



May 6, 2015

Docket Management Facility  
U.S. Department of Transportation  
1200 New Jersey Avenue S.E., W12-140  
Washington, DC 20590-0001

**RE: Docket No. DOT-OST-2015-0013**

Dear Docket Clerk:

On behalf of the more than 1,500 member organizations of the American Public Transportation Association (APTA), I write to provide comments for the Department of Transportation's (DOT) Notice of Proposed Rulemaking on Geographic-Based Hiring Preferences in Administering Federal Awards, published March 6, 2015, at 80 FR 12092, and the DOT Notice of Contracting Initiative, published March 6, 2015, at 80 FR 12257.

**About APTA**

APTA is a non-profit international trade association of more than 1,500 public and private member organizations, including public transit systems; high-speed intercity passenger rail agencies; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation. More than ninety percent of Americans who use public transportation are served by APTA member transit systems.

**General Comments**

While we recognize the concept of employing local workers on public transportation projects is attractive on its surface, and some of our public members have endorsed that concept, we have significant concerns that we believe DOT must address prior to any final action in this rulemaking.

**There are Constitutional issues related to local hiring initiatives that could subject any project employing the proposed authority to legal challenge**

While the Department of Justice (DOJ) Office of Legal Counsel (OLC) opinion Competitive Bidding Requirements under the Federal-Aid Highway Program (the OLC Opinion), August 23, 2013, addressed competition generally and briefly acknowledged potential use of Project Labor Agreements, it did not address local hiring preferences. Employment by government contractors amounts to a fundamental right, protected by the Privileges and Immunities Clause. As such, discrimination based on residency is only acceptable if based on a substantial reason and the targeted hiring closely tailored to a particular, substantiated evil. An excellent discussion of relevant law is found in the National Cooperative Highway Research Program's Legal Research Digest 59, April 2013.

Executive Committee  
Chair  
Phillip A. Washington

Vice Chair  
Valarie J. McCall

Secretary-Treasurer  
Doran J. Barnes

Immediate Past Chair  
Peter Varga

Members-at-Large  
Michael A. Allegra  
Christopher P. Boylan  
Nathaniel P. Ford Sr.  
Huelon A. Harrison  
Angela Iannuzziello  
Paul C. Jablonski  
Jeanne Krieg  
Donna P. McNamee  
Rosa Navejar  
Keith T. Parker  
Thomas F. Prendergast  
Michael A. Sanders  
Patrick J. Scully  
Carl G. Sedoryk

President & CEO  
Michael P. Melaniphy

Given the high burden any local hiring preference must meet, the OLC Opinion appears to be an insufficient basis on which to rest any targeted hiring initiative. DOT should draft appropriate guidelines to ensure grantees are prepared to meet this burden. To do otherwise risks leading those grantees into lengthy litigation that would likely wreak havoc on project budgets and schedules.

**“Local” should be defined in an objective way so grantees and modal administration personnel can ensure uniform application across the country**

The NPRM provides no objective means of determining what might constitute “local” for hiring purposes. In the absence of a standard, application could easily become fragmented, with different modes and their respective regional offices offering guidance and leading to substantial uncertainty among grantees and affected workforces.

**The national nature of DOT programs should be recognized and preserved**

DOT and its modal administrations must preserve the ability to ensure national goals are served by their programs. To devolve authority over these important programs to local authorities could threaten the future of those very programs.

**Rolling stock should be excluded from any local hiring initiative**

Providing jobs related to rolling stock to local residents is not sustainable. Locating manufacturing or assembly sites can only be done economically on the very largest scale. Local employees require a facility, and establishing a facility to service a single client is almost always unreasonable. Not only do rolling stock manufacturers invest tens of millions of dollars to establish a facility and train a workforce, they typically enter into long-term agreements with state and local governments as well as nearby educational facilities to create a viable, permanent facility. Capacity for both bus and rail car manufacturing already exceeds demand, so any movement of the finite number of related jobs would result in overwhelming excess capacity, loss of jobs in the communities – which cannot be described as well-to-do by any means – where these manufacturers are established, exaggerated pricing to compensate for relocation costs, and a net loss of jobs as increased prices lead to reduced orders. Moreover, the excessive costs of relocation(s) would pressure already fragile industries, likely prompting manufacturers to withdraw from the U.S. transit market. In short, local hiring from rolling stock purchases flows from the permanent vehicle operator, maintenance, and associated work that are decidedly local.

**Manufactured products should be excluded from any local hiring initiative**

Like rolling stock manufacturers, producers of other goods establish themselves in communities, establish and train skilled work forces, and enter into long-term agreements with state and local governments. Moving jobs means moving factories, increasing costs, creating unused capacity, and leaving a trail of unemployment in the wake. Even more so than with relatively high-cost rolling stock purchases, the detrimental impacts of requiring local work forces would likely decimate producers of manufactured products necessary to support the transit industry.

### **Professional Services should be excluded from any local hiring initiative**

The provision of professional services beyond architecture and engineering, which may be procured locally under current federal law, is very much a transient business. Small companies and disadvantaged business enterprises (DBE) with small work forces often provide these services. Local hire requirements that limit the ability of these companies to balance their work forces between a cadre of skilled professionals and already locally hired temporary workers would create a substantial barrier to growth, contrary to public policy as expressed in DOT's own DBE program and those of the Small Business Administration.

### **Heavy construction should be excluded from any local hiring initiative**

Constructing major transit projects is highly skilled and frequently dangerous work that depends on a cadre of highly experienced, technically skilled and mobile craft workers. In fact, the very safety of such public infrastructure is very much dependent on the experience level and craftsmanship of those who build them.

In addition, unlike residential housing or other conventional construction, in the heavy civil construction field, when one job is completed, workers by and large move to the area or region where the next job is located. Even in the largest of urban areas, a heavy construction project may typically employ residents of more than thirty states. Local hire requirements clearly don't fit with this type of work, would displace a contractor's existing, nationwide, skilled workforce, and would threaten the quality and reliability of infrastructure.

Apprentice or trainee requirements for union or non-union work are a better approach to provide sustainable career opportunities for disadvantaged persons and veterans. Pre-apprenticeship training programs such as "Helmets to Hardhats" provide the training necessary to be successful in the heavy construction industry, target the desired demographic of the local hire program and have a proven track record of success.

### **DOT should consider delaying any final action pending results of its pilot program**

DOT introduced its pilot program – its contract initiative, on the same day it published its NPRM. The existence of the "Bass Amendment" forbidding enforcement of existing regulatory bars to local hiring requirements and its wide ranging pilot program already provide opportunities to work with select grantees to determine if any application can meet Constitutional requirements, adequately define what "local" means in this context, and preserve the national nature of DOT programs.

### **DOT should limit or refashion its pilot program**

In its March 31 webinar, DOT confirmed its intent to entertain not just requests to deviate from local hiring limitations, but from any heretofore un-allowed contracting provision that DOT determines does not "unduly" limit competition. No examples are given and no further explanation of what may or may not amount to undue limitation appears available. With no parameters, no standard, and no provision for public review of proposals, the pilot program is dangerously unstructured.

Docket Management Facility

May 6, 2015

Page 4

**DOT should review its authority to conduct an experimental program for FTA grantees**

While FHWA grantees may be able to proceed under SEP-14, citation to 49 USC 5312 and 5314 does not support application to funding under FTA's 49 USC 5307 and 5309 programs.

We appreciate the opportunity to assist DOT in this important endeavor. For additional information, please contact James LaRusch, APTA's chief counsel and vice president corporate affairs, at (202) 496-4808 or [jlarsch@apta.com](mailto:jlarsch@apta.com).

Sincerely yours,

A handwritten signature in black ink, appearing to read "Michael P. Melaniphy". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael P. Melaniphy  
President & CEO

MPM/jpl:jr