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ACCNJ LEGAL & INSURANCE UPDATE

Proposed Changes to Davis Bacon Act Would Apply Prevailing Rate to More Off-Site Operations

On March 18, 2022, the Wage and Hour Division of the U.S. Department of Labor (DOL) released a [proposed rule](#) to significantly revise the regulations implementing the Davis-Bacon Act and its prevailing wage requirements on federal projects (and those receiving federal financial assistance). The rule changes hit on a host of issues that have impacted the Davis Bacon program over the last 40 years.

One of the more significant changes relates to the “site of work” provisions, which establish the rules for determining what types of offsite activity are subject to prevailing wage. Traditionally, the Davis-Bacon Act only applied to onsite labor, with few exceptions. One such exception is a secondary site where: (1) a significant portion of the building or work is constructed, and (2) such site is established specifically for the performance of the contract or project. Under the proposed changes, the second prong would be eliminated, and compliance officers would look solely to whether a “significant portion” of the work is performed at the secondary site. To help illustrate the potential impact of this change, consider the following:

*A project site is in Newark. Large structural modules will be constructed in Facility X, which is located 100 miles away. Facility X was not established specifically for the federal project and work is performed for other unrelated projects at Facility X. Under the current rules, Facility X is not covered by Davis Bacon because it was not established as a secondary site specifically for the federal project. Under the proposed rules, Facility X **might be** covered if the activity is considered a “significant portion” of the building or work to be constructed.*

Notice how the new rule creates uncertainty (which is something contractors do not need more of). Determining whether something is “significant” or not is a subjective process that will inevitably lead to inconsistent results concerning prevailing wage coverage. This is especially true with respect to several different types of offsite manufacturing and/or fabrication commonly incorporated into modern-day construction projects.

DOL insists that it will create a workable definition for “significant portion” and that standard prefabrication will remain excluded from coverage. The proposed rule indicates the definition will focus on: (1) the type/size of the work performed at the offsite location (i.e., entire modules as opposed to smaller prefabricated components), and (2) the type of work that needs to be performed once the item is delivered to the project site. If there is minimal construction work remaining other than installation and/or assembly, then the item is likely covered by prevailing wage.

Unfortunately, this strategy seems alarmingly close to the approach taken by the New Jersey legislature concerning “custom fabrication.” Changes to our State’s prevailing wage law in 2019 added prevailing wage coverage to prefabricated items which are “*either of components or structures pre-fabricated to specifications for a particular project of public work or of other materials finished into components without further modification for use in a project of public work or for use in a type or classification of a project of public work.*” (See N.J.S.A. 34:11-56.26(12)(b)). This language has proven unworkable, and we are still waiting for regulatory guidance on how to implement it. If the DOL is to create a workable definition for “significant portion,” it must avoid assessments of “customization” as this is a purely subjective concept. Prevailing wage laws must have more certainty in their application. Contractors rely on these rules when calculating labor costs and preparing bids. The proposed changes concerning secondary sites will hurt a contractor’s ability to predict labor costs and prepare accurate bids on Davis-Bacon projects.

Luckily, the proposed rules are still subject to a comment period, which will end on May 17, 2022 (barring any extension). ACCNJ will be working with AGC of America to submit comments concerning the proposed rule changes. Members are encouraged to reach out to the Association to share any concerns and/or comments they may have. For additional reading on some of the other changes in the proposed rules, [CLICK HERE](#).

A Look at Domestic Sourcing Initiatives in the New Infrastructure Law

Last year concluded with Congress passing the Infrastructure Investment and Jobs Act (“Infrastructure Bill”). The Infrastructure Bill creates plenty of opportunity for the construction industry, but with it comes new challenges. One such challenge is the Infrastructure Bill’s domestic sourcing initiatives, which will require contractors working on these projects to use domestically sourced construction materials. These are commonly referred to as the “Buy American” and/or “Buy America” initiatives. The Biden Administration is expanding on these concepts using executive, legislative, and regulatory processes.

A. The Sources of Change

Thus far, the three primary sources of change have come from the following:

1. [Executive Order 14005](#), which was signed during Biden’s first week of office. The EO initiated a review of Buy American policy. This eventually culminated in the FAR Rule discussed in #3 below.

2. [Infrastructure Bill](#), which contained changes to “Buy America” statutes and regulations applicable to federal financial assistance used in infrastructure-related projects. “Buy America” is different from “Buy American” (although they are commonly confused as being the same thing). “Buy American,” which stems from the Buy American Act of 1933 (BAA), refers to the rules and regulations applicable to direct federal government procurements of products used in federal projects. Whereas “Buy America” commonly refers to the statutes and regulations applicable to contractors working on federally assisted projects (traditionally in the transportation sector).

3. [FAR Rule Change](#). On March 7, 2022, the Federal Acquisition Regulatory Council (FAR Council) published a final rule implementing changes to “Buy American” requirements. The changes mainly dealt with the amount of domestic content necessary for a product to be considered “domestic end product” (details of which are provided below).

B. Expected Changes

Collectively, these new laws and rules will accomplish three initiatives:

1. **The types of projects subject to “Buy America” requirements will expand.** Buy America requirements were typically limited to certain transportation and water-related projects. Now, Buy America will apply to a broader spectrum of federal projects. The most notable expansion is its application to utility projects and electrical transmission facilities.

2. **The types of construction materials covered by “Buy America” requirements will expand.** Buy America requirements were typically limited to iron and steel. Now, many Buy America requirements will also include nonferrous metals like copper, plastic products, polymer-based products, glass, composite building materials, lumber, and drywall. Notably, cement has been carved out.

3. **The percentage of domestic content necessary for a product to qualify as “domestic end product” will increase.** Currently, Buy American regulations require a product to contain 55% domestic components to qualify as domestic. On March 7, 2022, FAR implemented a final rule, which increases this threshold to 60% effective October 25, 2022, followed by an increase to 65% in 2024, and an increase to 75% in 2029.

C. Waivers

With each of these rules, there are common exceptions. The beneficiaries of federal financing can seek waivers of domestic sourcing requirements based on public interest, practicality/impossibility, or cost. Specifically, the new law allows a federal agency to waive the requirement if:

1. applying the domestic content requirement would be inconsistent with the **public interest**;
2. types of iron, steel, manufactured products, or construction materials are not produced in the United States in **sufficient and reasonably available quantities or of a satisfactory quality**; or
3. the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than **25 percent**.

For each of these waiver types, the new laws will require an agency seeking a waiver to submit a request to the General Services Administration, which must publish the request on a newly established BuyAmerican.gov website and keep the request open for public comment for at least 15 days. The focus is on increasing transparency around when and how waivers are granted to limit inappropriate waivers.

D. Implementation Status

The Buy America obligation becomes effective on May 14, 2022. The Office of Management and Budget (OMB) has until November 14, 2022, to “promulgate final regulations or other policy or management guidance, as appropriate, to standardize and simplify how Federal agencies comply with, report on, and enforce the Buy American Act.”

ACCNJ will of course keep members up to date on the latest surrounding domestic sourcing initiatives attached to the new infrastructure spending.

EMAIL US

WEBSITE



ACCNJ | 91 Fieldcrest Ave, Suite A-19, Edison , NJ 08837-3627

[Unsubscribe jbarna@accnj.org](mailto:jbarna@accnj.org)

[Constant Contact Data Notice](#)

Sent by accnj@accnj.org