Procurement Law and State and Local Innovation:

Clarifying the Uniform Guidance

August 9, 2021
Limits on State and Local Action

Rejected contract specifications:

- promoted local hiring - *City of Cleveland v. Ohio*, 508 F.3d 827 (6th Cir. 2007)
- prohibited “pay-to-play” - bidders making political contributions to state elected officials
- mandated domestic partner benefits;
- required disclosures regarding contractor predecessors’ participation in slavery.
Executive Orders Prohibiting PLAs

Bush eras’ Executive Orders 13202 and 12818 prohibiting PLAs:

- Stifled competition and prohibition would foster: “job opportunities, especially for small and disadvantaged businesses.” (13202)

- Misconceptions extend to state and local law - “have as their purpose social policymaking, such as remedying racial and gender bias, will not be sustained.”

Reality:

- PLAs have been in practice since the 1930s
- Pre-hire agreements that level the playing field with respect to labor
Beginning 1990, FHWA uses SEP-14 to allow State DOTs to “evaluate non-traditional contracting techniques.” Once contracting alternatives have been evaluated they may become operational practices.

- Alternative = Any technique other than lowest responsive bid

- Since 2003, there have been 174 SEP-14 projects, 22 have been bid through Best Value contracting.

- Local Labor Hiring Pilot (LLHP)
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ABOUT
DOT program to assess whether states could use local hire in spending federal grant money. Permission to hire locally, by economic factors, and among veterans. It ran from 2015-2017.

FINDINGS
- The local hire provisions did not result in decreased market participation by potential bidders.
- No systematic difference in bid amounts between the local-hire and non-local-hire projects.

OVERVIEW OF THE DATA
- 19 states participated with projects valued from $1 million - $1 billion.
- 9 comparisons of bid #s - 4.0 average for non-local hire, 4.8 for local hire.
- Compared range of bids to independent cost estimates - Did not vary considerably, span similar ranges.
Four proposals to update the Uniform Guidance: “The Power of Permission”

1. Remove the geographic preference prohibition - Makes way for the US Jobs Plan (aka US Employment Plan)

2. Racial Equity in Contracting - Project Labor Agreements / Community Workforce Agreements

3. Workers and Advanced Technology

4. Addressing Misclassification
Regulating for the US Jobs Plan and Transparency

• Encourage grant recipients to include job-related scoring mechanisms in their procurement processes

• States/cities adopt strong policies to score Jobs Plans + full transparency
Racial Equity in Contracting

(1) allows cities to require construction contractors to use PLAs to achieve local/targeted hiring on publicly supported projects

(2) encourages cities to require targeted hire to create opportunity for marginalized people to get good jobs.
Other Workplace Issues

• Contractors train incumbent workers on new equipment rather than sell extended warranties and assess workforce impacts and plan to mitigate any projected job loss.

• Certify that all work on federally funded contracts is done by properly classified workers.