



Local Hiring Hits the Road

GUIDANCE ON US DEPARTMENT OF TRANSPORTATION'S LOCAL HIRING PILOTS

Introduction

On March 6, 2015, the U.S. Department of Transportation (USDOT) initiated an exciting one-year experimental pilot program to create job opportunities for communities impacted yet often ignored by local development projects. Until March 6, 2016, any Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) funded projects, if approved, will now be able to require local hiring. This represents a significant departure from past anti-local hiring directives issued during the Reagan Administration, as USDOT had previously prohibited recipients and subrecipients from contracting stipulations on local and state bidding not immediately relevant to the bidder's performance of work.¹ The program will enable grantees to use social and economic contracting requirements and USDOT will use the collected data to ultimately evaluate their effects on competitive bidding.

Why Local Hiring?

The benefits of local hiring extend beyond promoting strong local economies. As Secretary of Transportation Anthony Foxx puts it, "Local hiring just makes sense."² For decades, federal policies have denied preference to local residents, preventing the very communities that projects are being built in from benefiting. The practice of local hiring allows cities to use tax dollars to stimulate their local economies, leading to local businesses benefiting from the increased dollars that residents will spend. Local hire offers an opportunity for disadvantaged communities to lift themselves up and achieve financial security. Additionally, local hiring can reduce the environmental impact of daily commuting by shortening worker commutes.

What's Changing?

Expanding the use of local hire requirements to encompass projects funded by federal dollars has the potential to compound the benefits that local hire has already achieved, namely "improv[ing] access to jobs, education, and goods movement while providing construction and operations jobs."³ Before this program, municipalities could only require local hiring on projects that did not receive federal funds, or else the local hiring requirement had to be reduced in proportion to the amount of federal funds received. That is, if a city with a 50% local hire requirement embarked on a \$10 million construction project with \$5 million coming from federal funds, the city could only impose a 25% local hire quota on its contractors. With this pilot program, cities considering projects funded in part by USDOT are better able to take advantage of their local hire requirements, which means more jobs for their residents and more of their investment staying in local communities.



Establishing the Legality of Local Hiring

1. *Constitutional Challenges to Local Hire*

Geographic-based hiring preferences are scrutinized under the Privileges and Immunities Clause of Article IV, Section 2, which balances the fundamental rights of state citizens and out-of-state citizens.⁴ In the 2007 case *City of Cleveland v. Ohio*, the Sixth Circuit held that a proposed local hiring law avoided scrutiny under the Privileges and Immunities Clause because it restricted the scope of the ordinance to only in-state residents instead of out-of-state residents.⁵ This decision provided a new legal framework for cities to establish local hiring policies that would previously have been challenged in the courts.

Following the passage of the landmark 2010 Local Hiring Ordinance in San Francisco, local hiring policies have been increasingly legitimized, and many cities have sought to reap their benefits. Many cities today have only “good faith effort” ordinances, which, as past studies have outlined, are relatively ineffective due to lacking enforcement mechanisms.⁶ Through this new pilot, USDOT allows cities to depart from such ineffective practices by embedding alternatives into contracting preferences.

2. *Legal Basis for the USDOT Pilot Program*

Prior to this pilot program, USDOT interpreted a Federal statute requiring “full and open competition in the award of contracts under the Federal-aid highway program” as prohibiting the use of geographic hiring preferences.⁷ At USDOT’s request in 2013, the Department of Justice clarified that the statute in question “does not compel the DOT’s position” with respect to contracting requirements irrelevant to the bidder’s performance.⁸ Rather, it gives the Secretary the authority to permit other types of requirements, as long as they do not “unduly limit competition.”⁹ It also clarified that the Administrator has the discretion to determine whether a requirement limits competition, regardless of its effect on the number of eligible bidders for a contract.¹⁰ In other words, the Administrator has always retained wide discretion in revising contracting requirements, including local hiring ones.

USDOT policy on local hiring had also previously followed guidance from the Office of Management and Budget (OMB) that “in-state or local geographic preferences in the evaluation of bids or proposals” in connection with the receipt of federal funds were prohibited.¹¹ While USDOT has previously enforced this rule, Congress’s 2015 Appropriations Act “prohibit[ed] the Federal Transit Administration from using fiscal year (FY) 2015 funds to implement, administer, or enforce [the provision] for construction hiring.”¹²

Consequently, USDOT is now seeking to conclusively evaluate these contracting requirements that have traditionally been turned down. USDOT has initiated the pilot program under FHWA’s Special Experimental Project No. 14 (SEP-14), its “Alternative Contracting” experimental authority, as well as under the FTA under 49 U.S.C. 5312 to carry out research projects.¹³ Any



projects funded by the FTA and FHWA, including construction projects and rolling stock procurements, are eligible for consideration for the pilot program; accepted contracts must be advertised on or before March 6, 2016.¹⁴

3. *Regulation Revision for Local Hiring*

In a move to promote local hiring, USDOT has published a notice of proposed rulemaking to modify its implementation of 2 CFR Part 200, more commonly known as the Common Grant Rule.¹⁵ More specifically, 2 CFR 200.319(b) in its current state prohibits local hiring except where federal statute allows it.¹⁶ With this new pilot program and the growing national impetus for local hiring, USDOT hopes to change this to make local hiring more accessible. This new proposal affords communities the chance to convert projects into more local jobs and economic development.

Applying for the Pilot Program

1. *Contract Guidelines*

As transportation projects create pathways to jobs, USDOT's Ladders of Opportunity vision promotes paths into the middle class through thoughtful workforce programs and policies.¹⁷ To this end, USDOT has been especially interested in contracts with local or other geographic hiring preferences, in addition to preferences related to economic status or veterans.¹⁸ USDOT offers these example approaches for utilizing such hiring preferences, but does not restrict any preferences to specific definitions:

Geographic boundaries based on factors such as:

- state, county, city, or other public boundaries;
- zip code limits;
- census tracts; or
- other geographically-defined borders.

Economically defined areas based on factors such as:

- per capita income levels;
- unemployment rates; or
- other criteria that delineate areas of economic disadvantage.

Veterans for purpose of the pilot program are defined by 5 U.S.C. 2108.¹⁹

This historic pilot program will cement the benefits of local hiring on a national level. To put local hiring requirements to the test, it allows the use of both good faith effort provisions and incentives and penalties to encourage compliance.²⁰ Innovation in contracting requirements is strongly encouraged, barring changes to the Disadvantaged Business Enterprise Program.²¹



2. *Submission for FHWA Approval*

For FHWA funding on contracts, state and local recipients and subrecipients must request approval from the FHWA to use a specific SEP-14 related contracting requirement. State and local recipients will need to follow the standard procedure of submitting work plans to the FHWA.²² From there, local public agencies seeking to submit work plans must do so through their State DOT. State DOTs may submit a SEP-14 work plan to their respective local FHWA Division Office, which will review the request and forward it to FHWA headquarters if the local office deems it appropriate.²³

Conclusion

Transportation develops communities and offers a path for low-income neighborhoods into the middle class. The local hiring movement is only beginning to gain momentum, and this federal pilot program brings to it major progress. With this new initiative, we have been afforded the chance to not only explore the benefits of local hiring, but also to defend the rights of local communities around the country. Brightline is excited about USDOT's support of local hire initiatives and we believe that this pilot program will improve transportation's ability to revitalize communities and connect local communities to a better quality of life.

¹ The Department of Justice's Office of Legal Counsel (OLC) echoed this position with its decision in 1986 stating that 23 U.S.C. 112 required the Secretary of Transportation to withhold federal funds from contracts that departed from competitive bidding requirements for purposes other than cost-effectiveness.

² Posting of Anthony Foxx to Fastlane, <https://www.transportation.gov/fastlane/local-hiring-just-makes-sense> (March 3, 2015).

³ Geographic-Based Hiring Preferences in Administering Federal Awards, 80 Fed. Reg. 12,092 12,092 (Mar. 6, 2015) (to be codified at 2 C.F.R. pt. 1201), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-03-06/pdf/2015-05215.pdf>.

⁴ *United Building and Const. Trades Council v. Camden*, 465 U.S. 208, 221 (1984).

⁵ *Cleveland v. Ohio*, 508 F. 3d 827, 847 (6th Cir. 2007), available at <http://www.ca6.uscourts.gov/opinions.pdf/07a0460p-06.pdf>.

⁶ Chinese for Affirmative Action and Brightline Defense Project, *The Failure of Good Faith: Local Hiring Policy Analysis and Recommendations for San Francisco*, 6 (Aug. 2010), available at http://reimagerpe.org/files/The_Failure_of_Good_Faith-CAA_and_Brightline.pdf.

⁷ Geographic-Based Hiring Preferences in Administering Federal Awards, 80 Fed. Reg. 12,092 12,092 (Mar. 6, 2015) (to be codified at 2 C.F.R. pt. 1201), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-03-06/pdf/2015-05215.pdf>.



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- ⁸ Department of Justice, Office of Legal Counsel. *Competitive Bidding Requirements Under the Federal-Aid Highway Program*, 23, available at <http://www.justice.gov/sites/default/files/olc/opinions/2013/08/31/comp-bidding-reqs.pdf>. (August 23, 2013).
- ⁹ *Id.* at 2.
- ¹⁰ *Id.* at 2.
- ¹¹ Geographic-Based Hiring Preferences in Administering Federal Awards, 80 Fed. Reg. at 12,092 (Mar. 6, 2015), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-03-06/pdf/2015-05215.pdf>.
- ¹² *Id.*
- ¹³ Contracting Initiative, 80 Fed. Reg. 12257 (Mar. 6, 2015), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-03-06/pdf/2015-05204.pdf>.
- ¹⁴ *Id.*
- ¹⁵ Geographic-Based Hiring Preferences in Administering Federal Awards, 2 C.F.R. § 1201 (Apr. 8, 2015), 2, available at https://www.transportation.gov/sites/dot.gov/files/docs/2105-AE38%20LOCAL%20HIRING_0.pdf.
- ¹⁶ *Id.*
- ¹⁷ See U.S. Dep't of Transp., *Ladders of Opportunity*, <http://www.transportation.gov/ladders> (last visited Sept. 3, 2015).
- ¹⁸ U.S. Dep't of Transp., *Contract Initiatives: Questions and Answers*, 6, available at http://www.transportation.gov/sites/dot.gov/files/docs/Consolidated_QAs_PilotProgram_052715.pdf (updated May 27, 2015).
- ¹⁹ *Id.* at 5.
- ²⁰ *Id.* at 7.
- ²¹ *Id.* at 6.
- ²² *Id.* at 8.
- ²³ *Id.* at 7-8.