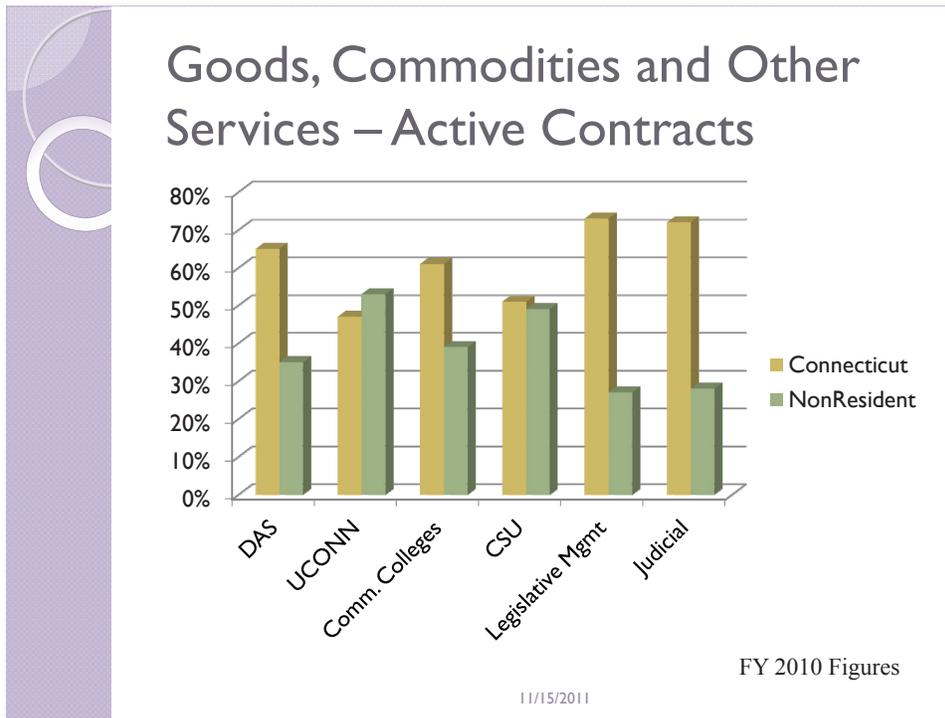
B. CONSTRUCTION SERVICES (DESIGN and ARCHITECTURAL SERVICES)



**DCS oversees construction contracts for the Judicial Branch and the Community College and Connecticut State University systems.*

Statistics assembled from agencies engaged in design and architectural services demonstrate that in the last three years contracts were awarded to Connecticut companies at the following proportions of each agency's total design contracts: 94% by DCS, 84 % by UCONN, and 87% by DOT.

C. GOODS, COMMODITIES and OTHER SERVICES



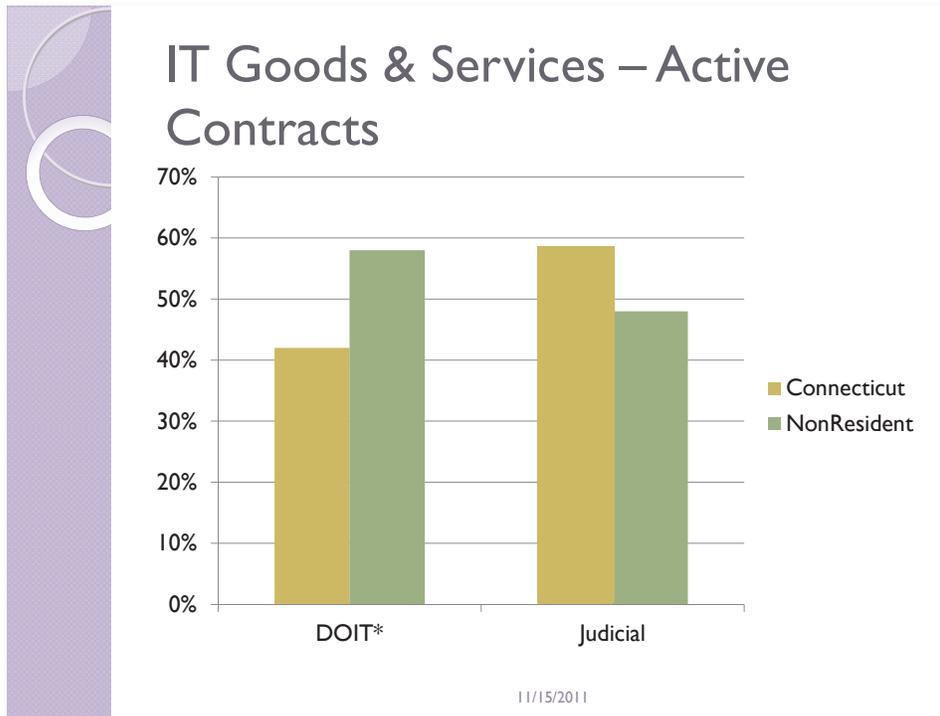
Similar data compiled for state contracts involving the purchase of commodities and other services indicate a lower level of in-state contracting, with the Department of Administrative Services (DAS) at 65% of contracts, UCONN at 47% of contracts, Judicial Branch at 72% of contracts, Legislative Management at 73% of contracts, the Connecticut State University system at 51% of contracts and the Community College system at 61% of contracts.

In terms of dollar amounts, in Fiscal Year 2010-2011, state agencies spent an estimated \$767 million for goods, services and other commodities purchased off of DAS-administered contracts. Of that, approximately \$498 million were payments to Connecticut companies, with the remaining approximately \$269 million going to out-of-state firms.

For dollar figures elsewhere, the Judicial Branch reports that, in 2010, it spent \$117,836,025 on goods, services and other commodities, of which \$106,900,941 was attributable to Connecticut vendors, or about 90% of the total. The Community-Technical Colleges reported that 9,186 contracts were issued in 2010 at a total cost of \$67,415,117, of which 61% were supplied by Connecticut vendors.

Given that most agencies are reporting in-state contracts for goods and services in the 60-70% range, it appears that there is room for growth in the use of local firms for this category of state contracting.

D. IT EQUIPMENT and SERVICES



**As of July 1, 2011
The Department of
Information and
Technology has
been merged into
the Department of
Administrative Services.*

In recent years the procurement of information technology goods and services has been handled by the former Department of Information and Technology, now part of DAS. As indicated above, the in-state purchase of IT equipment and services reflects an even lower level than the procurement of generic products, with slightly over 40% of acquisitions being provided by Connecticut companies.

In terms of the IT dollars, the Judicial Branch reports that, in 2010, it spent \$9,160,836 on goods, services and other commodities, of which \$5,301,224 was attributable to Connecticut vendors, or about 58% of the total. Previous procurement policies maintained by the former DOIT limited competition in the information technology field. The state's information technology contracts have traditionally not been re-opened very often; rather they typically have been renewed for long periods. This has reduced the opportunity to explore the possibility of increasing the participation of potential in-state vendors in this area.

E. OUT-OF-STATE CONTRACTORS GENERALLY

With respect to the provision of goods and services, Connecticut procurement officials participating in the Working Group maintain that all bidders must be treated equally and fairly. The competitive process ensures this integrity and sometimes results in contracts being awarded to out-of-state firms.

To the extent that out-of-state sources for some procurements are used, working group members reported that this is usually due to the fact that (1) a company that was located outside Connecticut was the sole source for the good or service or (2) the best price or service was awarded through an open and competitive bid and the out-of-state company offered the lowest price.

In addition, Department of Transportation officials referenced restrictive federal legislation which requires an open bidding process. Federal regulations generally prohibit any requirement that operates to restrict bidders whether non-resident or based on national origin or other prohibited factors.

For consultant selection generally, the policy of the federal government is to publicly announce all requirements for the architectural and engineering services and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices. This is generally without regard to geographic location of the firm.

The University of Connecticut indicated that the University follows Connecticut statutory requirements, as well as established agency policies, for public bidding. Depending on the bid type, decisions are made based on either price analysis with the award going to the lowest compliant bidder for Request for Quotations/Invitations to Bid, or an analysis of quality and merit decision-based criteria for Request for Proposals.

II. Policy Constraints on In-State Preferences

Before developing policy recommendations, it may be useful to reflect on existing policies and the public purposes that underlie them. Government procurement laws and policies have historically existed for the purpose of providing a legal and ethical framework within which government purchases goods or services that benefit the general public. Government makes such purchases with taxpayer's money and has an obligation to make such purchases in a way that maximizes the value to the taxpayer.

Policy changes that add other purposes, such as maximizing the use of in-state suppliers for goods or services, while encouraging local employment, may have the effect of undermining the traditional purpose of achieving the best price for the purchase at hand. The tension in balancing these two legitimate policy concerns, cost versus local employment – is a central point in this discussion.



To the extent that an in-state preference is established or expanded, a commonly discussed problem is that of potential retaliation by other states against Connecticut companies seeking to do business elsewhere. This is particularly relevant inasmuch as Connecticut is a relatively small state and there are several states nearby where Connecticut companies do business or may hope to do business. Of course, these companies employ Connecticut residents as well. Any policy that has the effect of dampening the out-of-state demand for in-state companies while pursuing an increase in in-state demand for in-state companies may well be counter-productive.

This state, along with at least 31 other states, has a law that provides for a penalty in procurement competition for companies that compete for business with the State of Connecticut but whose home states provide an in-state preference to their own companies doing business with their state government. (Sec. 4e-48, C.G.S.) The law requires the contracting agency to increase the out-of-state bid by the amount of preference the contractor receives on bids in its home state. If the increase makes an in-state contractor the lowest bidder, then the in-state contractor can win the contract if it agrees to meet the original low bid made by the out-of-state contractor.

Oregon.gov provides an updated chart of each state's reciprocal preference penalty laws.

A. CONSTITUTIONAL CONCERNS

Discussions concerning in-state preferences in state government procurement inevitably involve constitutional concerns that become relevant when states choose to treat citizens or businesses differently based on their state of residence or domicile.

As described later in this report, Connecticut, along with most other states, has a variety of in-state preferences in its procurement laws. Most of these, as written and as applied, are likely constitutional. The U.S. Constitution grants the sovereign states wide latitude when they are acting as buyers or sellers of goods or services and are using their own taxpayer's money to do it.



Where courts tend to find problems is in cases where the preference is rigid and exclusionary with regard to participation by non-residents or the preference is overly broad in its application and has more extensive, “downstream” impacts in the larger private market. Preferences that survive challenge tend to be narrowly drawn and directly related to a valid public purpose.

The act that gives rise to this report, Public Act 11-229, specifically identifies the Commerce Clause as a particular issue in consideration of in-state preferences and the recommendations of this report are required to comport with that clause. The following is a discussion of the Commerce Clause and one other significant constitutional provision. This is intended as a highlight of leading cases and is not an exhaustive survey of the constitutional case law in this area.

1. The Commerce Clause

Article I, section 8 of the United States Constitution gives the U.S. Congress the power to regulate commerce “among the several states”. The historic interpretation of that clause is that the delegation of that power to the federal Congress means that individual states may not regulate such commerce, at least not in a way considered burdensome to interstate commerce. There is voluminous case law that lays out the contours of the clause’s impact on states’ powers. Generally, states may not overly burden interstate commercial markets through taxing or regulatory schemes.

However, there is an important distinction that is made in Commerce Clause case law for situations in which a state is acting not as a market regulator, but as a market participant. That is, when a state is a buyer of goods or services, it generally is free to prefer its own in-state providers for such goods or services. In these cases, Commerce Clause challenges fail.

The U.S. Supreme Court first addressed this situation in the case of *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In that case, the state of Maryland had a scheme for recycling of scrap automobiles that

involved the state paying a ‘bounty’ for proof of a scrapped Maryland-titled car. The law required more rigorous documentation of such vehicles if the scrap processor was out-of-state. This had the effect of driving more scrap business to in-state processors whose paperwork was less involved since they were already licensed by the state. An out-of-state processor sued, alleging a violation of the Commerce Clause, but the U.S. Supreme Court upheld the law, saying “[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.

The Court further explained this decision in a later case by saying “[b]ecause Maryland was participating in the market, rather than acting as a market regulator,” it concluded that the law was constitutional. White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983).

A subsequent case reinforced the point. In Reeves, Inc. v. Stake, 447 U.S. 429 (1980), South Dakota had a policy whereby a state-operated cement plant’s sales of cement were limited to residents of the state. When challenged on Commerce Clause grounds, the Court upheld the policy and stated that the clause “responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace.... There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.” Id at 436.

In the White case cited above, the city of Boston required that certain construction projects funded by the city, or by the federal government through the city, were to be performed by a work force at least fifty per cent of which had to be residents of Boston. The U.S. Supreme Court held that the Boston policy did not violate the Commerce Clause. Applying its earlier cases, the Court stated that the city, in expending its own funds in construction projects, was a market participant and entitled to that Commerce Clause exception.

2. The Privileges and Immunities Clause

While most Commerce Clause case law that bears on the issue of in-state preferences in state procurement may not appear to be a significant bar to the existing preferences in Connecticut law, some case law involving the Privileges and Immunities Clause may be relevant and should be considered in any deliberations concerning additional preferences to be enacted here.

There are actually two privileges and immunities clauses in the federal constitution. Article IV, section 2, states that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. The 14th Amendment states that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

A leading modern case that explained the clauses’ impact on the states’ power to create a preference for its own residents in employment opportunities was Toomer v. Witsell, 334 U.S. 385 (1948). South Carolina had a law that required an exorbitant nonresident fee for commercial shrimp fishing operations in state waters. Before analyzing the law, the U.S. Supreme Court stated:

“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 U.S. Supreme Court found that the law violated the Clause inasmuch as there was no substantial reason for the exorbitant fee and that its effect was to bar out-of-state shrimpers from the local fishery.

Applying the Toomer principles to a state procurement case, the Court in Hicklin, et al., v. Orbeck, et al., 437 U.S. 518 (1978), found unconstitutional an Alaska requirement that oil and gas infrastructure projects to which the state was a party (as lessor of the land) had to employ qualified Alaska residents in preference to nonresidents. Alaska’s stated reason for the preference was to alleviate its local unemployment problem. The Court found, however, that the nonresident’s workers were not the “peculiar source of evil” that the law was enacted to remedy; rather it was the lack of education and job training of a substantial number

of Alaskan residents. Even if the influx of nonresidents were accepted as a source of that problem, the law did not “bear a substantial relationship” to that “evil”. The law granted all Alaskans, regardless of training or experience, a preference for the jobs.

(The Commerce Clause case, White v. Massachusetts Council of Construction Employers, Inc, described above, was distinguished by the Court from Hicklin on the grounds that in White, the city was developing its own property and acting as a market participant, whereas in Hicklin the state was more of a market regulator in that its role as lessor of land for oil and gas development gave its in-state preference an “economic ripple effect” into the larger private market.)

3. Other Constitutional Concerns

Some public procurement cases implicate the Equal Protection Clause of the 14th Amendment to the extent that a state discriminates against persons who are not U.S. citizens in employment or procurement. “Alienage,” as it is called in

constitutional case law, is a suspect classification that will draw strict judicial scrutiny and will require a compelling state interest in order to justify. (Residents of other states who are citizens of the United States are not “aliens” for purposes of this type of case and are not a suspect classification.)

Durational residency requirements have historically been struck down as violating a constitutional right to travel.



And finally, there have been cases implicating the Due Process Clause of the 5th and 14th Amendments where procurement laws are unclear or vague and leave too much discretion to the awarding authority in terms of who is awarded the contract. Generally, procurement laws have to be definite and concrete enough to allow authorities to compute any numerical bidding as well as to provide the awarding authority the ability to grant bids intelligently.

4. Summary of Constitutional Issues

How an in-state preference is viewed by the federal courts will turn on a number of factors: What is the role the state is playing, i.e. market participant vs. market regulator? What is the impact of the law on the larger private market, i.e., are there substantial ripple effects beyond the instant case? What is the rationale for the preference, i.e., is there a legitimate state interest and is the preference substantially related to it? Are there more narrowly tailored methods for achieving the same goal?

It is clear that a preference has a good chance of passing constitutional muster if it is a modest approach that (1) does not categorically or practically preclude out-of-state workers or businesses, (2) serves an important state interest, (3) is narrowly tailored and (4) is substantially related to the state's interest.

III. Existing Connecticut Preference Laws

Connecticut has a number of distinct, narrowly focused preferences in state procurement. The following is a summary.

A. PREFERENCES IN CONSTRUCTION

In the area of construction of state buildings and facilities, there are a number of provisions that are relevant to this discussion.

1. Building Construction Architects/Engineering Services

The Department of Construction Services (DCS) provides for design and construction of state facilities for the Executive and Judicial Branches, the Connecticut State University system and the Community-Technical Colleges. DCS projects involving consultant services, chiefly architectural and engineering firms, are required to consider a firm's knowledge of this state's building and fire codes, and the geographic location of such firm in relation to the geographic location of the proposed project. An extra ten points in added to the evaluation score if the company's headquarters is within 60 miles of project site. (§ 4b-57b, C.G.S.)

2. University of Connecticut Construction

The University of Connecticut is implementing measures to consider in-state preferences. For example, the University of Connecticut currently uses in-state criteria such as knowledge of the Connecticut Building Code and the location of the company's primary office when considering design professional services and will give a preference for firms with offices within 100 miles of the project site.

3. Project Labor Agreements

Occasionally the State has provided for project labor agreements on some of the larger and higher profile construction projects such as Rentschler Field, the Connecticut Convention Center and the Connecticut Science Center. Some of the larger municipalities have also required such agreements on some of the larger or more complex school construction projects. The benefits to the owner of such agreements is that they provide a framework within which issues, such as compensation, work rules and the division of labor, are either resolved in advance or a process for resolution is provided in the agreement. This tends to make projects go more smoothly and efficiently. One corollary effect of such agreements is that significant work for local subcontractors and local workers tends to be assured as a practical matter.

B. PREFERENCES IN CONSTRUCTION AND GOODS AND SERVICES

Goods and services present a different set of considerations and a number of preference policies have been established.

1. Set-aside Program for Connecticut Small and Minority Owned Business Enterprises (§ 4a-60g, et seq., C.G.S.)

Under the state minority set-aside program, state and quasi-public agencies and political subdivisions, other than municipalities, must set aside 25% of their contract spend for construction, goods, and services each year for small contractors, and must reserve 25% of that spend for small, minority-owned businesses (“set-aside goals”). Like most state contracts, set-aside contracts must be awarded based on competitive bids within the set-aside pool.

The DAS Supplier Diversity program certifies small contractors and minority business enterprises eligible for set-aside contracts and annually prints a directory of them. The Commission on Human Rights and Opportunities (CHRO) is required to monitor the achievement of the annual set-aside goals established by each state agency and prepare a quarterly report concerning such goal achievement.

This table illustrates the set-aside goals and achievements for all state agencies in FY ’10:

FY 2010 Goals: SBE: \$132,463,060 MBE: \$ 33,115,765	FY 2010 Actual: SBE: \$289,223,174 MBE: \$ 68,481,168
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In FY ’10, the actual amount that agencies spent using small and minority-owned businesses was more than double the goals.

The Set-Aside program carries out its intended purpose and the annual compliance reports illustrate the success rates of each agency. While not all state agencies achieve their goals, the compliance reports help agencies not meeting the State benchmarks to develop outreach strategies for future compliance.

For purposes of understanding the policy, it should be noted that prices paid for these vendors are sometimes higher on certain commodities, due to the fact that vendors in the SBE and MBE classification are not competing against larger companies, who are often able to propose lower prices.

2. Reciprocal Preference Penalty (§ 4e-48, C.G.S.)

The State Contracting Standards Board is charged with reviewing other states’ contracting preference provisions and producing a report that contracting agencies may use in applying the penalty provided by this statute. State contracting agencies must compare bid prices and add a percentage increase to the original bid of a nonresident bidder equal to the percentage preference given to the non-resident bidder in the state where the nonresident bidder resides. If low bidder is a resident bidder after applying preference, low resident bidder gets opportunity to meet original nonresident bidder price.

C. PREFERENCES IN GOODS AND SERVICES

1. Correctional Enterprises of CT (CEC)

State agencies are required to purchase necessary products and services from CEC, provided comparable price and quality, and sufficient quantity are available. (§ 18-88(g), C.G.S.) This preference appears to serve its apparent purpose, but it has a limited niche. DAS has administered a contract with CEC for agency and municipal use that includes: inmate and institutional mattresses, basic institutional clothing, shower curtains, linens, silk-screening, embroidery, printing, signage, plaques and furniture. The value of this contract is approximately \$3 million per year.

2. Board of Education and Services for the Blind (BESB)

State agencies must purchase products made by or services provided by blind persons as overseen by BESB provided they meet quality, quantity and price. BESB primarily offers food and vending services. (§10-298b, C.G.S.) This preference appears to work well for various food service locations throughout the state. Combined gross sales for the participants in the program exceeded \$4.6 million in the last fiscal year. Despite the challenging economy, the combined total net income of these entrepreneurs exceeded \$1.2 million.

3. Preference for Persons With Disabilities

There is a preference for the provision of certain services by persons with disabilities. This serves a number of human services policies in addition to providing for the goods and services. Currently administered by Connecticut Community Provider Association (CCPA), the program primarily offers custodial services, lawn mowing and other similar services. (§ 17b-656, C.G.S.) Generally seen as a success; there are nearly one hundred separate contracts with CCPA for custodial and other services. In FY 2010, \$2.2 million was paid to CCPA for services through preference.

4. Janitorial Work Pilot Program for Persons With Disability and Persons With a Disadvantage

In addition to the general disabled preference, there is a specific program under which DAS designates a particular site as a program location at which only qualified vendors can bid. In order to become qualified the company must meet certain requirements, including hiring employees with a disability and economically disadvantaged individuals. (§ 4a-82, C.G.S.) The program has largely achieved its intent. In 2010, \$3.7 million was paid to participants under the program and the program was extended to 2014.

5. Agricultural Products Preference

For state programs that involve provision of food, there is a preference for dairy products, poultry, eggs, fruit or vegetables grown or produced in Connecticut when such products are comparable in cost to other dairy products, poultry, eggs, fruit or vegetables grown or produced in another state. (§ 4a-51(b), C.G.S.) Through the State food contract, SYSCO provides Connecticut-grown dairy, eggs and produce to state agencies whenever possible, typically on a seasonal basis. In FY 2010, 5,293 cases of such produce were purchased by the Executive Branch at a cost of about \$80,000, an 11% increase from the previous year.

6. *General DAS Purchasing Preferences*

For general Executive Branch purchasing, state law (§ 4a-59 (c), C.G.S.) provides for a discretionary preference of up to ten percent for:

- goods made with recycled materials or products that are recyclable or remanufactured;
- motor vehicles powered by clean alternative fuel; and
- the purchase of goods or services from micro-businesses (gross revenues not exceeding three million dollars in the most recently completed fiscal year).

Additionally, section 4a-59(c) provides that “all other factors being equal, preference shall be given to supplies, materials and equipment produced, assembled or manufactured in the state and services originating and provided in the state.”

In general, the actual award of contracts to either micro-businesses (nationwide) or resident businesses through the reciprocal preference has occurred on a minimal basis. This is not due to any lack of consideration for these preferences; rather it is based on the actual bid results. With regard to the preference provided for supplies, materials and equipment produced, assembled or manufactured in state and to services originating and provided in the state if “all other factors [are] equal,” (i.e. a tie), over the past 14 years, DAS has only encountered that situation on 2 occasions where the preference for local vendors was invoked.

D. SUMMARY

Narrowly targeted preferences are not new to Connecticut and, due to their limited impact, applying to the state’s role as a purchaser of goods and services, these preferences would likely withstand constitutional challenges. At the same time, however, Connecticut does not have any broadly stated preference applying a strict point or percentage advantage to Connecticut companies. While such preferences may also be constitutional, until now public policy debate on the matter in Connecticut has been moderated due to the concern that thirty-seven other states have retaliatory reciprocal preference legislation in place which might be used to punish all Connecticut companies competing in other jurisdictions.

IV. Economic Factors for In-State Companies

The public act directed that this report examine whether there are laws or economic factors that negatively impact Connecticut companies' ability to participate in state contracting. Given the narrow scope of this directive, this examination was limited to factors affecting the procurement process itself. None of the agencies in the Working Group indicated that any law or economic factor is a particular bar to in-state firms generally being able to compete for state contracts.

However, a number of more general observations were made by Working Group members regarding small businesses' ability to do business with the state.

The issue of workers' compensation fund requirements and prequalification requirements were discussed at the September Informational Meeting as a possible impediment for some smaller, less sophisticated firms. Concerns were similarly raised regarding some small and minority businesses' ability to meet the financial requirements (bonding) necessary to be certified to bid on state construction projects. There were also indications that the requirement that a firm's financial statement be reviewed or audited by a CPA is a barrier in that these reviews or audits can cost thousands of dollars to obtain.

As a matter of policy, the state needs assurance that its interests will be protected in the event the contractors fail to perform properly. As a result, in order to be prequalified, an applicant must include a statement of the company's financial condition reviewed or audited by a licensed Certified Public Accountant and provide a letter from a bonding company indicating the company's aggregate work capacity (the maximum amount of work the company is capable of undertaking for any and all projects) and single limit work capacity (the estimated cost of a single project that the company is capable of undertaking). The bonding company must have at least an "A-" rating by the A.M. Best Company.

For small companies, it can be very difficult to obtain the required bonding. The Minority Bonding Guaranty program administered by the Department of Economic and Community Development was created in response to the inability of a significant number of minority contractors to acquire bonding through the traditional underwriting process. State funding for the program, approved by the State Bond Commission, has been used to reimburse surety companies in the event of default by the contractor. The program has been administered by the Hartford Economic Development Corporation (HEDCo), a non-profit organization that provides technical assistance, loan packaging, regulatory assistance, locational assistance and problem-solving services at no cost to businesses in Hartford. In 2011, the Minority Bonding Guaranty program was expanded to cover New Haven, New London and Bridgeport.

The funding for the program comes from the urban action grant program under section 4-66c of the general statutes. The State Bond Commission allocation for the program limited the use of the funds to support for payment bonds, which guarantee that a contractor's suppliers and workers are paid. It does not directly support performance bonds, which guarantee that the project will be completed, or bid bonds, which are required to show a contractor's capacity to bid on and handle projects of a particular size or scope. Requirements for bid bonds and performance bonds have become a standard prerequisite in state contracting since the program was originally created.

During the 2011 legislative session, DAS met with numerous stakeholders on these issues. Section 6 of public act 11-229 reduced the barriers that small companies face when attempting to obtain certification in DAS's Construction Contractor prequalification program by encouraging the use of an alternative route to obtain the necessary bonding, and simplifying the application process for small companies by eliminating the financial statement requirements for companies that are affiliated with certified a Community Development Financial Institution (CDFI). CDFIs provide loans, bonding support, and business assistance to small businesses. The companies will still be required to have bonding and meet the aggregate work capacity and single project requirements – which will be facilitated through the CDFI – but they will not have the burden of arranging for CPA-reviewed or audited financial statements in order to get prequalified under the DAS program. DAS believes this is a good first step in addressing those issues, but more needs to be done.

V. Other States' Preference Laws

States have a number of ways in which they prefer their own resources in state contracting.

1. Price Preferences

At least ten states (South Carolina, Hawaii, West Virginia, Wyoming, Louisiana, Alaska, Idaho, Arkansas, Illinois and California) provide for a “percentage preference” whereby an in-state bidder may win a bid if the in-state bidder is within some specified percentage of the low bid in cases where an out-of-state bidder is lower. These states have assumed the risk that other states may retaliate against their firms seeking to do business elsewhere.

Some examples of these preferences include:

Arkansas gives a preference of 5% to Arkansas bidders in the purchase of commodities that are materials and equipment used in public works projects against bids received from private industries located outside the State of Arkansas.

Illinois has a 10% preference to the cost of coal mined in the State of Illinois if used as fuel in institutions maintained by the state or any municipality.

California allows a preference of 5% to bidders manufacturing supplies in the State of California to be used or purchased in the letting of contracts for public works, with the construction of public bridges, buildings and other structures, or with the purchase of supplies for any public use. In addition there are preferences for contracts for goods in distressed areas and for bidders who agree to hire persons with high risk of unemployment.

2. Project Labor Agreements

State and local governments sometimes require that government construction projects use project labor agreements. The agency responsible for the construction project will enter into, or require the general contractor to enter into, an agreement with a union or group of unions, such as an area trade union council, to specify the wages and fringe benefits to be paid on a project and the amount of work to be provided by

organized labor or by minority firms (subcontractors) or workers and often includes binding procedures to resolve labor disputes. There may be provisions prohibiting a labor strike on the project as well as prohibiting management from locking out workers. Such an agreement often requires contractors to hire workers through a union hiring hall or employees to become union members after being hired. The agreement may also provide for a portion of the work to be done by small or minority-owned businesses. By providing these kinds specifications for the workforce or the subcontractors, such agreements tend to require local workers and firms to be involved at the labor or subcontractor level.

A number of state and municipalities have utilized project labor agreements, described above, in a variety of public works projects. Some examples include:

- New York City School Construction Authority
- Tappan Zee Bridge, State of New York
- Central Artery / Tunnel (“Big Dig”)
- Los Angeles (California) Unified School District

3. Comprehensive Surveys of State Preferences

The following are links to two websites that provide detail as to state preferences, it should be noted that these reports while comprehensive are not current and may not entirely reflect recent preference policy changes:



[Virginia Commonwealth Preference Study](#)
(report issued 7/2/2010)

[US States Procurement Preferences](#)
(report issued 2/29/2008)

Reviewing this information makes clear that many states have made a policy decision to prefer in-state resources in many cases, even if that means paying more for the good or service.

As noted, at least 31 states, including Connecticut, have a reciprocal preference penalty law which requires the contracting agency to increase the out-of-state bid by the amount of preference the contractor receives on bids in its home state. This demonstrates the competing policy goals that many states pursue: maximizing use of in-state firms in contracting while protecting the ability of in-state firms to work elsewhere. For a small state like Connecticut, the latter concern is significant.

VI. Recommendations

The following recommendations are the product of consultation with the Working Group, consideration of the information produced by the participating agencies and independent research. These recommendations reflect the intent that state procurement policy should favor in-state resources when doing so does not unduly impact the quality of the product or service, cost and efficiency, and when doing so is consistent with constitutional standards.

A. PROCESS IMPROVEMENTS

1. In order to better monitor the level of in-state contracting, procurement officers in each branch of state government, and in large agencies that conduct their own procurement activities, should add certain data elements to Requests for Information, Requests for Qualifications and Requests for Proposals applications to determine:

- If companies are headquartered in Connecticut
- If companies have other offices in Connecticut
- The extent to which companies employ Connecticut residents, pay state payroll taxes or are assessed local property taxes

To achieve this goal, a small committee of procurement professionals should be convened to agree on a uniform set of questions to be recommended for inclusion in appropriate documents.

2. Contract extensions, which have been common and recurrent in the purchase of IT services and equipment, should be sharply curtailed to ensure more frequent bidding, greater competition and transparency and improved opportunities for contract participation on the part of local companies.

3. DOT and other agencies utilizing federal funds should continue their efforts to “right-size” contracts to both comply with strict federal contracting requirements while maximizing opportunities for qualified local contractors. Agencies utilizing federal funds have had success with this approach and it should continue.

4. Bond requirements for small and minority-owned businesses often impose an impediment to the pre-qualification of small construction companies and, as a result, prevent such companies from participating in state contracts. Administrative efforts designed to result in an easier and more economical path to bonding and pre-qualification for Connecticut’s small and minority owned businesses should continue and be intensified. These efforts should be coordinated with other initiatives to strengthen and expand the minority business bonding guaranty programs already administered by the state. The bond allocation directive for the program could be expanded to include bid bonds and performance bonds.

5. While there are approximately 2,500 small businesses and 1,250 minority businesses currently certified by DAS to participate in the state’s set-aside program, outreach efforts to increase those numbers have been hampered due to budget cuts and personnel reductions. DAS and other procurement agencies should expand and intensify outreach efforts to small and minority-owned businesses in order to enroll them in the set-aside program. This effort will be supportive of Connecticut’s small business sector and also increase the likelihood

that more Connecticut businesses will come to compete and participate in state contracts. Toward this objective, state agencies should form partnerships with organizations representing or including small and minority-owned businesses to more aggressively recruit such businesses for state contracting.

6. The use of Project Labor Agreements (PLA) by state agencies, within the discretion of state procurement authorities, may be expanded to ensure the greater use of local labor, Connecticut small and minority owned businesses and locally provided goods and services. While perhaps not suited to every construction project, the use of PLAs in this state and other jurisdictions has served to foster greater and more equitable use of local resident businesses and labor. Comprehensive cost-benefit analyses may be needed to determine which projects may best be suited for project labor agreements.

7. Efforts to streamline state bidding and contracting processes and to make the system less imposing to Connecticut's mid-sized and smaller companies need to be continued and expanded. While some initial steps have been taken, including the establishment of online electronic filing of affidavits and other contract certification documents, more needs to be done to reduce the time-consuming and burdensome application process. Toward this goal, agencies should initiate efforts to achieve greater efficiency while employing expanded use of technology, including the implementation of on-line bidding procedures.

B. SELECTION CRITERIA

Where strict in-state preferences may not be preferred, selection criteria designed to value the use of companies with particular knowledge or expertise may be justified as being in the interest of the state. Connecticut already recognizes the importance of companies having knowledge of local building codes, for example, and the expanded use of such criteria may result in more local companies being selected for state work. All branches of state government and all agencies should, where practical, establish selection criteria that place a premium on local experience and knowledge. These may include:

- Knowledge of Connecticut law, regulations, codes or practices
- Geographic proximity of the vendor's offices to the project
- Experience with similar in-state projects or contracts where such experience may be considered advantageous to the state

C. POTENTIAL LEGISLATIVE CHANGES

1. The Legislature should consider the establishment of one uniform definition of "resident bidder" or "in-state contractor" in order to facilitate some of the recommendations in this report as well as to appropriately and consistently benchmark trends in this area of public policy. As noted earlier section 4e-48 of the general statutes provides a definition that includes provisions such as taxes paid to this state, the firm's business address and whether the firm has affirmatively claimed such status in the bid submission. This definition should, at a minimum, apply to the recommendations concerning application information and reporting requirements for contracting by state agencies.



2. The expansion of the state Small Business Enterprise and Minority Business Enterprise set aside programs may be warranted and would have the effect of increasing the use of Connecticut contractors and vendors. However, there are significant constitutional concerns around the minority set aside program. It is likely that the recently approved study of disparities in state contracting would need to be completed in order to provide a justification and basis for the existing program or any expansion.
3. As noted in this report, the requirement that contractors be bonded is a significant impediment to a number of smaller contractor firms. They simply lack the assets or work history that would allow them to meet the requirements for obtaining the requisite level of bonding for many state projects. Programs that subsidize or guarantee bond requirements on some projects could assist a number of smaller local firms in obtaining state business. Weighing against this would be the budget constraints to providing such a subsidy, as well as the risk to the state if the projects are not completed on time or on budget. The bond authorization for programs like the minority bonding guaranty program of the Department of Economic and Community Development could be expanded to include support for bid bonds and performance bonds.
4. The state's largest annual construction allocation, the school construction program, approximately \$600 million per year, is exempt from the Small Business Enterprise and Minority Business Enterprise set aside program requirements. The General Assembly may wish to analyze the extent to which Connecticut small and minority owned businesses are utilized in local school construction projects and re-evaluate the justifications for the exemption.
5. As noted in this report, an additional avenue for policy initiatives in this area could be the extension of preferences and the set aside programs to economic development construction grant programs. Such programs are those in which the state provides funding but is not the primary contracting entity. Any such a policy initiative should be vetted with appropriate economic development authorities.
6. The state could establish a numerical percentage preference to be afforded to in-state bidders in the competitive selection processes of the procurement agencies. As indicated in this report, there is some precedence for this in state statute already (§ 4a-59(c), C.G.S.). This would represent an expansion of that policy. As noted in this report, a number of other states have such preferences and those policies appear to be constitutional. However, if Connecticut firms attempt to do business in states with reciprocal preference penalty provisions similar to our own section 4e-48 of the general statutes, they would be disadvantaged to the same extent. Also, some of the members of the working group expressed a concern that price and numerical percentage preferences may cause upward pressure on prices that the State would have to pay for goods and services since vendors in the marketplace will, at some point, become aware of the preference and begin to factor it into their pricing.

