



# Partnering for Success:

A Cross-Practice Series on Top Legal Considerations for Government Contractors

*Part 1: Risks and Opportunities in Public Infrastructure Projects*

June 28, 2023

**Seyfarth Shaw LLP**

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## Series Schedule

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**July 2023** – Immigration and Export Control Concerns

**September 2023** – Wage and Hour Considerations and Strategies

**October 2023** – Protecting IP in Government Contracts and Subcontracts

**November 2023** – Negotiating Government Subcontracts

**December 2023** – Sovereign Immunity in Commercial Real Estate Transactions

**January 2024** – Structuring Government Contracts for Joint Venture Entities

# Speakers

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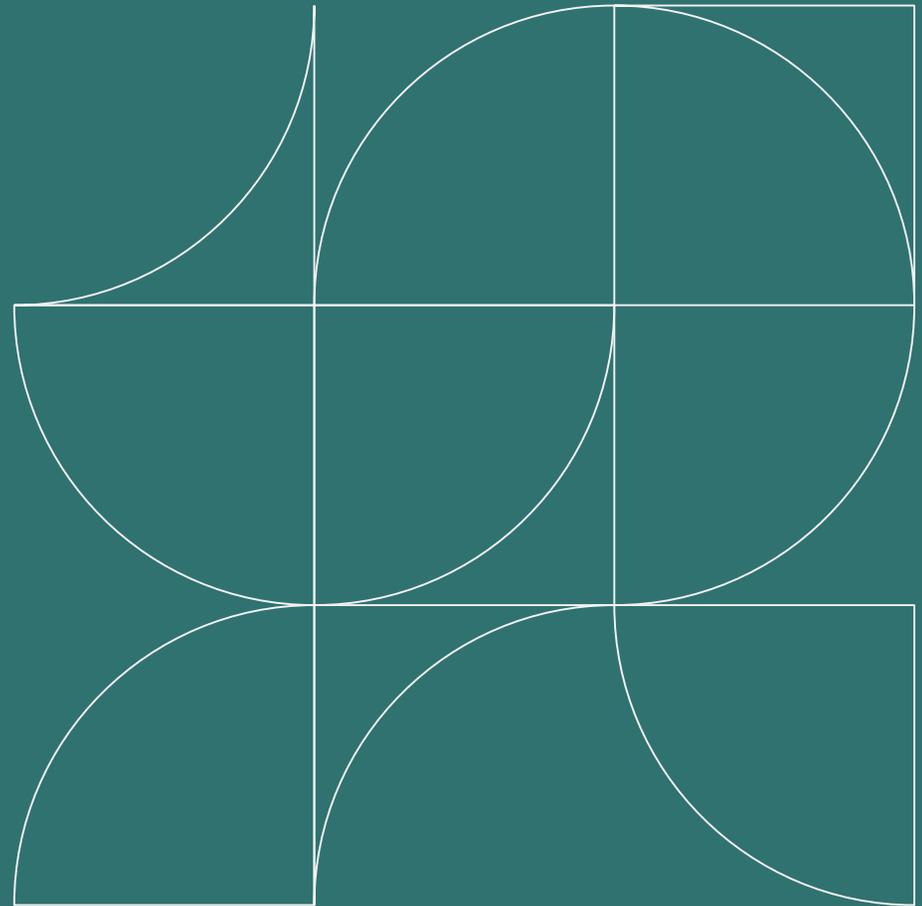
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# Agenda

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- 01** Intro to IIJA Funding
- 02** Opportunities and Risks: Infrastructure Development – Construction Perspective
- 03** Compliance Obligations for Federally-Funded Projects

# Intro to IIJA



# Influx of Federal Funding

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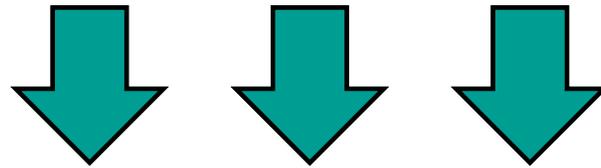


**Infrastructure Investment and Jobs Act  
(IIJA) \$1.2 trillion**

## What has happened so far?

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**\$200 billion**



**20,000 awards**

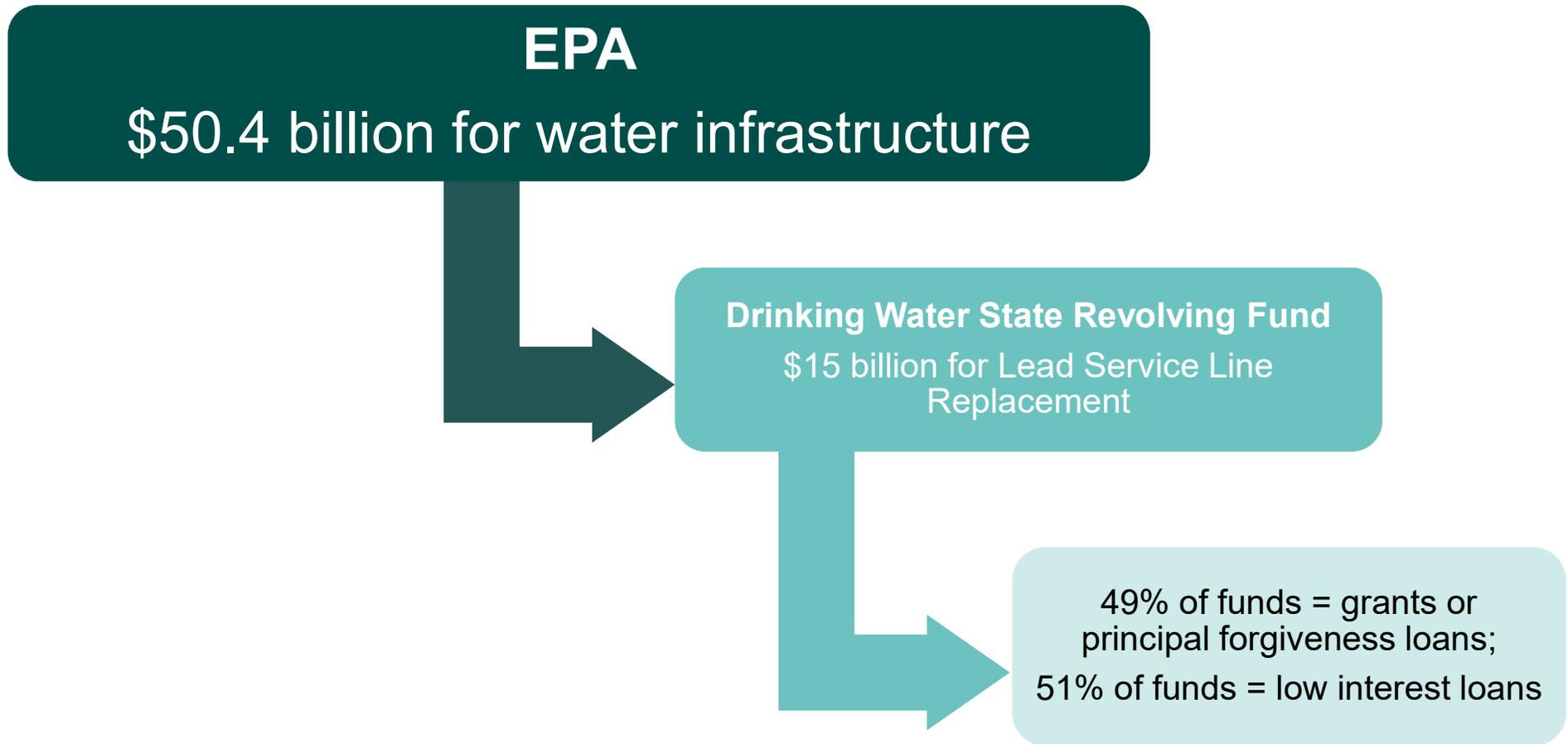
*As of February 8, 2023*

# What are the buckets of funding?



## Identification of Specific Priorities

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# Competitive & Non-Competitive Awards

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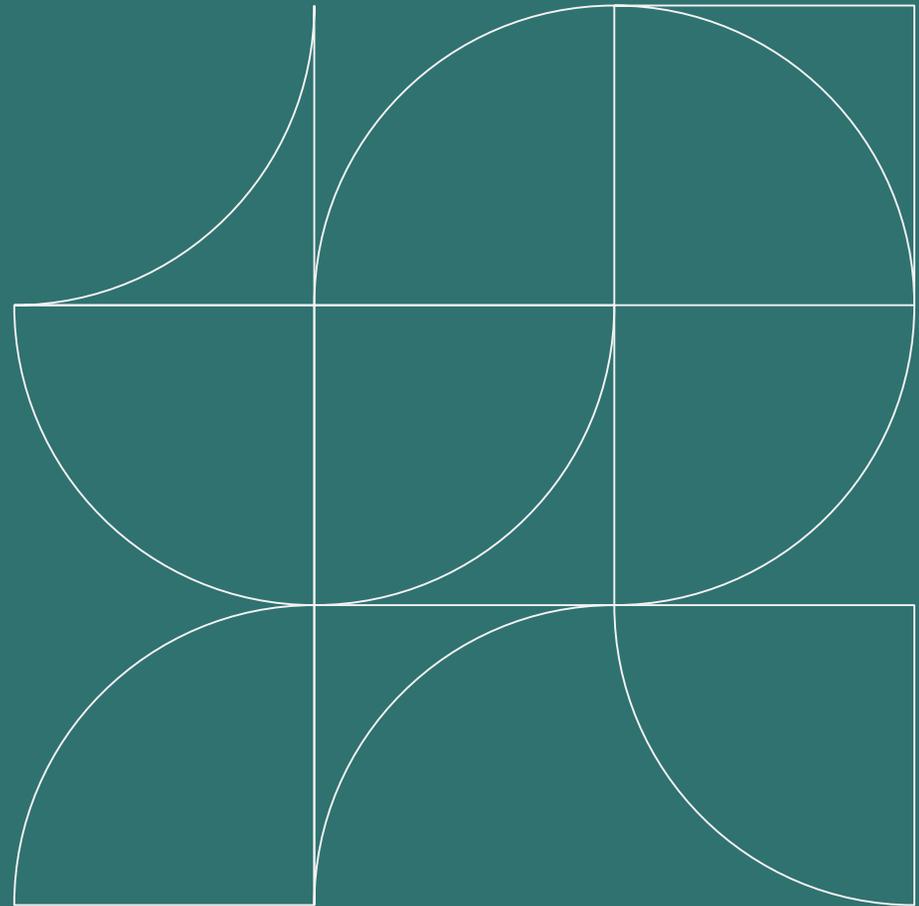
## Competitive Awards

- Agencies establish eligibility criteria for recipients and projects
- Potential recipients submit grant applications
- Agency evaluates grant applications and makes award
- Recipient typically makes subawards in support of project on a competitive basis

## Non-Competitive Awards

- Formulas determine level of funding to 50 states, D.C., and Puerto Rico
- State or territory decides on which projects to fund
- State or territory typically makes awards in support of a project on a competitive basis

# Opportunities and Risks: Infrastructure Development – Construction Perspective





## Opportunity Spotlight: Highways and Bridges

- Snapshot of 2022 – Contract Awards
  - Increased 25% across US
  - Increased in 40 states (plus DC)
  - Increased at least 29% in 25 states
- States have committed and additional \$21 billion in formula funds (January - April 2023)
- Will translate into increasing construction value in months and years ahead

## **State and Local Project Procurement – *Infrastructure Development***



- Traditional Design-Bid-Build
- Alternative Project Deliveries
  - Design-Build
  - EPC
  - Construction Management (CM) At Risk
  - Public-Private Partnership (DBF, DBOM, DBFOM)
  - Progressive Design-Build
  - Progressive P3 (Predevelopment Agreement)



## Opportunities Come With Challenges and Risks

- FHA: Every \$1 billion in highway/bridge investment supports 13,000 jobs
  - Construction and design industries: Labor and technical expertise
  - Public sector: Planning, procurement and execution expertise
- Construction materials
  - Supply chain
  - Volatile pricing
- Mega Projects

# Risk Profile – Key Considerations in Collaborative Models

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# IIJA – Public-Private Partnership (Transportation)

Private Activity Bonds (PABs) – doubles capacity

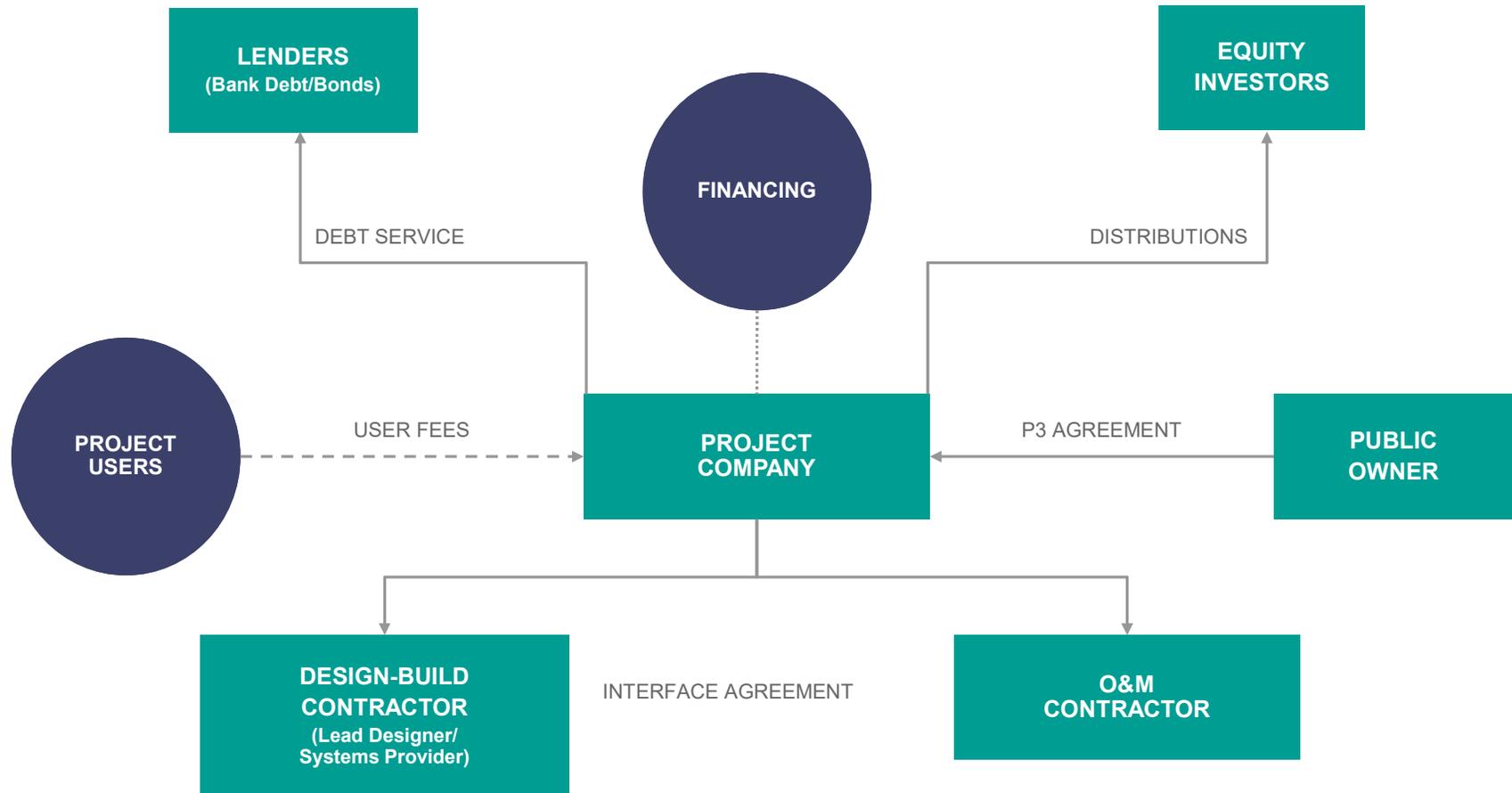
Streamlined permitting processes

Reports to Congress

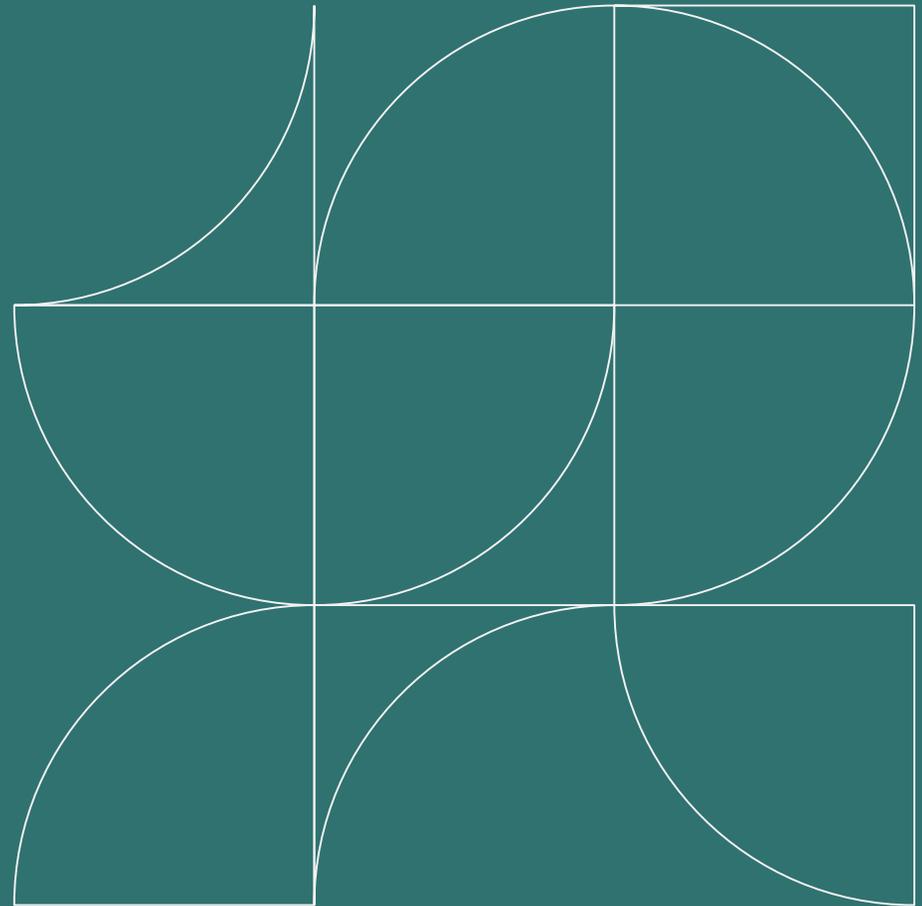
Technical assistance for governmental agencies

Value-for-money analysis (TIFIA) – projects over \$750 million

# Public-Private Partnership – Structure of DBFOM



# Compliance Obligations for Federally-Funded Projects





# Domestic Sourcing Requirements

- **Expanding Restrictions**

- Federal policy that fund recipients use “best efforts” to procure domestic products when feasible
- USDOT agencies implemented more restrictive domestic sourcing requirements, primarily restricting the use of foreign iron or steel in such projects.
- In 2021, the federal government enacted the “Build America, Buy America” Act (“BABA”), which will apply to all federally-funded infrastructure projects.

- **The "Test"**

- To be considered “produced in the United States” under the IIJA:
  - manufactured goods must contain greater than 55% domestic content and be manufactured in the United States;
  - in the case of construction materials, all manufacturing processes must occur in the United States; and
  - in the case of iron/steel, all manufacturing processes, from the initial melting stage through the application of coatings, must occur in the United States.

# Gratuities, Bribes, and Kickbacks

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- Prohibitions on soliciting or accepting gratuities, favors, or anything of monetary value from contractors or subcontractors. See 2 C.F.R. § 200.218(c)(1).
- Federally-funded construction projects require compliance with the Copeland “Anti-Kickback” Act
  - Prohibits inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. See 2 C.F.R. Part 200, App’x II(D).
- Federal grants require compliance with the Byrd Anti-Lobbying Amendment (31 U.S.C. § 1352)
  - Contractors applying or bidding for an award exceeding \$100,000 must file a certification that they will not and have not used federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any federal contract, grant, or any other award covered by 31 U.S.C. § 1352. See 2 C.F.R. Part 200 App’x II.
  - Noncompliance with these undue influence restrictions could pose FCA risk, particularly those restrictions accompanied by a requirement for an express certification of compliance.

# Bid Rigging / Collusive Bidding

## Examples of Collusion



**Complementary Bidding:** Competitors agree in advance as to which company will submit the winning bid on a competitive contract, and the other competitors purposefully submit prices above the intended winner's



**Bid Suppression:** When competitors agree to refrain from bidding on certain contracts.



**Bid Rotation:** When co-conspirators submit bids, and by agreement take turns on being the lowest bidder

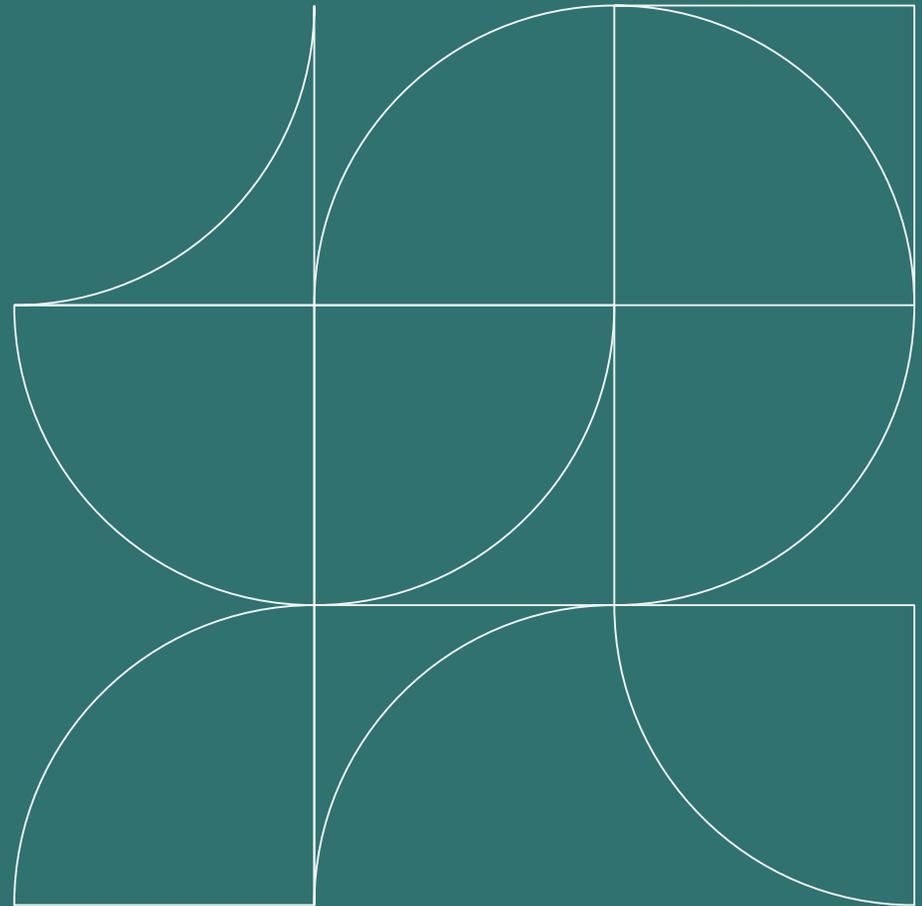
- These activities result in violation of the government's noncompetitive pricing restrictions regardless of whether they occur at the recipient, subrecipient, or contractor level. See 2 C.F.R. § 200.319(b)(3).
- Fund recipients should undertake reasonable efforts to ensure that prospective contractors have not engaged in noncompetitive pricing practices in responding to a solicitation.

## Wage and Hour Requirements



- Construction projects incorporate prevailing wage requirements for certain categories of workers
- Federal grant awards incorporate Davis Bacon Act requirements for construction contracts. See 2 C.F.R. Part 200 App'x II.
  - Requires contractors to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor; and
  - Requires contractors must be required to pay wages not less than once a week

**Now what?**



## The Best Defense is a Good Offense



- Ask questions of your compliance team when issues arise
- Monitor applicable regulatory regimes for updates
- Review and update compliance protocols as needed and on regular intervals
- Be proactive in rooting out misconduct and raising concerns as needed and appropriate
- Make reporting mechanisms known
- Where appropriate, disclose credible evidence of wrongdoing to the government

# Thank You

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