

FTA

FEDERAL TRANSIT ADMINISTRATION

DOT Notice of Proposed Rulemaking on Geographic-
Based Hiring Preferences
and
DOT Pilot Program on Contract Provisions



U.S. Department of Transportation
Federal Transit Administration

2 CFR 200.319(b)

“The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference.”

NPRM

Proposed Regulation: § 1201.319 Competition.
Notwithstanding 2 CFR 200.319, non-Federal entities may utilize geographic hiring preferences (including local hiring preferences) pertaining to the use of labor on a project consistent with such non-Federal entities' policies and procedures, when not otherwise prohibited by Federal statute or regulation.

NPRM

- Comment period open through April 6.
- Submit comments to the rulemaking docket at [regulations.gov](https://www.regulations.gov) to Docket# “DOT-OST-2015-0013”.

DOT Contracting Initiative

- Pilot Program Announced in the March 6, 2015 Federal Register, 80 FR 12257
- Initiative to permit, on an experimental basis, FHWA and FTA recipients and subrecipients to utilize various contracting requirements that generally have been disallowed due to concerns about adverse impacts on competition

DOT Contracting Initiative

- Initiative will be carried out as a pilot program for 1 year, unless extended
- Purpose is to determine whether or not the voluntary use of such requirements “unduly limit competition,” as provided in an August 23, 2013 opinion from the DOJ’s Office of Legal Counsel

DOT Contracting Initiative

- Traditionally, DOT has prohibited its recipients and subrecipients from using certain contracting provisions that do not directly relate to the bidder's performance of work in a competent and responsible manner
- E.g., local and other geographic-based labor hiring preferences, anti-Pay-to-Play provisions, benefits for same-sex partners

DOT Contracting Initiative

- Office of Legal Counsel (OLC) opinions
 - **1986 opinion:** Concluded that 23 U.S.C. 112 obligated the Secretary to withhold Federal funding from highway construction contracts that were subject to a New York City law imposing disadvantages on a class of responsible bidders, where the city failed to demonstrate that its departure from competitive bidding requirements was justified by considerations of cost-effectiveness. See *Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements*, 10 Op. O.L.C. 101 (1986)

DOT Contracting Initiative

- **2013 opinion:** Clarifies that section 112 does not compel DOT's position with respect to contracting requirements that do not directly relate to the bidder's performance of work, but rather provides the Secretary with discretion to permit other types of state or local requirements as long as they do not "unduly limit competition." See *Competitive Bidding Requirements Under Federal-Aid Highway Program*, 23 U.S.C. 112 (August 23, 2013)

DOT Contracting Initiative

- Competition would not be unduly limited by “[a] state or local requirement that has only an incidental effect on the pool of potential bidders or that imposes reasonable requirements related to the performance of the necessary work....”
- “[A] requirement that has more than an incidental effect on the pool of potential bidders and does not relate to the work’s performance would unduly limit competition unless it promotes the efficient and effective use of federal funds.”

DOT Contracting Initiative

- In assessing whether a requirement does promote the efficient and effective use of federal funds, the agency “may take into account whether the requirement promotes such efficiency in connection with the letting of a particular contract and also whether it more generally furthers the efficient and effective use of federal funds in the long run or protects the integrity of the competitive bidding process itself.”

DOT Contracting Initiative

- DOT retains discretion to evaluate whether a proposed State or local requirement that has more than an incidental effect on the pool of potential bidders is nonetheless compatible with section 112(b)(1)'s competitive bidding requirement

DOT Contracting Initiative

- Pilot Program
 - Objective is to enable DOT to determine which types of requirements may be used consistently with the 2013 OLC Opinion by promoting efficiency in connection with the letting of a particular contract, furthering the efficient and effective use of federal funds in the long run, or protecting the integrity of the competitive bidding process

Contracting Initiative

- DOT is particularly interested in contracts for which recipients and subrecipients wish to use a local or geographic hiring preference, economic-based labor hiring preferences, and labor hiring preferences for veterans
- For the purpose of the pilot program, veterans are defined by 5 U.S.C. 2108

Contracting Initiative

- Possible approaches include:
 - Geographic boundaries based on factors such as state, county, city or other public boundaries; zip code limits; or census tracts
 - Economically defined areas based on factors such as: per capita income levels, unemployment rates, or other criteria that delineate areas of economic disadvantage
 - State job banks, one-stop job referral centers, or employment clearinghouses
 - Project labor agreements, development agreements, or community benefit agreements

Contracting Initiative

- Examples of other potential types of contract specifications that recipients and subrecipients may consider submitting to FTA for consideration:
 - Pay to play provisions
 - Domestic partner benefit provisions

Pilot Program Applications

- Recipients should address the following in their applications:
 - Describe the contracting opportunity, including the schedule for the type of project and type of asset being constructed and the amount of FTA funding involved in the project as well as the estimated cost of the project
 - Describe the contracting requirement that may otherwise be found to be inconsistent with the general requirement for full and open competition

Pilot Program Applications (cont'd)

- Describe how you will evaluate the effects of relevant contracting requirements on competitive bidding.
- Describe how the relevant contracting requirement would lead to increases in the effectiveness and efficiency of Federal funds for the project.
- Describe and quantify how the experimental contracting technique would protect the integrity of the competitive bidding process either in connection with the particular contract or when considered over the long term for that agency's program.

Application Review

- FTA will consider the following when reviewing applications for the pilot program:
 - The anticipated effect of the proposed contracting provision on the pool of potential bidders
 - Relationship of proposed provisions to the performance of work under the contract
 - The extent to which the proposed provisions promote efficiency in connection with letting of particular contract
 - The extent to which the proposed provisions promote the efficient and effective use of Federal funds in the long run
 - The extent to which the proposed provisions protect the integrity of the competitive bidding process

Eligible Contracts

- Contracts accepted into the program must be advertised on or before March 6, 2016
- Any contracts accepted into the program and advertised before March 6 may continue to utilize any approved contract provision throughout the life of that contract.

Applicability of Other Statutes

- The prohibition on procurements that use exclusionary or discriminatory specifications (49 U.S.C. 5325(h)) still applies: In reviewing applications, FTA will consider the extent to which proposed specifications are exclusionary or discriminatory, and their effect on full and open competition
- The prohibition on State-law requirements for in-State bus dealers (49 USC § 5325(i)) still applies

Section 418

- Section 418 of the FY2015 Appropriations Act prohibits FTA from using FY2015 funds to implement, administer, or enforce 49 CFR 18.36(c)(2) for ***construction hiring purposes***.
- 49 CFR 18.36(c)(2) prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals.
- 49 CFR 18.36(c)(2) was recodified effective December 26, 2014, and is now 2 CFR 200.319(b).

Implementation of Section 418

- “Construction Hiring Purposes” means hiring of the construction labor workforce for a construction project.
- Section 418 prohibits FTA from enforcing compliance with 49 CFR 18.36(c)(2)/2 CFR 200.319(b) on existing construction contracts
- Section 418 applies to all FTA grants, including grants funded under the Hurricane Sandy Emergency Relief and TIGER programs.

FTA Oversight and Section 418

- In Triennial Reviews and other oversight reviews, FTA will ask about whether the grantee has any construction contracts that contain geographical hiring preferences for information purposes, but will not enter any deficiency findings

Frequently Asked Questions

- ***Can I amend an existing construction contract to add a geographic hiring preference?***
 - Whether you can amend an existing construction contract to add a local or geographic preference will depend on state and local contract law. Grantees must also follow requirements of FTA Circular 4220. IF Third Party Contracting Guidance.

Frequently Asked Questions

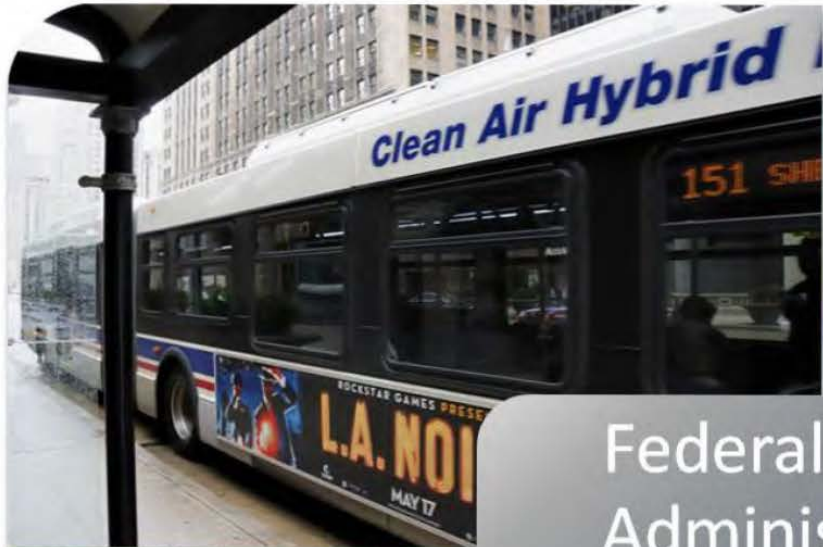
- ***Can I convert a previously non-FTA funded construction contract with geographic or local preferences to an FTA-funded contract?***
 - Yes, if the procurement process and contract complies with all other Federal requirements and FTA's grant making requirements.
 - Case-by-case determination

Frequently Asked Questions

- ***May I include a geographic or local hiring preference in a construction contract that is advertised before September 30, 2015, but not awarded until after September 30, 2015?***
 - Yes. Under Section 418, FTA will not enforce the prohibition against local or geographic preferences on procurements for construction contracts advertised before September 30, 2015.

Section 418 & Pilot Program

- Recipients do not need to submit an application for participation in the pilot program for the use of in-state or local geographic labor hiring preferences for construction contracts awarded or advertised on or before September 30, 2015
- FTA asks that recipients and subrecipients notify their FTA Regional Office if they intend to use in-state or local geographic hiring preferences in construction contracts



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