
Navigating federal requirements on federally funded California state and local public construction projects

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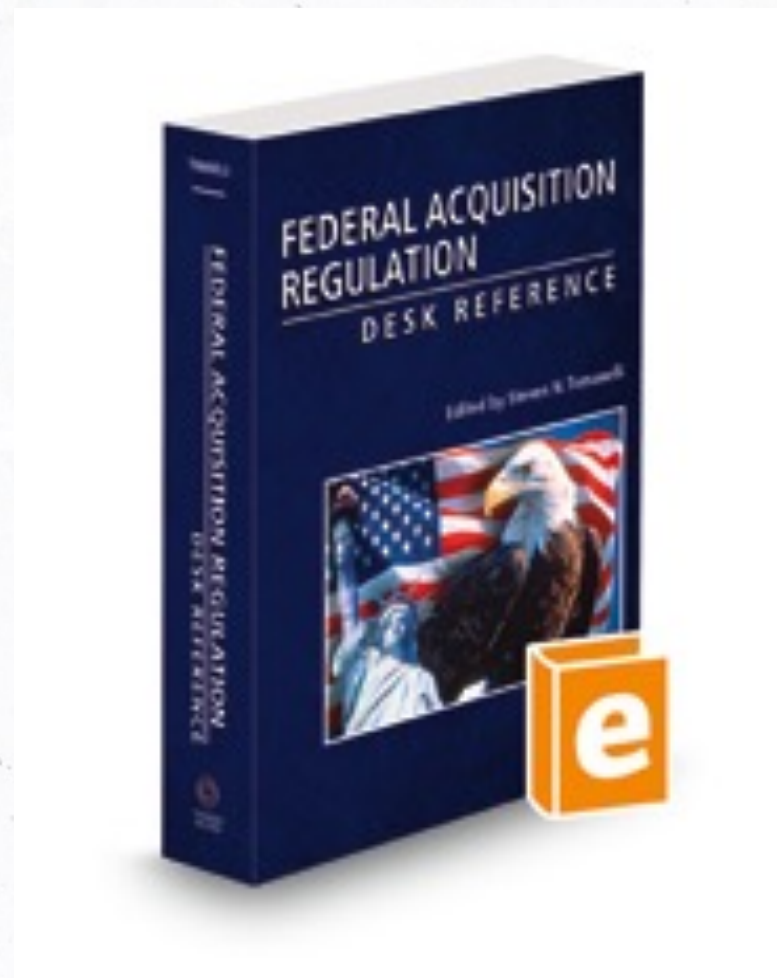
Federally Funded S&L Projects Are Big \$

- **\$550B** under Infrastructure Investment and Jobs Act of 2021 (the “Infrastructure Act”)
- **Over \$700B** under Inflation Reduction Act of 2022
- Projects are already out for bid and/or in contract
- Many more are coming



Federally Funded vs. Federally Owned

- Federally Funded
 - Grants
 - Tax Incentives
- Federally Owned (Gov Contracts)



Federally Owned vs. Federally Funded

Roles

- Fed Gov = Owner
- S/L Gov = None (or Prime)
- Contractors
 - Fed Prime
 - Subs

Roles

- Fed Gov = Grantor
- S/L Gov = Grantee/Owner
- Contractors
 - S/L Prime
 - Subs

Federally Owned vs. Federally Funded

- Funding/Appropriations
 - Fed
- Requirements Definition
 - Fed
- Solicitation/Procurement
 - Fed
 - Will include FAR & Agency Provisions

- Funding/Appropriations
 - Fed (100% or Partial)
- Requirements Definition
 - S/L Gov
 - Subject to Fed grant requirements
- Solicitation/Procurement
 - S/L Gov
 - Subject to Fed grant requirements
 - May include FAR & Agency Provisions

Federally Owned vs. Federally Funded

Prime Contract

- Will include FAR & Agency Clauses
- *Christian* Doctrine
- Fed law applies

Subcontracts

- May include FAR & Agency Clauses
- No *Christian* Doctrine (Likely)
- S/L laws apply? (“Fed enclaves”)

Prime Contract

- May include FAR & Agency Clauses
- No *Christian* Doctrine
- S/L laws apply

Subcontracts

- May include FAR & Agency Clauses
- No *Christian* Doctrine
- S/L laws apply

Types of Federal Requirements

THE BIG ONES:

- Domestic Source
- Prevailing Wage & Apprentices
- Disadvantaged Business Enterprises (DBEs)

Federally Owned vs. Federally Funded

Others Include ...

- **Anti-Discrimination/EE**
- **PLAs**
- **Sustainability**
- **Cybersecurity**
- **Anti-Assignment/Subletting**
- **Anti-human trafficking**
- **Procurement Integrity**
- **Lobbying Restrictions**
- **Subcontracting Plans**
- **Documented Labor**
- **Debarred & Suspended Entities**

Consequences of Non-Compliance

- Breach remedies
 - Damages Liability
 - Default Termination
- Suspension & Debarment
- False Claims Liability
- Performance Evaluations

Recent Major Federal Grant Legislation

- Coronavirus Aid, Relief, and Economic Security Act (CARES Act) of 2020
- Infrastructure Investment and Jobs Act of 2021
- Inflation Reduction Act of 2022
- Creating Helpful Incentives to Produce Semiconductors (CHIPS) and Science Act of 2022

The Infrastructure Investment and Jobs Act of 2021

“The Infrastructure Act” Public Law 117-58

Overview

- Signed into Law by Pres. Biden Nov. 15, 2021
- Known as IJIA, or Bipartisan Infrastructure Law (BIL)
- \$550 Billion authorized over fiscal year 2022 to 2026
- Roads, Bridges, Mass Transit, Water Infrastructure, Resiliency Efforts for Climate Change and Natural Disasters, Broadband Infrastructure

Key Figures

- \$110B for road repairs, bridges, and major transformational projects
 - In addition to current 5-year authorization for surface transportation (\$89B)
- \$39B to modernize transit programs
- \$17B in port infrastructure and \$25B in airports
- \$66B in additional rail funding (largest since Amtrak started)
- \$7.5B for EV charging network
- \$21B for Superfund and Brownfield clean up sites

Build America, Buy America Act

Title IX of the Infrastructure Act, §§ 70901-53

Domestic Preference Requirements

The act extends the list of Materials

- Iron and Steel, Manufactured Products, and new item *Construction Materials*.

...And expands the list of Projects

- Not just roads and rail
- Now includes structures, facilities, equipment, optical fiber, lumber, water and broadband infrastructure

Build America Buy America (Cont.)

Example Public Report

- **Public reporting feature for all federally-funded infrastructure projects**
- **Each agency must report deficient programs. § 70913.**

PUBLISHED DOCUMENT

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AGENCY:
Denali Commission.

ACTION:
Notice.

SUMMARY:
Section 70913(a) of the Infrastructure Investment and Jobs Act requires that the head of each Federal agency shall submit to the Office of Management and Budget and to Congress a report that identifies each Federal financial assistance program for infrastructure administered by the Federal agency, and that that report be published in the **Federal Register** .

FOR FURTHER INFORMATION CONTACT:
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DOCUMENT STATISTICS

Source: [federalregister.gov](https://www.federalregister.gov)

“Produced in the United States” means . . .

Iron and Steel:

All manufacturing processes from initial melting stage through application of coatings occurred in US

Manufactured Products:

Cost of components manufactured in US and that are mined, produced, or manufactured in US > **55%** total cost of all components

Construction Materials:

All manufactured processes for construction material occurred in US

Does not include cement or cementitious materials, aggregates in stone, sand, or gravel, or binding agents or additives. § 70917(c)(1)

The Buy America Act (enacted in 2005)

23 USC § 313

- Secretary of Transportation may obligate funds for Surface Transportation Act of 1982 only if Steel, Iron, and Manufactured Products are produced in the U.S.
 - Applies to surface transportation including highways, railways, and rapid transit systems
- Waiver Requirements
 - Inconsistent with public interest
 - Products not produced in US with sufficient and reasonable quantity
 - Would increase the cost of project by > 25%

Davis-Bacon Act

- Key component of Infrastructure Act
- Many Infrastructure-funded projects will require D-B wage compliance
- Requires:
 - Pay prevailing wages listed in wage determination
 - Keep accurate records of hours worked and wages paid
 - Enforce same obligations through subcontractors
 - Funding recipients must include D-B contract clauses set forth in 29 CFR 5.5.

Davis-Bacon Act (cont'd)

- Potential criminal liability for submitting false certified payrolls
 - *See, e.g. United States v. Estepa*, 998 F.3d 898 (11th Cir. 2021)
(contractors engaged in repairing vacant public housing units partially funded by fed. government were convicted of wire fraud and conspiracy to commit wire fraud)
 - Stated no subs would be used and then paid subs flat rates for work
 - Listed subcontractors as employees and made up number of hours
 - Certified payrolls substituted names of workers who were unauthorized
- Enhanced risk from Davis-Bacon Act Modernization in regs

California Prevailing Wage

Director of the California Department of Industrial Relations makes determination Feb. 22 and Aug. 22

Prevailing wage rate is the basic hourly rate paid on public works projects to majority of workers engaged in particular craft, classification or type of work within locality and in nearest labor market area

California prevailing wages will almost always be higher than minimum fed. wages

Resource: DIR website FAQ -
https://www.dir.ca.gov/OPRL/FAQ_PrevailingWage.html#q1

Make PPE in America

- Requires Government to award long-term contracts to domestically manufacture Personal Protective Equipment (PPE)
- Masks and gloves
- Came out of PPE shortage during COVID pandemic
- Follow-on to CARES Act

Forced Labor Restriction

- Requires coordination with US Customs and Border Protection
- Ensure that no illegal products or materials produced with forced labor are procured with funds made available under Infrastructure Act
- Look out for regulations that require compliance and training programs
 - Might requires drafting strict Code of Conduct
 - Mandatory annual training on Code of Conduct
 - Internal controls
- Parallel Example: F.A.R. § 3.1002 requires contractors with Fed. Government to have written codes of conduct, employee training on business ethics and internal controls to ensure detection

Disadvantaged Business Enterprise

Program of Department of Transportation (DOT)

Definition of “DBE”:

For-profit small business concern where socially and economically disadvantaged individuals own at least 51% interest and also control management and daily business operations.

Source: transportation.gov

DBEs (Continued)

State and Local Transportations receiving DOT assistance must:

- certify the eligibility of DBE firms in their DOT-assisted contracts
- establish narrowly-tailored goals for the participation of disadvantaged entrepreneurs
- Evaluate DOT-assisted contracts through the year and establish contract-specific DBE subcontracting

DBEs (Continued)

What is the Infrastructure Law's Impact to DBE?

Large amounts of funding

10% of amounts made available under Division A (surface transportation), 10% of Division C (Public Transportation Programs under the Federal Transit Administration), and safety R&D

Enduring Sign for DBE

Congress determined that DOT's DBE program has been successful, but DBEs still are underrepresented in federally assisted programs.

The Inflation Reduction Act of 2022

Public Law 117-169



Overview

- Signed into Law by Pres. Biden Aug. 16, 2022
- Projects to reduce greenhouse gas emissions across US economy
- Energy, transportation, water, buildings and manufacturing sectors

Key Figures

- \$739B in tax incentives + authorized funding
- \$369B over 10 years aimed at reducing carbon emissions
- Projected nearly \$3.5T in cumulative capital investment in new US energy supply infrastructure (2023-2032)

Grants & Tax Credits

GRANTS

- \$27B **Greenhouse Gas Reduction Fund**
- \$3B to fund **Neighborhood Access and Equity Grants**
- \$4B for US Bureau of Reclamation to use to address **drought in western US**
- \$BB for urban forests/parks, community resilience & water supply projects
- \$3B for **ports** to support climate action plans and purchase zero-emission technology and equipment
- \$1B **clean heavy-duty vehicle program** for zero-emission transit buses, garbage trucks and school buses (and related infrastructure)

Grants & Tax Credits

TAX CREDITS

- Extends fed. tax credits to spur **renewable energy** projects
 - Energy generation, transmission and inter-connection projects
 - Enhanced incentives for wind/solar projects for power to low-income communities
- Expands and extends 45Q credit for **carbon capture, utilization and storage** (CCUS) and direct air-capture projects
- Credit to keep **nuclear power plants** operating
- Tax credits for renewable power-generated **green hydrogen** projects
- **Energy storage** projects qualify for investment tax credit (first time)
- New production tax credits for **battery deployment** and domestic battery production and processing of critical minerals in battery supply chain

Labor Requirements

- Conditions receipt of higher bonus rate for tax incentives on meeting Davis-Bacon prevailing wage and apprenticeship requirements
 - Laborers and mechanics paid prevailing wages during construction, and, in some cases, for alteration and repair for defined period after project placed into service
 - Gov.-registered apprentices perform specific % of total labor hours
 - 10% of apprentices for projects for which construction begins in 2022, 12.5% in 2023 and 15% thereafter
 - If employ 4+ individuals to perform construction on project, must also employ at 1+ gov.-registered apprentice to perform such work

Buy America Requirements

- Conditions receipt of tax incentives on meeting domestic source requirement
 - Must ensure that any steel, iron or manufactured product that is part of project at time of completion was produced in US
 - Steel and iron must be 100% produced in US (same as IIJA)
 - Manufactured products are deemed to have been manufactured in US if adjusted % of total cost of components and subcomponents of project is attributable to components that are mined, produced or manufactured in US
 - Adjusted % applicable depends on ...
 - when construction starts (increasing through 2026/2027)
 - whether for offshore wind facilities (start lower than other projects)

Green Building Requirements

- \$330M in grants to states and localities to adopt energy codes meeting certain standards
 - Also authorizes \$670M for states and localities to adopt and carry out zero-energy “stretch” codes
- Not S/L projects but, FYI ...
 - Fed. Gov. (GSA) projects: \$215M for fed. buildings retrofits, \$2.15B to install low-embodied carbon materials and products in fed. building construction or renovation
 - Energy-efficiency provisions targeted for residential sector

More to Come?

IRA concessions to Sen. Manchin included commitment to enact permitting reforms for construction projects by end of September



Any questions?



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