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Public Contracting Requirements – Not Just for “Traditional” Government Contractors

Federal and state laws contain many construction-related requirements that are routine for traditional government contracts and contractors. Not routine, however, are applications of these requirements outside the realm of traditional “public works” projects. Private developers, contractors and quasi-governmental entities often are surprised to learn that these public contracting requirements invade projects not thought to be typical government contract projects.

This happens most often where private development projects contain one or more public incentives. Examples include tax credits, special development districts, tax exemptions, tax abatement, and development bonds. Additionally, governments often condition land use approvals of private development projects on the developer’s agreement to make public improvements (often in the nature of traffic-related improvements such as road widening, turn-lane construction, and signalization). Depending on the structure of the incentive or the improvement, the law may impose one or more of the following requirements.

- **Prevailing Wages.** Statutes require certain public bodies to pay or cause to be paid prevailing wages to workers. Typically the relevant department of labor will publish a wage order applicable to the project, and the approved wages are often in excess of “normal” rates (whether union or non-union).
- **Payment and Performance Bonds.** Statutes require certain public entities to require contractors to furnish a payment bond, a performance bond, or both. The policy rationale is to provide the type of protections that are provided by a mechanic’s lien on privately owned property. The type and structure of incentive

programs often trigger bonding requirements, even when the government entity does not actually own any underlying property (for example, in certain types of development agreements).

- **Prompt Payment.** Statutes require construction contracts to contain certain provisions providing for prompt payment to the contractor and its subcontractors and suppliers (maximum retainage, payment deadlines, interest, etc.). While many states have prompt payment statutes governing private contracts, the requirements under prompt payment statutes for public projects are normally stricter than those under the private prompt payment statutes.
- **Competitive Bidding.** Statutes obligate the state, counties and cities to require competitive bidding for specific types of projects.
- **E-Verify.** Firms doing business with certain public entities are required to execute affidavits confirming that they do not hire illegal aliens.
- **Miscellaneous Contract Requirements.** Statutes impose obligations on contracts let by certain public entities, and include such things as preference for local firms, preference for MBE/WBE/DBE certified contractors, preference for American-made products, and limitations on certain types of contracting (such as construction management and design-build).

Contractors must give careful consideration to the contracting entities, to the nature and structure of the incentive and to the local laws and ordinances. Contractors easily can find themselves caught by subtle differences. For example, in Missouri a public hospital district is not an "agent of the state," but a quasi-public utility company is an "agency of the state." Failure to navigate through the subtleties and to comply with public contracting requirements may result in severe consequences, ranging from fines and other financial penalties to contract termination, debarment, and criminal sanctions.

If you have further questions concerning public contracting requirements, please contact your Thompson Coburn attorney or one of the attorneys in our Construction Practice Group or Government Contracts Practice Group listed below:

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