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Out of State . . . Out of Mind?: Ensuring that Local and Out-of-State Construction Companies Play by the Same Rules

By Juanita Ferguson



The construction industry is all too familiar with its perception as a means by which individual and corporate citizens alike may experience economic opportunity. Whether at the federal, state or municipal level, set-aside programs exist to give small, local and other discrete businesses the ability to compete for lucrative construction contracts. Efforts to support local business and increase the employment of

residents are important to strengthen local economies. However, it is worthwhile to reevaluate government participation in the contractor selection process to ensure the goals of set-aside programs do not produce unintended results.

In the Washington, D.C. metropolitan area there are a variety of programs that allow for small businesses, local businesses, minority-owned, female-owned, disadvantaged and veteran-owned businesses to participate in construction projects in which states and municipalities are market participants. Among the federal government, D.C. government, and governing bodies in the counties of Prince George's, Montgomery, Arlington, Alexandria, Fairfax, Prince William and Loudoun, there is a deliberate push to create jobs for residents and local businesses. The benefits are obvious. An increased tax base and productivity builds better communities. But can more be done for the corporate participants?

How Out-of-State Companies Bend the Rules

The 14th Amendment guarantees that all citizens are entitled to the same privileges and immunities as citizens of a particular state. However, it has become common for out-of-state companies to join forces with local businesses to get construction contracts. Once the money is made, they return to their respective states and leave the local businesses with no recourse to enforce those very same contracts in the jurisdiction where the work is performed.

Consider the following example: the Commonwealth of Virginia is the owner of a construction project in Virginia. A construction company from Mississippi bids on the contract to perform a certain portion of the contracting work in Virginia. The company from Mississippi, as a condition of securing the contract, must agree to retain a construction contractor from Virginia to perform at least 51 percent of the

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work. The contract is performed. However, a dispute arises between the contractor from Virginia and the contractor from Mississippi. The contract provides that any disputes are resolved in Mississippi, which is 800 miles from Virginia.

The hidden costs associated with the contract are revealed. If the Virginia contractor wants to resolve its dispute with the Mississippi contractor, it must now incur the cost of transporting its witnesses to Mississippi and possibly obtaining counsel to represent its interests in Mississippi. The intended results of Virginia's program were to build the capacity of its local contractors to participate in larger construction projects and to highlight its skills. The unintended result was to subject the Virginia contractor to the jurisdiction of Mississippi and provide a disincentive for the Virginia contractor to work with an out-of-state contractor on a Virginia project.

Consider a different scenario: the Mississippi contractor enters into an agreement with the Virginia contractor to take advantage of the licenses that the Virginia contractor possesses to do business in Virginia. Virginia conducts an inspection of the payroll records for the Virginia construction project, and it is revealed that the Mississippi and the Virginia joint venture has incorrectly classified some of its employees as independent contractors. The Virginia contractor's license is suspended. The Mississippi contractor returns to Mississippi and resumes operations there unscathed.

In both of the situations described above, additional measures could, and probably should, have been taken. Virginia did not consider the "post-construction" issues that actually frustrated its original goal of increasing business for the Virginia contractor. The Virginia contractor didn't consider all of the operational costs of working with the Mississippi contractor. And the Mississippi contractor, not unreasonable in advancing its own interests, may have compromised its ability to bid on and to be awarded future public projects.

How to Combat Rule-Bending

Imagine how the scenarios described would have concluded had the following occurred:

- 1) The Virginia contractor had negotiated a threshold level at which disputes would have to be resolved in Virginia or another jurisdiction that was closer than 800 miles to the site of the construction project;
- 2) Virginia had a relationship with Mississippi stipulating that appropriate administrative action would occur in Mississippi if a Mississippi contractor violated any laws of Virginia;
- 3) The Mississippi contractor was required to disclose its previous bidding and post-award history for public contracts to Virginia while applying for the Virginia project.

Conclusion

Creating jobs and giving priority to local businesses through construction contracts means there must be more rigorous investigation to ensure compliance with workplace, tax and other laws. It also means that local contractors must be savvy in negotiating contracts with out-of-state companies. Local contractors must act as if there is no safety net to ensure that out-of-state contractors will play by the same rules in administering construction contracts. Only then will there be improved results and an increase in promoting local communities.

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Look! Up in the Sky! It's a...Plane!: Proposed FAA Policy Could Affect Building Heights

By Matthew Roberts



The Washington, D.C. metropolitan area has no shortage of airplanes flying over the region. There is also no shortage of developers and landowners who want to create the region's landmark buildings and skyscrapers which may fall within flight paths. These developers would rightfully be concerned that the Federal Aviation Administration (FAA) is proposing a change to its One Engine Inoperative (OEI) policy that could affect building height limits. The current proposal would allow the FAA to work with airport owners to define an OEI departure area from the runway.

What is the OEI Policy?

The FAA's OEI policy is designed to ensure that, in the event of an engine failure during takeoff, a plane can navigate and maneuver to avoid catastrophe. As the FAA noted in its Proposed Policy Statement in the Federal Register, engine failure during takeoff could prevent a plane from maintaining a normal climb rate. Building heights obstructing that climb rate during an engine failure could be impacted and create safety risks.

As part of the proposal to define an OEI departure area, the FAA would determine possible safety risks, which could include newer, taller buildings. If the FAA determined the building height exceeded its safety standards, the FAA would issue a determination of hazard.

How Might the OEI Policy Affect Local Development?

As the FAA noted, though, a determination of hazard does not prevent the developer from constructing its project, as the FAA does not have authority to determine building heights or prevent construction of entitled buildings. However, the FAA's determination could impact a local government's decision on the appropriate height of buildings proposed within the flight paths. Moreover, it could also influence whether and to what extent insurance companies will cover the risk of a plane engine failure in insurance policies for new buildings.

The most immediate impacts could be felt in Arlington County's Rosslyn and Crystal City neighborhoods. Arlington County's planning documents and zoning ordinance allow for significant heights and densities in these areas in an attempt to create Arlington's downtown business districts. However, effects could also be felt in Loudoun County near the Dulles Airport. While Loudoun County has planned the densities near Dulles Airport to account for current FAA policies, the Silver Line project will encourage additional density and possibly additional heights concentrated near Metro stops. The development of the Silver Line could reopen this debate, if the revised OEI policy moves forward.

The FAA is seeking comments on the proposed policy change through June 27th.

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