Responses to Notice 2022-51 – Tennessee Advanced Energy Business Council

A. Prevailing Wages

Q1. Application of Davis-Bacon Wage Requirements.

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

a. Definition of Construction

The Tennessee Advanced Energy Business Council ("TAEBC") askes the IRS to provide a definition of "construction" that aligns with Department of Labor terminology found in the Davis-Bacon Act. The term "construction" should refer only to work of a *significant nature*, performed at the *site of work* during the *construction period*. Each of these is discussed in more detail below.

1. *Work of a Significant Nature*

In general, prevailing wage and apprenticeship requirements during the construction period should only apply to construction work that creates new tangible property central to the production or storage of electricity. According to the Department of Labor, the term "construction" is intended to cover "construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work."

Under that definition, TABEC believes that construction work should not include transportation of materials or supplies to or from the site of the work. However, if the mechanics and laborers of a material supplier, after transporting items to a worksite, then perform part of a construction contract as a subcontractor (i.e., mixing supply items after delivery), that work should be considered construction work, and therefore should be subjected to applicable prevailing wage and apprenticeship requirements.

TAEBC believes that any incidental transportation in and around worksites should properly be included within the scope of construction activities. Consistent with legal precedent, the applicable time for prevailing wage or apprenticeship requirements is limited to time spent on the site of work; the time that such mechanics and laborers spend offsite should not be covered.

TAEBC also feels IRS guidance should clarify that only activities of a "significant nature" should be included in the scope of construction activities, and specifically exempt activities that are de minimis. The IRS guidance should adopt standards for establishing what activities constitute those significant enough to be considered activities of a significant nature for purposes of these requirements instead of relying upon DOL precedent.

2. *Construction Period*

To establish when prevailing wage and apprenticeship requirements are applicable, the IRS should clarify that onsite construction work should be considered to start at the earliest of the excavating to change the contour of the land, excavation for any permanent foundation(s), post/piling installation, or anchor bolts into the ground, or the pouring of the concrete pads of the foundation of a qualified facility

or energy property (i.e., work to tangible property that is integral to the production or storage of electricity).

Preliminary site work, such exploring, conducting surveys, clearing a site, drilling or pile driving and pull testing to determine soil condition, installation of meteorological towers and stations, or removing existing equipment on the site should not be considered construction activities.

Treasury guidance should also clarify that construction work should be limited to construction-like activity, including for purposes of repowering a project. Prevailing wage and apprenticeship requirements applicable for construction activities should end when the qualified facility or energy property is at a *state of readiness* and availability to perform its specifically assigned function, which typically occurs when it has been placed in service.

b. *Definition of Alteration and Repair*

The terms "alteration" and "repair" should refer to the tangible property regulations for determining what activities constitute such activity. Under those tangible property regulations, the terms would not include normal and routine operation and maintenance activities (including landscaping and vegetation management), preventive maintenance work, and minor repairs (such as cyclical, planned work on capital assets to keep equipment working in its existing state, i.e., preventing its failure or decline).

In determining whether work constitutes alteration and repair, a de minimis threshold should be defined in such a manner so that costs below 10% (or $1,000,000 if greater) of all initial construction costs and expenses required to place the project in service would fall outside of these alteration and repair rules.

c. *Definition of Laborers and Mechanics*

These requirements should be limited to laborers or mechanics, which should be defined as those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from clerical or managerial tasks. A laborer or mechanic should not include workers whose duties are primarily administrative, executive, or clerical, rather than manual.

Laborers and mechanics include apprentices, but such apprentices are not required to be paid prevailing wage rates if they are qualified as such under 29 CFR 5.2(n)(1), (2), (4) and 5.5(a)(4)(i), (ii).

TAEBC believe that the prevailing wage principles within the IRA should be limited to those persons falling under the definition of Laborers and Mechanics. Guidance should also clarify that transient workers be paid prevailing wage rates *only for their time on the site of the work*.

Treasury should also consider adding guidance that would apply a de minimis standard to exempt employees who spend insignificant time onsite (i.e., 20 percent of their work hours are spent on site).

(b) What should the Treasury Department and the IRS consider when determining "completion of construction" for purposes of the domestic content requirement? Should the "completion of construction date" be the same as the placed-in-service date? If not, why?

TAEBC recommends that instead of using the placed-in-service date, IRS clarify that the completion of construction for purposes of applying domestic content requirements is at the point where the qualified

facility or energy property is at a state of readiness and availability to perform its specifically assigned function.

II. ADDITIONAL COMMENTS ON ISSUES NOT RAISED BY IRS

D. Energy Storage Augmentation

Section 48(c)(6)(B) provides that new capacity added to energy storage technology, for which a new investment tax credit under §§ 48 or 48E is claimed, should be treated as a modification to the property, not as construction. Therefore, only the prevailing wage and apprenticeship requirements associated with "alteration or repair" should apply to such a modification. TAEBC requests that IRS clarify that any such modifications to energy storage technology, as described in section 48(c)(6)(B), which qualify for an investment tax credit under §§ 48 or 48E should be considered an alteration to the existing qualifying energy project and, therefore, should not extend or trigger the five-year period for prevailing wage requirements that start on the date such project is originally placed in service.

(b) What should the Treasury Department and the IRS consider when determining "completion of construction" for purposes of the domestic content requirement? Should the "completion of construction date" be the same as the placed-in-service date? If not, why?

TAEBC recommends that instead of using the placed-in-service date, IRS clarify that the completion of construction for purposes of applying domestic content requirements is at the point where the qualified facility or energy property is at a state of readiness and availability to perform its specifically assigned function.

Q2. Brownfield Designations

Does the determination of a brownfield site (as defined in subparagraphs (A), (B), and (D)(ii)(III) of § 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(39))) need further clarification? If so, what should be clarified?

TAEBC urges IRS to clarify that the definition of brownfields in the IRA, which references only some of the language in the definition for brownfields from the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), does not exclude areas in which contaminants associated with petroleum products exist.

Additionally, TAEBC urges IRS to conclude that past military lands, such as Formerly Used Defense Sites (FUDS) and sites that include or could include Unexploded Ordinance (UXO), may also qualify as a brownfield EC under CERLCA. The presence of state or local permits or consent agreements for remediation of a given brownfield site should not disqualify a project from claiming the federal EC bonus based upon brownfield eligibility.

Finally, we understand that a brownfield site is one which is undergoing remediation, meaning the energy project would have to wait until remediation was completed before it could be built. If that is a correct interpretation, it should be clarified that a site that is "clean" whether or not it has been the subject of remediation and is adjacent to a site that is undergoing remediation should qualify as a brownfield site due to the possible stigma the clean site may carry due to its location adjacent to a site being remediated. It is difficult to see a developer incurring cost to develop a project on a site undergoing remediation given the uncertainties involved in the remediation process. Allowing clean adjacent sites to be characterized as brownfield sites would be consistent with the goal of the statute, which is to encourage development in communities having such tainted properties.