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**AGING INFRASTRUCTURE: EXAMINING THE CHALLENGES AND
OPPORTUNITIES FOR IMPROVEMENT**

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I. THE CURRENT STATE OF INFRASTRUCTURE IN LIGHT OF THE IIJA

A. Overview

The Infrastructure Investment and Jobs Act (“IIJA”) is a new law that provides much-needed investments aimed at improving America’s transportation infrastructure systems. The IIJA includes the largest increase in federal highway and public transportation investment in more than 50 years.¹

The IIJA, which was signed into law on November 15, 2021 by President Biden, provides a once-in-a-generation opportunity to repair and modernize the transportation systems in each state.² The physical infrastructure improvements facilitated by the IIJA will improve the movement of people and products, making them both safer and more efficient.³

The law includes several industry-championed policy improvements including:

- Streamlined project delivery and environmental approval advancements, such as the codification of the “One Federal Decision” executive order;
- Increased investments in safety, research, and education programs; and
- Expanded access to Private Activity Bonds for highway and intermodal projects.⁴

\$450 billion has been allocated for highway, bridge, public transportation, and safety improvements.⁵ This includes five year investments in:

- railways: \$66 billion
- water infrastructure: \$55 billion
- airports: \$25 billion
- multi-modal projects: \$19 billion
- ports and marine highways: \$17 billion

The IIJA will also facilitate other non-transportation priorities, such as broadband, energy, and environmental programs.

¹ American Road & Transportation Builders Association, *Infrastructure Investment & Jobs Act: Analysis & Timeline of ARTBA Leadership on the Road to Reauthorization* at 4, WWW.ARTBA.ORG, https://www.artba.org/wp-content/uploads/2021/12/IIJA_Publication-1.pdf (2021).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* At 5.

Infrastructure Developments in 2022

- around 4,000 projects have been announced concerning roads, bridges, transit, broadband, water, etc.⁶
- DOTs will fix 65,000 miles of highways and fix 1,500 bridges in despair⁷
- \$1 billion to be made available for airport terminal development projects in fiscal year 2022. “These investments will increase capacity, expand accessibility for people with disabilities, reduce our carbon footprint, and improve airfield safety, all while creating good-paying jobs.” - Chair of the House Committee on Transportation and Infrastructure Peter DeFazio (D-OR) and Chair of the Subcommittee on Aviation Rick Larsen (D-WA)⁸

B. Roads and bridges

The IIJA includes a total of \$284 billion in transportation spending. This will go toward:

- ports and waterways
- road safety projects
- airports
- public transportation
- electric vehicle charging stations

\$110 billion has been allocated for roads and bridges.⁹ A White House press release called this sum the single largest investment in repairing and reconstructing US bridges since the construction of the interstate highway system.¹⁰ The White House also claims that \$173,000 miles of US roads and 45,000 bridges are in need of maintenance.¹¹ The IIJA will rebuild the most “economically significant” bridges as well as thousands of smaller roads, and repair crumbling roads and highways.¹²

Safe Streets and Roads for All program: aims to reduce traffic fatalities. The act designates \$1 billion for “stitching back together communities that were divided by roads or highways, in particular urban

⁶ See Barclays, *U.S. Machinery: Infrastructure: No Longer Just Prose, STOTU Shifts Focus To Doing at 1* (Mar. 1, 2022).

⁷ *Id.*

⁸ The House Committee on Transportation & Infrastructure, *Chairs DeFazio, Larsen Celebrate Investment in Airport Terminals Under the Bipartisan Infrastructure Law*, <https://transportation.house.gov/news/press-releases/chairs-defazio-larsen-celebrate-investment-in-airport-terminals-under-the-bipartisan-infrastructure-law> (Feb 23, 2022).

⁹ Julie Strupp, *7 things we know (so far) about the infrastructure act*, CONSTRUCTION DIVE, <https://www.constructiondive.com/news/7-things-contractors-should-know-about-iija-bipartisan-infrastructure-act/616917/> (Jan. 11, 2022).

¹⁰ The White House, *Fact Sheet: The Bipartisan Infrastructure Deal*, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/> (Nov. 6, 2021).

¹¹ *Id.*

¹² Strupp, *supra* note 9.

neighborhoods that were historically occupied by people of color.”¹³

- Eligible parties (metropolitan planning orgs., cities, etc.) can apply for the grant
 - Can be used for improving crosswalks, bicycle lanes, centerline and shoulder rumble strips, etc.¹⁴

C. Growth and Decline

The American Road and Transportation Builders Association (ARTBA) indicates that transportation construction market activity will grow 5% in 2022. This will be due to work beginning on IJA-supported projects and the improving economy. According to ARTBA, the biggest growth will be in these sectors:

- Amtrak and Class 1 rail work (+17%)
- Bridge and tunnel construction (+9%)
- Port and waterway projects (+6%)
- Highways and streets (+5%)
- Airports (+3%)

Subway and light rail work, however, is expected to decline by 10%.¹⁵ As explained in more detail below, the large investment into public transportation likely won't be enough to address the backlog.

D. Safety

The IJA includes several policy changes to protect “vulnerable road users:”

- Manual on Uniform Traffic Control Devices (MUTCD):
 - requires updates to the MUTCD every four years
 - Focus includes “vulnerable road users” and automated vehicles
- Safety Contingency Funds:
 - Allow state DOTs to create contingency funds, using federal resources, to cover costs for safety enhancements
- Red Grade Crossings:

¹³ *Id.*

¹⁴ US Department of Transportation, Safe Streets and Roads for All (SS4A) Grant Program, <https://www.transportation.gov/grants/SS4A> (last visited June 6, 2022).

¹⁵ Strupp, *supra* note 9.

- Continues support for safety enhancements at highway rail grade crossings
- Eliminates such crossings when feasible through highway construction over rail facilities.¹⁶

E. Build America, Buy America

The IJIA includes the Build America, Buy America Act which requires that no later than May 14, 2022, agencies shall ensure that none of the funds made available for the Federal financial assistance program for infrastructure, may be used for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the US.

The Act aims to maximize the use of goods, products, and materials produced in, and services offered in, the US. According to a White House memo, the Act specifically requires that:

(1) All iron and steel used in the project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(2) All manufactured products used in the project are produced in the United States. This means the manufactured product was manufactured in the United States, and 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, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation.

(3) All construction materials are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.¹⁷

Federal Acquisition Regulatory Council (“FAR Council”) Final Rule

Under the FAR Council’s final rule, contractors now have until October 25, 2022 to comply with a 60 percent domestic content threshold for end products and construction materials. They must get to 65 percent by 2024 and 75 percent by 2029.

The proposed rule wanted an immediate increase to the domestic content threshold from 55 to 60 percent. The final rule now gives the industry a grace period in response to comments received on the proposed rule. The final rule will “allow industry to prepare for the new domestic content threshold.” The content increases do not apply to products made predominantly of iron or steel. These are already subject to a more restrictive standard – less than 5 percent foreign iron or steel.

¹⁶ [ARTBA](#) at 18.

¹⁷ The White House, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf> (Apr. 18, 2022).

The final rule also provides:

- A discretionary alternate domestic content test will allow some contractors to “lock in” the domestic content threshold for a contract’s entire period of performance.
- A “fallback threshold” which allows agencies to use a 55 percent domestic content threshold until 2030 if they determine that:
 - No end products or construction materials are available that meet the new domestic content threshold or
 - Such products or materials are of an unreasonable cost

The fall back threshold applies to end products or construction material that:

- Don’t consist wholly or predominantly of iron or steel or a combination of both and
- Are not commercially available off-the-shelf items¹⁸

Price preferences for domestic goods under the BAA

The BAA does not prohibit the purchase of foreign end products or use of foreign construction material. Instead, it:

- encourages the use of domestic end products and construction materials by imposing a "price preference" for such goods, applied when the procuring agency assesses the "reasonableness" of the cost of domestic offers.
- If a domestic offer is not the low offer, the procuring agency applies the price preference by adding a specified percentage to the price of the foreign low offer, inclusive of duty.
- The price of the domestic bid is deemed reasonable if the bid price does not exceed the price of the low offer with the addition of the price preference.
- Under the current FAR, large businesses offering domestic supplies receive a 20 percent price preference, and small businesses offering domestic supplies receive a 30 percent price preference.¹⁹

Increased price preferences for "critical" products and components

The final rule requires procuring agencies to apply higher price preferences to end products and

¹⁸ Marques O. Peterson et al, *Final Rule Increases Compliance Obligations Under the Buy American Act*, PILLSBURY, <https://www.pillsburylaw.com/en/news-and-insights/final-rule-increases-compliance-obligations-under-buy-american-act.html> (Mar. 9, 2022).

¹⁹ Brian Picone, *Biden Administration Increases Domestic Content Requirements under Buy American Act, Enhances Price Preferences for Domestic “Critical” Goods*, WHITE & CASE, <https://www.whitecase.com/publications/alert/biden-administration-increases-domestic-content-requirements-under-buy-american> (Mar. 7, 2022).

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construction materials that OMB deems to be "critical" to US supply chains or made up of "critical components." This change will take effect on October 25, 2022. The White House has states that OMB will soon publish a final rule establishing the list of critical products and components in the FAR, and the level of additional price preference for such items.²⁰

II. HOW THE IIJA FUNDING IS GOING TO WORK/FLOW

A. How the money will flow

IIJA FUNDING

- The IIJA provides \$550B in new federal spending over the next five years.
- IIJA funding will be distributed to fund infrastructure projects in a variety of sectors – including transportation, energy, and water – through formula funding programs, competitive grant programs, and loan programs.
 - Formula funding refers to the distribution of funds to predetermined public entities (e.g., states, counties, cities) based on the characteristics of those entities (e.g., population).
 - Competitive grant programs require interested entities to apply and demonstrate how they meet program criteria in order to be awarded funds.
 - Federally administered loan programs include the loaning of money at very favorable rates to spur capital intensive infrastructure projects.
- The IIJA distributes money by (a) creating new federal programs, and (b) significantly increasing the funding available to existing federal programs.
- For most programs – especially those involving water and transportation funding – the federal dollars first flow to state/local entities. Then those state/local entities will distribute the money to additional local parties.

Overview of Key Areas and Funding

- **Roads, Bridges, and Major Projects:** ~\$110bn
 - Majority of new funding will come from ~\$55.5bn of increased contract authority
 - Another ~\$55bn of supplemental appropriations split between
 - \$5bn for national infrastructure project assistance grants
 - \$3.2bn for INFRA grants

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- \$1.25bn for the Appalachian Development Highway System
- \$500mn for surface transportation private activity bonds (PABs)
- \$95mn for University Transportation centers
- \$1bn for culvert removal and replacement
- **Passenger & Freight Rail:** ~\$66bn.
 - Funding is split between:
 - Northeast Corridor - \$6bn
 - National Network - \$16bn
 - Consolidated Rail Infrastructure & Safety Improvements – CRISI, \$5bn
 - Railroad Crossing Elimination - \$3bn
 - Federal State Partnership for Intercity Passenger Rail - \$36bn
 - Restoration & Enhancement - \$250mn
- **Public Transit:** ~\$39bn
 - ~\$19bn of funding will go towards increased contract authority
 - \$8bn towards the capital investment grants program
- **Airports:** ~\$25bn
 - \$15bn for airport infrastructure
 - \$5bn for airport terminal replacement and energy efficiency
 - \$5bn for air traffic facilities and equipment updates/upgrades
- **Ports & Waterways:** ~\$17bn
 - \$11bn for the Army Corps of Engineers, including:
 - \$5.15bn for construction
 - \$4bn for O&M
 - \$300mn for Mississippi River & Tributary

- \$100mn for general expenses/regulatory needs
 - \$2.25bn for DOT port infrastructure
 - \$430mn for Coast Guard infrastructure
 - \$385 for GSA/CBP land ports of entry modernization and construction
- **EV Charging & Buses/Transit:** ~\$15bn
 - \$7.5bn for clean school buses and ferries
 - \$7.5bn for alternative fuel corridors and electric charging
- **Safety:** ~11bn
 - \$1bn for PHMSA modernization (provides grants for community owned utilities to replace cast iron and bare steel distribution pipes)
 - ~\$2.2bn for the Federal Motor Carrier Safety Administration and the National Highway Traffic Safety Administration
 - \$55bn for the Safe Streets for All program
 - \$500mn for SMART grants (Strengthening Mobility and Revolutionizing Transportation)
 - \$1.1bn for NHTSA highway safety
 - \$500mn for FMCSA motor carrier assistance
 - \$200mn for safety grants
- **Reconnecting Communities:** ~\$1bn
 - Planning, design, and reconstruction of community infrastructure
- **Power:** ~\$73bn
 - ~\$27.7bn allocated towards grid infrastructure, resiliency, and reliability
 - ~\$27.9bn allocated towards fuel and technology infrastructure
 - ~\$7.7bn for clean energy supply chain
 - \$9.5bn for clean energy R&D
 - ~\$750mn for hydropower incentives

- **Broadband:** ~\$65bn
 - ~42.5bn for deployment grants to states, supported by an additional \$600mn for private activity bonds
 - \$2bn for rural support
 - \$1bn for “middle mile” telecommunication infrastructure
 - \$2bn for the Tribal Broadband Connectivity Program
 - \$2.75 in inclusion funding
 - \$14.2bn for wireless affordability
- **Water:** ~\$55bn
 - ~\$23.5bn will go towards the Drinking Water and Clean Water State Revolving funds
 - \$15bn will go towards lead service line replacement
 - \$10mn will go towards PFAS programs
 - \$1bn will go towards Bureau of Reclamation water programs
 - \$1.8bn will go towards tribes and tribal assistance organizations
- **Environmental Remediation:** ~\$21bn
 - \$3.5bn for the Hazardous Substance Superfund
 - ~\$1.5bn for brownfield competitive grants
 - \$16bn for orphan wells and abandoned mine reclamation
- **Resiliency:** ~\$47bn
 - Work in this category includes:
 - Flood mitigation
 - NOAA funding
 - FEMA grants
 - Waste management and recycling
 - Drought planning

- Ecosystem resilience
- Wildfire management
- Cyber R&D, etc. ²¹

Key formula initiatives according to ARTBA²²:

- **National Highway Performance Program (NHPP):** \$144.8 billion over five years
 - new eligibility for states to invest in:
 - resiliency against natural disasters;
 - cybersecurity threats; and
 - underground utility work.
- **Surface Transportation Block Grant Program:** \$72 billion over five years
 - increases the percentage of resources set-aside for the Transportation Alternatives Program from 7.5 percent to 10 percent.
 - retains existing eligibilities and allows states to use funds for:
 - electric vehicle charging stations;
 - intelligent and emerging transportation technology projects;
 - wildlife crossings;
 - resiliency and cybersecurity; and
 - waterfront infrastructure.
- **Bridge Construction Program (NEW):** \$27.5 billion over five years
 - this new initiative creates a rehabilitation and construction program to repair bridges on the National Highway System.
 - Resources are delivered via a formula calculated based on bridge conditions in each state.
 - Funding for this program comes from the General Fund and not the Highway Trust Fund

²¹ See Barclays, US Machinery & Construction: If You Build It, Share Returns Will Come; IJJA's Benefit to Professional Service Co's., at 6-10

²² ARTBA at 8-10.

(HTF).

- **Highway Safety Improvement Program (HSIP):** \$15.6 billion over five years
 - extends the use of HSIP funds to non-physical improvement programs, including driver behavior campaigns.
 - The revised HSIP emphasizes significant safety enhancements for “vulnerable road users,” including pedestrians, cyclists, and persons with disabilities, but still leaves decision-making authority with the states.
- **Congestion Mitigation and Air Quality (CMAQ):** \$13.2 billion over five years
 - expands CMAQ eligibility to include marine projects (i.e., lock and dam modernization projects and marine highway improvements) that are connected to the federal-aid highway system,
 - includes “micro-mobility” projects such as scooters and bike-share systems, as well as the purchase of zero-emission medium and heavy-duty vehicles and charging equipment.
 - The IIJA allows U.S. DOT to assist metropolitan planning organizations in tracking emissions reduction progress in disadvantaged communities as part of a performance plan
- **National Highway Freight Program (NHFP):** \$7.2 billion over five years
 - states may use up to 30 percent of NHFP funds on multi-modal projects, an increase from 10 percent.
 - New use of funds includes rural freight networks, lock, dam, and marine highway assets—if they are likely to reduce on-road emissions.
- **Promoting Resilient Operations for Transformative, Efficient, and Cost-saving Transportation (PROTECT) Grant Program (NEW):** \$7.3 billion over five years
 - establishes both a formula and discretionary program aimed at rewarding states that enhance the resiliency of transportation infrastructure and make plans for future improvements.
 - The \$7.3 billion in formula funding can be directed to projects that protect coastal infrastructure, improve evacuation routes, and other resiliency efforts.
- **Carbon Reduction Program (NEW):** \$6.4 billion over five years
 - provides resources to reduce transportation-related emissions.
 - Diesel engine retrofit projects and projects aimed at reducing the environmental and community impacts of freight movement are eligible.

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- Only states participating in the program will be required to submit carbon reduction strategies to the U.S. DOT, with the first state report due two years after the IIJA's enactment
- **National Electric Vehicle Formula Program (NEW):** \$5 billion over five years
 - provides funding to states to build out EV charging infrastructure
 - establishes an interconnected network to facilitate access and reliability for zero-emission vehicles.

The IIJA reserves a portion of annual highway funds for US DOT control. The IIJA provides the US DOT with control over \$8.6 billion in resources in FY 2022 and that amount will grow to \$9.5 billion by FY 2026.

Major discretionary project support categories according to ARTBA²³:

- **Nationally Significant Freight and Highway Projects (NSFHP):** \$8 billion over five years
 - allows the U.S. DOT to use up to 30 percent of annual funding for multi-modal projects, up from 10 percent.
 - broadens eligibility to resiliency, wildlife crossings, freight-related waterway, and international border projects.
 - New transparency provisions in the selection process for NSFHP are also included.
- **Bridge Investment Program (NEW):** \$12.5 billion over five years
 - directs resources from the HTF (\$3.3 billion over five years) and General Fund (\$9.2 billion over five years) to repair and replace bridges.
 - Projects must total at least \$2.5 million, and each state is guaranteed at least one project.
- **Charging and Fueling Infrastructure Grants (NEW):** \$2.5 billion over five years
 - creates a grant program to assist in the build out of EV and alternative fuel infrastructure.
- **Rural Surface Transportation Grant Program (NEW):** \$2 billion over five years
 - directs at least 25 percent of the resources to improvements on the Appalachian Development Highway System, and 90 percent must go to projects of at least \$25 million.
- **Promoting Resilient Operations for Transformative, Efficient, and Cost-saving Transportation**

²³ *Id.* at 11.

(PROTECT) Grant Program (NEW): \$1.4 billion over five years

- the discretionary portion of this program intends to support states that enhance the resiliency of transportation infrastructure and make plans for future improvements.
- Resources are directed to projects that protect coastal infrastructure, improve evacuation routes, and other resiliency efforts.
- **Appalachian Development Highway System (ADHS):** \$1.25 billion over five years
 - The ADHS was established in 1965 to connect a series of highways to the Interstate Highway System in the Appalachian Mountain region.

Research and Technology

\$2.6 billion has been allocated for research and technology:

- **University Transportation Centers:** funding for the network of transportation research centers grows from \$77.5 million in FY 21 to a five-year average of \$100 million
- **Revenue-Based Pilot Programs:** supports two pilot programs to examine various user-based revenue solutions
 - \$75 million to continue existing programs that study various road use-based revenue systems
 - \$50 million program designed to look at the feasibility of per-mile user-based revenue solutions and identify multiple ways revenue could be collected from program volunteers.²⁴

P3s and innovative financing:

- Transportation Infrastructure Finance & Innovation Act (TIFIA)
 - \$250 million per year for the program
- Railroad Rehabilitation and Improvement Financing (RRIF)
 - Authorizes \$50 million per year for credit assistance and \$70 million to repay the program's credit risk premium
- Value for Money Analysis
 - Sponsors of projects estimated over \$750 million that have P3 enabling legislation

²⁴ *Id.* at 19.

- Toll Credits
 - Toll credit exchange program where U.S. DOT may allow up to 10 states with unused toll credits to transfer or sell them to other states.

Multi-modal Grants

\$19 billion has been allocated for five multi-modal grant programs:

- **National Infrastructure Project Assistance**, \$5 billion over five years:
 - projects are usually of regional or national significance; and
 - must be highway, freight, freight rail, transit or multi-modal in nature.
 - Project will receive \$1 billion per year from FY 2022 through FY 2026 and the funding is available until it is expended.
- **Local & Regional Project Assistance**, \$7.5 billion over five years:
 - strongly resembles the RAISE discretionary grant program (formerly known as TIGER and BUILD) that has received \$1 billion in funding the last four appropriations cycles.
 - Grants will go to surface transportation projects that can be smaller, but still of local importance.
 - This discretionary grant program will receive \$1.5 billion per year over five years.
- **Safe Streets & Roads for All Grant Program**, \$5 billion over five years:
 - new competitive grant program
 - funded at \$1 billion per year from FY 2022 through FY 2026, for localities to implement safety plans with the goal of preventing fatalities on streets.
- **National Culvert Removal, Replacement & Rehabilitation Grants**, \$1 billion over five years:
 - \$200 million per year program aims to enhance and improve fish and other animal passage where roads and waterways meet
- **Strengthening Mobility & Revolutionizing Transportation (SMART) Grant Program**, \$500 million over five years:
 - invests \$100 million per year into autonomous, connected, and other intelligent

transportation system enhancements²⁵

Along with guaranteed funding, another \$27.9 billion is authorized for these or other similar programs.²⁶

Highway & Commercial Vehicle Safety Programs

The IIJA reauthorizes the Federal Motor Safety Carrier Safety Administration and the National Highway Traffic Safety Administration for 5 years and increases resources available to both programs. It will receive:

- \$9.5 billion from HTF revenues
- \$2.3 billion from the General Fund
- \$2.8 billion for NHTSA is authorized (subject to annual appropriations process)²⁷

B. How it's paid for

The IIJA does not address the HTF's revenue shortfall. Instead, it:

- Transfers \$118 billion from the federal General Fund to the HTF to cover the difference between projected outlays from its road, bridge, and transit investments and existing highway user fee revenue sources.
- Utilizes \$852 billion from a variety of sources to offset its investment levels, such as
 - \$205 billion in unused COVID-19 emergency funding.
 - \$87 billion from past and future spectrum auctions.
 - \$56 billion from projected tax revenue from infrastructure investments.
 - \$53 billion from states that did not use their previously allocated unemployment insurance during the pandemic.
 - \$49 billion by delaying until 2026 a Medicare prescription drug rule.
 - \$28 billion from reducing potential cryptocurrency tax avoidance.
 - \$6 billion from selling oil from the strategic petroleum reserve.
- Extends existing motor fuels and other HTF user fees at current rates through FY 2028²⁸

²⁵ *Id.* at 20.

²⁶ *Id.*

²⁷ *Id.* at 21.

²⁸ *Id.* at 14

III. SOME OF THE TANGENTIAL IMPACTS OF IJIA ON PROCUREMENT AND PROJECT DEVELOPMENT

A. Project Delivery & Process Improvements

The codification of “One Federal Decision” will streamline the National Environmental Policy Act by:

- Consolidating all permitting decisions into one single document
- Designating a federal “lead” agency that determines a schedule for the process
- Setting a goal of finalizing reviews within an average of two years; and
- Requiring completion of all authorization decisions for a major project within 90 days of issuance of a record of decision²⁹

Other ways the IJIA improves Project Delivery & Process Improvements:

- Directs US DOT to issue annual report detailing progress made on improving project delivery
- Allows more projects with limited federal resources to qualify for categorical exclusion status
- Makes it easier to gain CE authorization for projects already in an existing right of way by setting a 45-day deadline for preliminary approval
- Reforms the transportation planning process through the elimination of “fiscal constraint” requirements for projects beyond a four-year timeframe.³⁰

B. Public-Private Partnerships

The IJIA will likely popularize this type of procurement method. According to ConstructionDive, the three following measures will likely boost PPS:

- **Section 80403** would raise the cap on private activity bonds for highway and surface freight transfer facilities. The increase from \$15 billion to \$30 billion should help address current demand and lower the cost of private financing on future PPP projects.
- **Section 71001** provides \$100 million, disbursed over five years, for a program to provide technical assistance with PPP procurement for project sponsors that lack capacity to engage the experts they need.
- **Section 70701** requires a value-for-money analysis to ensure that certain projects — those receiving Transportation Infrastructure Finance and Innovation Act (TIFIA) and Railroad Rehabilitation & Improvement Financing (RRIF) credit assistance — evaluate whether a PPP

²⁹ *Id.* at 17.

³⁰ *Id.*

would provide public benefit over a conventional delivery method.³¹

C. Trade Agreements

The Trade Agreements Act of 1979, limits the Buy American Act's applicability by requiring US government procurements to treat as if they were domestic those materials originating in a country with which the United States has a covered trade agreement.³²

IV. OPPORTUNITIES & CHALLENGES PRESENTED BY THE IIJA

A. Opportunities

Jobs

4.0 million jobs would be supported annually by the Build Back Better agenda, including:

- 1.1 million caregiving jobs
- 763,000 green jobs
- 556,000 manufacturing jobs
- 312,000 construction jobs³³

The Act specifically boosts union and minority jobs

- The Disadvantaged Business Enterprise – creates targets for DBE business participation in federal contracts and will ensure that at least part of the funds are awarded to businesses led by women and people of color
- The Act establishes the Minority Business Development Agency to help DBE companies get access to contracts, capital, and grants.
- Supports the creation of training centers for the installation and maintenance of energy-efficient building technologies, run in partnership with employers and labor unions
- Government agencies must prioritize high labor standards (paying prevailing wages and offering the chance to join a union).³⁴

B. Challenges

Delayed Funding

³¹ Strupp, *supra* note 9.

³² Picone, *supra* note 19.

³³ Adam S. Hersh, 'Build Back Better' agenda will ensure strong, stable recovery in coming years, ECONOMIC POLICY INSTITUTE, <https://www.epi.org/publication/iija-budget-reconciliation-jobs/> (Sept. 16, 2021).

³⁴ Strupp, *supra* note 9.

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Although it was enacted in November, states and localities didn't have access to the full amounts contained in the IJA for four months. This was rectified in March with the enactment of an omnibus 2022 appropriations bill. However, because the funding was delayed, many potential IJA funded projects are still in the planning stages.³⁵

Project owners may need to reassess how they're procuring large-scale civil authorities

In order for IJA's mega projects to be successful, Travelers believes there are some red flags that need to be addressed.³⁶

Travelers released an Infrastructure study which looked at 224 heavy civil construction projects over a 17 year span from 2004-2020.³⁷ The study looked at projects with contract values between \$250 million and \$2 billion, including bridge, highway, rail/light rail, tunnel, and other large-scale civil work.³⁸

Travelers observed that even though jobs are big and do get completed, contractors weren't performing well, and many jobs lost money.

According to Stan Halliday, Chief Underwriting Officer at Travelers:

- roughly 50% of jobs in excess of \$250 million in contract value that are done on a design-build basis do not earn an acceptable return for the contractor, and
- roughly 25% of those projects lose money completely³⁹

Travelers advises a more collaborative approach when it comes to the design-build:

- progressive design-build: pricing is determined as the design progresses and is only finalized just prior to design completion.
- construction manager / general contractor (CMGC) at risk method: the project owner hires a designer separately from the contractor and they'll then work together on pre-construction to put together a plan and a budget.⁴⁰

Decline of Public Transit – Can the IJA revive public transit?

³⁵ Tom Ichniowski, *At Six-Month Mark, IJA Funds Flow but Other Provisions Spark Concerns*, ENGINEERING NEWS-RECORD, <https://www.enr.com/articles/54125-at-six-month-mark-ija-funds-flow-but-other-provisions-spark-concerns> (May 16, 2022).

³⁶ Bethan Moorcraft, *\$1.2 trillion infrastructure bill requires new look at project procurement methods*, INSURANCE BUSINESS AMERICA, <https://www.insurancebusinessmag.com/us/news/construction/1-2-trillion-infrastructure-bill-requires-new-look-at-project-procurement-methods-311319.aspx> (Sept. 27, 2021).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

Aging Infrastructure

The IIA commits \$39 billion in new funding for local public transit.⁴¹ However, experts say the maintenance and construction needed to improve public transit is expensive - Chicago's Red and Purple Line Modernization program, for example, is projected to cost \$8.7 billion over 10 years.⁴²

Experts claim that major investments in private transit infrastructure will create more congestion in cities and make bus routes slower.⁴³ Further, ridership levels are well below pre-COVID levels.⁴⁴ The New York Metropolitan Transportation Authority expects to see subway ridership as much as 20 percent below pre-COVID levels through 2024.⁴⁵

V. Q&A

⁴¹ Gabby Birenbaum, *The bipartisan infrastructure bill provides historic funding for transit. It's not enough*, VOX, <https://www.vox.com/22621793/public-transit-funding-bipartisan-infrastructure-bill> (Aug. 23, 2021).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Thomas Day, *Federal Transit Billions Are Coming, but There's a Catch*, GOVERNING, <https://www.governing.com/nw/federal-transit-billions-are-coming-but-theres-a-catch#:~:text=The%20Infrastructure%20Investment%20and%20Jobs,beefed%2Dup%20federal%20grant%20dollars> (May 12, 2022).

⁴⁵ *Id.*