EXECUTIVE SUMMARY

Federally Funded Construction Regulatory Update: A Primer On The Revisions To The Davis-Bacon And Related Acts Regulations And The Build America Buy America Final Guidance

By Jonathan Shaffer, Dan Ramish and Michael Maroulis

The Department of Labor (DOL) and the Office of Management and Budget (OMB) recently promulgated rules and guidance on two of the most important areas of compliance for construction projects funded by grants and other federal assistance agreements. In a final rule effective October 23, 2023, DOL revised the Davis-Bacon and Related Acts (DBRA) regulations, which require payment of prevailing wages and fringe benefits to laborers and mechanics on federally funded construction projects and direct procurement contracts with federal agencies. Effective the same day, OMB issued final guidance implementing the Build America, Buy America (BABA) Act, which requires that all iron and steel products, manufactured products, and construction materials incorporated in federally funded infrastructure projects must be produced in the United States.

Together, these new rulemakings encompass hundreds of pages of regulations and guidance and regulatory history, which will be central to construction-related compliance on infrastructure projects. Haynes Boone attorneys provide in-depth analysis of the rule and guidance in a new Briefing Paper for Thomson Reuters.

I. Davis Bacon and Related Acts Regulations

The Davis-Bacon Act (DBA) requires contractors to pay prevailing wages to all laborers or mechanics working at the site of the work on federal construction contracts over $2,000. Since the 1930s, Congress has extended DBA requirements to almost 80 Related Acts (collectively, the DBRA), such that Davis-Bacon requirements extend not only to federal government construction contracts but to construction projects funded by federal grants and other federal assistance as well. The DOL final rule that went into effect on October 23, 2023, 88 Fed. Reg. 57,526 (Aug. 23, 2023), was the most comprehensive revision to the regulations implementing Davis-Bacon requirements in forty years.

The DBRA final rule amends DOL's methodology for determining prevailing wages. That change, widely covered in the trade press, is anticipated to affect contractors over time by increasing the mandated wage rates. The Briefing Paper focuses on the many other significant changes in the rule that affect contractors more directly, including: (1) expanding the work that is subject to Davis-Bacon in a number of ways; (2) imposing new requirements for updating wage determinations in existing contracts; (3) formalizing certain policies for calculating fringe benefits; (4) increasing recordkeeping requirements for contactors; (5) providing for incorporation of Davis-Bacon requirements by operation of law when DBA clauses or wage determinations are omitted from a contract; and (6) enhancing enforcement provisions.

1. Expanded Coverage

The final rule first expands Davis-Bacon coverage by clarifying that energy infrastructure and related activities are covered, including solar panels, wind turbines, broadband installation, and installation of electric car chargers.

Next, the final rule expands coverage for work that takes place at "secondary construction sites." Under the old rule, offsite construction was generally covered only if a site was specifically established for the contract or project, or virtually adjacent to the site of the work (e.g., job headquarters, tool yards, batch plants, borrow pits). Now, offsite construction may be subject to Davis Bacon at sites that are exclusively or almost exclusively used to perform the contract for a specific period of time, even if the site was not set up for the project and is not near the primary work site. The change is intended to expand coverage of modular construction, which involves significant parts of the building or work being constructed offsite and then just assembled onsite.

The rule also clarifies or expands coverage for several categories of workers:

- Flaggers (personnel directing traffic) are covered by Davis-Bacon when they are working on sites adjacent or virtually adjacent to the primary construction site.
- Truck drivers are covered by Davis-Bacon when transporting supplies or materials within the work site, between the primary worksite and secondary or support sites, when transporting a significant portion of the building or work from a secondary construction site, and when loading or unloading or waiting for others to load or unload materials, unless the time spent on site is "de minimis."
- Survey crew members are also more likely to be covered by Davis-Bacon under the final rule. The preamble to the final rule says that surveyors who "spend most of their time taking or assisting in taking measurements" in support of a covered construction project will likely be covered by Davis-Bacon. Licensed surveyors may be exempt as "learned professionals," but the DOL suggests that this exemption might depend on state licensing requirements.

The rule also establishes a bright-line rule to exempt "material suppliers" and their employees from Davis-Bacon coverage. Companies that meet the following three requirements are considered "material suppliers" not subject to Davis-Bacon: (1) the company's contractual obligations are limited to material or equipment delivery or pickup and activities incidental to delivery or pickup, (2) the company's material supply facilities are not located on primary or secondary construction sites, and (3) the company's material supply facility must either (a) have been established before opening of bids, or (b) not be dedicated exclusively or nearly so to the performance of the DBRA-covered contract.

2. Updating Wage Determinations

Generally, the applicable wage determinations at the time of contract award apply for the life of the contract. But the final rule includes several exceptions. First, the wage determinations must be updated when a contract or order is modified to include substantial, additional construction that was not within the original scope. Second, updated wage determinations are required if an option is exercised or the contractor is required to perform work for additional time (other than a time extension to complete the original scope or additional work that is "merely incidental"). Finally, on contracts that

are not tied to a single project, such as indefinite-delivery, indefinite-quantity contracts, the wage determinations must now be updated every year, and new orders will then need to include the new wage determinations.

3. Fringe Benefit Rules

The final rule formalizes certain DOL policies for calculating allowable fringe benefits credits. The regulations now explicitly require "annualization" of fringe benefits. Contractors must allocate fringe benefit contributions for each worker across both Davis-Bacon and non-Davis-Bacon projects, and cannot take credit under Davis-Bacon for fringe benefits associated with non-Davis-Bacon jobs. The new regulations also say that contractors are not allowed to count their own administrative expenses for administering fringe benefit plans as part of the benefits they pay their covered workers.

4. Increased Recordkeeping Requirements

The final rule expands contractor recordkeeping requirements in three ways. First, contractors must now maintain records of each worker's last known telephone number and email address. Second, contractors at all tiers must retain all regular payrolls and other basic records for at least three years after "all work" on the prime contract is completed, and subcontractors cannot rely on prime contractors to maintain these records. Third, contractors must also maintain all contracts, subcontracts, and related documents (e.g., bids, proposals, amendments, modifications, and extensions) for at least three years after all work on the prime contract is completed.

5. Incorporation of Davis-Bacon Requirements by Operation of Law

Under the final rule, if a contracting agency fails to include Davis-Bacon clauses or the correct wage determinations in a contract, the required contract clauses and correct wage determinations will now be effective "by operation of law." DOL analogized the new "operation of law" regulation to the *Christian* doctrine applicable to government procurement contracts, which similarly incorporates mandatory clauses into a contract by operation of law when they have been omitted in certain circumstances. If Davis-Bacon requirements are read into the contract by operation of law, contractors will be entitled to an equitable adjustment.

6. Enhanced Enforcement

The final rule includes a range of provisions that boost enforcement including liability for and withholding of back pay, making contractors under the Davis-Bacon Related Acts subject to the more stringent debarment rules that apply to the Davis-Bacon Act itself, and adding whistleblower protections. Upper-tier subcontractors may now be liable for back wages of lower-tier subcontractors, if they knew or disregarded whether their lower-tier subs were paying their workers. The rule also broadens agencies' ability to withhold back pay from contractors, both by allowing other agencies besides the awarding agency to withhold payment, and by allowing withholding against entities related to the prime contractor, including controlling shareholders or member entities, or the joint venturers or partners when the prime contractor is a joint venture or partnership. Finally, the rule adds new provisions that protect whistleblowers that report violations or otherwise support investigations or enforcement actions, including new entitlement for whistleblowers to receive "make whole" relief if they are subjected to retaliation.

II. Build America Buy America (BABA) Act Final Guidance

On August 23, 2023, OMB issued final guidance, 88 Fed. Reg. 57,750 (Aug. 23, 2023), implementing the Build America, Buy America provisions of the Infrastructure Investment and Jobs Act (IIJA), which mandate that "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*." The final guidance creates a new part to the Uniform Guidance for grants and other federal assistance, 2 C.F.R. Part 184, "Buy America Preferences for Infrastructure Projects," and adds a reference to the requirements of Part 184 to 2 C.F.R. § 200.322, "Domestic Preferences for Procurements." Unlike the DBRA regulations, the Uniform Guidance is not a regulation but is given regulatory effect through federal agency grant and agreement regulations, which adopt and supplement the guidance. The effective date for the final guidance is October 23, 2023, but it may apply to awards obligated on or after May 14, 2022.

1. Coverage of Projects and Organizations

The BABA Act applies Buy America preferences to *infrastructure projects* in the United States that are funded by federal assistance. 2 C.F.R. § 184.4(a). "Infrastructure project" is defined in the final guidance to mean "any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project."

Though the BABA Act was enacted as part of the IIJA, the Buy America preference applies to all infrastructure projects funded by federal assistance, not just those funded by the IIJA. When a project is funded partly with federal funds and partly with non-federal funds, the Buy America preferences nevertheless will apply to the entire project. On the other hand, the Buy America preferences only apply to articles, materials, and supplies that are consumed in, incorporated in, or affixed to an infrastructure project, and do not apply to non-infrastructure components of covered projects.

One important limitation is that the BABA Buy America preferences do not automatically apply when the prime award recipient is a for-profit entity. By default, for-profit recipients are exempt from BABA. *But awarding agencies have authority under the Uniform Guidance to apply BABA preferences to for-profit entities.* Further, the exemption applies only at the prime award level: *when the recipient of an award is a government entity or non-profit or other non-federal entity, for-profit subrecipients and contractors working under the award will be subject to the requirements.*

When applicable, the Buy America preferences must be included in the terms and conditions of the federal award, and must be flowed down to "subawards, contracts, and purchase orders for the work performed, or the products supplied under the Federal award." 2 C.F.R. § 184.4(b).

2. Buy America Categories and Standards

On covered infrastructure projects, the BABA Act requires that all (1) iron or steel products, (2) manufactured products, and (3) construction material must be produced in the United States. Articles, materials or supplies are assigned to one of the three categories, each of which is addressed separately in the Uniform Guidance and is subject to a different domestic content test. The categories

are mutually exclusive, and generally "[a]n article, material, or supply incorporated into an infrastructure project must meet the Buy America Preference for only the single category in which it is classified." Categorization of an item is based on its "status at the time it is brought to the work site," rather than its status when it is incorporated into the project, or when the entire infrastructure project is complete.

- *Iron or steel products* are products that consist wholly or "predominantly of iron or steel or a combination of both," which means that the cost of the iron and steel content, i.e., "the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components," is more than 50% of the total cost of all components. 2 C.F.R. § 184.3 (definitions of "iron or steel products" and "predominantly of iron or steel or a combination of both"). For iron or steel products to be produced in the United States, "all manufacturing processes, from the initial melting stage through the application of coatings [must occur] in the United States."

- *Manufactured products* are "[a]rticles, materials or supplies that have been…[p]rocessed into a specific form and shape" or "[c]ombined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies." 2 C.F.R. § 184.3 (definition of "manufactured products"). Manufactured products may include components that are construction materials or iron and steel products, but if an item meets the definition of construction material or iron or steel product it will not be treated as a manufactured product. To be considered produced in the United States, manufactured products must meet a two-part test: (1) the manufactured product itself must be manufactured in the United States, and (2) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States must be greater than 55% of the total cost of all components of the manufactured product. The final guidance notes that if there is a preexisting Buy America standard that meets or exceeds this minimum domestic content standard, that may apply here instead. In contrast with the Buy American requirements in the FAR, the BABA domestic preferences offer no special treatment for commercially available off-the-shelf (COTS) items.

- *Construction materials* are articles, materials, or supplies that either wholly consist of one of a list of identified materials, or consist of that material with "[m]inor additions of articles, materials, supplies, or binding agents." 2 C.F.R. § 184.3 (definition of "construction material"). The listed materials are: non-ferrous metals; plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables); glass (including optic glass); fiber optic cable (including drop cable); optical fiber; lumber; engineered wood; and drywall. For construction materials to be considered "produced in the United States," the test is that "*all manufacturing processes* for the construction material [must have] occurred in the United States." 2 C.F.R. § 184.6(a) defines for each listed construction material what it means for "all manufacturing processes" of that material to occur in the United States, i.e., which steps are included. Only one construction material standard will be applied to a single construction material except as specifically provided in the final guidance.

3. Waivers

Federal awarding agencies can waive the Buy America preference on three grounds: nonavailability, unreasonable cost, or public interest. 2 C.F.R. § 184.7(a). These grounds track the three primary Buy American Act exceptions under the FAR. *See* FAR 25.103(a)–(c).

- *Nonavailability* waivers are appropriate when an item is "not produced in the United States in sufficient quantities or of a satisfactory quality." 2 C.F.R. § 184.7(a)(2).
- *Unreasonable cost* waivers are available when the use of United States-produced iron or steel products, manufactured products, or construction materials "will increase the cost of the overall infrastructure project by more than 25 percent." 2 C.F.R. § 184.7(a)(3).
- *Public interest* waivers require a finding that "[a]pplying the Buy America Preference would be inconsistent with the public interest." 2 C.F.R. § 184.7(a)(1). Potential grounds include:
    - De minimis (i.e., waiving requirements for purchases below a certain threshold, e.g., 5 percent of project costs up to a maximum of $1,000,000);
    - Small grants (e.g., exempting awards below the Simplified Acquisition Threshold per Federal Acquisition Regulation 2.101);
    - Minor components (allowing minor deviations for miscellaneous minor components within iron and steel products);
    - International trade obligations (state and local government procurements are not automatically covered under U.S. trade agreements, but 37 states have opted in to the World Trade Organization Government Procurement Agreement; such states and local governments therein may request waivers to avoid discriminating against trading partner products).

Agencies are required to provide recipients instructions for submitting waivers, including guidance on format, contents, and supporting materials. OMB Memo M-24-02 offers useful guidance on waivers as well.

Conclusion

Recent legislation such as the Inflation Reduction Act and the Infrastructure Investment and Jobs Act will add hundreds of billions of dollars of funding for federal construction projects over the next few years. These funds are accompanied by substantial compliance obligations, however. Davis-Bacon and Buy America domestic preferences are among the most burdensome and challenging of those obligations. Noncompliance could result in penalties, termination, or even False Claims Act liability or suspension or debarment. These rules are certain to be a focus for government enforcement agencies.

Davis-Bacon and domestic preference compliance require attention as early in a federal construction project as possible. Contractors, subcontractors, and suppliers should consider these rules and the costs of compliance in preparing their proposals. Construction contractors and suppliers should establish programs to maintain compliance during performance, including instituting appropriate internal controls, flowing down requirements, obtaining certifications and documentation from subcontractors and suppliers, and retaining required records.