

Office of the Secretary

2 CFR Part 1201

[Docket DOT-OST-2015-0013]

RIN 2105-AE38

Geographic-Based Hiring Preferences in Administering Federal Awards

AGENCY: Office of the Secretary (OST); U.S. Department of Transportation (DOT).

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The DOT proposes to amend its regulations in 2 CFR Part 1201 implementing the Government-wide Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards to permit recipients and subrecipients to impose geographic-based hiring preferences whenever not otherwise prohibited by Federal statute.

DATES: Comments must be received on or before [INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Late-filed comments will be considered to the extent practicable, but the DOT may issue a final rule at any time after the close of the comment period.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., W12-140, Washington, DC 20590-0001.

- Hand Delivery: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave., SE., between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329.
- Instructions: You must include the agency name and docket number or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comments. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Michael Harkins, Deputy Assistant General Counsel for General Law (OST-C10), Office of the Secretary, Department of Transportation, 1200 New Jersey Avenue, SE, Room W83-312, Washington, DC 20590, 202-366-0590.

SUPPLEMENTARY INFORMATION: On December 26, 2014, the DOT's regulations at 2 CFR Part 1201 became effective, which adopted the Office of Management and Budget's (OMB) revised Government-wide Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal awards to non-Federal entities at 2 CFR Part 200 (Common Rule). These requirements at 2 CFR 200.319(b) prohibit the use of in-state or local geographic preferences in the evaluation of bids or proposals except where Federal statute mandates or encourages the use of such preferences.¹ This prohibition extends to the use of geographic hiring preferences in contracts that are awarded by recipients and subrecipients with Federal financial assistance since such preferences could result in a competitive advantage for contractors based in the targeted hiring area. This provision in the OMB Common Rule is not new

¹ For example, 23 U.S.C. 140(d) authorizes the preferential employment of Indians living on or near a reservation on projects and contracts on Indian reservations roads under the Federal-aid Highway Program.

and was found in the DOT's implementation of the prior version of OMB's Common Rule (49 CFR 18.36(c)(2) (2014)).

Many recipients and subrecipients at the local governmental level have local hiring provisions that they otherwise apply to procurements that do not involve Federal funding. Such provisions are intended to ensure that the communities in which the projects are located benefit from the jobs that result from their investment of their funds, particularly for workers in low income areas. Transportation plays a critical role in connecting Americans and communities to economic opportunity. The choices that are made regarding transportation infrastructure can strengthen communities, create pathways to jobs and improve the quality of life for all Americans. Transportation investments and policies can improve access to jobs, education, and goods movement, while providing construction and operations jobs. As such, the DOT believes that local and other geographic-based hiring preferences are essential to promoting Ladders of Opportunity for the workers in these communities by ensuring that they participate in, and benefit from, the economic opportunities such projects present.

Additionally, Section 418 of the Consolidated and Further Continuing Appropriations Act, 2015, Public Law No. 113-235 (FY 2015 Appropriations Act), prohibits the Federal Transit Administration from using fiscal year (FY) 2015 funds to implement, administer, or enforce 49 CFR 18.36(c)(2), for construction hiring. Section 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.² Thus, at least for FTA-

² Effective December 26, 2014, 49 CFR part 18 will apply only to grants obligated on or before December 25, 2014. Grants obligated on or after December 26, 2014 will be subject to 2 CFR part 200. This provision (18.36(c)(2)) has been recodified at 2 CFR 200.319(b) and is substantively the same as

funded project in FY 2015, Congress has diminished the legal effectiveness of this provision.

Therefore, the DOT is proposing to amend Part 1201 by promulgating a provision to deviate from the OMB guidance by making clear that geographic hiring preferences may be used in DOT grant programs. With this deviation, local communities will be in a better position to leverage Federal and State and local funds into local jobs and economic growth. However, this deviation would only apply to the extent that such geographic hiring preferences are not otherwise prohibited by Federal statute or regulation. For example, the Federal statutory provision at 23 U.S.C. 112 requires full and open competition in the award of contracts under the Federal-aid highway program. The Federal Highway Administration has traditionally interpreted this provision as prohibiting the use of geographic hiring preferences and reinforced this interpretation in 23 CFR 635.117(b). Under a 2013 Opinion from the Office of Legal Counsel (OLC), OLC clarified that section 112 does not compel the DOT from prohibiting recipients and subrecipients under the Federal-aid Highway Program from imposing contract requirements that do not directly relate to the performance of work. Rather, the OLC opinion states that the Secretary has discretion to permit such requirements as long as they do not “unduly limit competition.” (*See Competitive Bidding Requirements Under the Federal-Aid Highway Program*, 23 U.S.C. § 112, (Aug. 23, 2013)).

In order to determine whether contracting requirements may be used consistent with the 2013 OLC opinion, the DOT has established a pilot program under which such geographic-based hiring requirements may be used on an experimental basis. This

18.36(c)(2). Although Congress did not address the change in codification in section 418, FTA intends to apply section 418 to grants obligated on or after December 26, 2014 and subject to 2 CFR 200.319(b).

program, which is published in today's *Federal Register*, allows recipients and subrecipients of Federal Highway Administration and Federal Transit Administration funds to use such requirements pursuant to the experimental authorities of those agencies. For any such projects, the DOT will monitor and evaluate whether the contracting requirements approved for use under the pilot program have an undue restriction on competition.

REGULATORY ANALYSES AND NOTICES:

Executive Order 12866 (Regulatory Planning and Review) and USDOT Regulatory Policies and Procedures

The DOT has preliminarily determined that this action would not be a significant regulatory action within the meaning of Executive Order 12866 and would not be significant within the meaning of DOT regulatory policies and procedures. It is anticipated that the economic impact of this rulemaking would be minimal. These proposed changes would not adversely affect, in a material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

Allowing local geographic preferences in hiring, where none currently exist, may result in additional local hiring and in non-local workers not obtaining jobs they otherwise might get. To the extent this occurs this would be an economic transfer from non-local workers to local workers and not a cost.

To the extent local labor markets are tight this could increase labor costs for the DOT-Grant funded projects if all hiring is local. Similarly, if local supply of labor in the skilled trades is low, productivity on DOT-Grant funded project could decrease and project costs could increase if all hiring is local. However, the proposed rule is not forcing local governments to hire locally; it is only saying that they *may* use geographic hiring preferences. They will only exercise this option if they feel it is net beneficial to their communities to do so.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), the DOT has evaluated the effects of this proposed action on small entities and has determined that the proposed action would not have a significant economic impact on a substantial number of small entities. This proposed action does not affect any funding distributed under any of the programs administered by the DOT. For these reasons, I hereby certify that this action would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$128.1 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the DOT will evaluate any regulatory action that might be proposed in subsequent stages of

the proceeding to assess the effects on State, local, tribal governments and the private sector.

Executive Order 13132 (Federalism Assessment)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the DOT has determined preliminarily that this proposed action would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The DOT has also determined that this proposed action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 13211 (Energy Effects)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, dated May 18, 2001. We have determined that it is not a significant energy action under that order since it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. Accordingly, the DOT solicits comments on this issue.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for

each collection of information they conduct, sponsor, or require through regulations. The DOT has determined that this proposal does not contain collection of information requirements for the purposes of the PRA.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The DOT certifies that this proposed action would not cause any environmental risk to health or safety that might disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

The DOT has analyzed this proposed rule under Executive Order 12630, Governmental Actions and Interface with Constitutionally Protected Property Rights. The DOT does not anticipate that this proposed action would affect a taking of private property or otherwise have taking implications under Executive Order 12630.

National Environmental Policy Act

The DOT has analyzed the environmental impacts of this proposed action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing

procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 3.c.5 of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Highway Administration’s implementing procedures, “[p]romulgation of rules, regulations, and directives.” 23 CFR 771.117(c)(20). The purpose of this rulemaking is to permit recipients and subrecipients to impose geographic-based hiring preferences whenever not otherwise prohibited by Federal statute. The agency does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects

2 CFR Part 1201

Uniform Administrative Requirements, Cost Principles, and Audit Requirements
for Federal Awards.

Issued in Washington, DC, on February 24, 2015

Anthony R. Foxx,
Secretary of Transportation.

For the reasons set forth in the preamble, Part 1201 of title 2 of the Code of
Federal Regulations is amended as follows:

PART 1201 -- UNIFORM ADMINISTRATIVE REQUIREMENTS, COST
PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

1. The authority citation for part 1201 continues to read:

Authority: 49 U.S.C. § 322

2. Add new section 1201.319 to read as follows:

§ 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.