ALFA International
THE GLOBAL LEGAL NETWORK

2025 Construction Law Seminar

July 23-25, 2025

UPDATES ON THE INFRASTRUCTURE INVESTMENT AND JOBS ACT IN 2025 & IMMIGRATION ENFORCEMENT AND NAVIGATING COMPLIANCE & WORKFORCE RISK

Nathaniel R. Martinez
Moderator
MAYER, LLP
Houston, Texas
NMartinez@mayerllp.com

Jeremy Ward
FRANDEN FARRIS QUILLIN GOODNIGHT ROBERTS WARD
Tulsa, Oklahoma
JWard@tulsalawyer.com

Infrastructure Investment and Jobs Act- Overview

The Infrastructure Investment and Jobs Act (IIJA), aka the Bipartisan Infrastructure Law (BIL), was signed into law by President Biden on November 15, 2021.

The IIJA is a transformative federal initiative aimed at revitalizing and modernizing U.S. infrastructure. The IIJA represents a historic investment in our nation's core infrastructure priorities – and the investments from the IIJA are designed to create jobs, stimulate economic growth, and address long-standing infrastructure challenges across the nation.

The IIJA authorized $1.2 trillion for transportation and infrastructure spending with $550 billion of that figure going toward "new" investments and programs. Under the IIJA, agencies and states can receive annual appropriations and grant funding from 2022-2026.

Through grants, loans, tax credits, and other financial incentives to state and local governments, consumers, utilities, and industry, these laws offer unprecedented opportunities to advance a clean energy economy, while increasing energy reliability, spurring economic growth, and reducing carbon pollution.

The $550 billion towards "new" investments and programs is divided into the following categories of improvements/projects:[i]

- Roads, Bridges, & major projects: $110B
- Passenger and Freight Rail: $66B
- Safety: $11B
- Public Transit: $39.2B
- Broadband: $65B
- Ports and Waterways: $16.6B
- Airports: $25B
- Water Infrastructure: $55B
- Power and Grid: $65B
- Resiliency: $47.2B
- Clean School Buses & Ferries: $7.5B
- Electric Vehicle Charging: $7.5B
- Reconnecting Communities: $1B
- Addressing Legacy Pollution: $21B
- Western Water Infrastructure: $8.3B

These funds are distributed to various projects through formula funding programs, competitive grant programs, and loan programs (explained below). The IIJA distributes funds both by creating new federal programs or significantly increasing funding available to existing programs.

- Formula Funding- distribution of funds to predetermined public entities (states-municipalities) based on characteristics such as population

- Competitive Grant Programs- Entities apply and demonstrate how they meet certain criteria in order to be awarded funds for projects
- Federally Administered Loan Programs- money is loaned at favorable rates to spur capital intensive infrastructure projects

Continued Impact of IIJA After the Five-Year Window

Though the IIJA was designed to allocate funds for a limited, 5-year timeframe (FY 2022-2026), IIJA projects are not just temporary solutions. These projects are designed with a long-term impact in mind to benefit communities long after the initial funding has ended by way of:

- IIJA funds are typically used to build or upgrade infrastructure with high-quality materials and modern technology, which elongates infrastructure lifespan and reduces necessity of repairs.
- Part of IIJA funding often supports creating maintenance plans or dedicated funds for upkeep. Agencies receiving the funds plan for long-term operation costs, ensuring the project doesn't degrade quickly after the initial build.
- Many IIJA projects include investments in workforce training and technical skills for local workers and agencies, increasing local capacity to maintain the improvements long-term.
- IIJA funding often acts as a catalyst, attracting state, local, or private investment to keep the project going and sometimes expand the original scope.
- Some projects incorporate smart technologies (like sensors for bridges or smart grids for energy). These innovations can provide ongoing monitoring and management capabilities, improving safety and efficiency continuously.

Current Status of IIJA Funding Allocation

Fifteen federal agencies reported that they, to date, have appropriated approximately $711.8 billion in Infrastructure Investment and Jobs Act (IIJA) funding available to award as grants to Tribes, states, localities, and territories across over 100 programs. About 98 percent of IIJA funding available for grants to nonfederal jurisdictions—as reported by agencies between September 2024 to March 2025—was appropriated to five agencies. The Department of Transportation received the most funding (74 percent of appropriations), while the EPA, Department of Energy, Department of Commerce, and Department of the Interior have also received substantial appropriations- all in excess of $20 billion. [ii]

Of the $711.8 billion in potential IIJA funds for grants identified, $580.6 billion (82 percent) became available to the 15 agencies to obligate toward infrastructure projects between fiscal year 2022 and fiscal year 2025. The remaining $131.2 billion (18 percent) which is unallocated will become available for obligation in fiscal year 2026.

The IIJA in Action- Program Examples

Roads and Bridges

- America's River Crossing – Memphis & Arkansas Bridge- $394 million grant under the IIJA that involves replacing the 75-year-old Interstate 55 bridge over the Mississippi River between Memphis TN and West Memphis, AR, addressing safety concerns and improving traffic flow between Tennessee, Arkansas, and Mississippi.
- Brent Spence Bridge Corridor Project-Covington KY and Cincinnati, Ohio- $1.635 billion federal grant to construct a companion bridge to the existing Brent Spence Bridge and reconstruct approximately 8 miles of interstate approach corridors to enhance traffic flow, capacity, and safety.

- I-90 Allston Multimodal Project (Boston, MA). The U.S. Department of Transportation approved $335 million in federal funding for the project to rebuild a section of the Massachusetts Turnpike and improve the Allston area in Boston.

Railways

- Railroad Crossing Elimination Program- In June 2023, Federal Railroad Admin. announced $570 million for 63 projects across 32 states to eliminate or upgrade more than 400 RR crossings to reduce train/vehicle collisions and alleviate traffic delays. Total availability since FY 2024 has climbed to $1.1 billion.
- Consolidated Rail Infrastructure and Safety Improvements Program (CRISI)- September 2023, Federal Railroad Admin announced $1.4 billion for 70 projects across 35 states to improve rail safety and strengthen supply chains via track upgrades, bridge rehabilitations, and addition of passenger rail services. These funds are also deployed to reduce emissions and make rail transportation more affordable to underserved areas.

Ports/Waterways

- U.S. Army Corps of Engineers (USACE): $17.1 billion in total allocated to USACE for river and harbor rehabilitation, coastal storm risk management, construction for inland waterways and navigation channels, and the like.
- Port Infrastructure Development Program (PIDP): $2.25 billion is designated for port infrastructure projects, including resilience enhancements and emissions reduction efforts. This funding improves port and related freight infrastructure and helps our ports meet anticipated growth in freight volume.
- Port Emissions Reduction: $400 million is allocated to test, evaluate, and deploy projects that reduce port-related emissions from idling trucks and commercial vehicles operating to move goods in/out of ports.

Examples of Projects Right Here in California

- Since 2021, California has received more than $42 billion in IIJA funds, including more than $29 billion for transportation-related projects.
- The Port of San Diego was awarded nearly $60 million in federal grants to support the electrification of equipment and infrastructure at its two maritime cargo terminals. This initiative is part of the port's Clean Cargo Project, aiming to reduce emissions and air pollution by transitioning from diesel and other fossil fuels to electricity.

President Trump's Unleashing American Energy Executive Order

On January 20, 2025, President Trump signed Executive Order "Unleashing American Energy," which directs agencies to pause disbursement of funds appropriated via the IIJA. This Executive Order directed all agencies to review their processes and procedures for issuing grants and disbursements, and to submit a report to the director of the NEC (National Economic Council) and director of OMB (Office of Management and Budget) which outlines the findings of the review. Per the Order, funding can resume only after the director of OMB and the Assistant to the President for Economic Policy "are consistent with any review recommendations they have chosen to adopt."[iii] Though the language and scope of the order is ambiguous (i.e. is it only limited to climate change programs, EV grants, etc. or all IIJA projects), the DOT and White House have provided no guidance, leading to widespread confusion and disarray

.

This Executive Order also revoked a previous EO which directed the CEQ (Council on Environmental Quality) to issue regulations to implement the National Environmental Policy Act of 1970 and required federal agencies to comply with said CEQ regulations. The NEPA required federal agencies to consider the environmental impact of their actions and take environmental factors into account when planning and implementing projects. In response to the Unleashing American Energy Executive order, CEQ published an interim final rule on February 25, 2025, rescinding all of its NEPA regulations.

In April of 2025, Judge Mary McElroy of the USDC for Rhode Island ordered the Departments of Energy, Housing and Urban Development, Interior and Agriculture, as well as the Environmental Protection Agency, to release IIJA awards previously withheld, after the ruling found the agencies lacked authority to freeze the funding. This nationwide injunction applies to all awardees nationwide.[iv]

Immigration Enforcement and Its Impact on the U.S. Construction Industry: Navigating Compliance and Workforce Risk

Immigration enforcement has become an increasingly central concern for the U.S. construction industry, which depends heavily on immigrant labor. The intensifying scrutiny from federal agencies, including I-9 audits, worksite raids, and increased employer accountability, poses substantial operational and legal risks.

The President has communicated a clear message to employers: do not turn a "blind eye" to the hiring of unauthorized workers and adhere strictly to U.S. employment verification laws.

The Construction Industry's Labor Challenge

The construction industry in the U.S. is already facing a chronic labor shortage. With immigration enforcement tightening, the pool of available workers is further strained. Many projects—especially large infrastructure and government contracts—are now under heightened scrutiny for wage, labor, and immigration compliance. Non-compliance can result in heavy fines, debarment from government contracts, and even criminal liability.

The construction industry relies significantly on foreign-born workers. In 2023, approximately 28.6% of the U.S. construction workforce was foreign-born, making it the industry with the highest percentage of immigrant workers.[v] One in five undocumented workers are employed in a construction-related sector.[vi] With such dependence, enforcement actions can lead to immediate labor shortages, causing project delays and increased costs.

I-9 Audits: Legal Obligations and Best Practices

The Form I-9 verifies the identity and employment eligibility of individuals hired in the U.S. Employers must retain and produce these forms upon request by DHS or ICE.

Upon receiving a Notice of Inspection (NOI), employers generally have three business days to provide I-9 documentation. Preparatory steps should include:

- Retaining outside counsel
- Conducting an internal preliminary I-9 audit
- Ensuring accurate and timely delivery of documents
- Assign a point-of-contact for all government interactions

- Educate frontline staff on what to do if ICE agents arrive

Voluntary internal audits, especially those led by third-party compliance experts, can reduce risks by:

- Identifying errors in I-9 forms (such as missing signatures or documentation)
- Re-verifying expired work authorization documents
- Rectifying storage violations (e.g., storing photocopies of IDs improperly)

Important: Only keep documents required by law. Extra documentation can become liabilities during audits or litigation.

Employers also should consider training their HR and legal teams to recognize suspect or fraudulent documents and how to conduct further investigation, when appropriate. This may involve working with document experts or outside counsel to assess whether there are legitimate concerns about an employee's documents or identity.

In addition, employers should document good-faith efforts to comply with both the Form I-9 employment eligibility verification and visa and green card sponsorship rules. Keeping records of audits, training, communications, and any corrective actions taken by the company may help mitigate risk and potential penalties. If an employer identifies issues in their Form I-9 records or their hiring practices, they should consult with outside counsel and/or correct them as soon as possible to avoid penalties during an inspection.

Finally, businesses should develop contingency plans for handling staffing shortages caused by a worksite enforcement action, as the arrest of critical employees can be disruptive to ongoing business operations. This includes ensuring that there are backup personnel or temporary staffing options available to minimize disruptions to business operations.

Worksite Raids: Planning and Response Protocols

In addition to Form I-9 inspections, worksite enforcement actions can be triggered by whistleblowers—often employees or former employees—who report suspected violations related to the employment of unauthorized workers, improper document practices, or discrimination allegations. An employer's prior violations may also result in ICE coming to an employer's worksite to observe, investigate, and determine whether prior violations have reoccurred, or in more flagrant situations, whether the company has criminally conspired to defraud the government in hiring or continuing to employ unauthorized workers. Worksite raids can disrupt operations and damage reputations.

Companies should have a Worksite Enforcement Plan that includes:

- Identify legal team and company representatives
- Limit access to public areas only. Immigration officers are permitted to enter any public areas of your workplace but must have a valid search warrant or your consent to enter non-public areas.
- A valid warrant must be signed and dated by a judge. It will include a timeframe within which the search must be conducted, a description of the premises to be searched, and a list of items to be searched for and seized (e.g., payroll records, employee identification documents, Forms I-9, SSA correspondence, etc.).

- An agent will serve the search warrant on a receptionist or company representative and alert other agents to enter.
- Your company can accept the warrant but not consent to the search. If you do not consent to the search, the search will proceed, but you can later challenge it if there are grounds to do so.
- Depending on the type of business, HSI may demand that equipment be shut down and that no one leave the premises without permission.
- HSI may move employees into a contained area for questioning.
- While some agents question employees, others will likely execute the search and seizure of items listed in the warrant
- Do not volunteer additional records or access beyond what is legally required
- Keep detailed logs of all agents and documents requested

Employer Rights and Responsibilities:

- If a search warrant is presented, examine it to ensure that it is signed by the court, that it is being served within the permitted timeframe, and that the search is within the scope of the warrant – the area to be searched and the items to be seized. Be sure to send a copy of the warrant to your attorney.
- Write down the name of the supervising agent and the name of the U.S. attorney assigned to the case.
- Have at least one company representative follow each agent around the facility. The employee may take notes or videotape the officer. Note any items seized and
- Request to make copies of any documents before they are taken. If the agent does not allow you to make copies, you can obtain copies later.
- If agents presented a valid search warrant and want access to locked facilities, unlock them.
- Request reasonable accommodations as necessary. If agents insist on seizing a document that is vital to your operation, explain why it is vital and ask for permission to photocopy it before the original is seized. Reasonable requests are usually granted.
- Do not block or interfere with federal agent activities. Note that you are not required to give the agents access to non-public areas if they did not present a valid search warrant.
- Object to a search outside the scope of the warrant. Do not engage in a debate or argument with the agent about the scope of the warrant. Simply state your objection to the agent and make note of it.
- Protect privileged materials: If agents wish to examine documents designated as attorney-client privileged material (such as letters or memoranda to or from counsel), inform them that they are privileged and request that attorney-client documents not be inspected by the agents until you are able to speak to your attorney. If agents insist on seizing such documents, you cannot prevent them from doing so. If such documents are seized, try to record in your notes exactly which documents were taken by the agents.

- Ask for a copy of the list of items seized during the search. The agents are required to provide an inventory to you.
- Company representatives should not give any statements to federal agents or allow themselves to be interrogated before consulting with an attorney.
- You may inform employees that they may choose whether or not to talk with federal agents, but do not direct them to refuse to speak to agents when questioned.
- Do not hide employees or assist them in leaving the premises without permission. Do not provide false or misleading information, falsely deny the presence of named employees, or shred or otherwise obscure documents.

E-Verify Compliance – Federal Contractors

E-Verify is a web-based system administered by the U.S. Department of Homeland Security (DHS) that allows employers to confirm the employment eligibility of their workers. For certain federal contractors, the use of E-Verify is not voluntary but mandated by the inclusion of the E-Verify clause in their contract. This requirement is governed by FAR 52.222-54, which took effect for contracts awarded or solicitations issued on or after September 8, 2009.

Scope of the FAR E-Verify Clause

The E-Verify FAR clause applies only if it is explicitly included in the written contract. Government contracting officers are responsible for determining whether the clause should be incorporated, based on specific criteria. These include:

- The contract must be a prime federal contract awarded on or after September 8, 2009
- It must exceed $100,000 in value
- The performance period must be longer than 120 days
- The work must involve services or construction

Additionally, subcontracts valued at over $3,500 that involve services or construction are also covered, provided they support a prime contract with the E-Verify clause.

Prime and Subcontractor Obligations Under the E-Verify FAR Clause

In the context of federal contracting, compliance with the E-Verify requirement under FAR 52.222-54 extends beyond the prime contractor to include all tiers of subcontractors involved in service or construction work. The prime contractor bears a critical oversight responsibility, ensuring that all subcontractors comply with employment eligibility verification obligations.

Oversight Responsibilities of the Prime Contractor

The prime contractor is obligated to oversee subcontractor compliance with the Federal Acquisition Regulation (FAR) clause related to employment eligibility. Specifically, the prime contractor must ensure that:

- All subcontract agreements at every tier incorporate the FAR 52.222-54 clause, titled *Employment Eligibility Verification*.

- Subcontractors understand and fulfill their duty to enroll in and use E-Verify for covered employees.
- Subcontractors are not in breach of their compliance obligations under federal law.

This oversight is essential to maintaining the integrity of the contractor's overall compliance program and to avoiding liability risks.

Consequences of Non-Compliance

A prime contractor who knowingly continues to engage a subcontractor in violation of the FAR E-Verify requirement may be subject to fines, penalties, or other enforcement actions. Potential consequences include:

- Contract termination
- Suspension or debarment
- Financial penalties for noncompliance

Therefore, maintaining documentation and performing periodic checks on subcontractor compliance should be standard practice for all federal construction or service contracts that contain the E-Verify clause.

Prevailing Wages and Davis-Bacon Act Compliance

The Davis-Bacon Act mandates payment of prevailing wages on federal construction projects. These wages are:

- Location-specific
- Project-specific
- Contract-specific

Documentation Requirements

- Certified payroll reports
- Job classifications
- Fringe benefit reporting
- Proper record retention for at least 3 years

Failure to comply can result in contract termination, withheld payments, and debarment from future projects.

Strategic Recommendations for Employers

Develop a Comprehensive Compliance Program:

- Designate a compliance officer
- Implement standardized onboarding and I-9 procedures
- Conduct regular internal audits

Strengthen Contractor Oversight:

- Review contracts to clearly allocate compliance responsibilities
- Require proof of I-9 and E-Verify compliance from all subcontractors
- Include indemnification clauses where appropriate

Legal Preparedness:

- Establish relationships with immigration and labor counsel
- Train management and HR teams on audit response protocols
- Maintain documentation that shows good-faith compliance efforts

Other Policy Changes Under the Trump Administration

President Biden implemented several executive orders during his first term to address climate change, environmental justice, and clean energy. However, upon returning to office in January 2025, President Donald Trump rescinded/pushed back on many of these initiatives, signaling a shift toward prioritizing fossil fuel development and reducing federal environmental oversight.

President Trump declared a "national energy emergency" on January 22, 2025, invoking emergency powers to expedite fossil fuel production and infrastructure development. This declaration grants the administration broad authority to override environmental regulations, utilize eminent domain, and leverage the Defense Production Act to accelerate energy projects. Listed below are a few examples of rescinded orders and reversals of previous Biden-era initiatives regarding climate change and environmental justice:

- Biden (2021)- Executive Order 13990 – Climate Crisis and Environmental Protection- This order aimed to restore scientific integrity in federal climate policy, including revoking the Keystone XL Pipeline permit and temporarily halting drilling in the Arctic National Wildlife Refuge.
    - Trump (2025): President Trump issued a memorandum directing the Secretary of State to make a speedy permitting determination regarding the Keystone XL pipeline, signaling the administration's efforts to get the project back on track.
- Biden (2021)- Executive Order 14008 – Tackling the Climate Crisis at Home and Abroad- This comprehensive order established the Justice40 Initiative, directing that 40% of federal climate and clean energy investments benefit disadvantaged communities. It also created the White House Environmental Justice Advisory Council and the Climate & Economic Justice Screening Tool.
    - Trump (2025): President Trump rescinded this order, dismantling the Justice40 Initiative and eliminating the associated tools and advisory bodies.
- Biden (2021)- Executive Order 14057 – Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability- This Order focused on reducing federal greenhouse gas emissions and promoting clean energy technologies within federal operations.
    - Trump (2025) Rescinded this order, halting federal efforts to transition to clean energy sources and reducing the emphasis on sustainability in federal operations.
- Biden (2021)- Executive Order 14162- Paris Agreement- Rejoined the Paris Agreement, reaffirming U.S. commitment to international climate action

- Trump (2025)- Issued order to withdraw the U.S. from the Paris Agreement.

IIJA Moving Forward- Effects of Trump's Funding Freeze via Unleashing American Energy Order

Due to the January 2025 EO which paused the flow of IIJA funding so that the administration may conduct a review of the associated processes, many infrastructure projects, at various stages of development, have been thrown into uncertainty. In addition, many state and local governments, as well as private entities, have entered contracts with the expectation of receiving these IIJA funds, which creates the potential for a litany of legal disputes.

According to Section 7 of the EO (titled "Terminating the Green New Deal"), the freeze on funds applies to "funds appropriated through the Inflation Reduction Act of 2022 (Public Law 117-169) or the Infrastructure Investment and Jobs Act (Public Law 117-58), including but not limited to funds for electric vehicle charging stations made available through the National Electric Vehicle Infrastructure Formula Program and the Charging and Fueling Infrastructure Discretionary Grant Program."

Below are some examples of programs/projects that are under fire due to the freeze in funds:

California High-Speed Rail

The California High-Speed Rail System is a planned two-phase 800-mile system with speeds of up to 220 miles per hour that aims to connect San Francisco to Los Angeles/Anaheim and in the second phase extend north to Sacramento and south to San Diego. This project, which has already received over $4 billion in federal funding, is under scrutiny. The Trump administration has announced plans to withdraw federal funding, citing cost overruns and lack of progress on the project. A report from the FRA (Federal Railroad Administration) cited missed deadlines, budget shortfalls, and questionable ridership projections.

Electric Vehicle (EV) Charging Infrastructure

The previously mentioned National Electric Vehicle Infrastructure (NEVI) program, which allocates $5 billion in IIJA funding for EV charging infrastructure is among the programs under review. This program has been significantly disrupted by the freeze of funding. By early 2025, all 50 states, along with Washington, D.C. and Puerto Rico, had submitted plans for how they would use NEVI funding for EV charging. These plans were in place for fiscal years 2022 through 2025. DOT had approved the projects/plans and the states were waiting for the funds.

Then, on February 6, 2025, (soon after the previously discussed EO) the Federal Highway Administration (FHWA) issued a memo. It canceled all earlier guidance and suspended the approval of every state's EV charging plan. FHWA said no new funding would move forward until new plans were submitted and approved. Only current projects could continue.

For instance, California, which was slated to receive over $300 million, and Michigan, expected to receive approximately $110 million, had their funding paused and, as a result, have experienced significant delays and uncertainties regarding their EV infrastructure plans. This pause/freeze has left between $885 million and $1.5 billion in funding in limbo throughout the U.S. This funding freeze is impacting states differently. Some states are putting their entire NEVI program on hold, while others are pressing forward with their projects.

In addition, the Charging and Fueling Infrastructure Discretionary Grant program, another IIJA funded program, provided $2.5 billion in funding for additional EV charging infrastructure, focusing on underserved and disadvantaged communities, and has been subject to similar threats of termination.

The Buy American Act of 1933 (BAA)

The BAA mandates a preference for "domestic end products" and "domestic construction materials" in federal government procurement contracts for supplies, materials, and manufactured goods. The main goal of the BAA was to support domestic manufacturing and energize the U.S. economy by prioritizing American product usage in government contracts. For a product to be "domestic" under the BAA, the product must be manufactured in the US and the cost of domestic components must exceed 65% of the total cost of all components therein. This "domestic component threshold" will be raised to 75% beginning in 2029.

The BAA's applicability depends on whether the particular project/transaction meets the "micro-purchase threshold" which is typically $10,000.00. The BAA does not apply, generally, to state or local governments, or projects funded by the federal government but managed by others. It mainly covers procurement but is silent about construction/transportation projects. Traditionally, the domestic threshold requirements of the BAA were waivable if the head of the procuring agency determined that (1) the BAA was inconsistent with the public interest or (2) the cost of acquiring the domestic product/material was unreasonable.

Buy America Provisions of the Surface Transportation Assistance Act of 1982 and the General Manufactured Products Waiver

The "Buy America" provisions of the SFTA apply to transportation related projects funded by the federal government (especially those funded by the Federal Highway Administration and Federal Transit Administration). These Buy America provisions of the SFTA apply to construction materials and equipment used in federally funded transportation infrastructure projects. Generally, the provisions require that steel, iron, and manufactured products used in federally funded transportation projects be produced in the US – that is- bridges, highways, etc. constructed with the use of federal funds must use US made steel, iron, and manufactured products. The "Buy America" requirements, therefore, are generally only applicable within the realm of DOT projects.

The Buy America Provisions require steel, iron and manufactured products used in these transportation products to be 100% U.S. made. However, waivers were permitted if there were cost/availability issues with the domestic products.

The General Manufactured Products Waiver

Importantly, in 1983, the Federal Highway Administration issued a general waiver regarding the Buy America Provisions of the SFTA, which waived the requirements regarding domestically manufactured products used in federally funded highway projects. This limited the Buy America requirements, with respect to federally funded transportation and infrastructure projects, to apply only to iron and steel used in these projects.

The FHWA stated that the waiver was necessary because of the high cost of applying Buy America to manufactured products, primarily due to the burden of identifying and tracing the origin of their components. The waiver limited the Buy America provisions' applicability to only iron and steel products, while permitting recipients of FHWA financial assistance to turn to foreign sources for more complex products used in these projects.

The Build America Buy America Act (BABAA)- Generally

The BABAA was enacted as part of the IIJA on November 15, 2021. The BABAA established a domestic content procurement preference for all Federal financial assistance obligated for infrastructure projects after May 14, 2022. The BABAA is more widely applicable than both the BAA and the Buy America provisions, as it applies to all federally

funded infrastructure projects, not just those related to transportation. The BABAA applies to any infrastructure project receiving federal funding, including situations where funds are passed through states, localities, or other entities.

According to the BABAA, an Agency may not obligate funds for an "infrastructure project" unless all the iron, steel, manufactured products, and construction materials used in the project are produced in the United States, or the Agency applies a waiver to the domestic content procurement preference requirement. Practically speaking, this means:

> (1) All iron and steel used in the infrastructure project must be produced in the U.S. (i.e. the entire manufacturing process for said iron and steel must occur within the U.S.);
>
> (2) All manufactured products used in the project must be produced in the U.S. This means that the product itself (the end result) was entirely manufactured within the U.S., and the cost of the components of the manufactured product that are mined, produced, or manufactured within the U.S. must be greater than 55% of the total cost of all components of the manufactured product (unless some other standard for determining this minimum threshold is established); AND
>
> (3) All construction materials are manufactured in the U.S. (i.e. the entire manufacturing process for said construction materials must occur within the U.S.).

BABAA established a domestic content procurement preference with the goal of increasing a resilient domestic supply chain and manufacturing supply for critical materials both for emerging and existing industries in the United States.

BABAA Stance on Waivers of General Applicability

The BABAA expresses a general distaste for general applicability waivers like the Manufactured Products General Waiver.

Section 70914(d) of BABAA requires Federal Agencies to review existing general applicability waivers by publishing in the Federal Register a document that: (i) describes the justification for the general applicability waiver; and (ii) requests public comments on the need for the waiver. Following consideration of comments received, BABAA then requires Federal Agencies to publish in the Federal Register a determination on whether to continue or discontinue the general applicability waiver. These requirements impose more stringent requirements on agencies with respect to waivers and invite public comment and discourse into the equation.

In March of 2025, the General Manufactured Products Waiver was terminated by the FHWA after the FHWA complied with the BABAA's express direction for agencies to review and reconsider waivers of general applicability. The FHWA determined that its original rationale for the waiver was no longer applicable, and it proposed revised regulations to harmonize its Buy America program with the requirements of BABAA. The final rule ends the General Manufactured Products Waiver and aims to maximize the use of domestically produced manufactured products permanently incorporated into Federal-aid highway and bridge projects. The new rule is intended to be rolled out in two phases:

- For projects obligated on or after October 1, 2025, final assembly of all manufactured products must occur in the U.S.

- For projects obligated on or after October 1, 2026, in addition to the final assembly requirement, the cost of components of products that are mined, produced, or manufactured in the U.S. must be greater than 55 percent of the total cost of all components of the manufactured product.[vii]

Definitional Issues/Interpretations Under the BABAA

Under the BABAA, a material may fall into only one of three categories: (1) steel/iron; (2) construction materials; or (3) manufactured products.

"Construction materials" as used in the BABAA, means articles, materials, or supplies that consist of only one of the items listed below, however minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of a construction material. To the extent one of the items listed below contains as inputs other items listed below, it is nonetheless a construction material:

- 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.

The definition provided has at least one glaring source of ambiguity - what is a "minor addition" of an article, material, etc. to a construction material? How does a supplier or contractor know when an addition is no longer "minor" such that the material is no longer considered a construction material at all? Unfortunately, these are questions that are currently without answers via legislative or judicial guidance. Additionally, things like paint, coatings, bricks, etc. are not included within this definition - though one might assume they would be.

Further, items that consist of two or more of these listed materials that have been combined through a manufacturing process, as well as items that include at least one of those listed materials and some other, unlisted material, are not considered as construction materials but rather as manufactured products. For instance, as stated in a White House Memo dated April 18, 2022 (Initial Implementation Guidance on the BABAA) a plastic framed sliding window should be treated as a manufactured product while plate glass should be treated as a construction material.

"Manufactured products" as used in the BABAA means articles, materials, or supplies that have been either (1) processed into a specific shape or form or (2) combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.

If an article is an iron or steel product, or a construction material, it cannot be a manufactured product because, under BABAA, the article must fall under only one definition. However, manufactured products may include "components" that are construction materials, iron/steel products, or Section 70917(c) materials (which are materials that, in and of themselves, are excluded from BABAA requirements), and still be considered a manufactured product. A component is an article, material, or supply that is incorporated directly into a

manufactured product or an iron and steel product.

Further, mixtures of these Section 70917(c) excluded materials delivered to a work site without final form for incorporation into a project are also not manufactured products. These Section 70917(c) materials such as cement, stone, sand, gravel, binding agents and additives are not, on their own, manufactured products. Even when these products are used at a worksite or combined (such as wet concrete, hot asphalt mix delivered to the site), they are still not manufactured products in and of themselves.[viii]However, these materials may be treated as components of a manufactured product when the components are combined before arrival to a worksite. For instance, precast concrete should be treated as a manufactured product with components that are Section 70917(c) materials, namely cement and aggregate binding agents.

Plainly, these definitional "gray areas" and the convoluted language and interaction between the different defined BABAA categories places a hefty burden on project owners and contractors alike to become hyperaware of every material that is used in a federally funded project so that they can assess whether BABAA's domestic origin requirements are applicable. As one might imagine, carrying this burden requires extreme organization and attention to detail, precise documentation and clarity in communication, and strong relationships with vendors, suppliers, contractors, and the like. Since the General Manufactured Products Waiver has been revoked, parties to these projects must proceed with the utmost caution and absolute knowledge of the nature of their products so as to avoid contractual and other types liability. Identifying whether something constitutes a "manufactured product" is simply the first step, after which the domestic manufacturing threshold becomes the primary consideration for BABAA compliance.,

Put differently, parties involved in these federally funded projects to which BABAA applies are now obligated to know, down to the component, the manufacturing process and origin of "manufactured products" used in the project – or else they face falling out of BABAA compliance on projects that receive federal grants/funding (and, for reasons discussed below, this could subject such party to immense penalties via the False Claims Act). Refusing to change organization, communication, and operations and put in additional effort to ensure BABAA compliance can be an extremely costly mistake in the current regulatory climate.

BABA Compliance-Post Revocation of the General Manufactured Products Waiver

Educating Supply Chains, Vendors, Contractors, Subcontractors

Entities and individuals at all levels of the supply chain must adjust their operations considering the Waiver's termination, as now the scope of allowable foreign products in federal infrastructure products has drastically diminished. Compliance with the BABAA demands a rigorous, transparent, and domestically focused supply chain which not only ensures that the manufactured product is entirely manufactured in the US, but also that the 55% component total cost threshold is me. This is true with respect to vendors, contractors, and subcontractors who are contracting for involvement in these federally funded projects.

Some suggestions to train/educate supply chains for these products and ensure compliance with the BABAA are as follows:

- Establish clear procedures for defining articles and materials
    - Ensuring BABAA compliance starts with correctly identifying the definition of a material – whether it is a construction material, iron/steel, a manufacture product, or one of those excluded products mentioned earlier

        - Different BABAA requirements depending on the definition, most burdensome requirements for manufactured products due to domestic manufacturing threshold calculation
    - Keep a database or spreadsheet of articles and materials purchased
        - Seek as much information from the manufacturer/seller as possible with respect to materials that make up that article
    - Establish good supplier relationships and strive to consistently purchase from reliable and trustworthy suppliers and vendors (this way, you know all the details of their articles and have already classified them in the past)
    - Encourage open communication with suppliers and vendors to receive notice if the manufacturing process changes with respect to certain articles (change in process means a re-assessment of the definition is likely needed)

- Map the entire supply chain and identify material and component source of manufacture, composition of materials, subsequent sources of manufacture of components
    - Verify geographic origins of all manufactured products and components
    - Identify gaps/risks where non-compliant components are used
    - Analyze percentage of product price comprised of foreign and domestic components
        - Identify the source of most expensive components, determine feasibility of moving to domestic manufacturer for those components which have the greatest impact on the 55% calculation
    - Request documentation (certifications/verifications) of component origin from manufacturers if need be.
    - Thoroughly document component and product origins ahead of time
    - If the material purchased is a combination of materials, articles, obtain verification and information regarding the cost of each component, the location of manufacture of each component, etc.

- Education/understanding of regulations and designation of compliance officials
    - Train employees, procurement teams, contractors, subcontractors, anyone involved in purchasing product for infrastructure projects on the specific requirements of BABAA as relates to foreign/domestic components
    - Establish and distribute written materials, policies, and guidelines to be referenced if questions arise
        - Ensure BABAA requirements are clearly articulated, and all imperative terms are defined in the materials (what is a “component”, what has to happen for something to be considered “manufactured” within the U.S.)
    - Hire BABAA compliance personnel or train existing compliance staff heavily on BABAA, and ensure they are available to procurement teams, contractors, etc.
        - Maintain a helpline/point of contact for compliance questions to be answered
        - Set up internal audits by compliance personnel on a regular basis
    - Emphasize the importance of BABAA compliance within company culture

- Relationships/networking
    - Make a pointed effort to build relationships with domestic manufacturers and suppliers.
        - Encourage suppliers to increase the content of domestic components within their products (or their components) to foster a growing relationship
    - Network with similarly situated entities/persons within your industry/geographic area and discuss their strategy working towards BABAA compliance in applicable projects
        - Use situations of noncompliance as case studies to identify areas of weakness
- Use technology, communication, and organizational skills to ensure a smooth transition
    - Utilize portals, spreadsheets, for where data relating to material manufacture details (price, origin, component price and manufacturing origin, definition of the material, status of supplier verification of details in writing, etc.) can be stored and easily referenced
        - Emphasize importance of submittals that include all data necessary to classify and calculate under BABAA
    - Train procurement team or other relevant employees to confirm BABAA compliance before a purchase is made/contract is signed
    - Monitor updates in BABAA regulations, definitions, related court proceedings, etc. which could impact requirements
    - Establish preferred vendor/contractor/subcontractor lists based on prior dealings which confirm compliance with BABAA in previous transactions
        - Prepare contingencies in case primary plan falls through due to inability to comply with BABAA, so that a fall through will not subject you to a contract breaching delay or failure to procure materials etc.
    - Conversely - “red flag” vendors/suppliers etc. that refuse/are slow to provide BABAA details for materials and components, that have been dishonest about details previously, that are not seeking to adapt their business in light of the regulations, etc.

Third Party Audits v. Reliance on Certifications from Vendors

At the bare minimum, written verification of all BABAA-related details should be obtained from the relevant party before a purchase is made or a contract is entered for the purchase of materials. That said, third-party audits are preferable to ensure continued growth and BABAA compliance. Third party auditors provide objective and independent assessments based on expertise and experience. Third party audits can serve to bolster an organization’s BABAA compliance program by offering insight that the internal compliance team might have overlooked.

- Third party audits serve as a learning opportunity for those seeking to evaluate their BABAA compliance protocols in this evolving landscape
- Third party auditors will evaluate the effectiveness of compliance program from a holistic perspective, ensure the presence of proper controls and systems, identify weaknesses and areas of improvement.
- Third party audits also provide external validation and enhance credibility to stakeholders (customers, regulators, and investors) that the company is committed to compliance and transparency.

Enforcement of the BABA and the False Claims Act

The False Claims Act, 31 U.S.C. § 3729, et seq., provides that any person who knowingly submits, or causes to submit, false claims to the government can be liable for treble damages, which can lead to a recovery of up to three times the amount of actual damages. The FCA is a key tool for enforcing laws such as BABA and other regulations related to government contracts and procurement. The FCA provides for penalties for knowingly misrepresenting the country of origin of manufactured products/components/construction materials etc. in the context of federally funded infrastructure projects. So, if a contractor, supplier, or subcontractor certified compliance with the BABAA domestic threshold but was knowingly using foreign materials in performance of the contract, they would be exposed to liability under the FCA. Treble damages are a significant deterrent and, in the context of some of these infrastructure projects in which millions of dollars of materials are being supplied, could represent significant financial difficulties for many entities if imposed.

Avoiding FCA liability falls back on earlier points regarding organization and utilizing technology and ensuring that the origin of manufacture of materials is recorded and stored. Implementation of robust internal compliance structure can help avoid FCA violations. Communication is also of the utmost importance in this context, if the compliance team has red flagged a vendor for BABAA compliance issues, but the procurement team does not check the database first and purchases those materials and uses them in an IIJA funded project, FCA liability is a high possibility. This threat can be alleviated by ensuring internal operations are highly communicative, and even more so when an entity is involved in a federally funded project.

Practical Effects on Construction Contractors- Delays in Project Bidding, Project Awards

The pause on federal funding for IIJA projects caused by the Unleashing American Energy EO disrupted the financial flow essential for initiating and advancing a multitude of federally funded projects across a variety of industries. Contractors who may have been interested in bidding for a certain job and expended time and resources in communicating with agency or project owner to initiate bid preparation process may be unsure if the project itself will even receive the federal funding and, thus, whether it will exist. This uncertainty removes contractor motivation to proceed with compiling bid materials and spend time and effort on a project that might be cancelled due to factors out of their control. This uncertainty also affords an unfair advantage to contractors/construction firms with more time and resources that can afford to compile and submit a bit in light of the unknown, whereas a smaller contractor cannot bear the risk of utilizing his time and resources on a project that is under threat of cancellation. Contractors are awaiting guidance from the agencies to clear up doubts about project funding. Ongoing litigation (aforementioned injunctions) has shown that the ball is rolling on this front, however nowhere near a final judicial resolution to provide certainty to contractors

Necessarily, this uncertainty also causes a delay in project awards, as with funding paused, it is unknown whether there will be a disbursement of federal funds so that contractors can be paid for the project if the bid is accepted. Further, the fund freeze causes a delay, if not an outright prevention, of contractor bid submissions, which pushes the timeline further since the bids must be thoroughly reviewed for BABAA compliance, etc. before any award can be made. This aura of uncertainty is filled with the threat of litigation, as no party wants to obligate themselves to make payment under a construction contract for a project that might have funding entirely revoked.

Terminated Awards and Contracts- IIJA Projects Affected by the EO

Earlier, we discussed several projects funded by the IIJA which were experiencing difficulties due to the pause in fund disbursement caused by the Unleashing American Energy EO. The breadth of projects affected by the EO are those involving renewable energy and climate change initiatives.

The EO signaled a significant policy shift by halting federal contracts/grants and awards associated with renewable energy and climate initiatives.

The EO suspended approvals, permits, and loans for both onshore and offshore wind energy projects. A coalition of 17 states and Washington, D.C., filed a lawsuit challenging this action, highlighting potential job losses and economic impacts.

In response to the EO, The Environmental Protection Agency (EPA) froze approximately $7 billion in grants under the Solar for All program, which aimed to finance community and rooftop solar installations in low-income communities. Recipients, including state and local governments and nonprofits, were informed that their grants had been paused until further notice.

As mentioned above, the EO caused a stoppage of disbursement to the NEVI program and the Chargin and Fueling Infrastructure Discretionary Grant Program ($7.5 billion total IIJA allocations).

Who Bears the Risk/ Contractual Protections and Drafting

This highlights the importance of carefully drafting force majeure, cancellation, and termination clauses within contracts regarding IIJA funded projects. If contractors are involved in projects which have grinded to a halt due to fund suspension – deploying strategic contract drafting techniques to mitigate risk in the event of fund cancellation is imperative. (think of the CA high speed rail project discussed previously that has already received $4 billion in federal funding and may be subject to claw-backs).

If the project is cancelled before a contract is finalized or funds are disbursed, the federal government generally assumes the risk, and the project does not proceed. However, if funds have already been disbursed and some work has started, contractors may bear some risk and be subjected to fund “claw backs” due to project cancellation.

As a contractor, ensure the contracts you enter for any IIJA related project provide you with ample protection. One way to do so is to make sure your contracts include a detailed and widely sweeping force majeure clause. Ensure that the force majeure clause is drafted so that fund cancellation, governmental action, project cancellation, and similar actions are expressly identified as force majeure events. Furthermore, include within the force majeure delays that might be caused due to BABAA compliance setbacks, i.e. if you have to find a new vendor or supplier to ensure that your materials used on the project are BABAA compliant, contract around a potential breach due to such a delay. Due to the level of uncertainty, these force majeure provisions need to be carefully thought out and include nearly every contingency imaginable that relates to fund cancellation and governmental actions which lead to fund cancellation.

Risk shifting is another important strategy that should be utilized in these IIJA project contracts. Include provisions within the contract which place the risk of governmental termination/cancellation of the project on the owner. Flow-down provisions are also important to protect a contractor from liability under any subcontractor agreements entered. That is, if the project is cancelled and the contractor does not receive payment from the owner, the contractor must make sure that he is not in breach of subcontractor agreements by way of subsequent failure to pay subcontractors. These flow-downs can provide that subcontractor payment is contingent upon contractor payment from the project owner or deploy similar language to protect contractors. In the event of project cancellation, fund suspension or revocation, governmental action that makes contract performance impossible, etc., include such events within provisions that provide for termination (for cause) of the contract and shield the contractor from asserted breaches by the owner if work is stopped.

Tarriffs

Tarriff implications shorten the timeframe for project bidding, especially for these large scale IIJA projects. Price volatility in materials causes expedited bidding timelines. Contractors may expect fluctuations in material prices due to tariffs/retaliatory trade which causes a rush to submit bids ASAP while prices are predictable. This situation, combined with funding uncertainty, makes it very difficult for a contractor to know when to bid on a job. Should the contractor wait too long, tariffs could price them out of a once valuable opportunity. If the contractor quickly submits a bid while material prices are favorable, they might be locked into a job based on a price that is no longer feasible because of rising material costs. Tariffs cause supply chain disruptions and shortages in materials which can lead to contractors securing contracts as fast as possible to begin material procurement before availability worsens.

Also, with tariffs causing rapid price changes in materials, contractors have less time to accurately estimate costs. They might shorten bid preparation to avoid missing the window before prices increase. In addition, the project owners themselves may set shorter bidding periods to encourage faster responses from contractors and lock in costs more quickly (in anticipation of market fluctuations). Generally, tariffs create uncertainty in material cost and availability which incentivizes both sides to shorten bidding timeframe to avoid cost escalations and supply delays that could constitute breaches.

An often-overlooked factor in this context is the impact of bidding errors: “The company that makes the biggest error gets the job” i.e. if a contractor underestimates the impact of tariffs on material prices, their bid will appear much lower than all competitors, which means they will be awarded the job based on an artificially low bid. This can lead to the contractor having to request and renegotiate contractual provisions related to change orders, seeking contract amendments to include provisions providing protection to the contractor in the event of defined material price fluctuations. At the very least, this imposes additional time and resource obligations on a contractor and likely will require assistance from counsel to navigate the contract revision process, red-lining, and negotiating for price fluctuation provisions. At worst, the project owner could refuse to alter the provisions, and the Contractor could be forced to perform the work/services at a net loss due to material price increases or risk a breach of contract claim if they refuse to perform citing cost issues.

---

[i] https://www.cantwell.senate.gov/imo/media/doc/Infrastructure%20Investment%20and%20Jobs%20Act%20-%20Section%20by%20Section%20Summary.pdf

[ii] https://www.gao.gov/assets/gao-25-107243.pdf

[iii] https://www.whitehouse.gov/presidential-actions/2025/01/unleashing-american-energy/

[iv] https://www.constructiondive.com/news/judge-orders-trump-reinstate-iija-ira-funding/745582/

[v] https://usafacts.org/articles/which-industries-employ-the-most-immigrant-workers.

[vi] https://www.americanprogress.org/wp-content/uploads/sites/2/2021/02/EW-Construction-factsheet.pdf.

[vii] https://www.infrainsightblog.com/fhwa-rescinds-longstanding-buy-america-waiver-for-manufactured-products

[viii] https://www.agc.org/sites/default/files/Files/Govt%20Regulations%20and%20Executive%20Orders/Understanding%20New%20BABAA%20Requirements_Handout.pdf