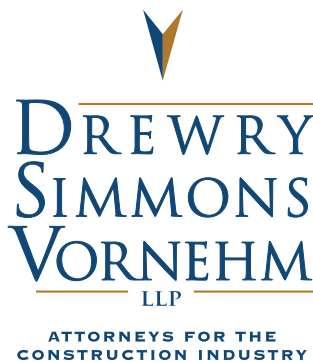


Local Preference – What Do I Do?

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Recently, I was in a meeting with a friend who is a consulting engineer. He expressed exasperation with the new Indiana Business Preference law. He was not sure how he should advise his clients. Engineering was his forte, not municipal law. However, he had discovered what most of us already know - Indiana is predominantly made up of small towns that look to their engineers and architects to not only design the project, but also to prepare the contract documents, including the “front-end” documents. Those front-end documents frequently include forms and references required by state and federal law. Now, here comes Indiana Code 36-1-12-22 which establishes a price preference that became effective July 1, 2011. How should this new law be addressed? Include nothing in the specification, hope no bidder claims the preference and, if one does, address the issue at that time? Include information regarding



the preference law and discuss what this municipality requires? Perhaps something in between? Knowing that this engineer was philosophically proactive, it was not difficult for me to advise him I believe his client would be best served with an aggressive approach. Of course cities and towns cannot ignore the new law, but they can provide key definitions and guidance that may help to avoid problems post-bid. Here are some suggestions that I gave to my friend.

1. Include a page in the instructions to bidders that addresses the preference. For the sake of this discussion, I will refer to it as the “Instruction.”
2. Remove ambiguity by:
 - a. Defining “principal place of business.” We have seen businesses claim the preference because they had a local office. I suggest that an owner define principal place of business as being the “nerve center” of the business: the place where a corporation’s officers direct, control and coordinate the corporations activities. Alternatively, where

the business tells the Secretary of State its principal place of business is located. Possibly, where the business tells the IRS its principal place of business is located. Regardless of how you define it, don’t leave it to be debated post-bid.

b. Applying two other tests to determine if a business is a local Indiana business with respect to a specific project are based on a) payroll or b) residence. We have seen businesses claim the preference based on either payroll or residence from the bid date forward. Of course, on a major project where the contractor will have a significant presence in an affected county because of the project and not before that, this may be the only strategy for the business to try and claim the preference. We believe that these two tests are meant to be applied to the payroll or residence of employees prior to the bid. The Instruction should specify that the data used for either the payroll or residence tests are for the two years prior to the date of the bid (or for whatever period of time considered appropriate by you and your client).

c. Noting in the Instruction that the proof supporting a bidder’s contention

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that it qualifies for the preference will be a post-bid submittal required of the apparent low responsive, responsible bidder. You don't want every bidder submitting information that is not needed with its bid. That increases the chance of a mistake by the bidder and a protest or bid challenge.

d. Deciding whether to define two more criteria that are undefined by the statute. These two additional criteria deal with a bidder's capital investment in the affected counties and/or a bidder's substantial positive economic impact in the affected counties. We have seen bidders attempting to qualify as a local business using these two criteria even though neither had been defined by the municipality. If your client has not defined

either or both of these two criteria, include a statement in the Instruction that those two elements are not acceptable criteria for the project in question.

By providing key definitions and including Instructions in the instructions to bidders, you can help your client avoid post bid problems and keep your project moving ahead. You also demonstrate to your client that they chose the right consultant.

Editor's Note: Engineers preparing bid documents for projects funded with USDA – Rural Development dollars should coordinate closely with USDA Rural Development representatives when including local price preference language in front end documents. Rural Development

representatives have indicated that including such language could result in projects losing federal funding.

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