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International Trade & Litigation Practice Group

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Senate Includes Buy American Requirement in Water Resources Development Act of 2013

Provision Would Mandate Use of American Iron, Steel, and Manufactured Goods in Certain Water Resources Projects

The United States Senate passed the Water Resources Development Act of 2013 by an overwhelming 83-14 margin on May 15, 2013. The legislation included an amendment sponsored by Senators Jeff Merkley (D-OR) and Sherrod Brown (D-OH), that would extend Buy American provisions to certain water infrastructure projects to be known as Innovative Financing Pilot Projects. The Senate bill would authorize \$50,000,000 in funding for the program for each fiscal year from 2014-2018.

WIFIA Buy American Provisions Contained in Senate-Passed Bill

Under the legislation approved by the Senate, recipients of federal loans and loan guarantees under the Water Infrastructure Finance and Innovation Act (WIFIA) for eligible construction, alteration, maintenance, or repair projects must use U.S.-produced iron, steel, and manufactured goods. The legislation contains an exception to the Buy American requirement in situations where the Secretary of the Army finds that (1) adhering to the requirement would be inconsistent with the public interest, (2) the iron, steel, and the relevant manufactured goods are not made in the United States in sufficient quantities or are not of satisfactory quality, or where (3) complying with the rule would increase the cost of the overall project by more than 25 percent. The Senate bill would also mandate that the Secretary of the Army publish “a detailed written justification as to why” for projects where the Buy American provisions are waived.

Eligibility for WIFIA Assistance Under Senate-Passed Bill Depends on Project Type and Anticipated Costs

The Senate bill would apply to projects valued at \$20,000,000 or more, except for certain rural water infrastructure projects that qualify for a lower \$5,000,000 project cost threshold. Under the bill, several types of projects would be eligible for WIFIA assistance, including:

1. certain flood control or hurricane and storm damage reduction projects;
2. certain water pollution control projects;

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3. certain Safe Drinking Water Act projects;
4. energy efficiency projects for public water systems or treatment works;
5. repair, rehabilitation, or replacement of treatment works, community water systems, or aging water distribution or waste collection facilities;
6. brackish or sea water desalination projects, managed aquifer recharge projects, or water recycling projects;
7. certain real property acquisitions in connection with a project, and
8. projects that combine a variety of eligible projects pursued by a state infrastructure financing authority or pursuant to a common security pledge.

The Senate bill also identifies several activities that would be eligible for assistance under WIFIA, including development-phase activities, construction, reconstruction, rehabilitation, replacement, real property acquisition, environmental mitigation, acquisition of equipment, and certain aspects of project financing.

Future Prospects

The U.S. House of Representatives Committee on Transportation and Infrastructure Subcommittee on Water Resources and Environment is in the process of holding a series of hearings on the U.S. Corps of Engineers and the Water Resources Development Act. There is no companion House bill for the Senate-passed Water Resources Development Act of 2013 at this time, but Subcommittee Chairman Bob Gibbs (R-OH) has expressed an intent to pursue legislation in the House this summer. Whether WIFIA, or its Buy American provisions, will be included in any House bill is unclear at this time.

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