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Expanded Requirements for Contractors on IIJA and IRA Funded Projects

By:

Ronald G. Robey, Partner, Smith, Currie & Hancock LLP

S. Elysha Luken, Partner, Smith, Currie & Hancock LLP

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Ronald G. Robey
Smith, Currie & Hancock LLP
245 Peachtree Center Avenue, N.E.
Suite 2700, Marquis One Tower
Atlanta, Georgia 30303-1227
rgrobey@smithcurrie.com

S. Elysha Luken
Smith, Currie & Hancock LLP
101 N.E. Third Avenue
Suite 1910
Fort Lauderdale, Florida 33301
seluken@smithcurrie.com

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Presented by:

Ronald G. Robey, Partner, Smith, Currie & Hancock LLP, Atlanta/Fort Lauderdale Offices
S. Elysha Luken, Partner, Smith, Currie & Hancock LLP, Fort Lauderdale Office

Author Biographical Information:

Ron Robey is a senior partner of Smith, Currie & Hancock. Education: B.A., Centre College and University of Kentucky (with distinction in the Honors Program); J.D., University of Kentucky; Order of the Coif; lead articles editor, *Kentucky Law Journal*. He is admitted in Florida, Georgia, Kentucky, Nevada, New York, and Michigan, and is Co-Editor of "Smith, Currie & Hancock's COMMON SENSE CONSTRUCTION LAW (5th Edition (2015) and the recent 2019 released 6th Edition, John Wiley & Sons).

Elysha Luken is a partner of Smith, Currie & Hancock's Fort Lauderdale office. Elysha represents all industry segments in public and private construction disputes, including bid protests, prosecuting and defending claims for money and time, drafting and negotiating contracts, construction lien and bond claims, and contractor and professional licensing. Elysha has served as project counsel for larger projects, from preparation of subcontracts and purchase orders and compliance to claims preparation, ADR, and litigation. Elysha often lectures on construction contracts; legal considerations for green building and sustainable projects; and alternative project delivery, design-build and P3.

Expanded Requirements for Contractors on IIJA and IRA Funded Projects

Introduction

The Infrastructure Investment and Jobs Act ("IIJA"), colloquially known as the Bipartisan Infrastructure Law, provides unprecedented funding for broadly defined infrastructure projects. Funding for these projects will flow from federal to state, and to local government, and at times directly to private entities. Funding may come in the form of formula and direct funding of federal projects, but also significant grants, loans, and incentives. The Inflation Reduction Act of 2022 ("IRA") follows a similar pattern, albeit with more focus on combatting climate change and a particular focus on renewable energy and energy efficiency.

Yet, when one "follows the money" for both laws it is apparent there will be strings - lots of them - attached to projects funded by the IIJA and the IRA, and that many of the funding conditions are actually obligations that fall on the contractor to perform. Contractor obligations in both laws take on various forms, some of which are familiar and others which are not. However, these requirements generally impact two significant categories for contractors: materials and labor.

Many of the contractor requirements in both the IIJA and the IRA are already well known to those working on federal or federally funded projects, such as the broader application of Davis Bacon Related Acts and apprenticeship requirements. But some are new, such as the Build America Buy America requirements for broadly defined infrastructure projects and the IRA's low carbon emission materials requirements.

This paper provides an overview of the IIJA and IRA requirements impacting contractors in these two key areas of materials and labor as follows:

1. Overview of IIJA and IRA and Primary Issues Facing Contractors
2. IIJA Material Sourcing and Content Requirements
3. IRA Domestic and Low Carbon Material Requirements
4. Prevailing Wage and Apprenticeship/Trainee Requirements in the IIJA
5. Workforce Requirements in the IRA

The topics above and the current legal landscape are addressed below, along with Common Sense Recommendations for addressing the new regulatory environment many contractors will face.

1. Overview of IIJA and IRA and Primary Issues Facing Contractors

The Infrastructure Investment & Jobs Act (IIJA) is an ambitious and unparalleled five-year investment of over $973 billion in broadly defined infrastructure projects. Also known as the Bipartisan Infrastructure Law (BIL), it provides a significant down payment on America's current and future infrastructure needs. Aside from the country's unquestionable need for significant repair investments and new projects, the IIJA is predicted to provide jobs and a needed economic boost. Much of the IIJA's investment is in transportation infrastructure and "formula" funding (such as large additional appropriations for the FAST Act for surface transportation), but other significant IIJA investments are directed beyond transportation and are funded more in the nature of block grants to states, loan assistance, or competitive grants. The result will likely be more discretionary projects and more money in the hands of state and local policy makers.

Full Text At: https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf

The Inflation Reduction Act of 2022 (IRA) is an expansive $485 billion act which seeks to both reduce inflation and fight climate change. The bulk of these funds ($369 billion) are invested in upgrading and modernize energy production and transmission in the United States, mainly through tax credits and other incentives for renewable and carbon sequestration projects. The IRA also uses the federal government's regulatory and purchasing power to develop and create demand for low-carbon construction materials through procurement requirements, incentives, and new programs for identifying and labeling low-carbon construction This combination of investments, tax credits, and regulatory increases are intended to reduce America's carbon footprint by 40% by 2030.

Full Text At: https://www.congress.gov/117/plaws/publ169/PLAW-117publ169.pdf

Like other significant financial investments in infrastructure in the past, such as the American Recovery and Reinvestment Act of 2009, the IIJA and the IRA use financial incentives and investments as a means to further socio-economic policies. For contractors, these policy preferences have an impact on the costs of performance and risk evaluations made when taking on new work. While the stated goal of both laws is to build infrastructure and increase construction activity, both laws have the consequence of increasing the regulatory burdens and attendant risks on contractors and increasing the costs of performing the work. The laws increase compliance obligations and costs for construction materials and limit a contractor's ability to select suppliers. Both laws will likely increase labor costs, as well as the regulatory burden and risks of noncompliance.

The scope of projects affected by the labor and material regulations in the IIJA and the IRA is broad and covers federal, state, local, public, and private work. Both laws seek to apply these requirements to projects even if the project is only partially funded by the IIJA or the IRA. Contractors therefore need to understand what projects will have to comply and what the requirements are.

2. IIJA Material Sourcing and Content Requirements

A. Preexisting Requirements - Buy American Act and Buy America

Most federal contractors are familiar with domestic preferences and domestic content requirements out of necessity. Such requirements are not new and have been in place for over a century. *See*, *e.g.*, Merchant Marine Act of 1920 (Pub. L. No. 66-261) (also known as the Jones Act). In an era of global trade and diminishing domestic manufacturing, compliance is complicated and challenging for even those accustomed to these requirements. Because the IIJA expands these types of requirements to include "infrastructure" receiving federal funding, a review of the preexisting framework is provided for context below.

i. Buy American Act

The Buy American Act (BAA) of 1933, 41 U.S.C. §§ 8301-8305, generally restricts government agencies to purchasing only domestic goods for their own use or for use in construction by the agency's contractors. The BAA requires construction contractors to use domestic construction material in contracts to which the BAA applies. This means, (for other than iron or steel) it must be: (1) unmanufactured construction material mined or produced in the United States; (2) construction material manufactured in the United States, with more than 60 percent of the cost of its components mined, produced, or manufactured in the United States; or (3) a commercially available off the shelf item (COTS). *See* FAR § 25.003. For construction material that consists wholly or predominantly of iron or steel or a combination of both, it is considered manufactured in the United States if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used in such construction material. *See id.*

The BAA impacts only a portion of federal contractors. It applies to construction contracts less than $7,032,000, supply contracts less than $183,000, and other specified contracts. For other contracts generally the Trade Agreements Act of 1979 ("TAA") applies and permits the waiver of the BAA for eligible products from designated countries. The BAA also permits the use of nondomestic construction materials if the head of the agency determines the cost of the domestic product or materials is unreasonable, that the purchase is inconsistent with the public interest, or if the end product is not mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities of satisfactory quantity. FAR §§ 25.103, 25.202. An exception can be granted prior to award, FAR § 25.203, or after based on an "evaluation factor" creating a preference for domestic products and materials. *See generally* FAR § 25.101(c).

For contractors, challenges have included differentiating between construction materials and components. In one case, steel beams fabricated in Japan were considered construction materials even though more domestic components were added later, resulting in the contractor violating the BAA. *See S.J. Amoroso Constr. Co. v. United States*, 12 F.3d 1072 (Fed. Cir. 1993) (each steel beam brought to construction site for incorporation into building had to satisfy domestic content requirements of BAA even though beams were later combined with other materials). Violations of the BAA can have consequences, up to and including debarment. *See* 41 U.S.C. § 8303 (violations may result in contractor and any affiliated subcontractor, material man, or supplier debarment for three years); *Glazer Const. Co., Inc. v. United States*, 50 F. Supp. 2d 85 (D. Mass. 1999) (debarment proceedings for BAA violation).

Over the years, the BAA has been altered and expanded by Congress and the Executive Branch in various ways. In 2009, the American Recovery & Reinvestment Act (ARRA), Public Law 111-5 (2009), set forth new and different BAA provisions affecting construction projects funded by the ARRA beyond direct federal contracts. More recently, the BAA percentage of required components for domestic construction material has increased from 50% in December 2020 to 60% effective October 2022, with an upcoming increase to 75% percent for items delivered starting in calendar year 2029. *See* FAR § 25.003.

ii. Buy America

Buy America requirements started in the Surface Transportation Assistance Act of 1982 and were intended to give preference for the use of domestically produced materials on transportation projects funded by the federal government. Buy America requirements apply to transportation projects receiving federal funding (including FHWA grants and federally funded state transportation projects) as well as other projects by the Environmental Protection Agency, Federal Transit Administration, Federal Rail Administration, Federal Aviation Administration and National Highway Traffic Safety Administration. Buy America is not limited to procurements by a federal agency, and flow down to recipients of grants and other federal funding from these agencies. Buy America applies after a *de minimis* monetary threshold to almost all projects. For example, the Federal Highway Administration's (FHWA) minimum threshold for Buy America to apply is that the total amount of iron and steel products delivered to the project be more than $2500 or 0.1% of the total contract amount, whichever is greater. *See* 23 CFR § 635.410(b)(4).

Buy America requires that the "steel, iron, and manufactured goods used in the project are produced in the United States." *See* 49 U.S.C. § 5323. This includes manufacturing processes, such as melting, casting, forming, finishing, and coating. A manufactured good is considered produced in the United States if: (1) all of the manufacturing processes for the product take place in the United States; and (2) all of the components of the product are of United States origin. A component is considered of United States origin if it is manufactured in the United States, regardless of the origin of its subcomponents. *See* 49 CFR 661.5(d). Some Buy America requirements are agency specific. For example, the Federal Transit Administration (FTA) requires the cost of components of rolling stock (train control, communication, traction power equipment, etc.) must be more than 70% produced in the United States. Most agencies include requirements for certifications as well as audit provisions to confirm compliance. *See e.g.*, 49 U.S.C. § 5323(m); 49 CFR part 663 (Buy America audit provisions for rolling stock).

Like the BAA, Buy America requirements can be waived if the agency finds that application of Buy America is inconsistent with the public interest or the steel, iron, and goods produced in the U.S. are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality. Each agency may have other more specific waivers. For example, FHWA may waive the applicability of Buy America when alternate bidding procedures are used, and lowest overall total bid based on using domestic steel is 25% more than the lowest overall total bid based on using foreign steel. *See* 23 CFR 635.410 (c)(1)(i). FTA may provide a waiver if including domestic material will increase the cost of the overall project by more than 25 percent for rolling stock (train control, communication, traction power equipment, etc.). *See* 49 CFR part 661. Waivers may be issued on a project-by-project basis, or on a regional or national basis. *See e.g.* 23 CFR 635.410 (c)(1)(i) (FHWA waiver process).

B. IIJA Requirements – Build America, Buy America

The IIJA includes as Title IX the "Build America, Buy America Act" ("BABA"), effective May 14. 2022. *See* Pub. L. No. 117-58, §§70901-52. In enacting BABA, Congress recognized existing domestic preference laws, finding that "for over 75 years, Buy America and other domestic content procurement preference laws have been a part of the United States procurement policy[.]" *Id.* §70911(8). However, BABA also expands upon already existing domestic preference laws because Congress believed that common construction materials were not adequately covered:

> common construction materials used in public works infrastructure projects, including steel, iron, manufactured products, non-ferrous metals, plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables), glass (including optic glass), lumber, and drywall *are not adequately covered by a domestic procurement preference*, thus limiting the impact of taxpayers purchases to enhance supply chains in the United States

Id. at 70911(5) (emphasis added). The intent then is that BABA will not only expand the coverage of domestic preferences to more potential recipients (extending to grant and funding recipients such as states and localities) and more projects (all infrastructure) but also to cover more construction materials.

The BABA provides prohibits federal funding on infrastructure projects unless all material used is domestically produced:

> [N]one of the funds made available for a Federal financial assistance program for infrastructure…may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.

Pub. L. No. 117-58, §70914. Notably, the BABA applies to *all* federal financial assistance for infrastructure, not just IIJA funding, unless the project or the material is covered by a waiver. This includes direct purchases by the federal government but also all forms of federal financial assistance. Additionally, BABA's definition of *infrastructure* is broad and encompasses almost any built structure or facility:

> INFRASTRUCTURE.—The term ''infrastructure'' includes, at a minimum, the structures, facilities, and equipment for, in the United States—
>
> (A) roads, highways, and bridges;
> (B) public transportation;
> (C) dams, ports, harbors, and other maritime facilities;
> (D) intercity passenger and freight railroads;
> (E) freight and intermodal facilities;
> (F) airports;
> (G) water systems, including drinking water and wastewater systems;
> (H) electrical transmission facilities and systems;
> (I) utilities;
> (J) broadband infrastructure; and
> (K) buildings and real property.

Pub. L. No. 117-58, §70912. Thus any of the above projects that receive federal funding will have to comply with the requirements of the BABA.

Materials covered by the BABA requirements include (1) iron and steel, (2) manufactured products and (3) construction materials (non-ferrous). Guidance released by the Office of Management and Budget in April 2022 advises that "an article, material, or supply should only be classified into one" of these three categories, and "[f]or ease of administration, an article, material, or supply should not be considered to fall into multiple categories." *See* OMB Mem. M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure (Implementation Guidance) (available at https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf). Items consisting of two or more of the listed materials that have been combined together by manufacturing processes, or when at least one of the listed materials is combined with an unlisted material, such an item "should be treated as manufactured products, rather than as construction materials." *See* Implementation Guidance at 6. In terms of defining "construction materials," included is glass, lumber, drywall, and plastic and polymer-based products, such as PVC, composite building materials, and polymers used in fiber optic cables. *See* Implementation Guidance at 13-14. Construction materials excluded are manufactured products, cement, and cementitious materials, aggregates (stone, sand, gravel), aggregate binding agents and additives and asphalt. *See id.*

For materials to be considered "produced in the United States" the following definitions apply. For iron and steel, "all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States." *See* Pub. L. No. 117-58, §70912. Manufactured products must be manufactured in the United States, and the costs of components that are mined, produced or manufactured in the United States is greater than 55% of the total cost of all components of the manufactured product, unless other minimum domestic content requirements are identified elsewhere. *See id.* For construction materials, "all manufacturing processes for the construction material occurred in the United States." *See id*.

The BABA encompasses all items permanently incorporated into a project, whether consumed in, incorporated into, or affixed to the construction project. *See* Implementation Guidance at 5. However, BABA does not apply to temporary works, items brought to and removed from the construction site prior to completion of the project, such as temporary scaffolding. *See* Implementation Guidance at 6. It also does not apply to equipment and furnishings used at or within the finished project and not permanently affixed, such as movable chairs, desks, portable computer equipmen. *See id.*

Waivers of the BABA requirements are available, but are applied for and granted on an agency by agency basis. *See*, *e.g.*, https://www.epa.gov/cwsrf/build-america-buy-america-baba-approved-waivers (EPA approved waivers); https://www.energy.gov/management/pf-2022-39-general-applicability-waiver-build-america-buy-america-requirements (DOE general applicability waiver). The requirements of the BABA may be waived by the head of the agency administering the funding. To grant a waiver, the agency head must find one of three reasons to waive the requirement, either the public interest, nonavailability, or unreasonable cost. *See* Pub. L. No. 117-58, §70914(b). For the public interest waiver, the agency head must determine that applying the domestic content preference would be inconsistent with the public interest. *See id.* An agency head may also find that the types of iron, steel, manufactured products or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality. *See id.* For the unreasonable cost waiver to apply, the agency head must find that the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent. *See id.* Waivers of the BABA requirements are intended to be time-limited, and agencies are directed to identify a short and definitive time frame for their application. Broad waivers are discouraged and the preference is for targeted waivers.

While the BABA is similar in many ways to the Buy America Act there are a few key differences. As discussed *above*, the Buy America Act requires 60% domestic content and that percentage will increase up to 75% by 2029. The BABA domestic content is requirement is lower, at 55%, with no specific escalators in the current version of the law. Another difference is scope, the BABA contains certain exclusions such as temporary works, tools, and equipment and furnishings. The Buy America Act encompasses every end product, even including furnishings. On the other hand, the Buy America Act contains a specific exclusion for COTS products and that exclusion is absent from the BABA requirements.

Common Sense Recommendations: Given the broad applicability of the BABA to any "infrastructure" funding, contractors need to become familiar with BABA requirements. Since waivers are issued on an agency-by-agency basis, contractors will also need to know, before bidding, which agency is administering the funds for a particular project to review waivers that may apply, or, to apply for a waiver if one is needed. Contractors also need to understand the verification they may be requested to provide to show compliance with the BABA, either during the bidding process through a certification, or by obtaining certifications of BABA compliance from material suppliers during the course of the work.

3. IRA Material Sourcing and Content Requirements

The IRA requirements for materials have more limited application and do not encompass all infrastructure projects such as those in the IIJA. But the IRA includes billions of dollars in federal tax credits which may turn on the required use of certain construction material, including materials and goods produced domestically and the use of low-carbon emission materials.

A. Low Carbon Emission Materials

One of the IRA's primary focus points is the reduction in United States greenhouse gas (GHG) emissions. To that end, the IRA includes funding for the use and development of so-called "low-carbon" materials, and creates incentives and requirements to do so. The IRA provides funding to the Federal Highway Administration (FHWA) and the General Services Administration (GSA) for the use of low-carbon construction materials in federally funded transportation projects and federal buildings.

Under the IRA, FHWA will distribute $2 billion over the next ten years to reimburse incremental increased costs or provide a 2% incentive to recipients for projects using construction materials with substantially lower embodied greenhouse gas (GHG) emissions ("low-carbon" construction materials). *See* Pub. L. No. 117-169, §60506. For federal buildings, $2.15 billion has been set aside for GSA to acquire and install low-carbon building materials and products for use in construction or alteration of GSA buildings. *See* Pub. L. No. 117-169, §60503.

For transportation projects, the determination of which materials will be considered low-carbon will be determined by the Environmental Protection Agency and reviewed by the FHWA for appropriate use. *See* Pub. L. No. 117-169, §60116. For GSA projects, the EPA will likewise be responsible for determining which construction materials qualify as low-carbon, in consultation with the GSA. *See* Pub. L. No. 117-169, §60501. In all the EPA will receive $100 million to identify and label low-carbon construction materials used for federal buildings and federal transportation projects.

The EPA has also been given $250 million to help develop standardized environmental product declarations (EPD) that will include measurements of embodied GHG emissions. *See* Pub. L. No. 117-169, §60112. The EPDs are to show embodied GHG emissions throughout the life-cycle of the material or product through production, use, and disposal. Nearly all of these funds are for the EPA to dispense grants and technical assistance to construction material manufacturers and others that assist them. *See* Pub. L. No. 117-169, §60112. Much like the EPA's Energy Star program for lighting, appliances, office equipment, consumer electronics, and heating and cooling equipment, it is expected that manufacturers will want to participate in this low carbon EPD process to increase the desirability of their products and their use in other projects beyond those funded by the IRA. If this EPD process goes the way of the Energy Star program, it will likely use similar certification requirements are based on international standards for conformity assessment, including product testing in EPA-recognized laboratories and certified by an EPA-recognized certification body.

Common Sense Recommendations: New and emerging materials without a proven record can carry risks for the contractor if materials do not perform as well as or just like traditional materials. Warranty issues and defects often may not manifest until years in the future and newer, untested products have the unknown potential for such issues. On projects where low-carbon materials will be required as part of an incentive program funded by the IRA, contractors will likely have to utilize materials with the required EPDs. Beyond that, the EPA's development of standardized EPDs will likely result in increased specification of low-carbon materials for use in private projects and public projects not funded by the IRA.

B. Domestic Materials as a Condition of Energy Tax Credits

The IRA extends multiple existing tax credits for various aspects of energy infrastructure projects. However, the IRA will now require many projects seeking such energy tax credits to comply with domestic preference requirements for construction of these projects. For example, to receive the Renewable Energy Production Tax Credit and the Renewable Energy Property Investment Tax Credit, *see* 26 U.S.C. 45, owners will now have to certify that iron, steel, and manufactured products used in construction projects for power generating facilities were domestically produced. Because these are tax credits, the Treasury Department is developing the rules for these requirements.

For power facilities seeking these tax credits, the IRA requires iron and steel requirements be applied in a manner consistent with the Federal Transit Administration's Buy America regulations, *see* 49 CFR §661, which specify that all iron and steel manufacturing processes must take place in the United States. Manufactured products would be deemed domestically produced so long as a threshold percentage of the total costs of manufactured products (including components) in a facility are mined, produced, or manufactured in the United States. *See* Pub. L. No. 117-169, §13101(g). For this IRA tax credit, the percentage is 40% for projects beginning construction prior to 2025, rising incrementally to 55% after 2026. *See id.* The percentage is 20% for offshore wind projects, increasing more slowly over time. *See id.*

The Secretary of the Treasury may waive domestic preference requirements as a condition of these tax credits where either the use of domestic products would increase the overall costs of construction of the facility by more than 25%, or where domestic products are not produced in the United States in sufficient or reasonably available quantities or of satisfactory quality. *See* Pub. L. No. 117-169, §13101(g).

Common Sense Recommendations: Contractors working in the energy sector should be aware of the IRA requirements applying Buy American obligations which may be more stringent that the domestic content requirements of the IIJA. Contractors should also investigate the waiver process within the Department of Treasury and regulations for requesting the same.

4. Prevailing Wage and Apprenticeship Requirements in the IIJA

The IIJA requires compliance with Davis-Bacon and prevailing wages for much of the monies being spent, no matter if they are spent by the federal, state, or local government or in some cases private entities receiving grants. These include monies allocated to states and local entities for surface transportation and energy projects, as well as broadly defined "infrastructure" projects that receive even relatively small portions of IIJA monies. The following outlines prevailing wage, trainee, and apprenticeship requirements that will likely be required on most projects that receive IIJA funding.

A. Davis-Bacon Act and Davis-Bacon Related Acts Overview

Enacted in 1931, the Davis-Bacon Act (DBA), 40 U.S.C. §§ 3141-3148, requires government contractors to pay locally prevailing wages to laborers or mechanics employed on certain federally funded construction projects. Many federal laws that authorize federal assistance for construction projects, whether via grants, loans, or other funding mechanisms, require funding recipients to comply with the prevailing wage and labor standard requirements of the Davis-Bacon Act. There currently dozens of federal statutes do this, involving construction for transportation, housing, air, and water pollution reduction and health. These laws are described as Davis-Bacon "related acts" because of their prevailing wage requirements.

The DBA requires government contractors to pay laborers and mechanics a "prevailing wage" based on Wage Determinations developed by the Department of Labor Wage & Hour Division. *See* 29 C.F.R. § 1.3. These prevailing wages are generally based on local union wage agreements and union job classifications. Prevailing wage requirements apply to federal construction projects in excess of $2,000 and many state projects, and generally apply to prime contractors and subcontractors of all tiers. Limited exceptions may include service/maintenance work, supply of materials, and some manufacturing. Prevailing wage requirements typically apply to laborers and mechanics working at primary and secondary sites of the work, in transport from secondary site to primary site, and if exclusively used for a project, at fabrication plants, borrow pits, and tool yards as well. Prevailing wage requirements have special considerations for apprentices, trainees, helpers, and require not only the payment of the prevailing hourly wage rate, but also fringe benefits or cash equivalent. *See* 40 U.S.C. § 3141(2).

Verification of payment of a prevailing wage where required is provided by contractor verification. Contractors and subcontractors must prepare and maintain payroll records and must submit weekly certification of such payrolls, typically using the DOL Form WH-347. Contractors must also ensure that prevailing wage requirements flow down to subcontractors of any tier. Prevailing wage requirements are typically enforced by the contracting agency or the DOL. Failure to pay a prevailing wage when required can result in the withholding of contract payments and penalties. *See*, *e.g.*, FAR 52.222-7.

B. DBA Requirements in the IIJA

The IIJA will greatly expand the number of projects that require compliance with the DBA. The IIJA applies the DBA to federally funded or assisted construction projects in several ways. First, the IIJA adds funding to programs previously authorized by an existing DBRA, making the number of projects subject to an existing DBRA greater. For example, the IIJA adds funds to the Drinking Water/Clean Water state revolving loan funds ($4 billion) which already are authorized by an existing DBRA.

Second, the IIJA adds new programs to existing DBRAs or under the umbrella of an existing DBRA, also making the number of programs, and projects, greater. Two such programs are the new Bridge Investment program ($12 billion) and the new Airport Terminal Improvement program ($5 billion). Both programs are being placed under the umbrella of an existing DBRA and therefore projects funded by these programs will also require contractors to comply with DBA.

Third, the IIJA includes provisions that expressly provide that prevailing wage and DBA standards will apply to all construction projects receiving funding under particular programs created or funded through the IIJA. This too increases the number of projects, but also spreads a wider net to include types of projects that may not have been under a DBRA in the past.

The IIJA specifically requires that DBA requirements will apply to all funded projects in Division D – Energy, which provides in part:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction, alteration, or repair work on a project assisted in whole or in part by funding made available under this division or an amendment made by this division shall be paid wages at rates not less than those prevailing on similar projects in the locality, as determined by the Secretary of Labor in accordance with [the Davis-Bacon Act].

See Pub. L. No. 117-169, §13101(g). This means that for every project funded by Division D, compliance with the DBA will be required. As discussed with the application of BABA to construction materials, any amount of funding under Division D would trigger the application of the DBA to the project, and would include funds distributed by loans and grants as well as money passed through to states and local entities. Division D – Energy includes an enormously broad set of programs and projects, including grid infrastructure, hydroelectric and renewable power projects, creation of supply chains for clean energy technologies, desalination projects, rural water projects, dam safety projects, and nuclear projects. While some of these types of projects may have had DBA requirements in the past, others probably did not.

Division D also includes funding for the Energy Efficiency and Building Infrastructure program. These types of projects and the contractors that work on them may not have faced DBA requirements in the past. This program will include funding for energy efficiency improvements in residential and commercial buildings, manufacturing plants, and schools.

Other portions of the IIJA may not specifically require prevailing wages of compliance with DBA, but contractors may need to contractually agree to do so as a condition of funding. For example, the IIJA's Division F – Broadband does not specifically require the payment of DBA prevailing wages. However, agencies administering these programs may consider the payment of prevailing wages as a positive factor in fund allocation for broadband assistance programs.

Common Sense Recommendations: More projects will have DBA requirements now that the IIJA has passed. Contractors or subcontractors who plan to work on projects funded even partially by the IIJA must learn about the requirements of the DBA and seek to ensure compliance whether required by the local, state, or federal government. Contractors not familiar with certified payrolls and the classification requirements of the DBA provisions should build in additional contract administration assistance to comply. In addition, to the extent some IIJA projects may also have funding from state or local agencies, contractors should also be aware of any state or local prevailing wage requirements.

C. Trainee and Apprenticeship Programs in the IIJA

The IIJA contains multiple options for states to develop trainee and apprenticeship programs with the funds made available to them under the IIJA. This means that states may implement program requirements for projects that use IIJA funding and require contractors to comply with trainee and apprenticeship programs developed on a state-by-state basis.

For example, the IIJA allows states to obligate funds from four programs authorized by the Fixing America's Surface Transportation Act (FAST Act) toward workforce development activities. These programs include the National Highway Performance Program, the Surface Transportation Block Grant Program, the Highway Safety Improvement Program, and the Congestion Mitigation and Air Quality Improvement Program. States may use funds to support pre-apprenticeship and apprenticeship programs as well as on-the-job training programs and require compliance by contractors on the state level. Additionally, the under the IIJA, DOT must encourage states to create 5-year human capital plans to address workforce issues within the construction industry for transportation. DOT will be releasing guidance on such plans in May 2023, which guidance is likely to include state sponsored trainee and apprenticeship programs.

The IIJA also funds $50 million in competitive grants to states from the Federal Highway Administration to fund the On-the-Job Training program. This program is intended to train the highway construction industry workforce and develop skilled labor. The funding directly supports the requirement that prime contractors participating on federally assisted contracts establish apprenticeship and training programs targeted to move minorities, women, and disadvantaged individuals into journey-level positions. State departments of transportation are also eligible for funding to implement skills training programs to prepare workers to participate as trainees.

Common Sense Take Aways: Use of trainees and apprentices can help contractors develop a future workforce and have benefits. Regulatory requirements accompanying such programs can be time consuming, and not all apprentices and trainees succeed. Shortages of available candidates can also create issues where contractors must locate and recruit trainees for on-the-job training programs the contractor must fill. Contractors on projects with trainee and apprenticeship programs should budget in the added contract administration costs associated with such programs as well as the potential for diminished output from trainees and apprentices on these projects.

5. Workforce Requirements in the IRA

The IRA contains significant tax credits for energy projects and commercial projects that follow prevailing wage and apprenticeship requirements. In order for the owner/taxpayer to meet the requirements of the offered tax credit and obtain the maximum value of the tax credit, it must ensure that the contractor performing the work (and in most instances subcontractors) complies with prevailing wage and apprenticeship requirements. Most of these credits permit a taxpayer/owner to cure the failure to pay a prevailing wage or use apprentices or raise a good faith effort exception. These requirements apply to several different types of energy infrastructure projects, including renewable energy projects, carbon capture projects, and nuclear energy projects, but also to some commercial projects as well.

On such credit is the Renewable Energy Production Tax Credit (PTC), an existing credit that applies to wind, solar, geothermal and other renewable energy infrastructure projects. The tax credit applies on a per kilowatt hour (kWh) basis for electricity produced at a qualifying renewable facility for the first 10 years of its operations. Under the IRA, the PTC is extended, but only for projects meeting registered apprenticeship or workforce requirements and pay prevailing wages. *See* Pub. L. No. 117-169, §13101. Some larger projects may still receive a portion of the credits even if they do not meet the wage and workforce requirements if certain conditions are met.

To obtain the tax credit the taxpayer must ensure that any laborers or mechanics employed in the construction of the facility be paid wages not less than the prevailing rates determined by the Secretary of Labor. *See* Pub. L. No. 117-169, §13101(f). If the taxpayer fails to do so it may cure the issue by paying the differential between the rate paid and the prevailing wage, plus interest, and a penalty of $5,000 for each mechanic or laborer who was not paid the prevailing wage. *Id.*

Additionally, to obtain the tax credit, a certain percentage of the total labor hours of the construction (including work performed by any contractor or subcontractor) must be performed by qualified apprentices. *See* Pub. L. No. 117-169, §13101(f). This percentage starts at 10% and increases to 15% for construction beginning after December 31, 2023. *See id.* Labor hours excludes any hours worked by foremen, superintendents, owners, or exempt employees. Department of Labor requirements for apprentice to journeyman ratios will still apply, and any contractor or subcontractor who employs four or more individuals at the project must employ one or more qualified apprentices. *See id.* Inadvertent noncompliance with apprenticeship requirements may be excused if a penalty of $50 per hour of missing apprenticeship hours is paid. A "Good Faith Effort" exception also exists where a contractor requested qualified apprentices from a registered apprenticeship program and the request was denied through no fault of the contractors. Intentional disregard for apprenticeship requirements should be avoided, and the per hour penalty increases to $500 in such instances.

These tax credits and the accompanying requirements will generally apply to renewable energy projects such as geothermal, wind and solar. However, prevailing wages will also apply to taxpayers seeking available credits for carbon oxide sequestration projects (including installation of "carbon capture" equipment) *see* Pub. L. No. 117-169, §13104, and nuclear power projects. *See* Pub. L. No. 117-169, §13105.

Other aspects of the IRA motivate owners to use prevailing wage and apprenticeship requirements in both development and construction phases. For example, the ITC for qualifying property for renewable energy provides a standard tax credit of 6% of the property's cost. However, if the construction project on the property will meet wage and registered apprenticeship requirements, the credit is 30%. *See* Pub. L. No. 117-169, §13501(a). Other credits are given similar enhancements for meeting wage and apprenticeship requirements. For zero emission nuclear facilities, the available tax credit is multiplied by five if the project will meet wage and registered apprenticeship requirements. *See* Pub. L. No. 117-169, §13105.

The IRA also applies prevailing wage and apprenticeship requirements to commercial and residential project tax deductions as well. The existing Energy Efficient Commercial Buildings Deduction is for energy efficient features installed in commercial buildings as part of the interior lighting system, HVAC, and hot water systems, and building envelope. This tax credit is updated to include new energy efficiency requirements to qualify for the deduction, but the deduction now also is dependent upon meeting prevailing wage and apprenticeship requirements. *See* Pub. L. No. 117-169, §13030. The New Energy Efficient Home Credit is extended and modified under the IRA. A larger credit is available if prevailing wage and apprenticeship requirements are met. *See* Pub. L. No. 117-169, §13304.

Because these are tax credits, the Department of the Treasury develops regulatory guidance for compliance. As of this writing the Department of the Treasury has recently published such guidance. *See* 87 FR 73580. The IRA provides that prevailing wage and apprenticeship requirements will apply to qualifying facilities, projects, property, or equipment on projects where construction begins 60 days or later after the guidance is published. The new guidance will apply to qualifying facilities, projects, property, or equipment if construction begins on or after January 29, 2023.

Common Sense Recommendations: Owners that plan to obtain tax credits offered under the IRA will seek contractors with the ability to comply with prevailing wage requirements, apprenticeship requirements, and reporting requirements as they develop. Contractors need to be prepared to fulfill these requirements. Contractors will also need specific information from owners about what type of credits owners are seeking and which projects will require compliance in the bidding phase. But caution should be taken in contractual agreements on such projects to avoid liability for consequential damages if a tax credit is not achieved. Additionally, contractors will have to contend with an alternative regulatory structure developed by the Department of Treasury, an agency that lacks experience with DBA and apprenticeship requirements. Finally, labor shortages may make compliance with apprenticeship requirements difficult, and contractors should review requirements for seeking a Good Faith Effort exception if applicable.

Conclusion

The impacts of the Infrastructure Investment and Jobs Act and the Inflation Reduction Act will be felt for years and decades to come. The implementation of these laws is in its early stages, as is the regulatory structure that will accompany them. Contractors have rightfully welcomed the unprecedented funding of these laws but will have to contend with the increased regulatory burden and costs of compliance with the labor and material requirements of these laws.