



December 22, 2015

**To:** MCDOT  
**Copy:** Mike Fischer  
**From:** Eric J. Van Schyndle  
**Re:** Special Experimental Project No. 14 – Local Labor Hiring Pilot Program

**ISSUE**

Whether Milwaukee County Transit System ("MCTS") or Milwaukee County Department of Transportation ("MCDOT") (collectively "Milwaukee") may engage in the US Department of Transportation's ("DOT") geographic preference pilot program.

**SUMMARY OF FINDINGS**

At this time, because of State law it is unclear whether Milwaukee can apply for the U.S. DOT's Local Labor Hiring Pilot Program ("Pilot Program" or "Program"). Further, as related by Milwaukee, there is no current Milwaukee project eligible for the Pilot Program.

On a prospective basis, should the Wisconsin Department of Transportation ("Wis DOT") agree, Milwaukee may consider future projects for eligibility. The DOT has issued a Notice of Proposed Rulemaking ("NPRM") that would permit recipients and subrecipients of its funds to utilize geographic hiring preferences in their projects when not otherwise prohibited by federal statute. While the DOT has not yet issued a final rule permitting the use of geographic hiring preferences, a department agent indicated to us that the DOT intends to do so in the near future.

**DETAILED ANALYSIS**

**1. What is the statutory authority through which the DOT has enacted the Pilot Program and to what projects does it apply?**

The DOT is using its "experimental authorities" under 23 U.S.C. § 502 and 49 U.S.C. § 5312, § 5314, and § 53235 to conduct the one-year Pilot Program, which enables the recipients and subrecipients of FWA funds and Federal Transit Authority ("FTA") funds to temporarily use contracting limitations/requirements that have generally been disallowed because of concerns about adverse impact on competition. *See e.g.*, 23 U.S. 502(b)(1)(B) ("The Secretary may carry out research, development, and technology transfer activities with respect to — all phases of transportation planning and development (including construction, operation, transportation system management and operations, modernization, development, design, maintenance, safety,

financing, and traffic conditions”). The goal of the Program is to determine whether the use of such requirements — primarily, local hiring preferences — unduly limits competition for DOT-funded projects. See FHWA, *Contract Initiatives Questions and Answers*, at pp. 1-2, available at [https://www.transportation.gov/sites/dot.gov/files/docs/Consolidated\\_QAs\\_PilotProgram\\_052715.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/Consolidated_QAs_PilotProgram_052715.pdf); see also DOJ, *August 23, 2013 Office of Legal Counsel Opinion*, at p. 23 (stating that the Secretary has discretion to permit contracting requirements as long as they do not “unduly limit competition.”) The DOT has limited the experimental Pilot Program to projects funded by the FTA and FHWA. *Id.* at pp. 2-3, 5.

All other DOT-funded projects remain subject to the Common Grant Rule, which prohibits recipients and subrecipients of federal funds from using geographic hiring preferences in its contracts. 2 C.F.R. § 200.319(b); *Contract Initiatives Questions and Answers*, at p. 2. As a result of this regulatory roadblock, the DOT has also published a Notice of Proposed Rulemaking (“NPRM”) to amend the implementation of the Common Grant Rule and permit recipients of DOT funds to use geographic hiring limitations for *all* DOT-funded projects. Geographic-Based Hiring Preferences in Administering Federal Awards, 88 Fed. Reg. No. 44 (proposed March 6, 2015) (to be codified at 2 C.F.R. pt. 1201). The comment period for the NPRM closed on May 6, 2015. To this date, the DOT has yet to issue a final rule. However, a DOT agent indicated to us that the Department intends to issue a final rule in the near future. If it does so, Milwaukee County should have the opportunity to include geographic hiring preferences in all DOT-funded programs where not otherwise prohibited by federal law. See *id.*; see also *Contract Initiatives Questions and Answers*, at p. 5.

## **2. What projects qualify for the Pilot Program?**

Only projects funded by the FTA and the FWHA are eligible for the Pilot Program. *Contract Initiatives Questions and Answers*, at p. 2. In addition, any project accepted in the Program must be advertised *on or before* March 6, 2016. *Id.*

## **3. Does Wisconsin law prohibit Milwaukee County from participating in the Pilot Program?**

Potentially. Notably, Wis. Stat. § 66.0901(1m)(b) (the “Statute”) provides that: “Except when necessary to secure federal aid, a political subdivision may not use a bidding method that gives preference based on the geographic location of the bidder or that uses criteria other than the lowest responsible bidder in awarding a contract.” Based on the plain language of the statute, Wisconsin law would appear to prohibit the County from utilizing any geographic preferences in its public works contracts subject to state law. However, in discussions with Wis DOT their general counsel's office has not indicated whether the Statute is an impediment to Milwaukee's use of geographic preferences. At this time, we are still waiting for confirmation from WISDOT on this issue.