Submitted Electronically via the Federal eRulemaking Portal

November 04, 2022

The Honorable Lily Batchelder
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

William M. Paul
Principal Deputy Chief Counsel
Internal Revenue Service Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: 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)

Dear Ms. Batchelder and Mr. Paul,

In furtherance of Ørsted' s goal, creating a world that runs entirely on green energy, Ørsted either directly or through its affiliates, develops, constructs, owns, and operates offshore and land-based wind resources, solar farms, storage, and offshore transmission facilities. Ørsted is among the world's largest renewable energy companies and the global-leader in establishing utility-scale energy projects at sea, including developing more than 28 offshore wind farms and 17 offshore transmission systems. This portfolio includes the world's first offshore wind farm (Vindeby, 1991); America's first offshore wind farm (Block Island); and the world's largest (Hornsea 2). Ørsted' s current installed offshore wind capacity is 7.6GW with another 2.3GW under construction. Ørsted has been awarded offtake agreements for about 5GW of offshore wind capacity on the east coast of the United States. With this extensive portfolio of offshore generation, Ørsted has designed and built the associated transmission assets including on- and offshore substations and converter stations and designed, permitted and constructed over one thousand miles of subsea export cables; and more than 1,700 miles of subsea array cables. Ørsted Onshore currently owns and operates 11 land-based wind farms, 4 solar farms, and 1 battery energy storage facility co-located with

solar, with many more projects in various stages of development in the United States. In total, approximately 4GW of renewable land-based generation is either operational or in an advanced construction stage.

Ørsted appreciates the opportunity to submit the following comments in response to the 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).

I. QUESTIONS FROM INTERNAL REVENUE SERVICE

.01 Prevailing Wage Requirement

Q1. Section 45(b)(7)(A) provides that a taxpayer must ensure that any laborers and mechanics employed by the taxpayer, or any contractor or subcontractor, are paid wages at rates not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality in which such facility is located as most recently determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, which is commonly known as the Davis-Bacon Act. Is guidance necessary to clarify how the Davis-Bacon prevailing wage requirements apply for purposes of § 45(b)(7)(A)?

> We recommend the following two sets of clarifications which directly impact offshore wind facilities and companies that have entered into Project Labor Agreements:
>
> **Locality Determination for Offshore Facilities**
> For offshore energy projects, the prevailing wage requirement should apply with reference to the location of the port from which the laborers or mechanics are based for purposes of that offshore work. For this purpose, a laborer or mechanic will not be deemed to be based at a port due solely to his or her short-lived or incidental presence at, or transit through, the port (or state in which the port is located). In the event that laborers and mechanics are based at multiple ports, the taxpayer shall have the option to submit requests for prevailing wage determinations to the Department of Labor to determine uniform rates that apply to the qualified facility or energy property. The requests shall include the following

information:

(1) The locations, including the county(ies) or other civil subdivision, and States from which the laborers or mechanics will be based.

(2) The name of the project and a sufficiently detailed description of the work to indicate the types of construction involved (i.e., building, heavy, highway, residential, or other type).

(3) Any available pertinent wage payment information, unless wage patterns in the area are clearly established.

(4) All the classifications of laborers and mechanics likely to be employed.

(5) Any pertinent information regarding contractual agreements that may exist between the taxpayer and a State for the procurement of energy from the qualified facility or energy property and/or statutory requirements with regard to labor standards that may apply to the qualified facility or energy property, including any conflicts that may exist between such contracts and/or statutes and the Prevailing Wage and Apprenticeship Requirements for §§ 45, 45Y, 45V, 48, and 48E Tax Credits in the Inflation Reduction Act.

Within 30 days of receipt of the request, the Department of Labor shall issue its determination of the uniform rates that apply to the qualified facility or energy property and advise the taxpayer.

Project Labor Agreement

Construction, alteration or repair contracts for a qualified facility or energy property awarded pursuant to a Project Labor Agreement ("PLA") established in accordance with the requirements of Federal Acquistion Regulation 22.504 ("General requirements for project labor agreements") be permitted to have different labor standards for shift, premium and overtime work. If the qualified facility or energy property is constructed under a PLA, and the employer, contractor or subcontract has provided shift, premium, overtime and other non-standard rates as they appear in a project's pre-negotiated labor agreement for all laborers and mechanics who are subject to terms and conditions of the PLA, the taxpayer should be deemed to be compliant with the prevailing wage requirement.

Q2. 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?

We would recommend that, upon notice of a final determination that a taxpayer has failed to comply with prevailing wage requirements, the taxpayer shall have an opportunity to cure any such deficiency within 180 days. If the taxpayer cures the deficiency within that period, there should be no recapture of the tax credit. If the taxpayer (or contractor or subcontractor) timely cures any such deficiency and timely pays any accompanying penalty, the prevailing wage requirement should be deemed to be satisfied and the full credit rate should apply. In the case of any failure to satisfy the prevailing wage requirements, any reduction in the credit rate should apply only to the specific period during which the deficiency occurred and was not cured, and any such reduction should not be applied retroactively to disallow credits that have already accrued during prior periods and taxable years, unless intentional disregard is determined. For a finding of intentional disregard, the taxpayer must knowingly or willfully choose to ignore the applicable prevailing wage requirements or act voluntarily in withholding required information, rather than accidentally or unconsciously.[1]

Q3. What documentation or substantiation should be required to show compliance with the prevailing wage requirements?

Certification

We recommend that Treasury guidance should require certification by the taxpayer that it has complied with the prevailing wage requirements to be eligible for the full value of the credit amounts under §§ 45, 45Y, 45V, 48, and 48E. We would recommend that the process include a

[1] *In the context of civil penalties imposed under I.R.C. § 6721(e), for incorrect information returns, "a failure is due to 'intentional disregard' if it is 'knowing or willful'" – determined on the basis of all the facts and circumstances in the particular case. Treas. Reg. § 301.6721-1(f)(2). Relevant facts and circumstances include whether the failure is part of a pattern of conduct by the person who filed the return and whether correction was promptly made upon discovery of the failure. Treas. Reg. § 301.6721-1(f)(3).*

certification statement attached to the taxpayers return on which such credit is claimed. Upon a request for inspection by the IRS, a taxpayer should be required to provide such books and records, in printed or in digital form, that are reasonably adequate to support its certification. A taxpayer should be permitted to accept and reasonably rely on a contractor's or subcontractor's representations that prevailing wage requirements have been met for purposes of executing a certification statement.

.02 <u>Apprenticeship Requirement</u>

Q1. Section 45(b)(8)(C) provides that each taxpayer, contractor, or subcontractor who employs four or more individuals to perform construction, alteration, or repair work with respect to a qualified facility must employ one or more qualified apprentices from a registered apprenticeship program to perform that work. 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?

We recommend that the IRS consider the number of labor hours performed by an apprentice. In cases where the number of labor hours performed by an apprentice in a job is lower than one full-time position, there should be no express requirement that an apprentice be in a full-time position. If a taxpayer is constructing more than one project in a taxable year, the taxpayer may elect to calculate the required number of apprentice hours based on a percentage of the total number of labor hours performed across its crew of laborers and mechanics, rather than just on a project-by-project basis.

Q2. Section 45(b)(8)(D)(ii) provides for a good faith effort exception to the apprenticeship requirement.

(a) What, if any, clarification is needed regarding the good faith effort exception?

We recommend that the term "good faith effort" shall be deemed to have been met if the taxpayer makes reasonable efforts to contact a registered apprenticeship program, as defined section

3131(e)(3)(B)[2], in the geographic area of the construction and the other criteria enumerated in section 45(b)(8)(D)(ii) are satisfied, and –

(I) such request has been denied, provided that such denial is not the result of refusal by the contractors or subcontractor engaged in the performance of construction, alteration, or repair work with respect to such qualified facility to comply with the established standards and requirements of the registered apprenticeship program, or

(II) the registered apprenticeship program fails to respond to such request within 5 business days of the date on which such registered apprenticeship program received such request, and

(III) the taxpayer provides documentation that the registered apprenticeship program has not complied with requests for apprentices or that the referral process has impeded the taxpayer's efforts to meet its obligations.

Q3. What documentation or substantiation do taxpayers maintain or could they create to demonstrate compliance with the apprenticeship requirements in § 45(b)(8)(A), (B), and (C), or the good faith effort exception?

We recommend Treasury guidance should make clear a taxpayer should comply with the recordkeeping requirements for registered apprentice programs outlined in 29 C.F.R. 30.12 and must maintain such records for 5 years from the date of making a record.

Q4. Please provide comments on any other topics relating to the apprenticeship requirements in § 45(b)(8)(B) that may require guidance.

Apprentice Safety

We recommend that safeguarding apprentices' welfare and wellbeing should be of paramount consideration in applying the apprenticeship requirement to offshore activities. Offshore work environments are challenging for a host of reasons, including their remote locations and the physical challenges of the work and the work environment.

[2] *The term "registered apprenticeship program" means an apprenticeship registered under the Act of August 16, 1937 (commonly known as the "National Apprenticeship Act"; 50 Stat. 664, chapter 663; 29 U.S.C. 50 et seq.) that meets the standards of subpart A of part 29 and part 30 of title 29, Code of Federal Regulations.*

Apprentices who are new to the construction industry lack experience in sufficiently identifying jobsite hazards, as evidenced by the increased prevalence of injuries among short-tenured workers. The unique health and safety considerations associated with offshore construction should be considered when developing guidance for the apprenticeship requirements. Specifically, we make the following recommendations:

- The Treasury Department and the IRS should consider limiting the apprenticeship utilization requirement to hours worked by classifications of laborers and mechanics for which a registered apprenticeship program exists within the Office of Apprenticeship List of Officially Recognized Occupations, and within the geographical area of the qualified facility.
- The Treasury Department and the IRS should consider whether apprentices engaged in offshore construction can reasonably maintain their status as apprentices in good standing within their registered apprenticeship program while working offshore for extended periods of time, as apprentices may be unable to attend requisite classroom-based instruction.
- The Treasury Department and the IRS should consider the nature of offshore construction, including but not limited to unique safety and environmental risks and limitations on the berthing capacity of vessels/ships engaged in offshore works, when issuing guidance for the apprenticeship requirement and associated ratios. Established apprentice-to-journeyworker ratios, as set forth by the Department of Labor or the applicable State apprenticeship agency for traditional land-based construction, alteration or repair work, may not be feasible or appropriate in the context of offshore construction.
- The Treasury Department and Department of Labor should consider developing a field operation handbook outlining the process for requesting apprentice referrals and compliance with apprenticeship requirements, including recommendations for good faith practices.

.03 Domestic Content Requirement

Q2. Sections 45(b)(9)(B)(iii) and 45Y(g)(11)(B)(iii) provide that manufactured products that are components of a qualified facility upon completion of construction will be deemed to have been produced in the United States if not less than the adjusted percentage of the total costs of all of such manufactured products of such facility are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States.

(b) Does the determination of "total costs" with regard to all manufactured products of a qualified facility that are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States need further clarification? If so, what should be clarified? Is guidance needed to clarify the term "mined, produced, or manufactured"?

We recommend clarify the following for purpose of the domestic content requirements:

Determination of Total Costs

Please clarify the associated costs for determination of "total costs" with regard to manufactured products. The "total costs" should include material cost, transportation cost (i.e., the costs of transporting manufactured products to the project site), and labor cost (i.e., labor cost of manufacturing components, and contractor/subcontractor labor cost incurred at the project site for actual component construction or final assembly of a qualified facility).

Manufactured

In addition, please clarify the meaning of the term "manufactured". We would suggest that "manufactured" is defined as the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from its components, which is consistent with "manufacturing process"[3] as defined in 49 C.F.R. Part 661.3. The following are examples

[3] *"Manufacturing process means the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they*

comprising the manufacturing process: forming, extruding, material removal, welding, soldering, etching, plating, material deposition, pressing, permanent adhesive joining, shot blasting, brushing, grinding, layup, casting, resin application, wire drawing, annealing, twisting and stranding, spooling, rolling, coating, integration, testing, mixing, blending, packaging, enclosing, filing, lapping, finishing, vacuum impregnating, and, in electrical and electronic pneumatic, or mechanical products, the collection, interconnection, and testing of various elements.

(c) Does the term "manufactured product" with regard to the various technologies eligible for the domestic content bonus credit need further clarification? If so, what should be clarified? Is guidance needed to clarify what constitutes an "end product" (as defined in 49 C.F.R. 661.3) for purposes of satisfying the domestic content requirements?

End Product

Please clarify the meaning of term of "end product" for purpose of satisfying the domestic content requirements, specifically whether the term refers to the entire integrated and interconnected wind/solar project, rather than its constituent parts. The entire wind/solar project needs to be constructed and interconnected to provide its intended end function or use without any further manufacturing or assembly changes. This interpretation is consistent with the definition of "end product"[4] under 49 C.F.R. 661.3.

(e) Does the treatment of subcomponents with regard to manufactured products need further clarification? If so, what should be clarified?

Treatment of subcomponent

Please clarify that the treatment of subcomponents with regard to manufactured products is consistent with 49 C.F.R. 661.5(d)(2)[5], that the origin of the subcomponents of a component which is a manufactured

represent a new end product functionally different from that which would result from mere assembly of the elements or materials."

[4] *"End product means any vehicle, structure, product, article, material, supply, or system, which directly incorporates constituent components at the final assembly location, that is acquired for public use under a federally-funded third-party contract, and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s)."*

[5] *"All of the components of the product must be of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents."*

product is disregarded for the purposes of satisfying the domestic content requirements.

Q5. Please provide comments on any other topics relating to the domestic content requirements that may require guidance.

Nonavailability

We recommend Treasury provide nonavailability waivers for domestic content requirements, even if the project does not qualify for direct pay. Nonavailability exemptions can be based on a case-by-case basis, when it can be demonstrated by taxpayer that a domestic product is not available or is not available in reasonably sufficient quantities of at a satisfactory quality.[6] In this case, the costs of any waiver product will be subtracted from consideration of the total cost of all of the manufactured products that are components of the qualified facility or energy property for purposes of determining whether the adjusted percentage has been met the domestic content bonus requirements. If such product is a steel and iron product, any waived product does not need to meet the steel and iron requirements for purposes of considering whether the domestic content bonus requirements have been satisfied.

.04 <u>Energy Community Requirement</u>

Q7. Please provide comments on any other topics relating to the energy community requirement that may require guidance.

Energy Community for Offshore Wind

We recommend Treasury recognizes the enormous decarbonization potential and economic boost to certain communities by offshore wind,

[6] *ORECRFP22-1 Preliminary Determination Memorandum (available at servlet.FileDownload (ny.gov)), NYSERDA commissioned a study from consultancy Advisian investigating the availability of steel plate required for monopile foundations for offshore wind turbines and offshore substations. Based on study, NYSERDA concluded that "steel plate with the necessary thickness, dimension, and strength properties used to manufacture monopile foundations cannot be produced or made in the United States in sufficient and reasonably available quantities without incurring unreasonable expense" and found that "requiring all structural iron or steel to be sourced domestically would not be in the public interest".*
Additionally, NREL/TP-5000-81602 report of June 2022 (available at The Demand for a Domestic Offshore Wind Energy Supply Chain (nrel.gov)), indicated that "while some U.S. manufacturers will be able to fabricate the smaller steel plates needed for monopile manufacturing, the larger plates will need to be imported because of a current inability to domestically produce plates that size. There is a domestic sourcing issue associated with the type of steel used in monopile foundations (S355ML) with limited suppliers being located in the United States. Finally, the technological capabilities for welding 150 millimeter-thick steel plates do not currently exist in the U.S."

please clarify and provide guidance on how offshore wind can qualify for the energy community requirement. Under a traditional location-based metric, offshore wind in federal water does not have energy community attributes, and the point of interconnection of offshore wind serves as a proxy for the economic benefits that it generates. Therefore, we would propose that an entire offshore wind meets energy community requirement, if the point of interconnection of offshore wind is located in the energy community.

II. CONCLUSION

Ørsted appreciates the opportunity to response this request for Notice 2022-51, and we would be pleased to discuss these comments with you if necessary.

Sincerely,

Peter Allen
CFO, Ørsted Americas