

FEDERAL
DESIGN-BUILD
SYMPOSIUM



No One is to Blame: Successful Collaboration in an Uncertain Market

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An Overview of the Legal Status and Options/Tools for Federal Agencies and Design-Builders

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Infrastructure Investment and Jobs Act (IIJA), Build America, Buy America Act (BABA) Pub. L. No. 117-58, §§ 70901-70953

IIJA authorizes \$1.2 trillion for transportation and infrastructure spending, which includes around \$550 billion in “new” investments, such as building America’s roads and bridges, water infrastructure, internet and more.

- **GENERAL RULE:** IIJA BABA applies to federally assisted infrastructure projects – “none 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.” IIJA, § 70914(a).
- **Applies to Infrastructure Projects:** “The structures, facilities, and equipment for, in the United States, roads, highways, and bridges; public transportation; ... and structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging”
 - The Final Guidance instructs the Federal awarding agency to interpret the term “infrastructure” broadly.
- **Final Guidance Issued by OMB on August 14, 2023** – Comment period closed in March 2023 (received more than 2,000 comments), and the OMB issued final guidance last week and that guidance will take effect in 60 days (i.e., mid-October 2023).

IIJA BABA – How Does it/Will it Apply?

OMB's Final Guidance

- Manufactured Products: Articles, materials, or supplies that have been: (i) Processed into a specific form and shape; or (ii) Combined with other articles, materials, or supplies to create a product with different properties....
 - **Produced in the United States**: “(i) The product was manufactured in the United States; and (ii) The cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product....”
- Construction Materials: Include Non-Ferrous Metals; Plastic and Polymer-based products; Glass; Fiber optic cable; Optical fiber; Lumber; Engineered wood; and Drywall
 - **Produced in the United States**: “All manufacturing processes for the construction material occurred in the United States....”
- Iron or Steel Products: articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both
 - **Produced in the United States**: “All manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.”

IIJA BABA – How Does it/Will it Apply?

- **Waiver may be justified for (1) public interest; (2) unreasonable cost; and (3) nonavailability.**
 - The same standard for waiver as in the Buy American Act.
 - For example, U.S. Department of Transportation finalized a *de minimis* BABA waiver on August 15, 2023 (last Tuesday):
 - “The total value of the non-compliant products is no more than the lesser of \$1,000,000 or 5% of total applicable costs for the project;” or
 - “The total amount of Federal financial assistance applied to the project, through awards or subawards, is below \$500,000.”
- **Trade Agreements Act exceptions – Depends & Still Unclear**
 - **The Rule:** BABA requirements “shall be applied in a manner consistent with United States obligations under international agreements.” Pub. Law 117-58, Sec. 70914(e).
 - Federal financial assistance awards are generally not subject to international agreements because international obligations often apply to “direct” procurements. However, “a number of States have opted to obligate their procurement activities to the terms of one or more international trade agreements, and as such, are included in schedules to the international trade agreements.” See OMB’s [additional information](#) on the final guidance.

Inflation Reduction Act of 2022 (IRA)

Purpose

To accelerate the deployment of clean energy, vehicles, buildings, and manufacturing, and reduce carbon emissions through \$370 billion in investments, \$270 billion of which is in tax incentives.

IRA – The Basics

- **Clean Energy Production and Investment Tax Credits:** “A project facility can earn **bonus** credits if it [1] meets Davis-Bacon prevailing wage and registered apprenticeship requirements, [2] meets certain domestic content requirements, and/or [3] is located in an energy community.” There are more than 20 tax incentives and loan programs, including:
 - **Prevailing Wage Rate/Apprenticeship Bonus Credit**
 - Local prevailing wages per trade; total labor hours of construction/alteration to be performed by qualified apprentices
 - 12.5% projects starting between 12/31/2022-1/1/2024; 15% project starting after 12/31/2023
 - **Domestic Content Bonus Credit (as a component of a qualifying facility)**
 - Steel and Iron: Manner consistent with FTA’s Buy America Requirements as stated in 49 C.F.R. § 661.5 – “All steel and iron manufacturing processes” must take place in the U.S.
 - Manufactured Product: Not less than the adjusted percentage of total cost of all manufactured products of the facility [40% for manufactured product; 20% for an offshore wind facility].

Economic Price Adjustment

FAR 52.216-4 Economic Price Adjustment – Labor and Material

- Must provide Contracting Officer 60 days notice of increase or decrease
- Requires at least 3% increase or decrease
- 10% increase cap
- No decrease cap
- Requires “schedule” of prices
- CO must issue a formal contract modification

FAR 16.203-2 (Fixed-price Contracts with Economic Price Adjustment) – Application

“A fixed-price contract with economic price adjustment may be used when (i) there is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance, and (ii) contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract. Price adjustments based on established prices should normally be restricted to industry-wide contingencies.”

Economic Price Adjustment

FAR 16.203-3 (Fixed-price Contracts with Economic Price Adjustment) – Limitations

“A fixed-price contract with economic price adjustment shall not be used unless the contracting officer determines that it is necessary either to protect the contractor and the Government against significant fluctuations in labor or material costs or to provide for contract price adjustment in the event of changes in the contractor’s established prices.”

General Services Administration (GSA)

- [Guidance on Addressing Inflation in GSA Contracts \(9/12/2022\)](#)
 - Provides Economic Price Adjustment Considerations
 - Highlights Importance of Speed in Acquisition
 - Shares Benefits of Shorter Contracts

Section 822 of the 2023 National Defense Authorization Act (NDAA)

- Section 822 of the NDAA (Modification of contracts to provide extraordinary relief due to inflation impacts)
- Amends Public Law 85-504
- Allows the DoD to “make an amendment or modification to an eligible contract when, due solely to economic inflation, the cost to a prime contractor of performing such eligible contract is greater than the price of such eligible contract.”
- Adjustments may “account only for the actual cost of performing such eligible contract or such eligible subcontract, but may account for indirect costs of performance, as the Secretary of Defense determines appropriate.”
- Effective through December 31, 2023

DoD's Guidance was Expected:

- “Not later than 90 days after the date of the enactment of an Act providing appropriations to carry out section 1 of Public Law 85-804 (50 U.S.C. 1431) (as added by subsection (a)), the Under Secretary of Defense for Acquisition and Sustainment shall issue guidance implementing the authority under subsections (b) through (d) of section 1 of Public Law 85-804 (50 U.S.C. 1431)(as added by subsection (a)).”
- The 2023 NDAA was enacted on December 23, 2022. Therefore, DoD's guidance on implementing inflation adjustments under Section 822 was due by March 23, 2023.
- **Current Status?** We are waiting on the House and Senate versions of the FY 2024 NDAA to be reconciled, signed into law, and implementing guidance to be issued. H.R. 2670; 2024 NDAA) states in relevant part:

SEC. 829. MODIFICATION AND EXTENSION OF TEMPORARY AUTHORITY TO MODIFY CERTAIN CONTRACTS AND OPTIONS BASED ON THE IMPACTS OF INFLATION.

Section 1 of Public Law 85-804 (50 U.S.C. 1431) is amended-- (1) in subsection (b), by adding at the end the following new sentence: “If any such amounts are so specifically provided, the Secretary may use them for such purposes.”; and (2) in subsection (e), by striking “December 31, 2023” and inserting “December 31, 2024”.