FCA International
Legislative Update
Building a Better Future for Our Families

Week of 3-14-23
Volume 23 | Issue 9

Congressional Overview

This week, the Senate held nomination votes and the chamber was minus three members with Sen. Minority Leader Mitch McConnell (R-KY) recovering from a concussion, Sen. John Fetterman (D-PA) receiving inpatient treatment for depression, and Sen. Dianne Feinstein (D-CA) recovering at home from shingles. The House was not in session this week.

Treasury Secretary Yellen Testifies 'Banking System is Sound’

Treasury Secretary Janet Yellen told Congress on Thursday the U.S. “banking system is sound” after two bank failures stirred economic fears. Yellen testified before the Senate Finance Committee and began her remarks by addressing the abrupt collapse of Silicon Valley Bank in California and Signature Bank in New York.

"I can reassure the members of the committee that our banking system remains sound, and that Americans can feel confident that their deposits will be there when they need them," she said. "This week's actions demonstrate our resolute commitment to ensure that depositors' savings remain safe."

Yellen said the Treasury took "decisive and forceful actions to strengthen public confidence in our banking system" in the wake of the failures which included guaranteeing the protection of all Silicon Valley Bank and Signature Bank deposits. Yellen repeatedly said Thursday the action was taken because officials felt there was significant risk other potentially catastrophic bank runs could be triggered.

When pressed by Sen. James Lankford, R-Okla., about whether deposit backstops will apply across the industry to smaller community banks, Yellen said no.

Input to the Office of Management and Budget on Buy America Act

On March 13, 2023, the Transportation Construction Coalition (TCC) submitted comments to the Office of Management and Budget (OMB) regarding the implementation of the Build America, Buy America Act (BABAA) provisions of the Infrastructure Investment and Jobs Act (IIJA). FCA International and the TCC fully support the twin objectives of maximizing the benefits from the IIJA’s historic investments, while growing domestic manufacturing, which is BABAA’s particular focus.

To that end, FCA and TCC coalition members have reviewed the draft guidance published by the OMB, and we identified two areas in which we request clarification, so as not to diverge from Congress’ intentions in enacting BABAA. Those two areas are:

OMB Should Reiterate BABAA Does Not Apply to Temporary Products

Section VI of the OMB Memorandum for Heads of Executive Departments and Agencies (M-22-11), published on April 18, 2022, states:

“The Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment,

and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project."

The new OMB guidance does not yet include an equivalent provision. There is no indication in the IIJA that Congress intended to change longstanding policy and extend Buy America coverage to temporary products, equipment and other such items used in constructing projects, but not permanently incorporated in them. Therefore, we respectfully request that OMB restate this clarification in the final guidance.

OMB Should Exclude Aggregates and Related Materials from Buy America Preferences, Consistent with Congress' Clear Intent

In Section 70917(c)(1) of the IIJA, Congress established an important limitation to the term "construction materials" as used in BABAA. Congress explicitly exempted "cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives" from the "construction materials" covered under BABAA. This limitation makes clear no domestic content procurement preference under BABAA applies to aggregates and these related materials.

Section 70915(b)(1) of the IIJA requires OMB to "issue standards that define the term 'all manufacturing processes' in the case of construction materials" to which BABAA applies a domestic content procurement preference. These standards will help determine whether particular products comply with BABAA requirements.

In Section 70917(c)(2), Congress reiterated the exemption for the above-listed materials in this additional context. The subsection states that OMB's standards for "all manufacturing processes" "shall not include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives as inputs of the construction material."

The draft OMB guidance inquires as to whether a combination of these exempt materials could somehow form an end product subject to Buy America coverage. First, BABAA does not provide authority for the listed materials being considered manufactured products because only the combination of construction materials not included in the limitation produces a "manufactured product" under OMB's proposed guidance.

Second, the combination of the listed items as concrete or asphalt mix are not a construction material for which BABAA establishes a domestic content procurement preference. Congress understood that the materials they were excluding from the term "construction materials" are, when combined, concrete and asphalt mix construction materials. Congress included Section 70917(c)(2) to ensure that the combination of construction materials in Section 70917(c)(1) into concrete and asphalt mix construction materials did not create a domestic content procurement preference for concrete or asphalt mixes.

Finally, no one disputes that aggregates and these related items are construction materials in the generic sense. However, as cited above, Congress enacted the language in these portions of the IIJA to explicitly exclude them from the "construction materials" for which BABAA establishes a domestic content procurement preference.

Opposition to the Fair and Open Competition Act

On February 27, 2023, Sen. Todd Young (R-IN) and Rep. James Comer (R-KY) reintroduced the Fair and Open Competition Act (FOCA), which prohibits government-mandated PLAs on federal and federally assisted construction projects. A total of 24 states have passed measures similar to the FOCA and FCA International, along with the Construction Employers Association (CEA), sent opposition letters regarding the legislation, which would upend the structure and stability that PLAs provide to large-scale construction projects, facilitate the misclassification of employees as independent contractors, and have the effect of depressing wages for American workers.

President Biden's February 2022 Executive Order (E.O. 14063) is grounded in a continuation of the policy determination made by his two predecessors that PLAs "promote economy and efficiency" on large-scale construction projects. It builds upon the PLA E.O. issued by President Obama and left in place by President Trump. The E.O. and its proposed implementing regulations do not mandate the use of PLAs, despite the fact that the use of these pre-negotiated agreements between project owners, contractors and subcontractors protects taxpayer-provided funds by guaranteeing project deadlines and ensuring high standards for quality, safety and health and fair compensation for workers.

E.O. 14063 also does not discriminate against non-signatory contractors or prevent them from bidding on projects, nor does it create an uneven playing field between signatory and non-signatory contractors. Rather, it provides a more level playing field between construction companies sponsoring training programs to ensure the future of construction's skilled workforce, and honoring their commitment to treat their workers fairly as employees and those seeking to compete by depressing wages and evading their obligation to pay overtime, health and retirement benefits, and employment taxes.

The preference for PLAs on public construction projects has been the policy of the Executive Branch across Administrations of both parties. It ensures the federal government realizes the same cost savings, project quality and safety assurances, and project stability and continuity benefits that large U.S. corporations have enjoyed for decades. It is well-established that PLAs help save taxpayer money in the long run, which is especially critical as Congress considers ways to reduce the national debt and the Administration implements transformative, bipartisan infrastructure legislation. It is for these reasons that we urge Congress to reject the legislation and enable federal agencies to realize the benefits of PLAs.