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Client Alert

Trial and Global Disputes

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Infrastructure Investment and Jobs Act: Key Provisions and Considerations for Project Participants

INTRODUCTION

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act ("Infrastructure Act"), which provides for $550 billion in new federal spending on infrastructure in the United States over a five-year period. The Infrastructure Act provides for federal spending on infrastructure in excess of New Deal levels as measured as a percentage of US GDP, and constitutes a key opportunity to strengthen the competitiveness of the U.S. economy.[1] The White House estimates that the Infrastructure Act will create approximately 1.5 million new jobs per year.[2]

The Infrastructure Act provides for $284 billion in new spending on America's transportation infrastructure, including but not limited to $110 billion for roads and bridges, $66 billion for railroads, $39 billion for public transportation systems, $25 billion to upgrade and expand U.S. airports, and $15 billion for electric vehicles. The Infrastructure Act also provides for $240 billion in new investments in the utilities sector, including $65 billion for upgrades to the power grid, $65 billion to expand broadband internet access in rural areas, $55 billion for water infrastructure, and $47 billion for strengthening U.S. resilience in the areas of cybersecurity and climate change. In addition, the Infrastructure Act commits $21 billion to remediate pollution, including superfund and brownfield sites.[3] A number of large-scale infrastructure projects have been identified as potential recipients of funding under the Infrastructure Act, including the expansion of the Brent Spence Bridge in Cincinnati, Ohio; the development of a bus rapid transit system in metropolitan Atlanta, Georgia; improvements to the rail hub in Chicago, Illinois to reduce congestion; and upgrades to port infrastructure in Baltimore, Maryland.[4]

Although the Infrastructure Act creates significant commercial opportunities for private companies bidding for federally funded infrastructure projects, the Act also contains specific requirements for specific types of projects,

including Public-Private Partnerships and Asset Concessions. In addition, the Infrastructure Act imposes strict "Buy America" sourcing requirements and wage rate requirements for federally funded projects.

The unique requirements of the Infrastructure Act will need to be taken into account during the bidding and execution phases, including in the analysis of project economics, the development of procurement strategies, and the manner in which the work is carried out and invoiced. Requirements of this nature create opportunities for companies around the United States, but they also may present challenges and compliance considerations that could lead to potential disputes on projects funded under the Infrastructure Act, including bid protests to challenge the fidelity of winning bids to the requirements of the Act as well as claims brought against companies working on funded projects under the False Claims Act. Each of these considerations is described in further detail below.

REQUIREMENTS FOR PUBLIC-PRIVATE PARTNERSHIPS

The Infrastructure Act contemplates the use of Public-Private Partnerships for transportation projects with an estimated total cost in excess of $750 million, and which are "anticipated to generate user fees or other revenues that could support the capital and operating costs of such project."[5] The Infrastructure Act places specific requirements on Public-Private Partnerships, providing that the entities carrying out such projects must conduct a "value for money analysis" that evaluates the life-cycle cost and project delivery schedule, the costs of using public funding versus private financing, a forecast of user fees or other revenue expected to be generated by the project, and a description of key assumptions made in developing the analysis.[6] The entity must provide this analysis, in the form of a project report, to the Build America Bureau.[7]

The Infrastructure Act articulates additional requirements for transportation projects undertaken by public-private partnerships. In particular, as a condition of receiving Federal financial assistance for a public-private partnership, the public partner must (1) conduct a review of the project, including a review of the compliance of the private partner with the terms of the public-private partnership agreement; and (2) certify that the private partner is meeting the terms of the public-private partnership or notify the Secretary of Transportation that the private partner has not met the terms of the partnership agreement.[8] In addition, the project sponsor for public-private partnerships must submit a financial plan for each project that includes "a detailed value for money analysis or similar comparative analysis for the project."[9]

REQUIREMENTS FOR "ASSET CONCESSIONS"

The Infrastructure Act amends Title 23 of the U.S. Code Chapter 6 (Highways: Infrastructure Finance) to add a section (23 U.S.C. 611) on asset concessions and innovative finance assistance. Section 611 defines an "Asset Concession" as long-term lease or concession agreement between a public entity and a private concessionaire, by which the concessionaire makes payments to the public entity.[10] Section 611 requires that the parties to the concession agreement agree that "the costs for a fiscal year of the agreement or lease, or any project carried out under the agreement or lease, shall not be shifted to any taxpayer the annual household income of whom is less than $400,000 per year, including through taxes, user fees, tolls, or any other measure, for use of an approved infrastructure asset."[11] This places a potential limitation on the concessionaire's ability to recover the costs of its lease payments under the concession agreement, and could impact the economics of projects financed under concession agreements.

The new Section 611 created by the Infrastructure Act imposes several other requirements on asset concessions. The asset concession shall not result in displacement, job loss, or wage reduction for the existing workforce of the eligible entity or other public entities.[12] As with Public-Private Partnerships, the eligible entity or the concessionaire shall carry out a value-for-money analysis, or similar assessment, to compare the aggregate costs and benefits to the eligible entity of the asset concession against alternative options to determine whether the asset concession generates additional public benefits and serves the public interest.[13] In addition, the full amount of any asset concession payment received by the eligible entity under the asset concession, less any amount paid for transaction costs relating to the asset concession, shall be used to pay infrastructure costs of the eligible entity.[14]

ALTERNATIVE CONTRACTING METHODS

The Infrastructure Act amends 23 U.S.C. 201 to allow for alternative contracting methods.[15] Under the amendment, the U.S. Secretary of Transportation, on behalf of a federal land management agency or a tribal government, to use alternative contracting methods available to a state, notwithstanding the Federal Acquisition Regulations (FAR), including project bundling, bridge bundling, design-build contracting, 2-phase contracting, and long-term concession agreements.[16] In addition, the amended Section 201 provides for the use of "any method tested, or that could be tested, under an experimental program relating to contracting methods carried out by the Secretary."[17]

The Infrastructure Act further provides that, "[i]n carrying out an alternative contracting method," the Secretary of Transportation will "establish clear procedures that are … applicable to the alternative contracting method" and "to the maximum extent practicable, consistent with the requirements applicable to Federal procurement transactions" and will "solicit input on the use of the alternative contracting method from the affected industry prior to using the method[.]"[18]

"BUY AMERICA" SOURCING REQUIREMENTS

The Infrastructure Act contains clear language emphasizing the importance of domestic procurement in federally funded infrastructure projects. "Infrastructure" is broadly defined so as to include "at a minimum, the structures, facilities, and equipment for" numerous items, including

- Roads, highways, and bridges
- Public transportation
- Dams, ports, harbors, and other maritime facilities
- Intercity passenger and freight railroads
- Freight and intermodal facilities
- Airports
- Water systems, including drinking water and wastewater systems
- Electrical transmission facilities and systems
- Utilities
- Broadband infrastructure
- Buildings and real property.

The legislation explains that "taxpayers expect that their public works infrastructure will be produced in the United States by American workers" and that "United States taxpayer dollars should not be used to reward their operations, investment dollars, and jobs to foreign countries or foreign factories, particularly those that do not share or openly flout the commitments of the United States to environmental, worker, and workplace safety protections."[19] The Infrastructure Act, however, also requires that its provisions "shall be applied in a manner consistent with United States obligations under international agreements."[20] Thus, there still will be a need for clarification via implementing regulations. For example, other funding provisions with similar language has been interpreted to allow direct federal acquisitions above the Trade Agreement Act thresholds (and grant programs providing funding for state agencies that have waived into the World Trade Organization's Government Procurement Agreement) to be governed by the funding obligations set forth in the Trade Agreement Act.[21]

The Infrastructure Act requires agency heads to ensure that all iron and steel, manufactured products, and construction materials used in a project that receives federal financial assistance be "produced in the United States," and establishes specific standards in relation to each category of procurement materials.[22] With respect to iron and steel, the Act requires that "all manufacturing processes, from the initial melting stage through the application of coatings, occurs in the United States."[23] For manufactured products, the manufacture must occur 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[.]"[24] For construction materials, "all manufacturing processes" for such materials must occur in the United States.[25] Again, it is expected that implementing regulations will be issued that further detail when the Infrastructure Act sourcing obligations apply, and when international obligations implemented through the Trade Agreements Act apply.

Also of note, the Infrastructure Act sourcing requirements may be waived where the Federal agency finds the procurement preference would be inconsistent, with the public interest, the required materials are not produced in the United states in sufficient and reasonably available quantities or of a satisfactory quality, or the inclusion of materials produced in the United State will increase the overall project by more than 25 percent.[26]

We anticipate that affected federal agencies will engage in a flurry of activity over the next six months in response to the passage of the Infrastructure Act, ranging from identifying covered federal financial assistance programs that are administered by the agency to identifying historic programs that are not being applied in a manner that is consistent with the requirements of Buy American obligations.[27] King & Spalding offers a specialized "Buy American" practice, which focuses on U.S. law and policy developments and their impact on global supply chains.[28] We track "Buy American" legislative and Executive Branch actions and provide regular client updates through our "Buy American and Supply Chain Policy Roundup" website.[29]

WAGE RATE REQUIREMENTS

The Infrastructure Act also establishes specific requirements regarding the rates at which workers are to be compensated under federally funded infrastructure projects. In particular, the Act provides that all laborers and mechanics employed by contractors or subcontractors in the performance of construction, alteration, or repair work on a project assisted in whole or in part by funding made available under this division or an amendment made by this division shall be paid wages at rates not less than those prevailing on similar projects in the locality, as determined by the Secretary of Labor.[30]

BID PROTESTS

The federal government's provision of funding under the Infrastructure Act may invite an increased number of protests from competing bidders on public contracts. A bid protest is a written objection to a federal agency's award of a contract to acquire supplies or services. Whether defending an award against a second-highest bidder, or seeking to protest an unresponsive bid, understanding the mechanisms around bid protests is important for any company participating in the bidding process for government contracts.

Bid protests on federal projects may be heard by individual agencies, the district courts, or the U.S. Court of Federal Claims, but most bid protests are filed with the Government Accountability Office (GAO).[31] The popularity of the GAO as a forum for bid protests may be partially explained by a unique statutory mandate that a bid protest filed with the GAO creates an immediate stay in the award of any public contract while the protest is pending.[32] Federal agencies may override this mandatory stay, however, for "urgent and compelling circumstances which significantly affect the interests of the United States."[33]

Any "interested party" may file a bid protest. "Interested party" means "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."[34] To file a protest, an interested party files a signed statement with the GAO setting forth the "legal and factual grounds of the protest" together with documentation to establish the protestor's identity, standing as an "interested party," and timeliness of the protest.[35]

No briefs or other forms of pleadings are required under GAO regulations, consistent with the statutory mandate that the Comptroller General provide for the inexpensive and expeditious resolution of protests to the maximum extent practicable.[36] When a protest is filed, the GAO notifies the relevant public agency immediately. The agency then notifies the awardee, or other bidders with a substantial prospect of receiving the award.[37] Within 30 days, the agency

must file a memorandum of the facts and law and all documents relevant to the award.[38] The protestor then has ten days to file written comments upon the agency report.[39]

The GAO ordinarily must issue a decision within one hundred days after the filing of the protest.[40] The GAO will sustain a protest if it finds that the agency acted in violation of a statute or regulation, or if the record clearly shows that the award does not have a reasonable basis, or is inconsistent with the evaluation criteria listed in the request for proposal.[41] If the GAO identifies a violation, it may recommend that the agency re-compete the contract, issue a new solicitation, terminate the contract, or implement any other recommendation to comply with procurement statutes and regulations.[42]

In addition to federal bid protests at the GAO, the Court of Federal Claims and in the District Courts, each state has its own procedures for filing bid protests. Large state entities, such as universities or utility companies, may in turn have their own bid protest procedures.

FALSE CLAIMS ACT LIABILITY

The False Claims Act ("FCA")[43] is the government's principal civil anti-fraud tool. Enacted during the Civil War to combat fraud perpetrated by government contractors on the Union Army, the FCA has developed into one of the most powerful weapons in the government's arsenal. Amendments in 1986, 2009, and 2010 strengthened key provisions of the FCA making it easier and more rewarding for the government and whistleblowers to file suit. Today it is used against a wide variety of entities across a broad spectrum of industries. For example, in Fiscal Year 2020, the Department of Justice recovered over $2.2 billion from FCA cases.

In general terms, FCA liability attaches to any person or entity who knowingly submits a false claim to the government, knowingly causes another to submit a false claim to the government, knowingly makes a false record or statement to get a false claim paid by the government, or knowingly acts improperly to avoid or decrease and obligation to pay money to the government.[44] While the conduct must be "knowing," this can be satisfied with actual knowledge, deliberate ignorance, or reckless disregard of the truth or falsity of the information provided.[45] No proof of specific intent to defraud is required. The "knowledge" requirement is therefore quite broad and permissive.

The FCA provides for treble damages plus per-claim penalties.[46] Further, states may join in with state FCA equivalents, and there may also be parallel criminal investigations. The injury to a business relationship with the government can be enterprise-threatening for regulated entities, even if the dollar exposure in an individual matter is not. The FCA therefore presents high-stakes issues for companies in a business relationship with the government.

In a typical FCA case, a private citizen ("relator") files a qui tam action (under seal) or the government initiates the investigation. Once a relator files suit, the Department of Justice must decide whether to intervene (i.e., take over and prosecute the suit).

While the FCA poses potential liability to a broad swath of regulated industries, it is particularly important for businesses involved in federally-funded construction and infrastructure to be aware of its potential application. For example, when a construction or infrastructure project is federally funded, any payment, application, or invoice made to the government may potentially be subject to the FCA. Further, as mentioned above, the FCA may impose liability even where a company does not directly submit a false claim to the government, but merely causes a false claim to be presented by another party. Thus, in any federally-funded project, both the direct contractors with the government, as well as any subcontractors, should be aware of potential FCA exposure.

This is particularly important in light of the Infrastructure Act and its unique and specific requirements. As discussed, the Infrastructure Act imposes "buy American" sourcing requirements, wage rate requirements, and a variety of public-private partnership rules. Any of these rules could theoretically form the basis of a False Claims Act whistleblower case or a government investigation. Businesses involved in construction and infrastructure should carefully monitor federal rulemaking activity in order to understand their legal obligations, and should strengthen their compliance programs in order to pressure test claims for payment before they are submitted to the government.

DIGITAL ASSET REPORTING OBLIGATIONS

As laid out more fully below, the Infrastructure Act also amended several sections of the Internal Revenue Code of 1986 (the "Code") to reporting obligations relating to digital asset transactions.

- **Broker Reporting Obligations:** Code Section 6045, which imposes 1099-B reporting obligations on brokers, was expanded to impose those and similar reporting obligations on "any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person." "Digital assets" will generally include any digital representation of value recorded on a distributed ledger. Thus, brokers who facilitate cryptocurrency transactions for clients and other third parties will be required to report basic information—names, addresses, and gross proceeds—associated with the transaction. Importantly, it is possible—although, as of now, unclear—that these expanded obligations would extend not just to traditional brokers, but also to cryptocurrency miners and others involved in the digital asset ecosystem. **"Covered Securities"**: Code Section 6045's reporting obligations previously applied to "covered securities," which included corporate stock shares, debt obligations, certain designated commodities (and derivatives), and other financial instruments. Under the Infrastructure Act, this definition was amended to include "digital assets," meaning that brokers will be required to report the adjusted basis and the gains or losses upon the sale of digital assets, including utility tokens, stablecoins, and asset-backed tokens.
- **"Cash" Transactions**: Under Code Section 60501, persons engaged in a trade or business who receive more than $10,000 in a cash transaction are subject to reporting obligations with respect to that transaction. The Infrastructure Act amends the definition of "cash" to include digital assets, and thus even outside the brokerage context large transactions—including transactions in digital tokens and cryptocurrencies—must be reported.

As a result of these amendments, companies and individuals involved in digital asset transactions are encouraged to evaluate their reporting obligations under these new rules and should monitor any further guidance from the Department of Treasury and the Internal Revenue Service relating to such rules in the future.

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King & Spalding is uniquely positioned to advise participants in projects that receive funding under the Infrastructure Act at all stages. Our Government Matters team includes six U.S. Attorneys, 24 Assistant U.S. Attorneys, and former senior officials from the highest ranks in regulatory and enforcement organizations, including the Environmental Protection Agency, the Federal Trade Commission, the Federal Energy Regulatory Commission, and the National Highway Traffic Safety Administration. We have been named "Law Firm of the Year" for Government Relations by *US News & World Report*, have been recognized three times as Environmental Group of the Year by *Law360*, and are recognized as among the leading energy regulatory practices in the United States by *Legal 500*.

Our Construction and Engineering Disputes practice works with some of the world's largest owners, developers, contractors, consultants and financiers to resolve complex construction disputes. Our accolades include recognition as 2018 and 2020 Practice Group of the Year by *Law360*, as Tier 1 for Construction in the United States by the *Legal 500*, and as a Leading Construction Practice in Texas by *Chambers USA*.

King & Spalding also has a leading financial services practice, with a dedicated team of more than 470 lawyers spread across financial centers worldwide. Clients across the industry, ranging from the largest global banks to a wide range of asset managers, broker dealers, private equity, alternative capital, fintech and digital asset participants, rely on us for sophisticated advice on their most complex matters. Our financial services focus stands out in the market not only for its breadth and the commitment of its lawyers, but also for its ability to collaborate internally across practice groups to inform lawyers on financial services trends, and efficiently provide commercially-savvy advice and thought-leadership to the industry.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,200 lawyers in 22 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

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[1] Brookings Institute, *America has an infrastructure bill. What happens next?*, https://www.brookings.edu/blog/the-avenue/2021/11/09/america-has-an-infrastructure-bill-what-happens-next/
[2] Fact Sheet: The Bipartisan Infrastructure Deal, https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/.
[3] McKinsey, *The US Infrastructure Investment and Jobs Act: Breaking It Down*, https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-us-infrastructure-investment-and-jobs-act-breaking-it-down.
[4] CNN, *4 Projects that could be funded by Biden's infrastructure package*, https://www.cnn.com/2021/11/14/politics/biden-infrastructure-roads-bridges/index.html.
[5] Infrastructure Act, § 70701(a)-(b).
[6] Infrastructure Act, § 70701(a)-(b).
[7] Infrastructure Act, § 70701(c).
[8] Infrastructure Act, § 11508.
[9] Infrastructure Act, § 11508.
[10] Infrastructure Act, § 71001(a)
[11] Infrastructure Act, § 71001(a).
[12] 23 USC 611(f)(1)(C).
[13] 23 USC 611(f)(1)(D).
[14] 23 USC 611(f)(1)(E).
[15] Infrastructure Act, § 11305(a).
[16] Infrastructure Act, § 11305(a).
[17] Infrastructure Act, § 11305(a).
[18] Infrastructure Act, § 11305(c).
[19] Infrastructure Act, § 70911.
[20] Infrastructure Act, § 70925.
[21] Trade Agreements Act of 1979 (19 U.S.C. § 2501 et seq.); 48 C.F.R. § 25.402(b).
[22] Infrastructure Act, § 70912(6).
[23] Infrastructure Act, § 70912(6(A).
[24] Infrastructure Act, § 70912(6)(B).
[25] Infrastructure Act, § 70912(6)(C).
[26] Infrastructure Act, § 70914(b).
[27] Infrastructure Act, § 70913.
[28] https://www.kslaw.com/capabilities/buy-american.
[29] https://www.kslaw.com/pages/buy-american-and-supply-chain-policy-roundup.
[30] Infrastructure Act, § 41101.
[31] https://sgp.fas.org/crs/misc/R40228.pdf.
[32] 31 U.S.C.A. § 3553(c)(1).

[33] 31 U.S.C.A. § 3553(C).
[34] 31 U.S.C.A. § 3551.
[35] 4 C.F.R. § 21.1(c).
[36] 31 U.S.C.A. § 3554(a)(1).
[37] 4 C.F.R. § 21.3(a).
[38] 4 C.F.R. § 21.3(d).
[39] 4 C.F.R. § 21.3(i).
[40] 31 U.S.C.A. § 3554(a)(1); 4 C.F.R. § 21.9(a).
[41] *Matter of: Mcwane & Co., Inc.*, B-270374 (Comp. Gen. Mar. 1, 1996).
[42] 31 U.S.C. §3554(b)(1)(A)-(H).
[43] 31 U.S.C. §§ 3729-3733.
[44] 31 U.S.C. §§ 3729(a)(1)(A), (B), and (G).
[45] 31 U.S.C. § 3729(b)(1).
[46] 31 U.S.C. 3729(s).