



“Raising standards in the construction industry.”

Indiana, Illinois, Iowa Foundation for Fair Contracting
Comments to the Department of the Treasury and the Internal Revenue Service

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

Notice 2022-51

November 4, 2022

The Indiana, Illinois, Iowa Foundation for Fair Contracting (III FFC) is a 501(c)5 nonprofit construction industry advocacy organization guided by a joint board of trustees representing the International Union of Operating Engineers, Local 150 (Local 150) and its signatory contractors. Local 150 represents approximately 23,000 members performing work for more than 1,000 contractors in various locations including 25 counties in northern Illinois, 14 counties in northern Indiana, and 7 counties in eastern Iowa.

The III FFC’s mission is to increase market share for responsible contractors, work opportunities for skilled craftspeople, and value for taxpayers. The III FFC is committed to promoting fair and efficient contracting practices in support of responsible contractors and keeping skilled workers employed on jobsites throughout Indiana, Illinois, and Iowa. We achieve our mission through procurement oversight, market share analysis, jobsite monitoring, legal and regulatory advocacy, and governmental and public policy education.

The III FFC routinely works with local, state, and federal enforcement agencies, such as the U.S. Department of Labor (hereinafter “DOL”), on compliance matters pertaining to prevailing wage and responsible bidder requirements.

The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) have asked for comments to help inform the development of guidance implementing various provisions of the Inflation Reduction Act of 2022 (IRA), including those pertaining to prevailing wage and apprenticeship requirements. With more than 20 years’ experience in the public and private construction arenas, the III FFC is uniquely positioned to understand the significance of these efforts.

Prevailing wage requirements establish minimum wage rates for skilled construction workers based on wages, benefits, and training contributions that are paid for similar work in the local area where a project is to be completed. Without prevailing wages, long-term investments in training, health, and retirement benefits can be slashed in order to win a bid on a short-term project.

Prevailing wages take labor costs out of this equation, allowing contractors to compete based on core competencies rather than undermining local standards of compensation and craftsmanship. Further, prevailing wages keep more income, more consumer spending, and more tax dollars in local economies.¹

Reflecting local market-based standards for wages, benefits, and training contributions in the communities where projects are being built also bolsters the system of registered apprenticeship in the United States. Construction apprenticeship enrollments are up to 8 percent higher due to prevailing wages (Bilginsoy, 2005²). The III FFC recognizes the importance of expanding apprenticeship opportunities to provide high-quality training and good jobs, especially in areas such as clean energy. The III FFC supports the comments concerning apprenticeship requirements submitted by the Local 150 Apprenticeship and Skill Improvement Program (ASIP) and focuses the following comments on prevailing wage requirements.

With this background in mind, the III FFC appreciates the Treasury Department and IRS' request for comments in developing guidance as an essential step toward ensuring prevailing wage compliance on clean energy projects.

1. Is guidance necessary to clarify how the Davis-Bacon prevailing wage requirements apply for purposes of § 45(b)(7)(A)?

Taxpayers may qualify for increased tax credits or increased deductions under the IRA if certain prevailing wage requirements are satisfied. Namely, taxpayers must ensure that laborers and mechanics performing construction on covered projects are paid wages not less than the prevailing rates in the locality as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31 of title 41. *See* Pub. L. No. 117-169, Title I, Subtitle D, Sec. 13101(f). To that end, existing regulations implementing prevailing wage requirements under the Davis-Bacon and Related Acts (DBRAs) provide well-established and straightforward guidance for the Treasury Department and IRS to utilize for implementation and enforcement of the prevailing wage requirements set forth in the IRA.

Guidance to clarify how prevailing wage requirements apply to section 45(b)(7)(a) will be beneficial as some taxpayers performing clean energy infrastructure work may be unfamiliar with prevailing wage regulations. Specifically, explaining Davis-Bacon prevailing wage requirements, where to find applicable prevailing wage rates, including fringe benefits, as well as information about certified payroll records, apprentices, and similar guidance, will help ensure taxpayers applying for the prevailing wage bonus credit or deduction do so responsibly and without need for correction, thus lessening the administrative burden of compliance enforcement.

¹ *See* Frank P. Manzo & Kevin Duncan, *An Examination of Minnesota's Prevailing Wage Law: Effects on Costs, Training and Development*, (Midwest Economic Policy Institute, La Grange, Ill.) July 2018 at 1. (Local contractors account for a 10 percent higher market share when prevailing wages are paid on public school projects); Kevin Duncan, *Economic, Fiscal And Social Impacts of Prevailing Wage in San Jose, California*, Econ. Pol'y BRIEF, April 2011, at 1 (county-resident businesses account for 16 percent higher market share when prevailing wages are paid on library construction projects).

² Cihan Bilginsoy, *Wage Regulation and Training: The Impact of State Prevailing Wage Laws on Apprenticeship* (Dpt. Of Econ., Univ. Of Utah Working Paper Series, 2005).

To that end, the III FFC supports recommendations submitted by North America's Building Trades Unions (NABTU) that the Treasury Department issue a notice that all solicitations, contracts, and subcontracts expressly state that prevailing wage requirements apply in order to receive a covered bonus credit or deduction under the IRA. Further, all solicitations, contracts, and subcontracts should require certified payrolls be submitted on a monthly basis and attach appropriate wage determinations. Specifically, the III FFC supports recommendations submitted by NABTU suggesting guidance should adapt the following clauses for taxpayers to include in all solicitations, contracts and subcontracts for construction of covered projects:

- a. FAR 52.222-5(a), Construction Wage Rate Requirements – Secondary Site of the Work
- b. FAR 52.222-6 (a) & (b), Construction Wage Rate Requirements (the wage determinations referenced in this clause are publicly available at sam.gov)
- c. FAR 52.222-8 (a), (b) & (c), Payrolls and Basic Records
- d. FAR 52.222-9 (a) & (c), Apprentices
- e. FAR 5.2.222-14, Disputes Concerning Labor Standards

Additionally, the III FFC encourages the Treasury Department to include a withholding clause modeled after FAR 52.222-7 wherein the taxpayer must withhold from the contractor accrued payments or advances as necessary to pay laborers and mechanics, including apprentices, employed by the contractor the full amount of wages required under the contract. In the event of a failure to pay wages, the taxpayer should be required to suspend any further payment until the violation is resolved. A withholding clause will ensure workers are receiving wages owed where a prevailing wage credit or deduction is taken, and that the taxpayer is using responsible contractors who do not cheat their workers.

The Treasury Department should consult with DOL to establish a procedure to collect monthly certified payrolls from the taxpayer to be submitted to the Secretary of the Treasury and/or the Secretary of Labor during construction of each covered project. A procedure by which certified payrolls are submitted monthly will help the Treasury Department to monitor work performed at qualified facilities for compliance.

Finally, requiring the taxpayer seeking the prevailing wage tax credit or deduction to disclose to the Treasury Department the location and nature of the project for which the credit or deduction is sought prior to the start of construction is recommended for efficiency and compliance. Taxpayers seeking a tax credit or deduction should further be required to sign an attestation certifying compliance with all Treasury Department contract terms and certifying all such clauses have been included in contracts and subcontracts for the project.

Moreover, publicly disclosing such information is recommended in the interest of greater transparency and to improve compliance with the prevailing wage and apprenticeship requirements during the construction period. Such disclosure enables essential third-party compliance monitoring from organizations like the III FFC. The ability to provide added prevailing wage compliance support and expertise encourages efficiency and preserves Treasury Department and DOL resources. To that end, as the Treasury Department is charged with administering, among

other things, the prevailing wage and apprenticeship credit enhancements, the III FFC recommends that the Treasury Department accept compliance information from interested parties such as workers, labor organizations, developers, contractors, taxpayers, manufactures, and the like.

2. Section 45(b)(7)(B)(i) generally provides a correction and penalty mechanism for failure to satisfy prevailing wage requirements. What should the Treasury Department and the IRS consider in developing rules for taxpayers to correct a deficiency for failure to satisfy prevailing wage requirements?

The III FFC appreciates the heightened penalties for taxpayers who intentionally disregard prevailing wage requirements and nevertheless claim the relevant tax credit deduction. However, the III FFC believes guidance should go further in disincentivizing taxpayers from intentionally disregarding the requirements under this section through automatic disqualification of a tax credit or deduction under any covered tax program due to an intentional disregard of the requirements. In addition to disqualification, increased penalties of \$10,000 per aggrieved worker should remain. Moreover, repeated violations should be considered to impute knowledge of the requirements onto the taxpayer whereby subsequent corrections should be considered intentional.

Additionally, the III FFC believes guidance is needed to determine whether a violation is unintentional as opposed to intentional. For instance, it is the opinion of the III FFC that penalties assessed, and former debarments issued, by DOL should be considered as evidence to determine intent. The DOL determines whether a contractor is in compliance with DBRA regulations and assesses penalties based on whether there is a willful disregard of the regulations. A previous finding of a willful disregard under the DBRA by the taxpayer, its owners, officers, directors, partners, managers, agents, or any firm, corporation, partnership, or association in which an ownership interest exists should impute an automatic assumption of an intentional disregard of the Act for purposes of this section. Implementing such guidance will help ensure bad actors are not taking advantage of tax credits or deductions with ill intent.

Falsification by the taxpayer of any certifications in order to receive a covered tax credit or deduction should be subject to civil or criminal prosecution under 26 U.S.C. § 7206.

Finally, the taxpayer should be responsible for compliance of this section by any contractor or lower tier subcontractor. Where construction was not carried out in accordance with this section, the taxpayer should be liable for any unpaid wages and penalties due.

3. What documentation or substantiation should be required to show compliance with the prevailing wage requirements?

Documentation demonstrating compliance with prevailing wage requirements includes certified transcripts of payroll and attestations submitted for work performed at a qualified facility, any audit or investigation findings conducted by DOL on a qualified facility, and bid proposals submitted by the taxpayer or contractor and lower tier contractors. Additionally, where the prevailing wage rate is based on a collective bargaining agreement (CBA), an executed CBA may be considered to support compliance. The Treasury Department should consider audit or investigation findings conducted by DOL on any project involving the taxpayer claiming the credit

or deduction or involving any contractor or lower tier contractor in determining intent with respect to corrections and penalties. Other substantiation to show compliance includes worker interviews, statements, affidavits, and/or check stubs.

4. Is guidance for purposes of § 45(b)(7)(A) needed to clarify the treatment of a qualified facility that has been placed in service but does not undergo alteration or repair during a year in which the prevailing wage requirements apply?

The III FFC encourages guidance clarifying the treatment of qualified facilities that are placed in service but do not undergo alteration or repair during a year in which prevailing wage requirements apply. Specific examples would be beneficial to clarify how the duration of construction and various credits having different termination dates and pre-guidance construction credits operate.

5. Please provide comments on any other topics relating to the prevailing wage requirements for purposes of § 45(b)(7)(A) that may require guidance.

The III FFC supports NABTU's recommendation that the Treasury Department apply all DOL regulations, rulings, and interpretations when implementing tax credits for prevailing wage and labor standards under the IRA, including but not limited to 29 CFR parts 1, 5, and 7. Consistent implementation will provide clarity for contractors performing work on these projects, as well as improve efficiency in the administration of the requirements.

For example, in the public construction arena, it is sometimes suggested that a wage determination requires additional classifications for clean energy construction jobs. In fact, existing labor classifications including power equipment operator, electrician, and laborer cover work performed on these projects. Stated differently, a worker operating heavy equipment such as an excavator, bulldozer, roller, skid steer, crane, post pounder, or loader is classified as a power equipment operator, regardless of whether that individual is excavating, moving, or lifting materials to construct a public school, state highway, or solar project.

If a wage determination is missing a labor classification needed to perform work on a project, DOL's Wage and Hour Division (WHD) has a well-established conformance process. WHD's Conformance Request Guide provides concise descriptions of "What is a conformance?" and "How do I know if I need a conformance?"³ Further, the description of "When do I need to request a conformance?" provides practical examples on this issue. In particular, the Guide's example of a broadband project is instructive:

A large infrastructure contract has been funded to promote rural broadband and Davis-Bacon applies due to the funding source.

Q: Do you need to seek a conformance?

³ U.S. DOL, Wage and Hour Division Davis-Bacon Wage Determination Conformance Request Guide, September 2021, at 4 (Sept. 2021), available at <https://www.dol.gov/sites/dolgov/files/WHD/davis-bacon/Conformance.pdf>.

A: No, “broadband” is not a labor classification. Typically, a broadband infrastructure project will include the labor classifications for power equipment operators, general laborers, and electricians; if the necessary labor classifications are listed on the wage determination, you do not need to seek a conformance.

Similarly, solar and wind projects will include work performed by the labor classifications for power equipment operators, laborers, and electricians. If the necessary labor classifications are listed on the wage determination, it is not necessary to seek a conformance.

Further, existing DOL regulations, rulings, and interpretations also address questions regarding fringe benefits. *See* Federal Acquisition Regulations *supra* page 3. For example, 29 CFR part 5 sets out labor standards applicable to the DBRA, including definitions of “construction, prosecution, completion or repair,” “site of the work,” and “wages” which include the basic hourly rate of pay; any contributions made to a bona fide fringe benefit plan; and rate of cost that may be reasonably anticipated in providing bona fide fringe benefits. 29 CFR § 5.2.

In sum, while the Treasury Department and IRS must develop guidance implementing the prevailing wage provisions of the IRA, it is unnecessary and inefficient for the Treasury Department to contemplate rules and interpretation different than existing Davis-Bacon prevailing wage regulations and guidance issued by DOL.

The III FFC would like to note that the administrative costs of prevailing wage compliance are minimal. First, contractors must already comply with federal overtime law, including the Fair Labor Standards Act, that requires contractors keep, among other things, records about hours worked, rate of pay, deductions, and payment dates of their employees. Thus, many of the records required by prevailing wage requirements are already maintained by contractors.

Second, the reporting process for Davis-Bacon compliance has been streamlined to the point of which DOL estimates a clerical staff take 55 minutes for a first-time filer to complete collection of the data needed, including gathering, maintaining, and reviewing necessary data.⁴ Again, these are all tasks a payroll clerk would otherwise perform under IRS and overtime requirements. If, in fact, prevailing wage laws increased administrative burdens, contractors would be discouraged from bidding on public construction projects. To the contrary, of 18 peer-reviewed academic studies on prevailing wage laws since 2000, 15 find that they have no effect on the total costs of traditional public works construction projects, such as roads, schools, municipal buildings, and clean water and sewer projects.⁵ In addition, there have been four peer-reviewed studies since 2012

⁴ *See*, U.S. DOL, Wage and Hour Division, Payroll Submission Form WH-347, available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh347.pdf>; U.S. DOL, Wage and Hour Division Instructions for Completing Payroll Form, WH-347, accessed on Oct. 20, 2022, available at <https://www.dol.gov/agencies/whd/forms/wh347> (“Public Burden Statement: We estimate that it will take an average of 55 minutes to complete this collection of information, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.”).

⁵ Lina Stepick & Frank P. Manzo IV, *The Impact of Oregon’s Prevailing Wage Rate Law: Effects on Costs, Training and Economic Development* (2021), <https://illinoisepi.files.wordpress.com/2021/01/uo-ilepi-oregon-prevailing-wage-report-final.pdf>.

that empirically examine the effect of prevailing wage standards on the overall level of bid competition. All four of these studies, which collectively evaluate data on more than 2,000 bid proposals, find that prevailing wage standards do not reduce the number of bidders on public construction projects.⁶ In fact, “the cost-reducing effect of increased bid competition is stronger on projects covered by the prevailing wage policy.”⁷

The III FFC appreciates the Treasury Department and IRS’ request for comments in developing guidance as an essential step toward ensuring prevailing wage compliance on clean energy projects.

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⁶ *Id.*

⁷ Lameck Onsarigo, et al., *The effect of prevailing wages on building costs, bid competition, and bidder behaviour: evidence from Ohio school construction*. 38 *Const. Mgmt. and Econ.* 917, 917-33 (2020).