Michigan Law Review

Volume 55 | Issue 8

1957

Constitutional Law - Relation of Federal and State Governments Applicability of State Licensing Statute to Federal Contractors

Lee N. Abrams S.Ed.
University of Michigan Law School

CONSTITUTIONAL LAW—RELATION OF FEDERAL AND STATE GOVERNMENTS—APPLICABILITY OF STATE LICENSING STATUTE TO FEDERAL CONTRACTORS—A contractor submitted a bid for construction of facilities at an Arkansas Air Force Base over which the United States had not acquired jurisdiction.[1] After this bid was accepted by the federal government and work on the project had begun, the contractor was tried by the Circuit Court of Pulaski County, Arkansas, and found guilty of submitting a bid, executing a contract, and commencing work as a contractor without the license required by Arkansas law.[2] The Arkansas Supreme Court affirmed the judgment of the trial court.[3] On appeal to the United States Supreme Court, *held,* reversed. In a brief per curiam opinion, the Court stated that to subject a federal contractor to state licensing requirements would interfere with the federal policy of awarding construction contracts to the lowest responsible bidder.[4] *Leslie Miller, Inc. v. State of Arkansas,* 352 U.S. 187 (1956).

In refusing to approve the application of the state regulations to federal contractors, the opinion made no reference to the series of earlier decisions relied on by the Arkansas courts, but rather was based solely on the holding of one previous case[5] to the effect that the states have no power to require additional qualifications from employees of the federal government who have been deemed competent for their work by that government. That case, however, can be readily distinguished on its facts, for it concerned a direct employee of the government who was driving a government-owned truck in the performance of a governmental function—the delivery of mail. Petitioner in the principal case, on the other hand, was an independent contractor, resident in Arkansas, and a requirement that he be licensed by the state would appear to have only an indirect effect on the federal government.[6] In earlier cases the Supreme Court has consistently upheld the

[1] The federal government might have acquired jurisdiction over the property pursuant to 54 Stat. 19 (1940), 40 U.S.C. (1952) §255.

[2] Ark. Stat. (1947; Supp. 1955) §§71-701 to 71-721.

[3] Leslie Miller, Inc. v. State, 225 Ark. 285, 281 S.W. (2d) 946 (1955).

[4] This policy is enunciated in 62 Stat. 22 (1948), 41 U.S.C. (1952) §152(b). The theory of the government policy of competitive bidding is discussed in United States v. Brookridge Farm, (10th Cir. 1940) 111 F. (2d) 461.

[5] Johnson v. Maryland, 254 U.S. 51 (1920).

[6] The imposition of such an indirect burden on the federal government was upheld in State v. Wiles, 116 Wash. 387, 199 P. 749 (1921) (one who contracted to transport mail was required to get licenses for his trucks); Baltimore & Annapolis R. R. v. Lichtenberg, 176 Md. 383, 4 A. (2d) 734 (1939), appeal dismissed, 308 U.S. 525 (1939) (one who contracted to carry workers for the federal government was required to obtain a permit to

power of the states to impose a privilege or excise tax on contractors working on federal projects if the project was within the territorial limits of the state and exclusive jurisdiction over the property had not been ceded to the federal government.[7] The analogy which might have been drawn from those cases, which was essentially the basis of the decisions in the Arkansas courts, was tacitly rejected in the principal case. Furthermore, the Court ignored a basic distinction drawn in two cases involving state regulation of the price of milk sold to army bases.[8] It was held in those cases that minimum prices established by the states for the sale of milk could be enforced when the army base which purchased the milk was located on state lands,[9] but could not when the sale occurred on property under exclusive jurisdiction of the federal government.[10] The decision in the principal case attached no significance to the fact that the Air Force Base involved was not under such exclusive federal jurisdiction, although this was emphasized by the Arkansas Supreme Court. The real significance of this case appears to lie in its broad application of the doctrine that a state's exercise of its police power, as opposed to its taxing power, will be curtailed when necessary to prevent limitations of the power of the federal government.[11] The decision seems to rest on the theory that the enforcement by a state of employment standards differing from the federal regulations on the subject would be an improper interference with the power of the federal government to select its own employees and contractors on whatever basis it sees fit.[12] In earlier decisions the Court has shown somewhat more respect for the power of states to regulate activities within their borders, in

act as a common carrier on the highways of the state); E. E. Morgan Co. v. State, use Phillips County, 202 Ark. 404, 150 S.W. (2d) 736 (1941) (statute requiring a corporation to comply with requirements for doing business in the state was held applicable to a corporation working on a federal project there); Commonwealth v. Closson, 229 Mass. 329, 118 N.E. 653 (1918) (mail wagon driver compelled to obey state traffic laws, even though it slowed mail delivery).

[7] A tax imposed on an independent contractor is not laid on a government instrumentality. James v. Dravo Contracting Co., 302 U.S. 134 (1937) and cases there cited; Alabama v. King & Boozer, 314 U.S. 1 (1941); Trinityfarm Construction Co. v. Grosjean, 291 U.S. 466 (1934); Sollitt v. Commonwealth, 161 Va. 854, 172 S.E. 290 (1934).

[8] Penn Dairies v. Pennsylvania Milk Control Commission, 318 U.S. 261 (1943); Pacific Coast Dairy, Inc. v. California Department of Agriculture, 318 U.S. 285 (1943).

[9] Penn Dairies v. Pennsylvania Milk Control Commission, note 8 supra.

[10] Pacific Coast Dairy, Inc. v. California Department of Agriculture, note 8 supra.

[11] See Arizona v. California, 283 U.S. 423, 451 (1931) (federal government can build a dam across a navigable river, in performance of its functions, without conforming to the police regulations of a state, which required its engineer to approve all dams built in the state); Mayo v. United States, 319 U.S. 441 (1943) (state cannot exact an inspection fee as to fertilizer owned by the United States and being distributed in the state pursuant to a federal statute); Ohio v. Thomas, 173 U.S. 276 (1899) (state cannot, through its police power, regulate the management of a federal soldiers' home).

[12] Compare Ark. Stat. (1947) §71-709 with 32 C.F.R. (1954) §§1.307 and 2.406-3, which sets forth a list of factors to be considered in making awards and determining who is a "responsible contractor."

the absence of federal legislation to the contrary.[13] The summary disposition accorded the principal case, however, probably indicates that the Court did not intend a radical departure from its earlier position at this time. The case may be appraised most accurately, then, from a broader viewpoint as a further manifestation of the recent trend in judicial thinking emphasizing the authority of the federal government to perform its functions without interference by the states.

Lee N. Abrams, S.Ed.

[13] "Hence, in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. . . . *Furthermore, we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government.*" Penn Dairies v. Pennsylvania Milk Control Commission, note 8 supra, at 275. Emphasis supplied.