

Facilitating Local Hiring on Transportation Projects: A Recommendation for the Surface Transportation Authorization

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Overview

Local hiring practices are a mechanism for connecting local residents, especially lower-income people, women, and people of color, to quality construction jobs that are being undertaken in the communities in which they live. Communities all across the country have employed local hire provisions on projects large and small, building support for large, often-controversial projects; developing strong relationships between government, community, labor, and contractor stakeholders; and targeting employment and training opportunities to maximize the economic benefit of federal and local expenditures.

While local hiring is an important mechanism for achieving important economic and social goals at the local and state level, a needlessly narrow interpretation of statutes requiring “full and open competition” for the letting of contracts by the U.S. Department of Transportation (US DOT) has stymied efforts in several communities to implement local hire on individual projects.

Specifically, the US DOT has interpreted requirements to attempt to employ local workers (along with other contract terms that may be in the public interest) as inconsistent with open competition provisions, as detailed in sections 112(a) and 112(b)(1) of title 23, United States Code, which pertains to the bidding requirements for Federal-aid highway projects, as well as section 5325(a) of title 49, which pertains to the bidding requirements for transit projects. (We have included existing statutes in this memo for your reference.)

Communities as diverse as Baltimore, Cleveland, and Los Angeles, seeking to deliver promised job and training opportunities for local workers, have found the US DOT interpretation of the contracting provision to be a stumbling block. Representatives from these communities have petitioned US DOT to revisit their interpretation to allow these communities to employ local hiring on transportation projects that receive federal funds. While US DOT was able to develop a workaround for one specific project in Los Angeles, they have indicated that the only way to provide a fair, consistent set of standards allowing prudent local hiring measures is to include in the next surface transportation authorization policy language that provides more discretion.

Towards that end, the Administration’s transportation draft bill that was leaked in April 2011 included language to address this issue. The proposed language provides discretion to the Secretary of Transportation to consider other factors that are “in the public interest”. The language in the Administration’s leaked proposal applies only to Federal Highway Administration (FHWA) projects. (We

have included the language and explanation of language from the Administration's draft proposal in this memo.)

Our Recommendations

The language in the Administration's draft bill is a step forward in removing the stumbling block to implementing local hire. We are proposing policy language for the surface transportation authorization that builds upon the Administration's language, but would more effectively facilitate local hiring in three important ways. Our proposed language:

- 1. Applies the Administration's proposed "fix" to Federal Transit Administration (FTA) and FHWA projects.** The language in the Administration's leaked proposal amends only title 23 of the US Code, which pertains to FHWA projects. Language should also be included to amend title 49, pertaining to FTA projects.
- 2. Ensures that other regulations and statutes do not limit the Secretary's discretion to allow local hire and provides flexibility for local recipients of federal transportation funds.** The Administration's proposed language addressed one particular statute, but in the past US DOT has pointed to several statutes and regulations as a constraint to local hiring.
- 3. Allows local recipients discretion to require local hiring efforts, within parameters established by US DOT.** The Administration's proposal would require an affirmative finding by US DOT in order to allow local hiring on a specific project. Our proposal instead allows local recipients discretion to require local hiring efforts, within parameters established by US DOT through regulations or administrative guidance. This ensures a consistent set of standards and avoids US DOT having to rule on repeated requests with varying policy approaches and attendant political pressures.

Proposed Legislative Language to Address Our Recommendations

The following language would allow either US DOT or a recipient of FHWA or FTA assistance to establish targeted hiring requirements on FHWA- or FTA-funded projects. Proposed new language is italicized. Additions to title 23 pertain to FHWA. Additions to title 49 pertain to FTA.

23 U.S.C. § 112(a): In all cases where the construction is to be performed by the State transportation department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.

Notwithstanding the foregoing or any other law, rule, regulation, or guidance, the Secretary or the State transportation department, or an entity under the supervision thereof, may establish bid specifications or requirements that direct employment or job training opportunities to local workers who are low-income, who reside in low-income census tracts, who are displaced homemakers, or who are members of targeted groups as defined in Internal Revenue Code Section 51(d).

23 U.S.C. § 112(b)(1): Subject to paragraphs (2) and (3), construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by contract awarded by competitive bidding, unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility. *Notwithstanding the foregoing or any other law, rule, regulation, or guidance, criteria of responsibility for a particular project may include provisions directing employment or job training opportunities to local workers who are low-income, who reside in low-income census tracts, who are displaced homemakers, or who are members of targeted groups as defined in Internal Revenue Code Section 51(d).* No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

49 U.S.C. § 5325(a): Recipients of assistance under this chapter shall conduct all procurement transactions in a manner that provides full and open competition as determined by the Secretary. *Notwithstanding the foregoing or any other law, rule, regulation, or guidance, the Secretary or recipients of assistance may establish bid specifications or requirements that direct employment or job training opportunities to local workers who are low-income, who reside in low-income census tracts, who are displaced homemakers, or who are members of targeted groups as defined in Internal Revenue Code Section 51(d).*

Language from Administration's Draft Proposal

Applies to FHWA only

(a) FLEXIBILITY.--Section 112(a) of title 23, United States Code, is amended by inserting before the period at the end of the second sentence "unless the Secretary affirmatively finds that, under the circumstances relating to the relevant project, it is not in the public interest to do so".

(b) BIDDING FLEXIBILITY.--Section 112(b)(1) of title 23, United States Code, is amended by inserting before the period at the end of the first sentence ", or unless the Secretary affirmatively finds that, under the circumstances relating to such project, some other method is in the public interest".

Explanation of Language from Administration's Draft Proposal

This section would amend sections 112(a) and 112(b)(1) of title 23, United States Code, pertaining to the bidding requirements for Federal-aid highway projects. Section 112(b)(1) now requires construction contracts to be awarded by competitive bidding, on the basis of the lowest responsive bid submitted by a responsible bidder. This section prohibits the imposition of a requirement or obligation as a condition precedent to the award of a contract to a bidder unless it is otherwise lawful and specifically set forth in the advertised specifications. Under section 112(b)(1), a State may demonstrate to the satisfaction of the Secretary that another bidding method would be more cost effective or because an emergency exists.

Section 112 previously contained language allowing the Secretary to find that under the circumstances relating to a project, some other bidding method would be in the public interest. This language was

struck in 1983, and current language concerning cost effectiveness was implemented. This amendment to section 112(b)(1) reinserts the prior language to provide additional flexibility in limited circumstances for the Secretary to affirmatively find that some other bidding method would be in the public interest.

Although amending section 112(b)(1) alone would provide the Secretary additional flexibility to affirmatively find that some other bidding method would be in the public interest, it may not fully address all competition issues. A 2007 Sixth Circuit case determined that section 112(b)(1) only deals with the process of how bids are awarded, rather than the substance of the underlying contract provisions themselves. *City of Cleveland v. Ohio*, 508 F.3d 827 (6th Cir. 2007). The Court stated that section 112(a), on the other hand, "gives the FHWA the authority to review 'plans and specifications' with an eye toward 'securing competition' within the public bidding process." In light of the distinction drawn by the Court between subsections (a) and (b), this section amends section 112(a) to include similar public interest language to afford the Secretary with flexibility to find that the inclusion of a certain contract provision would be in the public interest, notwithstanding the provision's adverse impact on competition.

Language in Existing Statute for Federal-aid Highway Projects (from 23 U.S.C. § 112)

(a) In all cases where the construction is to be performed by the State transportation department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.

(b) Bidding Requirements. -

(1) In general. - Subject to paragraphs (2) and (3), construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by contract awarded by competitive bidding, unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility. No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

(2) Contracting for engineering and design services. -

(A) General rule. - Subject to paragraph (3), each contract for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services with respect to a project subject to the provisions of subsection (a) of this section shall be awarded in the same manner as a contract for architectural and engineering services is negotiated under chapter 11 of title 40.

(B) Performance and audits. - Any contract or subcontract awarded in accordance with subparagraph (A), whether funded in whole or in part with Federal-aid highway funds, shall be performed and audited in compliance with cost principles contained in the Federal Acquisition Regulations of part 31 of title 48, Code of Federal Regulations.

(C) Indirect cost rates. - Instead of performing its own audits, a recipient of funds under a contract or subcontract awarded in accordance with subparagraph (A) shall accept indirect cost rates established in accordance with the Federal Acquisition Regulations for 1-year applicable accounting periods by a cognizant Federal or State government agency, if such rates are not currently under dispute.

(D) Application of rates. - Once a firm's indirect cost rates are accepted under this paragraph, the recipient of the funds shall apply such rates for the purposes of contract estimation, negotiation, administration, reporting, and contract payment and shall not be limited by administrative or de facto ceilings of any kind.

(E) Pre notification; confidentiality of data. - A recipient of funds requesting or using the cost and rate data described in subparagraph (D) shall notify any affected firm before such request or use. Such data shall be confidential and shall not be accessible or provided, in whole or in part, to another firm or to any government agency which is not part of the group of agencies sharing cost data under this paragraph, except by written permission of the audited firm. If prohibited by law, such cost and rate data shall not be disclosed under any circumstances.

(F)(F) (1) Subparagraphs (B), (C), (D) and (E) herein shall not apply to the States of West Virginia or Minnesota.

(3) Design-build contracting. -

(A) In general. - A State transportation department or local transportation agency may award a design-build contract for a qualified project described in subparagraph (C) using any procurement process permitted by applicable State and local law.

(B) Limitation on final design. - Final design under a design-build contract referred to in subparagraph (A) shall not commence before compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(C) Qualified projects. - A qualified project referred to in subparagraph (A) is a project under this chapter (including intermodal projects) for which the Secretary has approved the use of design-build contracting under criteria specified in regulations issued by the Secretary.

(D) Regulatory process. - Not later than 90 days after the date of enactment of the SAFETEA-LU, the Secretary shall issue revised regulations under section 1307(c) of the Transportation Equity Act for 21st Century (23 U.S.C. 112 note; 112 Stat. 230) that -

(i) do not preclude a State transportation department or local transportation agency, prior to compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332), from -

(I) issuing requests for proposals;

(II) proceeding with awards of design-build contracts; or

(III) issuing notices to proceed with preliminary design work under design-build contracts;

(ii) require that the State transportation department or local transportation agency receive concurrence from the Secretary before carrying out an activity under clause (i);and

(iii) preclude the design-build contractor from proceeding with final design or construction of any permanent improvement prior to completion of the process under such section 102.

(E) Design-build contract defined. - In this paragraph, the term "design-build contract" means an agreement that provides for design and construction of a project by a contractor, regardless of whether the agreement is in the form of a design-build contract, a franchise agreement, or any other form of contract approved by the Secretary.

(c) The Secretary shall require as a condition precedent to his approval of each contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, a sworn statement, executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract.

(d) No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State transportation department or local subdivision of the State without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof.

(e) Standardized Contract Clause Concerning Site Conditions. -

(1) General rule. - The Secretary shall issue regulations establishing and requiring, for inclusion in each contract entered into with respect to any project approved under section 106 of this title a contract clause, developed in accordance with guidelines established by the Secretary, which equitably addresses each of the following:

(A) Site conditions.

(B) Suspensions of work ordered by the State (other than a suspension of work caused by the fault of the contractor or by weather).

(C) Material changes in the scope of work specified in the contract. The guidelines established by the Secretary shall not require arbitration.

(2) Limitation on applicability. -

(A) State law. - Paragraph (1) shall apply in a State except to the extent that such State adopts or has adopted by statute a formal procedure for the development of a contract clause described in paragraph (1) or adopts or has adopted a statute which does not permit inclusion of such a contract clause.

(B) Design-build contracts. - Paragraph (1) shall not apply to any design-build contract approved under subsection (b)(3).

(f) Selection Process. - A State may procure, under a single contract, the services of a consultant to prepare any environmental impact assessments or analyses required for a project, including environmental impact statements, as well as subsequent engineering and design work on the project if the State conducts a review that assesses the objectivity of the environmental assessment, environmental analysis, or environmental impact statement prior to its submission to the Secretary.

(g) Temporary Traffic Control Devices. -

(1) Issuance of regulations. - The Secretary, after consultation with appropriate Federal and State officials, shall issue regulations establishing the conditions for the appropriate use of, and expenditure of funds for, uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations.

(2) Effects of regulations. - Based on regulations issued under paragraph (1), a State shall -

(A) develop separate pay items for the use of uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations; and

(B) incorporate such pay items into contract provisions to be included in each contract entered into by the State with respect to a highway project to ensure compliance with section 109(e)(2).

(3) Limitation. - Nothing in the regulations shall prohibit a State from implementing standards that are more stringent than those required under the regulations.

(4) Positive protective measures defined. - In this subsection, the term "positive protective measures" means temporary traffic barriers, crash cushions, and other strategies to avoid traffic accidents in work zones, including full road closures.

Language in Existing Statute for Federal Public Transportation Projects (from 49 U.S.C. § 5325)

(a) Competition.--Recipients of assistance under this chapter shall conduct all procurement transactions in a manner that provides full and open competition as determined by the Secretary.

(b) Architectural, Engineering, and Design Contracts. —

(1) Procedures for awarding contract.--A contract or requirement for program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services for a project for which Federal assistance is provided under this chapter shall be awarded in the same way as a contract for architectural and engineering services is negotiated under chapter 11 of title 40 or an equivalent qualifications-based requirement of a State.

(2) Effect of state laws.--Paragraph (1) does not apply to the extent a State has adopted by law, before the date of enactment of the Federal Public Transportation Act of 2005, an equivalent State qualifications-based requirement for contracting for architectural, engineering, and design services.

(3) Additional requirements.--When awarding a contract described in paragraph (1), recipients of assistance under this chapter shall comply with the following requirements:

(A) Performance of audits.--Any contract or subcontract awarded under this chapter shall be performed and audited in compliance with cost principles contained in part 31 of title 48, Code of Federal Regulations (commonly known as the Federal Acquisition Regulation).

(B) Indirect cost rates.--A recipient of funds under a contract or subcontract awarded under this chapter shall accept indirect cost rates established in accordance with the Federal Acquisition Regulation for 1-year applicable accounting periods by a cognizant Federal or State government agency, if such rates are not currently under dispute.

(C) Application of rates.--After a firm's indirect cost rates are accepted under subparagraph (B), the recipient of the funds shall apply such rates for the purposes of contract estimation, negotiation, administration, reporting, and contract payment, and shall not be limited by administrative or de facto ceilings.

(D) Pre notification; confidentiality of data.--A recipient requesting or using the cost and rate data described in subparagraph (C) shall notify any affected firm before such request or use. Such data shall be confidential and shall not be accessible or provided by the group of agencies sharing cost data under this subparagraph, except by written permission of the audited firm. If prohibited by law, such cost and rate data shall not be disclosed under any circumstances.

(c) Efficient Procurement.--A recipient may award a procurement contract under this chapter to other than the lowest bidder if the award furthers an objective consistent with the purposes of this chapter, including improved long-term operating efficiency and lower long-term costs.

(d) Design-Build Projects.-- (1) Term defined.--In this subsection, the term "design-build project" —

(A) means a project under which a recipient enters into a contract with a seller, firm, or consortium of firms to design and build a public transportation system, or an operable segment of such system, that meets specific performance criteria; and

(B) may include an option to finance, or operate for a period of time, the system or segment or any combination of designing, building, operating, or maintaining such system or segment.

(2) Financial assistance for capital costs.--Federal financial assistance under this chapter may be provided for the capital costs of a design-build project after the recipient complies with Government requirements.

(e) Multiyear Rolling Stock.—

(1) Contracts.--A recipient procuring rolling stock with Government financial assistance under this chapter may make a multiyear contract to buy the rolling stock and replacement parts under which the recipient has an option to buy additional rolling stock or replacement parts for not more than 5 years after the date of the original contract.

(2) Cooperation among recipients.--The Secretary shall allow at least two recipients to act on a cooperative basis to procure rolling stock in compliance with this subsection and other Government procurement requirements.

(f) Acquiring Rolling Stock.--A recipient of financial assistance under this chapter may enter into a contract to expend that assistance to acquire rolling stock—

(1) based on—

(A) initial capital costs; or

(B) performance, standardization, life cycle costs, and other factors; or

(2) with a party selected through a competitive procurement process.

(g) Examination of Records.--Upon request, the Secretary and the Comptroller General, or any of their representatives, shall have access to and the right to examine and inspect all records, documents, and papers, including contracts, related to a project for which a grant is made under this chapter.

(h) Grant Prohibition.--A grant awarded under this chapter or the Federal Public Transportation Act of 2005 may not be used to support a procurement that uses an exclusionary or discriminatory specification.

(i) Bus Dealer Requirements.--No State law requiring buses to be purchased through in-State dealers shall apply to vehicles purchased with a grant under this chapter.

(j) Awards to Responsible Contractors.—

(1) In general.--Federal financial assistance under this chapter may be provided for contracts only if a recipient awards such contracts to responsible contractors possessing the ability to successfully perform under the terms and conditions of a proposed procurement.

(2) Criteria.--Before making an award to a contractor under paragraph (1), a recipient shall consider—

(A) the integrity of the contractor;

(B) the contractor's compliance with public policy;

(C) the contractor's past performance, including the performance reported in the Contractor Performance Assessment Reports required under section 5309(l)(2); and

(D) the contractor's financial and technical resources.