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Ohio Supreme Court Rejects Residency Requirements for Public Construction.

Public construction in Ohio, as in most states, is subject to a myriad of statutory and administrative rules and requirements, many of which can impact a contractor's manner of performance, profitability and in some cases its eligibility to be awarded work. With respect to the issue of eligibility, a public authority mandating that contractors employ a specific number or percentage of its residents as a threshold requirement to perform public improvements is a particularly onerous limitation. Residency preferences or restrictions of this nature can effectively preclude or greatly limit the eligibility of contractors located in other political subdivisions to perform public construction work This, in turn, reduces competition, could potentially compel the use of unskilled construction workers and could result in increased costs for the construction of public improvements.

In a decision which benefits Ohio and out-of-state contractors as a whole, the Ohio Supreme Court has determined that residency preferences for public improvements imposed by municipalities under their home-rule authority are no longer valid based on R.C. 9.75, enacted in 2016, which prohibits a public authority from requiring a contractor to "employ as laborers a certain number or percentage of individuals who reside within the defined geographic area or service area of the public authority." Cleveland v. State, Slip Opinion No. 2019-Ohio-3820 (Sept. 24, 2019).

This case was initiated by the City of Cleveland, which sought to enjoin the enforcement of R.C. 9.75 as an infringement on its municipal home-rule authority, and which it claimed was otherwise unconstitutional. The residency requirement at issue, The Fannie Lewis Law, was enacted in 2003. The law was intended to alleviate unemployment and poverty in Cleveland by providing more employment opportunities to city residents on local public improvements. Specifically, the law required public-construction contracts in an amount of $100,000 or more to include a provision mandating that city residents perform a minimum of 20 percent of the total construction work hours under the contract. It also required the construction contract to specify penalties for a contractor's failure to comply with this contractual term. Those penalties included damages of up to 2.5% of the final total amount of the contract as well as the possibility of the city withholding payments, terminating the contract or disqualifying the contractor from future bids.

In reaction to these types of residency requirements, the General Assembly enacted R.C. 9.75 premised on its authority to provide for the general welfare of employees under the Ohio Constitution. R.C. 9.75 invalidates such requirements and provides, in part:

(B)(1) No public authority shall require a contractor, as part of a prequalification process or for the construction of a specific public improvement or the provision of professional design services for that public improvement, to employ as laborers a certain number or percentage of individuals who reside within the defined geographic area or service area of the public authority.

(B)(2) No public authority shall provide a bid award bonus or preference to a contractor as an incentive to employ as laborers a certain number or percentage of individuals who reside within the

defined geographic area or service area of the public authority.

R.C. 9.75(B)(1-2).

The trial court permanently enjoined the enforcement of R.C. 9.75, finding that the statute “does not provide for the comfort, health, safety, and welfare of its employees; rather, [it] seeks only to dictate the terms by which municipalities may contract for workers in construction projects within their realm.” The trial court also concluded that R.C. 9.75 violated the Home Rule Amendment of the Ohio Constitution as the statute impermissibly limited the city’s exercise of local self-government. On appeal, the Eighth District Court of Appeals affirmed this decision, determining that “R.C. 9.75 does not relate to the right of an individual to choose where to live or a matter implicating the general welfare of all employees,” and further determined that R.C. 9.75 constituted an attempt to preempt the established powers of local self-government.

The Ohio Supreme Court rejected the lower court decisions and found that “the ordinance regulates the employment of workers hired under public-works contracts by requiring those contracts to exact binding promises dictating the eligibility of a worker to be hired on a construction project.” According to the Supreme Court, by imposing a quota for the employment of Cleveland’s residents, “the Fannie Lewis Law directly impacts hiring, the most basic condition of employment, for workers on public-improvement projects. In doing so, the city of Cleveland has legislated within a field subject to regulation by the General Assembly pursuant to Article II, Section 34.” The Court further noted that the legislature expressly stated the intent of R.C. 9.75 was to “provide for the comfort, health, safety, and general welfare of those employees [working on Ohio’s public-improvement projects],” and the Court refused to second-guess such a plain statement of legislative intent. The Court, therefore, determined that R.C. 9.75 is a valid exercise of the power granted by the Ohio Constitution, and it supersedes the Fannie Lewis Law, a local ordinance enacted by a municipality pursuant to its home-rule authority.

With respect to public construction projects, this decision is a definite win for contractors in general. While this decision invalidates similar residency preferences throughout the State of Ohio, contractors should be mindful that not all municipalities may be aware of this decision and they should be prepared dispute such requirements if imposed on a public improvement project. Outside of Ohio, similar regulations may exist and contractors should identify such requirements and determine whether they are enforceable.

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