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interview, please contact:
Leo Levinson - 215-545-4600
leo@grouplevinson.com

FOR IMMEDIATE RELEASE:

**ONE YEAR LATER:
HOW THE "BUILD AMERICA, BUY AMERICA" ACT (BABA)
IS AFFECTING FEDERAL CONSTRUCTION PROJECTS**

**Construction Industry Thought Leader Identifies 7 Issues
That Need To Be Addressed**

(Philadelphia, PA) Approximately one year after implementation of the Infrastructure Investment and Jobs Act (IIJA), which includes the Build America, Buy America Act (BABA), the construction industry is still faced with significant questions regarding complying while minimizing cost increases and slowdowns. The law states that "none of the funds made available for a Federal financial assistance program for infrastructure, may be obligated for a project unless all of the **iron, steel, manufactured products, and construction materials** used in the project are produced in the United States."

According to James Gallagher, partner at Resolution Management Consultants, "generally the concept of "Buy American" is a great idea. However the timing of this law, coming in the midst of inflation, continuing supply chain uncertainties, a tight labor market and other issues has the potential to constrain the IIJA boost that the construction industry is anticipating, which also has the potential to lift the economy."

Although the law does provide for application for waivers in situations where buying American is inconsistent with the public interest; when the materials are not sufficiently available in the United States; or when using the

materials would increase the cost of the project overall by more than 25%, this policy has not yet been completely defined. Said Gallagher, "because the penalties for non-compliance are costly and time-consuming, contractors can be loath to proceed and risk having to tear out non-compliant materials and redo work."

Gallagher suggests that "BABA 2.0" needs to be passed to quantify some of the gray areas. He asks, "What did the initial Federal law miss that might be affecting its success?" In particular, Gallagher has made the following observations:

- 1) Instead of putting the burden on individual project managers for knowing global issues, the law needs to take into account what is possible relative to the market. The government has this information. For example, the government collects data to know if U.S.-made steel is already producing at capacity. If it is, a waiver should be built into the law so no guessing is needed.

- 2) What does "made in America" mean? More detailed definitions are needed. Currently, the law stipulates that "iron, steel, manufactured products and construction materials" must be American, but expansion of the definition needs to be developed to address the origin of raw materials, where they are processed, where parts come from, where assembly is made, where finishing is done, etc.

- 3) Record keeping must be better defined. Obviously records must be kept regarding the origins of each material. However, clarity must be developed regarding the format records should take in order to be considered compliant.

4) How do Federal BABA inspectors decide what is compliant and what is non-compliant and subject to penalty? What is the process for project managers to challenge those accusations in mediation or litigation?

5) What is the framework for management and responsibility for insuring that subs and contractors comply.

6) BABA is supposed to be in force, even when Federal funds cover only part of an infrastructure project. Federal laws supersede state laws. However, being a new law, federal and state governments may be fighting over jurisdiction and legality. What is a contractor supposed to do in the meantime, while these issues play out through the legal system?

7) From the effects of supply and demand, BABA could trigger greater cost increases. Although the law provides an automatic waiver if the cost exceeds 25%, can we imagine what would happen if IIJA projects will now be more than 25% more expensive? How are cost increases truly managed under IIJA?

For those companies currently working on and/or bidding on IIJA infrastructure projects, Gallagher advises, "Keep your contracts as open-ended as you possibly can, regarding cost increases and delay penalties. Be proactive about your acquisition of materials. To maintain more control over the process, develop your supply plan in advance and continually monitor it. Apply for waivers, if needed, early in the project. Manage this process at the highest levels because potential penalties are costly."

About Resolution Management Consultants, Inc.

Resolution Management Consultants, Inc. (RMC) is a nationally recognized consulting firm headquartered in Marlton, NJ. There are two sides to the business: the construction planning and management aspect – helping clients build more successful projects – and the litigation aspect – should matters go to court, providing analysis and testimony as expert witnesses. Founded in 1993 by veterans in the construction, contracting and engineering professions, RMC has assisted numerous private owners, public agencies and contractors in either achieving project goals or resolving cost and time disputes between the contracting parties.

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