

Buyer Beware: Key Compliance Considerations for Infrastructure Investment and Jobs Act Projects

Wiley Government Contracts

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Hello, and thank you for joining us today. I'm Tracye Howard, a partner in the Government Contracts group at Wiley Rein in Washington, and with me today is Eric Leonard, also a partner in our Government Contracts practice at Wiley.

In today's podcast, we're going to discuss a few of the key compliance considerations that companies should think about if they're contemplating work on projects funded by the bipartisan infrastructure act, particularly projects that involve construction work.

As is the case whenever a company is doing business with the federal government, with opportunity comes obligation. There are often strings associated with performing work funded by the act. Some of these issues are common to all large construction projects that are performed under even a traditional federal contract award. But the nature of these infrastructure act projects also may implicate state and local compliance issues that can further complicate planning for compliance.

So, with that I want to talk a little bit about the act. President Biden signed the Infrastructure Investment and Jobs Act, Public Law 117-58, into law on November 15, 2021. It's described as the largest long-term investment in our infrastructure and economy in the nation's

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history. It authorizes \$550 billion over fiscal years 2022 through 2026 for new federal investment in infrastructure, and that includes things like roads, bridges, mass transit, and also projects such as water infrastructure, resilience efforts for climate change and natural disasters, and broadband infrastructure – so, more than just the traditional roads and bridges that we think about with infrastructure.

You may be wondering why we're talking about this now when the infrastructure act was enacted more than six months ago. Because of appropriations and fiscal law restrictions, even if agencies had available funds when the infrastructure act was signed, they couldn't start working on new projects that were authorized in the act until the fiscal year 2022 appropriations were enacted, and that didn't occur until March 2022. So even though the infrastructure act was passed quite a while ago, many of the projects are just now getting underway. And many of them will, of course, be going on for several years, assuming that they continue to receive funding in the appropriations process.

Eric Leonard

And let me just add that while the act does impose a number of interesting compliance obligations on companies that perform the work funded by the act, as Tracye noted, many of these obligations should not be new to companies that do business with the federal government. So, for instance, I'm going to talk a little bit about the Davis-Bacon Act.

That's a common act that you're going to find in virtually all federally funded construction projects. But in addition, we've kind of seen this before during the Obama era related to projects funded by the American Reinvestment and Recovery Act, known as ARRA, from 2009. That experience at least provides us a bit of a model under which to analyze these issues and assess risk and just have a better sense of what to expect when these projects actually roll out in the different states and other entities that'll be awarding contracts.

But as we noted, buyer beware, right? As with any large federal outlay of funding, there will be investigations and oversight associated with the expenditures under the act, like many large-scale programs before them involving significant federal expenditures. Take hurricane projects, war on terror, ARRA, and, most recently, COVID relief programs – audits and investigations will follow. So part of what we want to try and do today is to help companies get out ahead of some of these issues, so that rather than addressing them after the fact or in the context of an auditor investigation, we can think about them proactively.

So, here's hoping you can get ahead of the game by looking at these issues that we talk about here. But keep in mind, by no means can we identify all the potential issues associated with infrastructure contracting in this podcast. So instead, we're going to focus on, sort of, issue-spotting key areas that any contractor is going to need to understand and appreciate before signing on the dotted line to receive funds for a project funded by the bipartisan infrastructure law.

We each come at these issues from a different perspective based on our, sort of, relative areas of expertise and experience as Government Contracts lawyers, so hopefully you'll find that productive.

So why don't we get started. Tracye, from your perspective, what are some of the compliance areas that you think should be on any prospective contractor's radar screen?

Tracye Howard

Yeah, so in terms of traditional federal contracting issues, I would say domestic preferences is a big issue in the infrastructure act. There are a number of provisions focusing on that, and they will affect contractor supply chains for projects that are authorized by the act and government contracts more generally.

So, unlike what we saw with the Recovery Act back in 2009, for the most part these provisions apply to all government contracts and grants. They're not setting up a separate set of rules and regulations for the infrastructure act projects. This is a good thing for companies that are already performing government contracts because they're not going to have to set up two different sets of compliance systems. But for companies that aren't currently federal government contractors and might be considering bidding on portions of state projects that are funded under the act, these requirements might be entirely new, and so it's important to understand what they are, and even for experienced contractors to understand the differences and how they might be stepping up the compliance measures that you're already familiar with.

So, the first one is a section of the act called Build America, Buy America. And it requires public reports on all federally funded infrastructure projects and their compliance with domestic preference requirements, such as Buy America. The Buy America program requires use of domestic steel and other materials on infrastructure projects, and it's been around for a long time. These reports, which are new, will specifically identify deficient programs that don't meet the domestic preference requirements, so I call this the "public shaming" part of the act. And it also prohibits further funding for projects if all the iron, steel, and construction materials were not manufactured in the United States.

Any waivers have to be publicly published as well, so again, more opportunity for public shaming. And for those who are already familiar with the current Buy America requirements, you may need to tune back in to this because the act expands both the types of projects and the materials that are covered. So it now applies to structures, facilities, and equipment beyond the traditional transportation projects that you might be familiar with and includes projects like water infrastructure, broadband infrastructure, and electricity generation and transmission, as well as materials such as glass and optical fiber, lumber, and some plastics and polymers, so going well beyond the iron and steel that you might be used to.

So with all that in mind, it's a good time for everybody to go back and review and update your Buy America policies and procedures, even if you feel like this is an issue that you've had well-covered in the past.

The infrastructure act also included a section on Made in America provisions. These largely are codifying into statute the provisions of the Executive Order that President Biden signed right after he took office in January 2021. And so, many of these issues were already underway, but this is Congress coming in and saying that, you know, they think these are important, and they're making these provisions permanent so that they can't be undone by some future President signing another Executive Order.

Again, these provisions apply to all government contracts, not just those that are funded by the infrastructure act. A few of the highlights are establishing government-wide guidance to standardize Buy American Act waivers across all the agencies, and that'll be coordinated by the Office of Management and Budget. There's also establishing a new Made in America office within the Office of Management and Budget that's supposed to maximize and ensure compliance with domestic preferences like the Buy American Act and review all the waiver requests from across the government.

Those waivers have to be published on a public website, which is buyamerican.gov. It's already up and running – you can go check out the waivers that have been uploaded, and also eventually we'll have results of routine audits.

The infrastructure act also confirms that the Buy American Act applies to iron and steel articles and materials even if they are commercially available off-the-shelf, or "COTS." Under the standard Buy American Act guidance, COTS products are not subject to the cost of components test for the Buy American Act, but here the infrastructure act is saying that iron and steel will be subject to those tests even if they're COTS. And then finally, there's a sense of Congress that the domestic content requirement for Buy American Act should increase to 75% from the current 55%.

The infrastructure act also includes a Make PPE In America section that says the government should award long-term contracts for domestically manufactured PPE, trying to avoid some of the issues that we ran into with COVID with the shortage of domestically produced things like masks and gloves. And again, this isn't limited to projects funded by the infrastructure act.

And then, finally, there's a forced labor provision that requires coordination with U.S. Customs and Border Protection to, quote, "ensure that no illegal products or materials produced with forced labor are procured with funds made available under this act." So, taken literally, this could result in significant and wide-ranging regulations that will require companies to implement compliance programs to ensure that their supply chain at all tiers for any project funded by the act doesn't include any products produced by forced labor. So that's a potentially significant burden on contractors that are performing projects under the act.

Eric Leonard

Well, yeah, and speaking of labor-related obligations – there's a big one tacked to infrastructure-funded projects, and it's not a new act by any stretch, but the Davis-Bacon Act I mentioned earlier is an act that's kept federal construction contractors awake at night since the 1930s, but in this context I see new compliance challenges associated not only with applying some of the substantive requirements of the act, but other challenges surrounding implementation and oversight, as well as an ongoing effort that's now in process to change the Davis-Bacon Act in some key areas.

So, there's a whole lot of moving parts that I just want to highlight here for anyone that's again thinking of pursuing one of these projects, understanding the current context I think is going to be very important. Of course, at its most basic level, the application to Davis-Bacon and the Davis-Bacon and related acts to infrastructure projects is something to carefully consider. As far as obligations at a high level, Davis-Bacon and

Davis-Bacon related acts – and I’ll talk about them together – one is federally funded finance projects versus contract awards. But for purposes of our discussion, I think we can discuss them together. But those acts require contractors to pay prevailing wages listed in a wage determination applicable to the project to all covered personnel, keep accurate workers – I’m sorry, accurate records of hours worked and wages paid, flowdown these obligations to their subrecipients or subcontractors, and submit certified payrolls that contain potential criminal liability for violations or falsity. And the penalties for noncompliance with the Davis-Bacon Act are harsh and include possible debarment for violations. The payment of Davis-Bacon rates to workers under infrastructure projects was a core component of the infrastructure act. And there’s multiple ways that the infrastructure bill, that the Davis-Bacon labor standards may apply to your project.

One may be you have a situation where funds are added to programs previously authorized as a Davis-Bacon related project, and new infrastructure funds are added. That may again call into bring these obligations to the forefront. There also may be an addition of new programs to an umbrella of another existing project, or you could have a completely new awarded project under the infrastructure act for a construction-related project that includes the Davis-Bacon requirements. It is important to note that while the broadband assistance programs, I think that Tracye mentioned earlier, under the act do not generally require the payment of Davis-Bacon prevailing wages, the DOL guidance (Department of Labor guidance) says that agencies should keep in mind that any agency administering those programs may consider the payment of prevailing wages as a positive factor when allocating funding.

So, what does that mean? Well, I think bottom line is the Labor Department is supporting the idea that payment of Davis-Bacon wages should be encouraged and, therefore, used as I won’t say an evaluation factor, but something like an evaluation factor, when evaluating a project that relates to broadband assistance. So while just assuring compliance under Davis-Bacon can be challenging and cumbersome enough – I mean we work in this area and we see compliance actions, and we see false claims actions and all kinds of other oversight and compliance – the upcoming changes to the Davis-Bacon regulations that really are just in the process now are going to really complicate this effort. These changes have been referred to as a modernization and are really the first major changes to the Davis-Bacon Act in many, many years. But I think this is really going to not only be challenging for current contractors that are familiar with the Davis-Bacon Act, but particularly for contractors that we like to call the nontraditional government contractors that we tend to see in projects, like funded under mechanisms such as ARRA or the infrastructure project. These are companies that probably are not what you would consider your typical federal contractor. Maybe state-based, may typically pursue state-based awards, be more local – these are contractors that probably don’t have as much of a working familiarity with the Davis-Bacon Act, and we expect that we’ll see, like we did in ARRA, a lot of contractors of this nature pursue dollars under the infrastructure act. Unfortunately, if you’re the prime contractor or the subcontractor or the recipient, subrecipient, whatever you might be, this is going to enhance the risk profile when it comes to the Davis-Bacon Act. So, let me just talk quickly about some of these changes that are proposed to the Davis-Bacon Act and how they can potentially impact an infrastructure contractor that’s performing work.

First, I think it's important to know, just know that that changes are coming to the Davis-Bacon Act and that the regulations that are in place today may change midstream during performance. So I think you need to be nimble and make sure you have someone following the status of these changes and mechanisms built into your contract to ensure that if changes are made, that they're flowed-down properly and everyone in the chain of performance, is made aware of them.

One proposed change that could have a significant impact on infrastructure contractors is the proposed expansion of the definition of the term "site of work" under Davis-Bacon. Traditionally, the "site of work" is the defined location where Davis-Bacon rates must be paid to workers. Other locations like home office and other potential work site areas typically are excluded from the obligation to pay Davis-Bacon Act rates. The proposed rule that just came out a few months ago proposes to expand the definition of the term "site of work" to include many other different job locations that previously were not subject to the Act.

So, this will be a challenge to address, from a pricing and an operational perspective, particularly if you have a situation where there was only one site was included or a price to include Davis-Bacon rates. And then six months into performance, two other sites now fall under this definition of "site of work." And it's not just the site of work change. There's also other changes related to how Davis-Bacon Act rates will be developed and updated that could have significant impacts. Let me just skip to the not so surprise ending on this one: Davis-Bacon Act wage rates are going to go up. Not down. DOL is proposing to go sort of back in time, if you will, as part of their modernization effort to use their old method for how to develop Davis-Bacon Act wage rates. And not to go into too much detail here, but review of that methodology and how it would play out in in real time makes it pretty clear that that that's going to result in a lot of localities where wage rates could increase. But not all the changes are bad for contractors.

There's at least one effort to reduce the number of wage conformances a contractor must pursue at DOL, which should make that process a little less complicated, and that's a positive development. But there is one further change to the potential scope of coverage that I think is going to present some significant challenges, especially for contractors that aren't used to performing DBA-covered work. This change would permit the Davis-Bacon Act requirements to be read into contracts by operation of law, even in situations where the DBA clause is omitted, whether intentionally or by mistake, by an agency and in an awarded contract. So, let me just throw that out there again: DOL is proposing – and this goes beyond just infrastructure, this goes to all construction projects – but the proposal is to apply Davis-Bacon to contracts, even in situations where the clause is not included. This is a dramatic departure from precedent and, as you can imagine, will probably result in some unwelcome surprises for contractors and subcontractors caught up with an incorporation of the Davis-Bacon Act by operation of law after the fact.

For infrastructure projects, it's pretty clear from the statute that Davis-Bacon will apply. Unless you have, you know, some type of project where it's been excluded, Davis-Bacon's not required, such as the broadband world. But, nevertheless, I think this is going to cause a lot of confusion particularly in circumstances where, for one reason or another, a Davis-Bacon Act clause, is not put in any type of solicitation. And these are just a few of the changes on the table. So, I think it's really important to have someone that's monitoring this. In May, comments were submitted in response to these changes and 37,000 of them were submitted. So we've

got a lot of interest, and there's a lot of people weighing in on these changes, and we don't know how it's going to all shake out, but definitely something worth monitoring since DBA is going to be part of these infrastructure-funded construction projects. And according to DOL, they expect they're going to finalize these changes by the end of the year. Seems pretty ambitious but, either way, it doesn't leave much time to prepare if you're going to have to again make adjustments, whether it's midstream performance or advance a performance to deal with these changes to the Davis-Bacon Act. And the reason I harp so much on the Davis-Bacon Act is just because of the significant potential penalties for noncompliance. Contractors need to understand and appreciate the potential liability for false or inaccurate certified payrolls – the potential that funds will be withheld from your contract, or other contracts, for violations to pay for any back wage payments, and that there's joint and several liability for violations by any of your subcontractors. I've seen this worst case scenario play out on projects funded by the American Recovery and Reinvestment Act.

So, it's not just a theoretical concern. We had a case that involved the use of subcontractors under an ARRA-funded project, where the subcontractors didn't even know what the Davis-Bacon Act was. And of course ignorance isn't a defense. In that case obviously it wasn't. And any false certified payrolls that are submitted can give rise to this criminal liability and/or a False Claims Act case. So, it doesn't take much to get yourself in hot water under the Davis-Bacon Act if you don't know and appreciate the scope of the requirements. Let me shift gears real quickly, and then I want to get Tracye's thoughts on this too on some of the other state and federal interplay issues that we expect to see with respect to infrastructure.

Some of the practical concerns surrounding implementation and oversight of the DBA and DBRA stem from the fact that state and local entities are likely going to be implementing a lot of the requirements under the infrastructure projects. This could be a challenge not just with implementation challenges under the Davis-Bacon Act, including the correct clauses and DBA wage determinations and other aspects of the Act that need to be included, but beyond Davis-Bacon Act, I think it's really important that you carefully check your solicitation, RFP for an infrastructure project to see what, if any, state-based wage and hour statutes or regulations have been included with your contract.

You need to be aware that many states and local jurisdictions could have higher minimum wage rates than what's found in the Davis-Bacon Act. Some of these rates could easily exceed the one or two, if not more, of the relevant wage determination rates, and who knows what inflation is going to do to this rate structure on the local side in the near term. There's also a number of state-based paid sick leave laws that impose obligations on contractors and subcontractors involved in construction work. Now there's a federal paid sick leave law that anyone that does work in this area would be familiar with. But a lot of these state/local laws deviate from the federal paid sick leave requirements, and in many cases either provide more generous paid sick leave benefits to employees, or have different accrual rates, different rules with respect to how sick leave is treated once an employee leaves. Just, for instance, District of Columbia paid sick leave rules have very different rules on accrual that vary based on business size. This is very different than the federal paid sick leave rule. New Mexico, who just recently passed their own rule, they have a rule that models after the federal rule, but provides for a higher amount of paid sick leave than federal. So, all these state paid sick leave laws – they're not uniform, they don't necessarily marry up with the federal rule. They provide this sort of

tangled web of regulation that becomes even more and more complex when you try and harmonize them with the federal paid sick leave rules.

So, for projects that are going to span multiple states, this could really present a compliance headache. And the last thing I want to note is that, you know, within certain states, there may be beyond sick leave, beyond just their wage laws, there may be other labor-specific statutes that could impact what you have to pay your employees. For instance, Montana has what's called the "Little Davis-Bacon Act," which provides for very robust fringe benefits, and really differs from the sort of federal Davis-Bacon Act, and keep in mind, any of these state and local jurisdictions, if they have rules on wages and benefits that exceed whatever the federal rule is, the Davis-Bacon Act or Service Contract Act or whatever the basis might be, those higher standards – whether it's fringe or wage – are always going to apply. So be careful. Make sure you look carefully at all these different iterations of state and local laws that could also impact your obligations.

Tracye Howard

Yeah, and you know in addition to the labor laws, there may be local – state and local – requirements with regard to subcontractors and preferences that a certain amount of materials need to come from within the state or local area. So that's another difference that contractors need to be thinking about, in addition to just complying with the Buy America Act or the Buy America requirements. They're also, you're also going to need to look to, perhaps even, you know, hyper-local sources of materials or subcontractors. And so, you know, companies just need to be aware of that if they're, you may not even realize that you, the project that you're bidding on is ultimately funded by the infrastructure act. But you're going to be subject to both those federal and state and local requirements, and you're going to have to, as Eric said, make sure that they're flowed-down appropriately to all of your subcontractors and suppliers and to make sure that you can comply with your own obligations.

From a broader perspective, contractors need to consider that infrastructure act spending is part of the broader Biden Administration initiatives that are focused on compliance and enforcement generally. And they've made it clear they're going to focus on things like fostering participation in unions and, you know, wage and hour issues that are common for construction work. And we're seeing these, again, the definitions and the application go beyond what would typically be considered pure construction work to other types of infrastructure projects. And so it's critical to understand the nuances of things like the National Labor Relations Act, recent court decisions, applicable Executive Orders, guidance from the NLRB, and what might be in a collective bargaining agreement, and how all those things may or may not be implicated in labor standards and statutes like the Davis-Bacon Act or the Service Contract Act.

So, the takeaway here if you leave with anything from our podcast, we hope it's that you approach these infrastructure projects with cautious due diligence that assesses what strings may be attached to any of these projects on, you know, nothing in life is free and so, yes, it's great to work with the government and these are large projects and you're more or less guaranteed a customer that's not going to go bankrupt, but there are many obligations that come with that. And so, you know, the other important thing is you need to assess how you and your subrecipients are going to ensure compliance with all these requirements including, but not

limited to, the ones that we've talked about today. Because you can be sure that when you're doing, you know, federally funded projects, oversight and enforcement are always going to be present.

Eric Leonard

Thanks, Tracye, and thank you everyone for taking the time today, and please feel free to reach out to us with any questions on this, and as Tracye said, we tried to cover the key points here. But there's a whole lot of potential ground in terms of compliance obligations that are associated with these infrastructure projects. So, all I can say now is good luck, and if you want to talk further with us, feel free to reach out to either of us. Thank you.