D.C. Jobs Bill has Far-Reaching Implications for Contractors

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Developers, general contractors and subcontractors doing business in the District of Columbia ("District") should exercise caution before entering into certain agreements to provide construction-related services. The District of Columbia Workforce Intermediary Establishment and Reform of First Source and Living Wage Amendment Act of 2011, commonly referred to as the Amended First Source Act, is the most recent legislation passed by the District to reduce unemployment and to increase the taxpaying base in the city.

The term "first source" is not new to the construction community, however, the amended law promises to have a much greater impact than the original law passed in 1984. Under the original Act, if a beneficiary, i.e. party to an agreement with the District, received at least $100,000 in contracts or other financial assistance from the District, the beneficiary had to agree to fill 51 percent of all new construction jobs, apprenticeships or trainee positions for the funded projects with District residents. In other words, the "first source" for finding employees to fill new job vacancies was unemployed residents registered with the District's Department of Employment Services ("DOES").

One of the challenges for parties subject to the First Source Act has always been eliminating the perception that construction jobs require no skill and can be performed by anyone. Another challenge is that the mechanisms in place to assist beneficiaries in filling vacancies do not always assure beneficiaries' ability to comply with the law. Contractors should be able to look to DOES for a bank of qualified persons for construction jobs, as well as assistance when the contractor's own recruitment efforts do not produce the desired results of a qualified labor pool. Success in that area has not always been consistent.

Under the Amended First Source Act, for every construction or non-construction contract or project valued between $300,000 and $5,000,000 that receives funds from the District or federal funds that are administered by the District, 51 percent of a contractor's new hires shall be District residents. For every government-assisted project or contract that receives government assistance totaling $5,000,000 or more, at least 20 percent of journey worker hours shall be performed by District residents, at least 60 percent of apprentice hours shall be performed by District residents, at least 51 percent of the skilled laborer hours shall be performed by District residents, and at least 70 percent of common laborer hours shall be performed by District residents.

Stringent reporting obligations have been enacted to monitor beneficiaries' efforts to comply with the Amended First Source Act. From the beginning of a project or contract...
until construction is completed and a certificate of occupancy is issued, monthly compliance reports must be submitted by beneficiaries to DOES. This includes, but is not limited to, information on the number of employees hired to work on a project, the number of new jobs created, the number of employees transferred from other jobs, the number of job openings listed with DOES, the total direct and indirect labor costs of the project or contract, the number of District residents hired for the reporting period, and the social security number, job title, hire date and referral source for all new hires. For projects or contracts totaling $5,000,000 or more, certified copies of payrolls of all contractors working on a project must be submitted to DOES.

While the Amended First Source Act provides waivers for those who make good faith efforts to comply with the Act but are unable, the penalties for noncompliance with the Amended First Source Act are significant. The District Mayor may impose a penalty equal to one-eighth of one percent of the total amount of the direct and indirect labor costs of the project or contract for each percentage by which a beneficiary fails to meet hiring requirements. If a beneficiary receives a second violation of the hiring requirements within a 10-year time period, the Mayor is required to automatically debar the violator from being considered for contract awards for a period of not more than five years, and the violator may be considered ineligible for consideration of government-assisted projects for a period of not more than five years.

The Amended First Source Act has caused concern throughout the construction community. It is not an uncommon sentiment that smaller employers will not be able to meet the reporting requirements due to the fact that either the personnel necessary to compile the data are not in place or the cost to maintain the records will add to the bottom line costs that must be passed on to owners of projects. Additionally, opponents of the legislation are adamant that the mandatory hiring percentages are impossible for any sized employer to meet given the limited number of District residents that are qualified and/or have the skills to work in the construction industry. Finally, those persons who might otherwise be hired to work on a project but are not District residents will be denied the opportunity to work on construction projects for which they might otherwise have been eligible.

It remains to be seen whether the Amended First Source Act will result in increased job opportunities for District residents or the demise of contracting businesses for failure to comply with the requirements of the law. One thing is certain – if you plan to do business in the District, it is essential you familiarize yourself with the requirements of the Amended First Source Act in order to make an intelligent bid for work and to navigate safely through the procedural requirements that could have a lasting impact on your ability to participate in future projects, whether within the District or another jurisdiction.