

Comment from Associated General Contractors of America

Please see the attached comments from the Associated General Contractors of America on on the Internal Revenue Service's Notice 2022-51 - Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Inflation Reduction Act of 2022 - Docket (IRS-2022-0025).



Dan K. Fordice, III, President
Lester C. Snyder, III, Senior Vice President
Thomas Brown, Vice President
Henry J. Massman, IV, Treasurer
Stephen E. Sandherr, Chief Executive Officer
Jeffrey D. Shoaf, Chief Operating Officer

November 4, 2022

VIA ELECTRONIC SUBMISSION: <http://www.regulations.gov>

Charles P. Rettig, Commissioner
Internal Revenue Service
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice 2022-51 – Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022

Dear Commissioner Rettig:

On behalf of the Associated General Contractors of America (hereinafter “AGC”), thank you for the opportunity to submit the following comments on the Internal Revenue Service’s (hereinafter “IRS”) Notice 2022-51 - Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Inflation Reduction Act of 2022 (hereinafter “IRA”) - Docket (IRS-2022-0025).

The Associated General Contractors of America is the leading association for the construction industry. AGC represents more than 27,000 firms, including over 6,500 of America’s leading general contractors, and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. These firms, both union and open-shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property.

AGC appreciates the opportunity to provide input on the apprenticeship and prevailing wage requirements under the Inflation Reduction Act of 2022. These unprecedented provisions require thoughtful and comprehensive analysis as the IRS comes to fully understand the complexity and challenges contractors will face meeting the requirements. While similar requirements have been tied to various federal, state and local public works projects, for the first time ever prevailing wage and apprenticeship requirements will now be required on particular private projects. Many of the contractors on these intended projects will have little to no experience in meeting such requirements and the challenges in meeting such requirements will vary dramatically by region and construction market. Additionally, the complexity and burden of meeting prevailing wage and apprenticeship requirements on current public projects results in a majority of contractors avoiding such work as a

business practice entirely. AGC recommends flexibility in compliance as the particular circumstances of each project will challenge the fulfillment and proof of fulfillment for each requirement.

It is also important to point out that the IRS has no experience in implementing and regulating prevailing wage or apprenticeship requirements. To truly appreciate the complexity of these requirements, the IRS should have exhaustive consultations with the U.S. Department of Labor's (hereinafter "DOL") Wage and Hour Division (hereinafter "WHD") and Employment and Training Administration (hereinafter "ETA") prior to issuance of any guidance. While the intent of the IRA is to provide rapid and timely funding to the development of green energy projects through tax benefits, many developers and owners are not rushing to break ground on these projects. Instead, potential recipients of these new tax benefits are waiting for comprehensive guidance so they can fully determine the projects can meet the requirements and therefore receive the full benefits provided in the IRA. Incomplete or haphazard guidance will only prove to delay expansion of the exact green energy projects intended by the spirit of the IRA. AGC recommends truly thoughtful and comprehensive guidance be developed and provided through proper rulemaking so that owners and contractors can understand and meet these unique requirements.

Finally, truly meaningful input will require extensive consultation, discussion, and coordination with AGC chapters and members to assess impact and practicality. To best accommodate your request, AGC would like the opportunity to reach out to its members regarding the impact of the requirements on their companies. Unfortunately, thirty days does not warrant our membership organization enough time to draft a survey, receive feedback from members, analyze the results, and draft a thoughtful response to your request for comments. Also, in construction, fall denotes the late peak construction season and many of those who would provide AGC with thoughtful feedback are currently focused on finishing existing projects on-time as promised. As a result, it will be extremely difficult for AGC to get meaningful feedback from its members in time to properly prepare comments before the November 4 deadline.

Regardless of the rigid timeline of the existing comment period, AGC would like to take the opportunity to address the following specific topics of the Notice by the IRS:

The IRS Should Provide Clear and Consistent Guidance on How the Prevailing Wage Requirements Apply and Consider the Challenges Contractors Currently Face Meeting the Requirements of the Davis-Bacon and Related Acts.

AGC is disappointed in the lack of truly thoughtful proposals by the IRS on how it intends to implement the prevailing wage requirement of the IRA and hopes to have the opportunity in providing meaningful comments in the future through a proper rulemaking via the notice and comment process. That being said, and again as previously stated, prevailing wage requirements for the first time ever will now be placed on private projects and in many instances on owners and contractors unfamiliar with this requirement. Additionally, the IRS itself is for the first time having to provide guidance and regulate this labor requirement. The existing requirement to provide prevailing wages on public work as governed by the Davis-Bacon and Related Acts (hereinafter "DBRA") and a number of state laws is extremely complex and burdensome. So much so, that a large number of contractors avoid public work entirely.

If the IRS intends to require contractors to provide prevailing wages, it should detail specifically how contractors should do so and understand the unique challenges contractors face and, as such, should provide flexibility instead of rigid adoption of the DOL's current requirements. DOL's almost

exclusive reliance on voluntary wage surveys to produce and update wage determinations (hereinafter “WDs”) has created a compensation system for DBRA covered construction that poorly reflects the construction labor market in many parts of the country. Inaccurate WDs and classifications hinder the ability of contractors to compete, and many times expose them to unexpected liabilities. Contracting agencies and contractors alike are plagued with issues regarding WHD’s WDs, including missing classifications, woefully outdated WDs, and/or many times completely inaccurate WDs which leave it up to the contractors themselves to sort out after award of a project. A major reason for the lack of contractor participation in wage surveys, and therefore lack of utilizable data, is the DOL’s insistence that wage rate and fringe benefit data be reported by how many workers in each craft classification were employed on each construction type by individual county and by individual project. Extracting this data from contractor payroll records is painstaking, especially when a survey is occurring during the high construction season (typically spring-fall).

Additionally, and unfortunately, there is no set rulebook or consistent guidance on which trade performs particular work across the country. Instead, which trade performs particular work is often guided by collective bargaining agreements if applicable and/or determined by the common practice in that particular market, also known as “Area Practice”. This often leads to jurisdictional disputes (when multiple trades claim the same work) among trades and liability to contractors if they are determined to be using incorrect classifications and paying incorrect wages. Other results include contractors being forced into using trades that are not the most suitable for the work and resolving the issue is typically costly and left to the contractor.

AGC wonders how the IRS is going to handle many of these issues. By the modern nature of the projects eligible for the IRA’s benefits, so too is the work. Many of the traditional trades that are governed by WDs for contractors to pay prevailing wages will not apply to these projects. This will assuredly lead to a dominating number of missing classifications and therefore conformance requests (process to request the addition of a classification of laborers or mechanics and the corresponding wage rate not listed on a DBRA wage determination that is incorporated into a DBRA covered contract), along with widespread disputes over the work. Additionally, many areas of the country, typically the rural and traditionally non-union areas which are also most targeted for projects by the IRA, are the ones plagued with missing and/or woefully outdated WDs. The current DOL conformance process can be time-consuming, resource-intensive and almost always very slow. Many contractors have been reporting wait times of months to hear if the DOL will agree to a request. To avoid further delay of the development of the projects covered by the IRA, AGC advises the IRS to implement an efficient and timely system to process the many expected missing classifications and wage determinations. The IRS will also need to commit significant resources to this process and set a time limit for response to conformance requests (e.g., thirty days from submittal of the request) for contractors to rely upon. Absent a response from the IRS to their conformance request within the time period, contractors should be able to move forward with the classification and wage rate included in the original request. If by chance the IRS merely leans on the DOL to handle the conformance process under the IRA, AGC again advises the IRS to set the same time limits to respond, giving the contractor some stability in operation and to not delay projects further.

The IRS should also be aware of the structural differences between the prevailing wage requirements of the current DBRA regulations and what is intended in the IRA, starting with the funding mechanism and ending with reporting and investigations. Currently under the DBRA, a federal

contractor is awarded a contract and funding by a specific procurement agency (owner), who then provides oversight of the requirements of the project. The agency provides the current wage determinations during the bid process and liaises between the contractor and DOL to answer any specific compliance issues. If there are missing classifications, contests of WDs or jurisdictional disputes, the contractor typically turns to the contracting agency for resolution before elevating to the DOL. Additionally, under the DBRA there are strict payroll requirements for federal contractors. Under DBRA projects, general contractors submit certified weekly payrolls to the contracting agency and retain their own records. AGC believes the practice of weekly payroll is antiquated and advocates on revising the requirement to at most biweekly. And finally, when it comes to an investigation around the compliance of a contractor on a DBRA covered project, it falls to the DOL's WHD to investigate and enforce.

The bedrock of the IRA funding mechanism is inherently different than that of DBRA covered projects and AGC wonders how the oversight of payment of prevailing wages would be designed. Under the IRA there is no procurement agency to play an oversight role through the entire process of a covered project, such as the role a procurement agency plays on a DBRA project. What kind of reporting mechanism is necessary and who does a covered contractor report to? Who is ultimately the entity that is required to report or liable for an investigation? Who would the contractor turn to resolve issues such as missing classifications, incorrect or outdated WDs, area practice questions, or jurisdictional disputes? Will contractors submit weekly payroll to private owners, tribal leaders, or municipalities to demonstrate compliance? Do these entities have an understanding of prevailing wage compliance and the capacity to staff the compliance work?

Finally, AGC wonders how deeply the IRS will mirror the extent of the prevailing wage requirements to the DBRA and how far down it will apply to general contractors, sub-contractors and sub-contractors of sub-contractors. Where does it end? Additionally, who exactly would be liable for any penalties? The project owner is the entity that receives the benefit of IRA credits, yet it appears that the prevailing wage recordkeeping compliance and penalty is passed on to the contractor. Will contractors be able to self-attest or obtain third-party certification of compliance and be allowed flexibility through further good faith exceptions? Absolute clarity is necessary.

AGC again advises the IRS, through proper rulemaking, to think comprehensively about all these issues prior releasing clear and consistent guidance along with providing flexibility for the contractor or covered entity to ensure or achieve compliance around the paying of prevailing wages on these projects and avoid any ambiguity, disputes and liability.

Prevailing Wages Must be Limited to Only Work Performed on the Site of the IRA Covered Project

Any prevailing wage requirements should be limited only to work performed on the actual site of work, such as the IRA covered project, and not to any suppliers or work done elsewhere for the project. The DOL has recently proposed comprehensive changes to the guidance governing the DBRA and specifically around the site of work provisions. AGC submitted comments to the DOL highlighting that the site of work provisions have been settled through litigation for decades now and the regulatory changes made in response to litigation have made application of the "site of work" and "adjacent or virtually adjacent" more consistent and predictable. Contractors understand the current site of work regulations and it appears the DOL is trying to get around the litigation and excessively expand the definitions. Additionally, the current limitation of DBRA coverage to adjacent or virtually adjacent facilities imposed by previous court decisions does not need further

elaboration and does not apply to “nearby” facilities. Nor should it for the prevailing wage requirements under the IRA.

Site of Work Background

*Building and Construction Trades Department, AFL-CIO v. U.S. Department of Labor Wage Appeals Board and Midway Excavators, Inc.*¹

In this case, the court held that:

The Act [DBA] covers only mechanics and laborers who work *on the site* of the federally-funded public building or public work, not mechanics and laborers employed off-site, such as suppliers, materialmen, and material delivery truck drivers, regardless of their employer. . . . Material delivery truck drivers who come onto the site of the work merely to drop off construction materials are not covered by the Act even if they are employed by the government contractor . . . 29 CFR 5.2(j), insofar as it includes off-site material delivery truck drivers in the Act’s coverage, is invalid.

Following *Midway*, DOL published an interim final rule amending the regulations to state that “the transportation of materials or supplies to or from the site of the work by employees of the construction contractor or a construction subcontractor is not ‘construction, prosecution, completion, or repair.’”² Truck drivers employed by a contractor or subcontractor who transport materials to or from the ‘site of the work’ would not be covered for any time spent off-site, but would remain covered for any time spent directly on the ‘site of the work.’” At the same time, DOL noted that in the *Midway* decision held that the Midway truck drivers who were engaged in making deliveries to the site were not covered under DBA even though they spent brief periods of time on the site.”

DOL proposed to define this incidental time on site as less than 20 percent of an employee’s workday or workweek. The 20 percent threshold was incorporated into FOH 15e16(c) on *material supplier* truck drivers. Specifically, if a material supplier truck driver “undertakes to perform a part of a construction contract as a subcontractor” such as “warranty and/or repair work,” and if such work exceeds 20 percent of the driver’s time in a workweek, the driver is covered for all on-site time during the workweek.

*Ball, Ball and Brosamer, Inc. v. Reich*³

This case involved a portable concrete plant 2 miles from the construction site. The court held that:

The Secretary maintains that the regulations at 5.2(l)(2) satisfy the geographic limiting principle of the Davis-Bacon Act and *Midway*. This might be the case if the Secretary were applying the regulatory phrase “so located in proximity to the actual construction location that it would be reasonable to include them” only to cover batch plants and gravel pits located in actual or virtual adjacency to the construction site. *See* 29 CFR 5.2(l)(1). But such

¹ *Building and Construction Trades Department, AFL-CIO v. U.S. Department of Labor Wage Appeals Board and Midway Excavators, Inc.*, 932 F.2d 992 (D.C. Cir. 1991).

² 29 C.F.R. 5.2.(j)(2).

³ *Ball, Ball and Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994).

an application is not before us and we express no opinion on its validity. Instead, the Secretary attempts to find any tiny crack of ambiguity remaining in the phrase “directly upon the site of the work” and cram into it a regulation that encompasses other sites miles from the actual location of the public works.

In *Midway*, we determined that “not surprisingly, that Congress intended the ordinary meaning of its words.” 932 F.2d at 992. That is, the limitation in the statute making it applicable to “mechanics and laborers employed directly upon the site of the work” restricts coverage of the Act to employees who are working directly on the physical site of the public building or public work being constructed.”

In the end, we reach the same conclusion we did in *Midway*. The statutory phrase “employed directly upon the site of the work,” means “employed directly upon the site of the work.” Laborers and mechanics who fit that description are covered by the statute. Those who don’t are not.

*L.P. Cavett Company v. U.S. Department of Labor.*⁴ The court held that an asphalt plant 3 miles from a highway project was not a site of work. Specifically:

In reaching our decision, we rely on the reasoning employed by the D.C. Circuit in *Ball, Ball & Brosamer, Inc. v. Reich*.

In reaching its decision [in *Midway*], the [DC Circuit] court commented that “[n]othing in the legislative history suggests, as DOL has ruled, that Congress intended the employment status of the worker, rather than the location of his job, to be determinative of the Act’s coverage.”

The statutory phrase “employed directly upon the site of the work” means that only employees working directly on the physical site of the public work under construction have to be paid prevailing wages.

Moreover, if the geographic proximity of the Davis-Bacon Act were expanded in the manner advocated by the Department of Labor, we would create the difficult problem of determining which off-site workers were indeed closely enough “related” to the public work site to justify inclusion under the Act. The *Ball* court noted as much when it stated, “[T]he Secretary attempts to find any tiny crack of ambiguity remaining in the phrase “directly upon the site at the work” and cram into it a regulation that encompasses other sites miles from the actual location of the public works.”

*In the Matter of Rogers Group, Inc., John C. Haydon and Rose Transport, Inc.*⁵

WHD argued that when the time spent on site by material delivery truck drivers employed by DBA contractors and subcontractors during the course of the day is “significant,” the de minimis exception cannot exempt them from DBA coverage for this “significant” time. In this case WHD

⁴ *L.P. Cavett Company v. U.S. Department of Labor*, 101 F.3d 1111 (6th Cir. 1996).

⁵ *In the Matter of Rogers Group, Inc., John C. Haydon and Rose Transport, Inc.* Case No. 2012-DBA-00005 (5/28/13), Available at: [https://www.oalj.dol.gov/Decisions/ALJ/DBA/2012/WAGE_and_HOUR_DIVISI_v_ROGERS_GROUP_INC-ROS_2012DBA00005_\(MAY_28_2013\)_162104_CADEC_SD.PDF](https://www.oalj.dol.gov/Decisions/ALJ/DBA/2012/WAGE_and_HOUR_DIVISI_v_ROGERS_GROUP_INC-ROS_2012DBA00005_(MAY_28_2013)_162104_CADEC_SD.PDF).

contended that the truck drivers spent their entire day furnishing materials and were on the sites between one and 52 times a day, for between 10 minutes and seven and one-half hours.

The Administrative Law Judge (ALJ) rejected this argument, holding that in *Midway* the DC Circuit concluded that laborers and mechanics employed off-site are not covered by the DBA. Material delivery truck drivers who come onto the site only long enough to make their deliveries are not employed directly on the site of the work. The DC Circuit reiterated this interpretation in *Ball, Ball & Brosamer, Inc.* The Sixth Circuit relied on this reasoning in *Cavett*.

In response to these decisions, the Department published proposed revisions to its position on DBA applicability to truck drivers. The Department noted that truck drivers who transport material to or from the site would not be covered for time spent off-site, but would be for any time spent directly on the site that is more than de minimis.

The Department argued that the 2000 revision to 29 CFR 5.2(l)(1)⁶ is entitled to *Chevron*⁷ deference. The ALJ did not agree. This deference was rejected in *Midway*. Where the intent of Congress is clear, the court and agency must give effect to the unambiguously expressed intent of Congress. Both *Midway* and *Cavett* found no ambiguity in the plain language of the DBA. The Department's interpretations of the DBA and the scope of the *Midway* decision and its regulation are not entitled to deference either. Neither is the Field Operations Handbook (FOH). The FOH is contrary to the Sixth Circuit precedent expressly excluding material delivery truck drivers from DBA coverage. In addition, agency interpretations contained in agency manuals and guidelines such as the FOH lack the force of law and do not warrant *Chevron* style deference.

The Department did not allege that the truck drivers employed by Rogers performed any work while on the site other than unloading the materials they delivered. The Department argued that a court must consider both the location where the drivers spent the majority of their time and the time spent on the site during each delivery. According to the ALJ, the Department infers from *Midway* that material delivery truck drivers were not entitled to DBA wages based on where the drivers spent most of their time and the amount of time they spent on the site during each trip.

The ALJ disagreed. The *Midway* court concluded that material delivery truck drivers who come onto the site merely to drop off deliveries are not covered because their work serves the same function as materialmen, who are excluded from the DBA. Under *Midway* and *Cavett*, truck drivers who deliver materials from off-site facilities to the site are not covered because they are not employed directly on the site of the work. Material delivery truck drivers who enter the site of work only long enough to deliver construction materials, like those employed by Rogers, are employed off-site and not subject to the DBA.

DOL has not issued any opinion letters that specifically address the parameters of the site of the work as published in the 2000 regulatory amendments. The Administrative Review Board has also issued a limited number of decisions that address "site of the work." The following decisions provide limited guidance:

⁶ *Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction*, 65 Fed. Reg. 80278 (December 20, 2000) (to be codified at 29 CFR Part 5). Available at: <https://www.govinfo.gov/content/pkg/FR-2000-12-20/pdf/00-32436.pdf#page=12>.

⁷ *Chevron, U.S.A. v. Natural Res. Def. Counsel*, 467 U.S. 837 (1983).

*In re Abbe & Svoboda, Inc.*⁸ the Board applied the previous regulatory definition of “site of the work” and found that laborers performing clean up duties on the ground below bridges that were being painted per the covered contract were on the site of the work.

*In re Forest M. Sanders*⁹ the Board held that a borrow pit was part of the site of the work if it was dedicated exclusively, or nearly so, to the performance of the road project and if it was adjacent or virtually adjacent to it, and remanded the case to WHD for further consideration.

*In re Gary J. Wicke*¹⁰ the Board held that although the previous definition applied in this case, it affirmed WHD’s determination that a borrow pit 3-5 miles from construction site was not on the “site of work,” not adjacent or virtually adjacent to it, or exclusively dedicated to the project, noting that the Administrator’s determination was consistent with the court of appeals decisions and the revised regulations.

Current DOL Site of Work Guidance

The site of the work is currently defined as “the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.” 29 CFR § 5.2(l)(1); *see also* FOH 15b04.¹¹ Batch plants, borrow pits, job headquarters, tool yards, etc., are part of the site of work, provided they “are dedicated exclusively, or nearly so, to performance of the contract or project” and are “adjacent or virtually adjacent to the site of the work” as defined in 29 CFR § 5.2(l)(1). 29 CFR § 5.2(l)(2) (emphasis added); FOH 15b04. However, the site of the work does not include permanent home offices, branch plant establishments, tool yards, etc., “whose location and continuance in operation are determined wholly without regard” to the particular contract or project. 29 CFR § 5.2(l)(3). The regulations further address permanent facilities of materials suppliers.

As listed in FOH 15b04, examples of site of the work include:

1. If a small office building is being erected, the “site of work” will normally include no more than the building itself and its grounds.
2. In the case of larger contracts, such as for airports, highways, or dams, the “site of the work” is necessarily more extensive and may include the whole area in which the construction activity will take place.
3. Where a very large segment of a dam is constructed up-river and floated downstream to be affixed onto a support structure, the secondary construction site would be within the meaning of “site of the work” for Davis-Bacon purposes if it was established for and dedicated to the dam construction project.

This definition has been in place since the Department’s December 20, 2000 final regulations, effective January 19, 2001, that revised the definitions of “site of the work” and “construction,

⁸ *In re Abbe & Svoboda, Inc.*, ARB No. 01-063, 2004 WL 1739870 (ARB July 30, 2004).

⁹ *In re Forest M. Sanders*, ARB No. 05-107, 2007 WL 4248530 (ARB Nov. 30, 2007)

¹⁰ *In re Gary J. Wicke*, ARB No. 06-124, 2008 WL 4462982 (ARB Sept. 30, 2008)

¹¹ Available at: <https://www.dol.gov/agencies/whd/field-operations-handbook>.

prosecution, completion, or repair.” 65 FR 80268-01 (Dec. 20, 2000). The revisions were made to clarify the regulatory requirements in response to three U.S. Court of Appeals decisions that held that DOL’s application of the prior regulatory definitions was inconsistent with the DBA limitation to those workers employed “directly on the site of the work.” 65 FR at 80270. The preamble to the final regulations includes the following DOL guidance and observations:

1. DOL is “constrained” “to limit prevailing wage coverage of off-site, dedicated support facilities to those that are either adjacent or virtually adjacent to the construction location.” 65 FR at 80271.
2. Dedicated support facilities are viewed as included within the site of the work only where they are located on, adjacent, or virtually adjacent to the site of the public building or public work. 80271-72.
3. The Department does not precisely define the terms adjacent or virtually adjacent. It believes that the courts intended it to apply the site of work requirement “narrowly, but with common sense and some flexibility” and determinations should be made on a case-by-case basis. 80272.
4. Establishing a specific maximum distance beyond which off-site facilities would not be covered “would be ill-advised.” “[I]t can be almost impossible to determine the exact outer boundaries of large public works projects, such as . . . a major highway construction project. Thus, a numerical figure representing the maximum distance a dedicated facility can be located from the construction site would be arbitrary and impractical to apply.” “[T]he site of work limits for the construction of a single building in an urban location would likely be restricted, and a dedicated facility located only a few city blocks away from the building “would most likely not be considered ‘virtually adjacent’ for Davis-Bacon purposes.” 80272-73.

“The Site of Work”, “Significant Portions”, and “Nearby Dedicated Support Site” Have Already Been Litigated

The site of work regulatory requirement does not apply to related acts that extend DB coverage to all laborers and mechanics employed in the “development” of a project (citing housing acts). The material supplier exception does not apply to work under statutes that extend DB coverage to all laborers and mechanics employed in the “development” of a project, regardless of whether they are employed by contractors or subcontractors. The adjacent or virtually adjacent limitation on coverage of material suppliers was adopted after the *Ball*¹² and *Cavett*¹³ decisions. And the provision that exempts transportation of material to or from the site is from the 1992 interim final rule implementing *Midway*¹⁴.

DOL recently proposes to revise the site of work to (1) “further encompass” certain construction of “significant portions” of a building or work at a secondary site, (2) clarify application of the site of work to include flaggers, (3) better delineate material suppliers and (4) set clear standards for truck

¹² *Ball, Ball and Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994)

¹³ *L.P. Cavett Company v. U.S. Department of Labor*, 101 F.3d 1111 (6th Cir. 1996)

¹⁴ *Building and Construction Trades Department, AFL-CIO v. U.S. Department of Labor Wage Appeals Board and Midway Excavators, Inc.*, 932 F.2d 992 (D.C. Cir. 1991)

drivers. DOL also proposes to use the term “nearby dedicated support site” to describe locations such as batch plants that are part of the site of work because they are dedicated exclusively, or nearly so, to the project and are adjacent or nearly adjacent to a primary or secondary construction site.

The 2000 rule amended the definition of the site to include a site away from the building or work where the site is established specifically for the contract and a “significant portion” of a building or work is constructed. Transportation between the sites is also covered. The *Ball* and *Cavett* decisions involved facilities that were no more than 3 miles from the site of work. This proposal seeks to use a more subjective standard of “nearby” to extend coverage off-site facilities.

The site of work provisions have been settled through litigation for decades now and the regulatory changes made in response to litigation have made application of the “site of work” and “adjacent or virtually adjacent” more consistent and predictable. Contractors understand the current site of work regulations and it appears the DOL is trying to get around the litigation and excessively expand the definitions. Additionally, the current limitation of DB coverage to adjacent or virtually adjacent facilities imposed by the *Ball* and *Cavett* decisions does not need further elaboration and does not apply to “nearby” facilities.

We anticipate that by dramatically revising and expanding the definitions as proposed, the result would lead to further costs and compliance nightmares. Why drastically rewrite existing guidelines that contractors currently are familiar with? Additionally, if DOL follows its proposed changes, the resulting regulations will assuredly end up back in the courts for years resulting in further uncertainty. AGC recommends that the WHD and Treasury instead put into regulation the already clear and existing rules that contractors regularly turn to in compliance and have for a long time. In a nutshell, why create unnecessary confusion?

AGC also recommends that both the DOL and Treasury:

- Limit Davis-Bacon Act coverage to the physical site of construction;
- Revise regulations to codify the enforcement practice of applying a de minimis threshold that excludes coverage of activities at the site of the work that amounts to 20% or less of the employees’ work hours that week; and
- Expand application of the de minimis rule to all covered workers and activities at the site of the work, not just truck drivers who are loading and unloading materials.

Prevailing Wages for the Alteration and Repair of a Covered Facility and Transferability of the Tax Credits

The IRA also requires the payment of prevailing wages for the “alteration and repair” of a covered facility for the entire period of the tax credit. Under this time frame, liability to provide prevailing wages for 5, 10, and even 12 years later on certain covered facilities by operations and maintenance service providers. Questions remain around this provision. Who will define the work that falls under the definition of “alteration and repair” and again provide the WDs, especially if classifications are missing or wrong as expected? Would this apply to employees of the owners who are providing operations and maintenance service? The differential between prevailing wage and the owner's maintenance pay may result in work that should be performed by a contractor, being performed by owner maintenance staff thereby taking work from the construction industry. Who is liable and/or

penalized? Is the owner, contractor who did the original work on the project, or operations and maintenance service providers liable?

The IRA also allows the transferability of certain tax credits which will lead to a secondary market where entities might sell the tax credits. This too leads to questions around who is ultimately liable for the compliance of providing prevailing wages. Is the owner, contractor who did the original work on the project, or operations and maintenance service providers liable? It appears that all upside is for the owner, while all the work and risk is on the contractor.

Again, providing prevailing wages for the “alteration and repair of a covered facility and transferability of the tax credits too is new territory and necessitates similar answers. AGC advises the IRS to think these issues through thoughtfully and provide clear guidance for all involved in the lifecycle of a covered project to confidently rely upon.

Apprenticeship Requirements Will Pose Supply Challenges to Programs and Contractor Alike in a Workforce Challenged Industry and IRS Should Provide Flexibility in Compliance

The Construction Workforce Crisis by the Numbers

Labor shortages in the commercial construction industry remain significant and widespread, impacting virtually every aspect. There were 437,000 job openings in construction, not seasonally adjusted, at the end of August, a rise of 47,000 (12%) from August 2021, according to the U.S. Bureau of Labor Statistics (BLS).¹⁵ That was the largest August total in the 22-year history of the series and the 18th consecutive month of rising y/y openings. Hires rose by 4,000 (1.1%) y/y to 378,000. Layoffs and discharges decreased by 33,000 (20%) y/y to 129,000, the lowest level yet for August. Quits jumped by 46,000 (20%) to 281,000, the highest for any month in series history. This data and others underscore the challenges that construction contractors currently face in finding and retaining qualified workers.

Recent AGC survey data underscores this statistical reality. According to the data, 93 percent of construction firms report they have open positions they are trying to fill. Among those firms, 91 percent are having trouble filling at least some of those positions – particularly among the craft workforce that performs the bulk of onsite construction work. All types of firms are experiencing similar challenges. Nearly identical results were reported by contractors that use exclusively union craft labor and by firms that operate as open-shop employers; by firms with \$50 million or less in annual revenue and ones with more than \$500 million in revenue; by companies in all four regions of the country; and by contractors doing building construction, highway and transportation projects, federal and heavy work, or utility infrastructure.¹⁶

¹⁵ U.S. Department of Labor, Bureau of Labor Statistics (October 7, 2022), *Employment Situation Summary*, retrieved from <https://www.bls.gov/news.release/empsit.nr0.htm>.

¹⁶ The Associated General Contractors of America and Autodesk (August 31, 2022), *2022 Workforce Survey Analysis*, retrieved from https://www.agc.org/sites/default/files/users/user22633/2022_AG_C_Workforce_Survey_Analysis.pdf.

Apprenticeship Programs are Integral to the Industry but Limited by Area and Market

According to BLS, there are 378,000 job openings in construction, yet according to the Department's Office of Apprenticeship (OA), there were only 197,421 active apprentices in the industry for 2021. While there are multiple paths into the industry, the fact remains that it is difficult for many firms and their partners to establish apprenticeship programs for construction workers and fill in the gap between workers currently being upskilled through registered programs and the industry's current needs.

Much like prevailing wage issues varying by areas of the country and specific construction markets, so too is the establishment of apprenticeship programs and supply and utilization of apprentices themselves. Some union heavy areas of the country have established registered apprenticeship programs, but contractors continue to report a workforce shortage. And in more rural, non-union areas, there are few registered apprenticeship programs, programs face challenges getting established, or contractors have turned to alternative on the job training and development programs that meet their particular needs and without the needless administrative burdens that come with a registered program. These areas would face significant challenges meeting any apprenticeship utilization requirement. Additionally, while the intent of this provision is to expand apprenticeships, the result appears to be limiting the utilization of apprenticeships to the existing programs that do not have the capacity to supply these new projects under the IRA. Setting an arbitrary goal for contractors to meet will have no impact itself on the increased enrollment of apprentices in programs. Without relief and flexibility, these projects will only end up being delayed as owners hesitate unless they can confirm they will receive the full benefits under the IRA.

What Factors Should the Treasury Department and the IRS Consider Regarding the Appropriate Duration of Employment of Individuals for Construction, Alteration, or Repair Work for Purposes of this Requirement?

While the intent of the apprenticeship utilization requirements in the IRA are to increase enrollment of apprentices in programs, as well as workforce development and training in the industry in general, capacity at the moment can be limited. And, the varying nature of construction employment cannot be forward looking, but instead must be a retroactive test. For example, under the union model, employment cannot be under one contractor, as the employee can work for multiple contractors over a period of time and projects. Plus, all contractors face issues such as seasonality in construction and transitory nature of the workers as they go to where the projects are located, and work needed.

Instead of considering "duration of employment", the IRS should refer to the "use of qualified apprentices or journey workers that have completed a registered apprenticeship program." Referring to the use of qualified apprentices as currently enrolled apprentices only, will result in a lot of good faith efforts and will not result in new apprentices. Additionally, what if the project is a multi-year project and an apprentice graduates during the construction of a project? In this situation, the contractor could be out of compliance and incentivized to replace the employee with another apprentice, which goes against the spirit of the policy if they age out or replaced. Also, is the utilization goal considered per contract or trade? If the goal is per trade, it would penalize multi-craft contractors having to satisfy goals across all trades. And finally, any requirements should apply to only the construction on-site of the qualified project.

Additionally, collective bargaining agreements (CBAs) define the jurisdiction of work, hourly pay and apprentice to journey worker ratios. In instances where the IRA guidelines are in conflict with the language of collective bargaining agreements, will the IRS allow waiver for adherence to CBAs or will it require that union labor-management committees renegotiate the CBAs which is lengthy process?

Clarification is Needed Regarding the Good Faith Effort Exception

AGC has many questions regarding the good faith exception that will need to be clarified. Covered entities need clarity and relief, especially in the near future as covered projects break ground and contractors make their best efforts to come into compliance. Especially if IRA requires the use of current apprentices and not journey workers that have completed existing programs, existing programs could easily not have the capacity to supply all these projects at first and will need time to recruit and grow.

First, while the credit is going to sponsor or owner (taxpayer), who ultimately is responsible for submitting documentation? At what frequency would this documentation need to be submitted (beginning, during, end of project)? And, similar to many of the previous comments, who is receiving any documentation and making the final decision. Maybe the IRS should consider an annual self-attestation or third-party reporting on the number of workers per trade, the number that completed a registered apprenticeship program and the number that are currently participating in a registered apprenticeship program?

Another question is what specifically constitutes the eligible program to reach out to? Is there a geographic, state, or market limitation to which programs must be consulted and if there are none, does that meet the exception? What if a union contractor cannot meet the threshold because the joint program cannot supply the apprentices, but an open-shop program can, are these contractors required to break their CBAs? If the project is located in a geography that is predominantly non-union, is a union contractor required to hire a non-union apprentice? Or if the project is located in a geography that is predominantly union, is a non-union company required to hire a union apprentice? What if an open-shop contractor requests an apprentice through a joint labor management program and that program requires the contractor to sign a CBA to get the apprentice. If the contractor refuses to sign the CBA and the program refuses to supply the apprentices, does that qualify under the exception?

There are also questions around what kind of documentation is required for the five-day notice of request of apprentices by the contractor to a program and response necessary. What kind of documentation is required (phone call, written, email, etc.)? Is a general contractor responsible for seeking this documentation for its subcontractors? What is considered the definition of five days to respond? Because of the constant nature of construction, AGC recommends five calendar days. And finally, how specifically is intentional disregard defined?

What Factors Should be Considered in Administering and Promoting Compliance with this Good Faith Effort Exception?

Less frequent administrative burdens while reporting and responding to investigations would benefit the timeliness and efficiency of the delivery of covered projects. An annual self-attestation or third-

party reporting on whether the project meets the good faith exception makes sense, especially for large projects, but questions remain.

Will there be a national registry of sorts of covered entities, which could be more efficient for both government and contractors? As in many instances commented on previously, who is reporting and who is the contractor reporting to (project sponsor or government)? What happens if unforeseen schedules impact ratios or percentages, such as employees calling out sick or unexpectedly resigning? AGC strongly believes that if a contractor comes out of compliance, it must have opportunity to take interim steps to cure penalty and there should be a warning period.

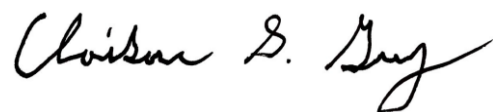
Are There Existing Methods to Facilitate Reporting Requirements, for example, Through Current Davis-Bacon Reporting Forms, Current Performance Reporting Requirements for Contracts or Grants, and/or Through DOL's Registered Apprenticeship Partners Information Management Data System (RAPIDS) Database or a State Apprenticeship Agency's Database?

There are deficiencies in any of the existing reporting systems and are systems the IRS is not familiar. Pushing reporting down to particular state agencies would disadvantage multi-state contractors. While certified payroll contains much of the information, again, what entity would be required to submit it and what entity would it be submitted? RAPIDS is outdated and not widely known or used by the contractor community. Much more education needs to be done, by the DOL and IRS long before compliance is required if using such a model. And again, if the IRS is going to be requiring and enforcing these requirements, maybe it should consider allowing a self-attestation and/or third-party services that capture and validate this requirement on a quarterly/biannual/annual basis.

Conclusion

AGC appreciates the opportunity to provide this initial input on the apprenticeship and prevailing wage requirements under the Act Commonly Known as the Inflation Reduction Act of 2022. AGC also looks forward to the opportunity to fully engage in the rulemaking process and to working with the IRS as it develops comprehensive guidance so that contractors can understand and meet these new requirements. If we can aid in any way, please do not hesitate to contact me.

Sincerely,



Claiborne S. Guy
Director, Employment Policy & Practices