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Offshoring Design Talent Requires Tailoring to Jurisdictions

With states and cities passing laws that can hinder the use of foreign talent for public contracts, Riker Danzig's Rudy Randazzo explains how design firms can maneuver around the restrictions.

Foreign talent—always an appealing labor option for US design firms—has soared because it addresses two important issues: the domestic labor shortage and expanding domestic wage inflation.

But US jurisdictions are increasingly adopting laws and policies to curb use of offshore talent on large, publicly funded projects that design firms rely on for financial solvency.

This complex economic and regulatory environment requires firms to develop strategies that yield the benefits of offshore talent while maintaining eligibility for public work.

Anti-offshoring laws are government tools that restrict foreign labor. Constitutional protections generally limit applying these restrictions to government-funded projects. These limits render the restrictions toothless because many industries derive the bulk of their revenue from privately funded projects.

That's not the case for the design industry, where public contracts account for more than a third of all non-residential construction projects and nearly all infrastructure projects.

Federal restrictions are well-known, but state and local rules can be harder to identify. State restrictions usually are adopted by executive order or statute but occasionally appear in agency-specific regulations. Local restrictions may be imposed by ordinance but can be hidden in the policy manuals of municipal utilities and transit authorities.

Motivating Factors

Developing an effective work-around means understanding the two main motivations—money and security—behind a specific rule.

Rules motivated by money are protectionist measures meant to keep firms from employing people, and therefore spending public dollars, outside a given jurisdiction. This can mean outside the US or something far more insular, such as outside a given city. Money-motivated rules have been the most common prohibition on using foreign labor.

Quickly catching up, however, are security-motivated rules meant to restrict the transfer of sensitive information outside the US. A combination of high-profile terrorist attacks and the constant threat of cyberattacks have made government agencies increasingly anxious about who has access to sensitive details about critical infrastructure, such as power grids, bridges, and tunnels.

Once the motivation is known, design firms should make certain the prohibition applies to their specific services. There are many “buy American” laws that apply only to goods and not to design services.

The Nitty-Gritty

For money-motivated restrictions, firms should determine whether they’re bans or preferences. Many “domestic preference” laws exist in the US and they’re just that—a government preference that domestic labor be used. Massachusetts requires that public procurement agencies give preference to Massachusetts-based vendors, for example.

At least two effective strategies address this type of restriction. The first is a government affairs approach that informs government decision-makers about the benefits of working with a particular firm, and how that firm might indirectly meet the underlying policy goals of the restriction despite the firm’s use of foreign talent.

The second is a business-led approach that stresses the practical and substantive benefits of using the target firm over a less-qualified domestic labor firm.

If the restriction is an outright ban (such as in New Jersey), whether money-motivated or security-motivated, design firms will need to shift gears.

First, they should determine exactly what the restriction prohibits. A ban might restrict employment to “citizens of the United States,” “persons lawfully residing in the United States,” or “persons authorized to work in the United States.”

These classifications have different meanings, and understanding the options under each is essential. Second, firms need a strategy to address the underlying motivation and demonstrate why the use of foreign labor satisfies all concerns.

Finally, firms should determine whether the ban has published exceptions. For example, Ohio enforces a money-motivated ban prohibiting outsourcing of services on any public contract, but provides two exceptions: one for emergency use and one for a waiver upon executive approval.

Using these approaches and other strategies, it’s possible for design firms to have their cake and eat it too.

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