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## **DOT Announces Pilot Program Permitting Local Hiring Preferences: Holland & Knight**

### **HIGHLIGHTS:**

- The U.S. Department of Transportation (DOT) announced a pilot program that would permit state and local recipients of federal highway and federal transit funds to issue solicitations with “local hire” preferences.
- In its notice, DOT states “the DOT believes that local and other geographic-based hiring preferences are essential to promoting Ladders of Opportunity for the workers in these communities.” DOT also intends to permit the use of veteran hiring preferences and hiring preferences for economically disadvantaged (i.e., low-income) workers.
- There have been – and will likely continue to be – several significant legal issues to local hiring preference programs. DOT states that it will use the pilot program “to determine whether state and local preferences may be used consistent with the [DOJ’s] 2013 legal opinion.”

The U.S. Department of Transportation (DOT) announced a pilot program that would permit state and local recipients of federal highway and federal transit funds to issue solicitations with “local hire” preferences. DOT also proposes to amend its regulations to permit the use of such hiring preferences “whenever not otherwise prohibited by Federal statute.” According to the notice, the pilot program appears to apply – effective immediately – to new bid announcements. Comments on the proposed changes to DOT’s regulations are due April 6, 2015.

### **DOT Seeks to Promote Local “Ladders of Opportunity”**

Many state and local governments have local hiring provisions that otherwise apply to their procurements, however, federal law has long been held to preclude the use of such preferences when using federal highway or transit funds. As set forth in the notice, DOT is in favor of these preferences and states “the DOT believes that local and other geographic-based hiring preferences are essential to promoting Ladders of Opportunity for the workers in these communities.” FR 12092. To this end, DOT also intends to permit the use of veteran hiring preferences and hiring preferences for economically disadvantaged (i.e., low-income) workers. However, as discussed below, there have been – and will likely continue to be – several significant legal issues to local hiring preference programs.

A federal statutory provision (23 USC 112), requires full and open competition in the bidding of federally funded transportation contracts, and has been interpreted to prohibit local hiring preferences in projects receiving federal funding. This statutory directive has been carried over into DOT’s regulations that are now found in the federal “Common Rule” applicable to federal assistance agreements (2 CFR 200.319(b)) (prior to last year this provision was set forth in DOT’s regulations at 49 CFR 18.36(c)(2)(2014)).

This long-standing statutory and regulatory scheme was interrupted, at least in part, by a narrow provision in the FY2015 Consolidated Appropriations Act (2015 CAA) which precludes the Federal

Transit Administration (FTA) from using any fiscal year 2015 funds “to implement, administer or enforce” the provisions of 49 CFR 18.36(c)(2). \_\_ P.L. \_\_ §418. According to DOT, the result of this “no funds” language is, “at least for FTA-funded project (sic) in FY 2015, Congress has diminished the legal effectiveness of this provision,” (i.e., the regulatory provision barring local hiring preferences).

23 USC §112 requires recipients of federal aid highway grant funds to award federally funded construction contracts by “competitive bidding.” The statute goes on to specify that awards are to be made on the basis of the “lowest responsive bid submitted by a bidder meeting established criteria of responsibility.” It also provides that a recipient may only deviate from competitive methods if it can demonstrate the other method is “more cost effective or that an emergency exists.” 112(b)(1).

### **DOT Using Its Pilot Program to Test DOJ’s 2013 Opinion**

For many years DOT has interpreted this provision as creating an outright ban on local hiring preferences. In 2013, DOT’s Office of Legal Counsel received a lengthy opinion from the Department of Justice (DOJ) in 2013, which concludes that

Section 112 authorizes FHWA to exercise discretion to approve federally funded highway construction contracts – notwithstanding state or local requirements that have more than an incidental impact on the pool of eligible bidders and are unrelated to the necessary work – so long as such requirements, in FHWA’s judgment, advance the purposes of this statute and thus do not unduly limit competition.

Against this backdrop DOT has unveiled the pilot program and states that it will use the pilot “to determine whether state and local preferences may be used consistent with the 2013 legal opinion.” FR 12093. DOT invokes certain “experimental authorities” to justify its use of a pilot and states that it will “monitor and evaluate whether the contract requirements approved for use under the pilot program have an undue restriction on competition.” FR 12093.

### **FHWA and FTA Pilot Programs Vary Regarding Prior Approval**

Because the “experimental” authorities DOT invokes are slightly different for FHWA and for FTA, the pilot programs vary slightly.

For FHWA-funded projects, state and local recipients must receive prior approval by FHWA to impose local hire preferences. DOT directs state and local recipients (and subrecipients) to “follow the normal process that includes submitting work plans to the appropriate FHWA division office.” Notice, p. 6-7. DOT further suggests some minimum points that such work plans should address, including describing:

- the project
- any contracting requirement that may be found inconsistent with the general requirement for full and open competition
- how the relevant contracting requirement would increase the efficiency and effectiveness of the project
- how it would “protect the integrity of the competitive bidding process”

The FTA provisions are largely the same and suggest recipients and subrecipients address virtually identical criteria. However, DOT has not imposed a prior approval requirement. In declining to do so, DOT points to the “no funds” language in Section 418 of the FY2015 CAA as prohibiting DOT from taking any action to approve such preference provisions in advance. However, DOT is still

requiring recipients and subrecipients to provide reports on the implementation of these policies so DOT can evaluate them.

## **Debate and Litigation of Federal Statutory Bidding Requirements Will Continue**

The debate over the extent of federal statutory competitive bidding requirements is far from new. As noted in the DOJ's 2013 Opinion, the scope and applicability of those requirements - and the extent to which state and local bidding and evaluation criteria are permissible - has been the subject of debate and litigation for decades. This includes several cases in the fairly recent past about the use of project labor agreements. Putting aside whether DOT's stated goals are meritorious from a policy standpoint, it seems likely that the body of case law in this area is about to grow again.

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Article by Robert K. Tompkins and Michael L. Wiener  
Holland & Knight

Robert K. "Bob" Tompkins is a Partner in our Washington DC office and Keith M. Wiener is a Partner in our Atlanta office.

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