

Federal Construction Update 2021

New Developments and Practice Tips for Federal Construction Contractors

October 2021

Holland & Knight

Agenda

- The vaccine mandate: E.O. 14042 & FAR 52.223-99
- Recent E.O.s and new compliance requirements
- The Infrastructure Bill... and DOJ's Procurement Collusion Strike Force/False Claims Act cases
- Updates on prime/sub disputes and the Miller Act
- Latest changes to small business regulations
- Timely Gov't disputes decisions (and risk mitigation strategies)

First things first: the Gov't is telling contractors to roll up their sleeves.

- President Biden has issued an Executive Order mandating the creation of a new FAR clause (**FAR 52.223-99**)
 - Requires compliance with the Safer Federal Workforce Task Force's COVID-19 Workplace Safety Guidance
- So when are we going to start seeing this FAR clause? If you haven't already...
 - Contracts awarded prior to Oct. 15 where performance is ongoing → when an **option** is exercised or an **extension** is made
 - **New contracts** awarded on or after Nov. 14 → the clause must be included
 - Contracts awarded between Oct. 15 and Nov. 14 →
 - **New solicitations** issued on or after Oct. 15 will include the clause
 - Otherwise “encouraged” to be included
- And am I required to flow the clause down? You bet.
 - Required in subcontracts “at any tier” that exceed **\$250,000**; are for **services** (including construction); and are performed in the United States

Got it. So has this Task Force issued Guidance Yet?

Yes. On Sept. 24, the Task Force issued its Guidance to contractors and subcontractors.

The Guidance is subject to change (read: be updated, impose additional requirements).

And because the FAR clause incorporates the Guidance by reference, we need to keep tabs on it.

You can find the Guidance on the Task Force's website:
<https://www.saferfederalworkforce.gov/>

COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;

Compliance by individuals (employees and visitors) with masking and physical distancing while in covered contractor workplaces; and

Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

Let's move on. Domestic content requirements are increasing (again).

- In Jan. 2021, President Biden issued an Executive Order on Ensuring the Future Is Made in All of America by All of America's Workers. (Yes, more Executive action.)
- Let's summarize the E.O. quickly. The E.O.:
 - Establishes a “Made in America Office” within OMB, headed by a “Made in America Director”
 - Prior to granting a waiver, requires agencies to assess “whether a significant portion of the cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured goods or the use of injuriously subsidized steel, iron, or manufactured goods”
 - Promotes transparency by requiring GSA to develop a website publicizing information on waivers ([MadeinAmerica.gov](https://www.madeinamerica.gov))
 - Requires partnership to “conduct supplier scouting in order to identify American companies . . . that are able to produce goods, products, and materials in the United States that meet Federal procurement needs”
 - Establishes a process for reviewing and updating the list of domestically nonavailable articles in the FAR
 - Directs the FAR Council to review “existing constraints” on the Made in America Laws to commercial item IT

That was a lot.

- We know. In terms of what you may want to pay attention to **immediately** → in July 2021, the FAR Council issued a proposed rule that contemplates:
 - Replacing the “component test” in FAR part 25 “with a test under which domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity”;
 - Increasing the domestic content threshold
 - Initially, from 55% to 60%
 - Then, in 2 years, from 60% to 65%
 - And 5 years after the 2nd increase, to 75% (with a fallback threshold)
 - Increasing the price preference for end products and “construction material deemed to be critical or made up of critical components”
 - Establishing a postaward reporting requirement
- Comments on the proposed rule were due last month. To be continued...

Great. Are there any more Executive Orders I should know about?

- Probably. See, e.g., Executive Orders on Tackling the Climate Crisis at Home and Abroad & on Climate-Related Financial Risk. But we'll keep this brief.
- Climate Crisis (E.O. 14008) →
 - Requires action to:
 - Ensure federal infrastructure investment reduces climate pollution
 - Require federal permitting decisions consider the effects of greenhouse gas emissions and climate change
 - Reporting on progresses to accelerate the deployment of clean energy and transmission projects
 - See also Federal Clean Electricity and Vehicle Procurement Strategy
- Financial Risk (E.O. 14030) →
 - Consider amending the FAR to require major suppliers to publicly disclose greenhouse gas emissions & ensure that major procurements “minimize the risk of climate change”

And have there been any amendments to the FAR yet?

- Consider it “in progress”
- Earlier this month, the FAR Council issued an advanced notice of proposed rulemaking announcing its intention to amend the FAR to give **preference to bids and proposals** from contractors with **lower greenhouse gas emissions**
- So, what does this mean? Contractors with lower greenhouse gas emissions could have a competitive advantage, as emissions may become a factor in winning contracts
- The FAR Council is requesting comments on the proposed rulemaking by **December 14, 2021**

Now for the good stuff: the Gov't is ready to spend \$550 billion in new infrastructure.

- The Infrastructure Investment and Jobs Act, if passed, will provide significant opportunities for federal construction contractors
- The bill earmarks **billions of federal dollars** for new construction, improvements, maintenance, and repairs of:
 - Road and bridges;
 - Passenger and freight rail, public transit;
 - Power reliability and grid modernization;
 - Broadband infrastructure and deployment;
 - Airport improvements; and more



I like the sound of that.

- So do we. Just a few reminders: “With great federal spending, comes great oversight.” Or something like that.
- The Department of Justice’s new Procurement Collusion Strike Force is cracking down on antitrust crimes, such as **bid-rigging conspiracies**—particularly in the construction industry:
 - In February 2020, a Connecticut insulation construction company and one of its owners pleaded guilty for scheming to rig bids and engage in criminal fraud on insulation contracts
 - In June 2021, a North Carolina engineering firm was sentenced to pay \$7 million in criminal fines and over \$1.5 million in restitution after pleading guilty to long lasting conspiracies to rig bids and defraud the North Carolina Department of Transportation
 - In September 2021, a Minnesota concrete contractor pleaded guilty to rigging bids on public concrete repair and construction contracts

Bid rigging = competitors agreeing in advance who will submit the winning bid, effectively raising prices on the Gov’t

But sometimes bid rigging isn't as obvious as you'd think...

- In January 2020, DOJ announced three companies had agreed to pay \$29 million to resolve allegations that they violated the **False Claims Act** by colluding to rid the bidding of an auction to purchase a Department of Energy loan
- So, what happened there?
 - DOE issued a loan pursuant to a program designed to support the development of advanced technology vehicles, reduce petroleum, and promote domestic manufacturing
 - The loan was later auctioned, and a **whistleblower** filed suit alleging that the three companies had **exerted pressure on other companies to discourage other bidders** in an effort to ensure acquisition of the loan
 - The companies' actions allegedly deprived DOE of a fair bidding process, resulted in only one bid being submitted (from one of the three companies), and reduced the amount DOE ultimately recovered in the auction ("**bid suppression**")

False Claims Act? Whistleblower? I could use a refresher.

- Coming right up. The civil False Claims Act (“FCA”) imposes liability on any person who knowingly presents, or causes to be presented, a false or fraudulent claim to the government
 - “Knowingly” = actual knowledge; deliberate ignorance for the truth or falsity of the information; or reckless disregard of the truth or falsity of the information
 - “Claim” = means any request or demand for money or property presented to the government
 - (Read: the definition of “claim” under the FCA is significantly broader than claims submitted pursuant to the Contract Disputes Act)
 - No specific intent required
- Civil means no jail, right? Right, but there’s also a criminal false claims statute (18 U.S.C. § 371). Best to steer clear of all fraud.
- And everyone’s favorite: **implied certification**
 - Based on the premise that when a contractor submits a claim to the government, it “impliedly certifies” compliance with all conditions of payment

And sometimes there's nothing “implied” about it:

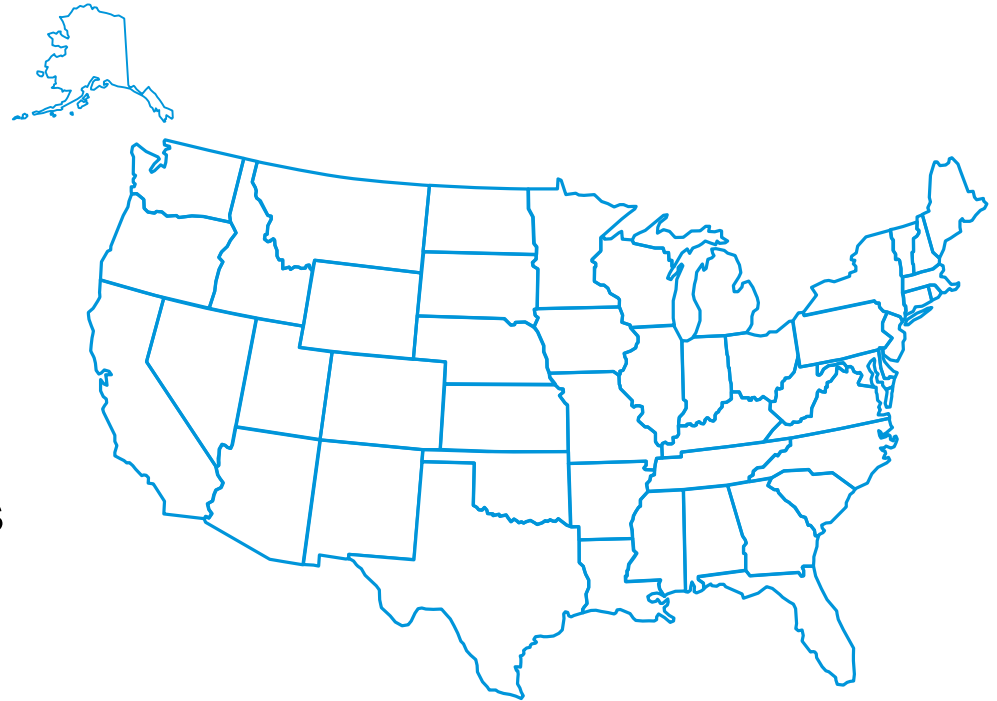
- Earlier this year, DOJ announced that a construction subcontractor agreed to pay over \$560,000 based on allegations that the company caused the submission of falsified payroll records on two construction projects for the VA
- Both the prime and subcontractor were required, by law, to pay their workers prevailing wages
- The subcontractor allegedly paid its workers significantly less than the prevailing wages, but submitted **falsified payroll records** to make it seem as if it has paid the prevailing wages
- The subcontractor pocketed the difference, shorting its workers the wages they were legally owed

Yikes. A subcontractor did this?

- Yup. The prime only discovered the falsity during an arbitration, when the subcontractor pulled out two sets of payroll records.
- We'll come back to subcontractors in a second, but first...

One last point on the Infrastructure bill.

- While certain federal assistance programs are already subject to Buy America, the bill would apply Buy America to **all infrastructure projects that receive federal funding** under the Act.
- Another reminder to always read the fine print when accepting federal funds!



OK, back to subcontractors. Let's talk Miller Act.

- In an April 2021 decision, the Eastern District of VA held that **pure supervisory work** is not considered “labor” as defined by the Miller Act
 - So what's the takeaway? The decision limits the scope of what services can be considered within the purview of coverage
- And, making its way up to the Seventh Circuit → timing of the notice of a claim under the Miller Act
 - In *A&C Construction & Installation Co., v. Zurich American Insurance Co.*, the Seventh Circuit found that a notice issued in August 2016 was far too in advance of the last date of work (Feb. 28, 2017) to satisfy the Act's notice requirements

Anything else on the Miller Act?

- Yep. Congress recently amended the Transportation Infrastructure Finance and Innovation Act (“TIFIA”) → requiring a Gov’t review to determine if the underlying project should be subject to the Miller Act
 - (TIFIA typically finds P3 projects)

Next up: a brief rundown on the latest changes to the small business regulations.

- Last fall, the SBA significantly overhauled its regulations governing small business concerns. Most notably, SBA:
 - Combine the 8(a) Mentor/Protégé Program with the All Small Mentor Protégé Program
 - Established a new requirement that on unrestricted MACs → the appropriate NAICS code and size standard must be assigned at the task order level
 - Revised its size recertification provisions, particularly related to the impact of M&A activity
- And in August 2021, the FAR Council published three final rules—
 - (1) Providing examples of what constitutes a “good faith effort” to comply with a small business subcontracting plan;
 - (2) Revising the limitations on subcontracting under FAR 19.505; and
 - (3) Allowing SBA procurement center representatives to review any proposed acquisition so that they may make recommendations for improving competition for small business concerns

Last topic of the hour: Gov't disputes and some timely decisions you need to be aware of...

- Have a fixed price contract & dealing with **COVID impacts**?
 - See *Pernix Serka*, CBCA No. 5683 (rejecting contractor's claim for costs associated with additional safety measures necessitated by Ebola outbreak where Gov't declined to issue directions regarding contractor's performance)
 - See also CARES Act, Section 3610
- Failure to establish reasonableness of claimed costs results in claim denial
 - *Kellogg Brown & Root Services*, No. 2019-1683 (Fed. Cir. Sept. 1, 2020) (contractors costs incurred for payments to subcontractor for transportation delays were not reasonable where delay costs were **not based on documented costs, but instead based only on estimates**)
 - Because KBR failed to show cost reasonableness, Fed. Cir. did not address Gov't breach
- Reminder: **final payment bars contractor claims** submitted subsequent to final payment
 - *Matcom Diamond*, ASBCA No. 59637 (denying claim for Eichleay home office overhead delay damages because (1) contractor failed to show critical path impact and (2) claim barred because not presented prior to final payment)

