



Ohio Legislative Service Commission

Bill Analysis

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Sub. S.B. 152

131st General Assembly
(As Reported by H. State Government)

Sens. Uecker, Seitz, Jones, Hottinger, Jordan, Lehner, Coley, Eklund, Oelslager

BILL SUMMARY

Local residency requirements in public improvement contracts

- Prohibits, with limited exceptions, a public authority from requiring a contractor to employ a certain number or percentage of laborers from the public authority's defined geographic area or service area for the construction or professional design of a public improvement.
- Prohibits, with limited exceptions, a public authority from providing a preference to a contractor who employs as laborers a certain number or percentage of individuals who reside within the public authority's defined geographic area or service area.

Project labor agreements in public improvement contracts

- Prohibits a state agency, in the bid specifications for a contract related to a public improvement to be constructed by or on behalf of the agency, from requiring a contractor or subcontractor to enter into (similar to current law, which is not currently enforced) or prohibiting a contractor or subcontractor from entering into certain labor agreements.
- Prohibits a state agency from discriminating against a bidder, contractor, or subcontractor for refusing or electing to become a party to certain labor agreements.
- Prohibits any state funds from being distributed for constructing a public improvement by or for a political subdivision if the subdivision, in its bid specifications, requires a contractor or subcontractor to enter into, or prohibits a contractor or subcontractor from entering into, certain labor agreements.

- Allows an interested party to bring an action against a state agency or political subdivision to have a prohibited contract voided.

CONTENT AND OPERATION

Local residency requirements in public improvement contracts

With limited exceptions (see "**Exceptions**," below) the bill prohibits a public authority from doing either of the following:

- Requiring a contractor, as part of a prequalification process or for the construction of a specific public improvement or the provision of professional design services for that public improvement, to employ as laborers a certain number or percentage of individuals who reside within the public authority's defined geographic area or service area;
- Providing a bid award bonus or preference to a contractor as an incentive to employ as laborers a certain number or percentage of individuals who reside within the public authority's defined geographic area or service area (see **COMMENT 1**).¹

Exceptions

If a project is administered by the Ohio Department of Transportation (ODOT) and is subject to federal environmental justice mitigation requirements, the bill does not prohibit ODOT from using residency requirements. ODOT may use residency requirements on projects subject to on-the-job training requirements as long as no more than 5% of the total number of labor hours anticipated to be needed on a project are apportioned to residents of a particular area or region to meet those requirements.²

The bill does not apply to a multi-phase ODOT project that is funded solely with state funds and is under development on or before the bill's effective date.³

Definitions

The bill defines the following terms for the prohibitions described above:

¹ R.C. 9.75(B).

² R.C. 9.75(C).

³ R.C. 9.75(D).



"Contractor" means a person who undertakes to construct, alter, erect, improve, repair, demolish, remove, dig, drill, or provide professional design services for any part of a structure or public improvement, including any public or business association and any person or entity that actively participates in whole or in part in the actual construction of a public improvement or provision of professional design services by itself, through the use of employees, or through the use of a construction manager, construction manager at risk, professional design firm, design build firm, general contractor, or subcontractor.

"Laborer" means a person who does any of the following in furtherance of a public improvement:

- Performs manual labor or labor of a particular occupation, trade, or craft;
- Uses tools or machinery of a particular occupation, trade, or craft;
- Otherwise performs physical work in a particular occupation, trade, or craft.

"Public authority" includes any of the following:

- The state;
- A county, township, municipal corporation, or any other political subdivision;
- Any public agency, authority, board, commission, instrumentality, or special district of the state, a county, township, municipal corporation, or other political subdivision;
- Any officer or agent of one the entities listed above who is authorized to enter into a contract for the construction of a public improvement or to construct a public improvement by the direct employment of labor.

"Public improvement" means any of the following:

- A road, bridge, highway, street, or tunnel;
- A waste water treatment system or water supply system;
- A solid waste disposal facility or a storm water and sanitary collection, storage, and treatment facility;



- Any structure or work constructed by a public authority or by another person on behalf of a public authority pursuant to a contract with the public authority.⁴

Current law construction residency requirements

The bill repeals current law provisions that, if all of the following apply, require a contractor for a project described below to comply with political subdivision regulations or ordinances that were in effect before July 1, 2009, and that specifically relate to the employment of residents and local businesses of the political subdivision in the performance of the work of the project:

- The project is for the construction or other improvement of a building or structure and is administered by the Executive Director of the Ohio Facilities Construction Commission or by another state agency authorized to administer a project under the Public Improvements Law,⁵ or the project is for the construction or other improvement to a road or highway and is administered by the Department of Transportation or any local public authority authorized to administer such a project;
- The project is located in a municipal corporation with a population of at least 400,000 that is in a county with a population of at least 1.2 million;
- A political subdivision contributes at least \$100,000 to the project.

These ordinances or regulations currently must be included by reference unambiguously in the contract between the administering state agency, department, or local public authority, and the contractor for the project.⁶

Legislative intent and findings

The bill states that in enacting the bill's residency requirement prohibitions, the General Assembly declares its intent to recognize both of the following:

- "The inalienable and fundamental right of an individual to choose where to live pursuant to Section 1 of Article I, Ohio Constitution" (see **COMMENT 2**);

⁴ R.C. 9.75(A).

⁵ R.C. Chapter 153.

⁶ R.C. 153.013 and 5525.26, repealed.



- Section 34 of Article II, Ohio Constitution, specifies that laws may be passed providing for the comfort, health, safety, and general welfare of all employees, and that no other provision of the Ohio Constitution impairs or limits this power, including Section 3 of Article XVIII, Ohio Constitution.⁷

The bill also states that the General Assembly finds, in enacting the bill's residency requirement prohibitions, that it is a matter of statewide concern to generally allow the employees working on Ohio's public improvement projects to choose where to live, and that it is necessary in order to provide for the comfort, health, safety, and general welfare of those employees to generally prohibit public authorities from requiring contractors, as a condition of accepting contracts for public improvement projects, to employ a certain number or percentage of individuals who reside in any specific area of the state.⁸

Project labor agreements in public improvement contracts

The bill eliminates a current law requirement that a state agency hold a public hearing before the state agency may issue a bid specification for a proposed public improvement that requires a contractor or subcontractor to enter into a project labor agreement. Current law requires the state agency to publish notice of the hearing not less than 30 days before the hearing date. The state agency must decide whether to include the project labor agreement requirement in the bid specification not earlier than 30 days after the hearing.⁹

The bill limits the application of the Unlawful Labor Requirements in Public Improvement Contracts Law to only state agencies, rather than to "public authorities" under current law. That Law prohibits the imposition of certain labor requirements as a condition of performing public works (essentially, project labor agreements). A "state agency," for this portion of the bill, means any officer, board, or commission of the state authorized to enter into a contract for the construction of a public improvement or to construct a public improvement by the direct employment of labor and includes a state institution of higher education. A "state institution of higher education" for this portion of the bill is any state university or college, community college, state community college, university branch, technical college or the Northeast Ohio Medical University and its board of trustees.

⁷ Section 3.

⁸ Section 4.

⁹ R.C. 153.83, repealed.



Currently, the Unlawful Labor Requirements in Public Improvement Contracts Law defines a "public authority" to include a state agency as described above, any Ohio political subdivision, and any institution supported in whole or in part by public funds, authorized to enter into a contract for the construction of a public improvement or to construct a public improvement by the direct employment of labor. However, currently under that Law, "public authority" does not mean any municipal corporation exercising the municipal corporation's home rule authority, unless the specific contract for a public improvement includes state funds appropriated for the purposes of that public improvement.¹⁰

The Ohio Supreme Court held in *Ohio State Bldg. and Constr. Trades Council, et al. v. Cuyahoga County Bd. of Commissioners, et al.*¹¹ that the Unlawful Labor Requirements in Public Improvement Contracts Law is preempted by the National Labor Relations Act¹² (NLRA) and is thus unconstitutional; therefore, the law is not currently enforced (see **COMMENT 3**).

Imposition of certain labor requirements in public improvement contracts

The bill limits to state agencies, including state institutions of higher education, the prohibition against including certain labor requirements in bid specifications for a public improvement undertaken by those agencies or on their behalf, and does not directly apply the prohibition to any political subdivision of the state or any institution supported by public funds (the bill indirectly applies the prohibition—see "**Use of funds for certain local projects**," below). The bill also appears to expand this provision by not permitting a state agency to *prohibit* the requirements. Thus, under the bill, a state agency, when engaged in procuring products or services, awarding contracts, or overseeing procurement or construction for public improvements, must ensure that the agency-issued bid specifications for the proposed public improvement do not require a contractor or subcontractor to do, or prohibit a contractor or subcontractor from doing, either of the following:

(1) Entering into agreements with any labor organization (essentially, a union) on the public improvement;

(2) Entering into any agreement that requires the employees of that contractor or subcontractor to become members of or affiliated with a labor organization or to pay

¹⁰ R.C. 4116.01, 4116.02, 4116.03, 4116.031, and 4116.04.

¹¹ 98 Ohio St.3d 214, 2002-Ohio-7213 (2002).

¹² 29 United States Code 151, *et seq.*



dues or fees to a labor organization as a condition of employment or continued employment.

As under current law, this provision also applies to any subsequent contract or other agreement for the public improvement to which the state agency and a contractor or subcontractor are direct parties.¹³

Prohibited actions by state agencies

Similar to current law, the bill prohibits a state agency (rather than a public authority as under current law) from doing any of the following with respect to public improvements undertaken by or on behalf of the state agency:

(1) Awarding a contract for a public improvement if the contract or subsequent contract or other agreement to which the state agency and a contractor or subcontractor are direct parties is required to or prohibited from containing the elements described in (1) and (2) under "**Imposition of certain labor requirements in public improvement contracts**," above;

(2) Discriminating against any bidder, contractor, or subcontractor for refusing or electing to become a party to any agreement with any labor organization on the public improvement that currently is under bid or on projects related to that improvement;

(3) Violating the state agency's duty to ensure that bid specifications issued by the state agency for the proposed public improvement, and any subsequent contract or other agreement for the public improvement to which the state agency and a contractor or subcontractor are direct parties, do not require or prohibit the elements described in (1) and (2) under "**Imposition of certain labor requirements in public improvement contracts**," above.¹⁴

Use of state funds for certain local projects

The bill prohibits any state funds from being distributed for the purpose of constructing a public improvement by or on behalf of a political subdivision, if the political subdivision, in procuring products or services, awarding contracts, or overseeing procurement or construction for public improvements undertaken by or on behalf of the political subdivision, requires in the bid specifications a contractor or subcontractor to enter into, or prohibits in the bid specifications a contractor or subcontractor from entering into, an agreement described under "**Imposition of certain**

¹³ R.C. 4116.02.

¹⁴ R.C. 4116.03.



labor requirements in public improvement contracts," above. The bill defines a "political subdivision" as a county, township, municipal corporation, or any other body corporate and politic that is responsible for government activities in a geographic area smaller than that of the state.¹⁵

Enforcement

Continuing law permits an interested party to bring an action to enforce the Unlawful Labor Requirements in Public Improvement Contracts Law; however, the bill permits those actions to be brought against a state agency or political subdivision, rather than a public authority. An "interested party," under continuing law and with respect to a particular public improvement, includes all of the following:

- (1) Any person who submits a bid for the purpose of securing a contract for the public improvement;
- (2) Any person acting as a subcontractor of a person mentioned in (1), above;
- (3) Any association having as members any of the persons mentioned in (1) or (2), above;
- (4) Any employee of a person mentioned in (1), (2), or (3), above;
- (5) Any resident who is a resident of the jurisdiction of the state agency or political subdivision for which products or services are being procured for, or work is being performed on, a public improvement.

Similar to current law, the bill permits an interested party to file a complaint against a state agency or political subdivision alleging a violation of the Unlawful Labor Requirements in Public Improvement Contracts Law, as amended by the bill, within two years after the date on which the contract is signed for the public improvement, in the court of common pleas of the county in which the public improvement is performed. Under continuing law, the performance of the contract forms the basis of the allegation of a violation. Continuing law requires the court in which the complaint is filed to hear and decide the case and, upon a finding that a violation has occurred, must void the contract and make any orders that will prevent further violations. If the court finds a violation has occurred, the court may award reasonable attorney's fees, court costs, and any other fees incurred in the course of the lawsuit to the prevailing

¹⁵ R.C. 4116.031.



plaintiff. Under continuing law, the Rules of Civil Procedure govern these actions, and any determination of a court is subject to appellate review.¹⁶

COMMENT

1. It is unclear if the bill's prohibitions infringe upon a municipal corporation's home rule authority under Article XVIII, Section 3 of the Ohio Constitution. Courts have held that, as a matter of local self-government, a municipal corporation may not necessarily be bound by state laws concerning construction contract provisions or competitive bidding, and that a municipal corporation could adopt ordinances that differed from the state laws.¹⁷

However, Article II, Section 34 of the Ohio Constitution (Section 34) allows the General Assembly to enact laws providing for the "health, safety, and general welfare of all employees" and provides that "no other provision of the constitution shall impair or limit this power." The Ohio Supreme Court found in *Lima v. State* that a state law that prohibits a political subdivision from requiring its employees to be political subdivision residents¹⁸ was passed under Section 34. And because the law was passed under Section 34, the Court found that a home rule analysis was unnecessary and that the residency statute supersedes a conflicting municipal ordinance regardless of a home rule analysis; the home rule authority in the Constitution cannot impair or limit Section 34.¹⁹

2. The implication of this language is unclear. The Ohio Supreme Court has not recognized a right to choose where to live. The U.S. Supreme Court and Ohio Supreme Court have held that a person does not have a constitutional right to be employed by a city while living elsewhere.²⁰

3. In 2002, the Ohio Supreme Court held that specified provisions of the federal NLRA preempted Ohio's Unlawful Labor Requirements in Public Improvement Contracts Law. The NLRA generally applies to the private sector, and a state may be limited in regulating labor relations between private employers and unions. Sections 8(e) and (f) of the NLRA specifically allow the construction industry to enter into agreements and

¹⁶ R.C. 4116.01 and 4116.04.

¹⁷ See *Dies Electric Co. v. Akron*, 62 Ohio St.2d 322, 326 (1980) and *Greater Cincinnati Plumbing Contractors Assn. v. Blue Ash*, 106 Ohio App.3d 608 (1st Dist. 1995).

¹⁸ R.C. 9.481, not in the bill.

¹⁹ *Lima v. State*, 122 Ohio St.3d 155, 2009-Ohio-2597 at ¶¶ 14-16.

²⁰ *Buckley v. Cincinnati*, 63 Ohio St.2d 42 (1980); *McCarty v. Philadelphia Civil Service Comm.*, 424 U.S. 645 (1976).



take other actions that other private employers cannot. The Court held that the Revised Code provisions essentially prohibit public authorities from entering into or enforcing project labor agreements on public construction projects, and that those sections of the NLRA allow such agreements. The Court stated that if the state, as a market participant, wants to prohibit the use of project labor agreements, the state may do so as the purchaser of the product or services. However, by prohibiting other entities, such as political subdivisions, from using project labor agreements, the prohibition amounts to a regulation, and the Court held that the state cannot pass laws to regulate the construction industry in contravention of the NLRA.²¹

In a separate case, the federal Sixth Circuit Court of Appeals (whose geographic jurisdictional area includes Ohio) concluded that a Michigan law was not preempted by the NLRA because the law was not regulatory in nature and was essentially just a blanket action by the state as a market participant. The Michigan law generally prohibits a governmental unit that awards any construction contract from doing either of the following in any bid specifications, project agreements, or other controlling documents:

- Requiring a bidder or contractor to enter into or prohibiting a bidder or contractor from entering into an agreement with a union for that project;
- Discriminating against a bidder or contractor for becoming or remaining or refusing to become or remain a signatory to, or for adhering or refusing to adhere to, an agreement with a union in regard to that project or a related construction project.²²

Only a court could decide whether any part of this bill concerning project labor agreements is preempted by the NLRA.

HISTORY

ACTION	DATE
Introduced	04-29-15
Reported, S. Gov't Oversight & Reform	06-24-15
Passed Senate (21-11)	06-25-15
Reported, H. State Government	05-03-16

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²¹ *Ohio State Bldg. and Constr. Trades Council*, at ¶65, 69, and 94.

²² *Mich. Bldg. & Constr. Trades Council & Genessee v. Snyder*, 729 F.3d 572 (6th Cir. 2013); M.C.L.A. 408.875.

