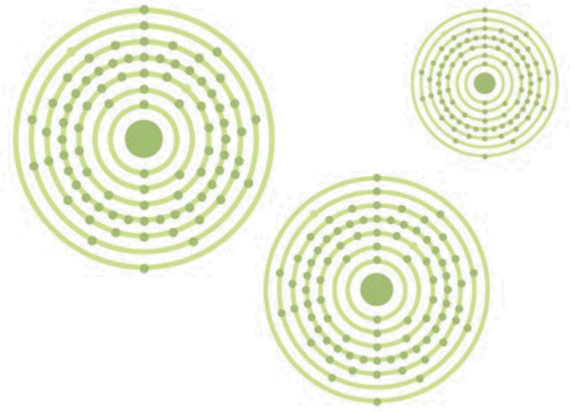

November 4, 2022

Submitted Electronically via the Federal eRulemaking Portal (www.regulations.gov, IRS-2022-51)

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-51)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Dear Sir or Madam,

We are submitting these comments pursuant to Notice 2022-51 with respect to the prevailing wage, apprenticeship and domestic content rules found in the Inflation Reduction Act of 2022 ("IRA").

TerraPower, LLC ("TerraPower") is planning to build a new, state-of-the art, nuclear facility in Lincoln County, Wyoming using a Gen IV Sodium Fast Reactor technology and integrated energy storage in a process developed by TerraPower and GE-Hitachi (the "Facility"). The Facility will be placed in service after 2024. As it will be a zero emissions nuclear power facility, it will qualify for the new Clean Electricity Production Credit under IRC section 45Y or the Clean Electricity Investment Credit under IRC section 48E. In addition to producing power, it will use a thermal salt storage technology that will have the effect of storing energy for later use, allowing the plant to load follow which is in high demand by the utility marketplace.

The Facility will be located in an energy community – near the site of a closed coal-fired power plant. Also, TerraPower intends to use domestic sourced materials to construct the Facility and intends to satisfy the domestic content requirements.

Prevailing Wages

The IRA provides a base credit rate and a bonus credit rate for facilities that qualify under section 45Y and section 48E.

In order for the Facility to qualify for the bonus credit rate under section 45Y (currently 2.75 cents per kilowatt hour) or section 48E (30%), TerraPower, through its contractors and subcontractors, must pay

prevailing wages. (We note that the credit rate percentages will be higher for TerraPower due to the fact that the Facility will be located in an energy community.)

The provision is as follows as it applies to section 45 and 45Y:

(A) In general.—The requirements described in this subparagraph with respect to any qualified facility are that the taxpayer shall ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in—
(i) the construction of such facility, and
(ii) with respect to any taxable year, for any portion of such taxable year which is within the period described in subsection (a)(2)(A)(ii), the alteration or repair of such facility,

shall be paid wages at rates not less than the prevailing 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, United States Code. For purposes of determining an increased credit amount under paragraph (6)(A) for a taxable year, the requirement under clause (ii) is applied to such taxable year in which the alteration or repair of the qualified facility occurs. (emphasis added)

IRC 45(b)(7) (emphasis added).

A similar rule applies under section 48 and 48E.

The bolded language above is referred to as the "Davis-Bacon Act." (See Notice 2022-51, sec. 3.01(1))

As an awardee of one of two demonstration projects under DOE's Advanced Reactor Demonstration Program, TerraPower is in the process of receiving certain funds from the Department of Energy to assist with the construction of the Facility. As part of that arrangement, TerraPower will also have to comply with the Davis Bacon rules.

In order to ensure there is no duplication of effort and compliance associated with these rules, TerraPower requests that the Davis Bacon rules apply for purposes of the prevailing wage statutory provision copied immediately above – without change or alteration by the IRS or the IRA -- and, further, that in order to avoid duplication of effort and unnecessary administrative burdens, the documentation requirements be the same.

Apprenticeship rules

In order for the Facility to qualify for the bonus credit rates under section 45Y (currently 2.75 cents per kilowatt hour) or section 48E (30%), TerraPower, through its contractors and subcontractors, must satisfy certain apprenticeship requirements. (We note that the credit rate percentages will be higher for TerraPower due to the project being located in an energy community.)

(8) Apprenticeship requirements.--The requirements described in this paragraph with respect to the construction of any qualified facility are as follows:
(A) Labor hours.--
(i) Percentage of total labor hours.--Taxpayers shall ensure that, with respect to the construction of any qualified facility, not less than the applicable percentage of the total labor hours of the construction, alteration, or repair work (including such work performed by any contractor or subcontractor) with respect to such facility shall, subject to subparagraph (B), be performed by qualified apprentices.
(ii) Applicable percentage.--For purposes of clause (i), the applicable percentage shall be--
(I) in the case of a qualified facility the construction of which begins before January 1, 2023, 10 percent,
(II) in the case of a qualified facility the construction of which begins after December 31, 2022, and before January 1, 2024, 12.5 percent, and
(III) in the case of a qualified facility the construction of which begins after December 31, 2023, 15 percent.
(B) Apprentice to journeyworker ratio.--The requirement under subparagraph (A)(i) shall be subject to any applicable requirements for apprentice-to-journeyworker ratios of the Department of Labor or the applicable State apprenticeship agency.
(C) Participation.--Each taxpayer, contractor, or subcontractor who employs 4 or more individuals to perform construction, alteration, or repair work with respect to the construction of a qualified facility shall employ 1 or more qualified apprentices to perform such work.

IRC 45(b)(8).

A similar rule applies under sections 48 and 48E.

This new rule does not have an analogue in the Davis-Bacon Act, although we understand that the federal government sometimes includes apprenticeship requirements in individually negotiated contracts.

Therefore, taxpayers and their contractors have limited experience applying this new rule.

We ask that, to the extent that the federal government under its general contracting authority has a custom and practice on documentation requirements for apprenticeship requirements, we recommend that those documentation requirements apply here. This will allow taxpayers to draw on whatever prior experience exists in substantiating compliance with these rules.

There is a waiver process – “good faith effort” – to the apprenticeship requirements, which also should be clarified

The statutory language for this waiver is as follows:

(D) **Exception.**--

(i) **In general.**--A taxpayer shall not be treated as failing to satisfy the requirements of this paragraph if such taxpayer--
(I) satisfies the requirements described in clause (ii), or
(II) subject to clause (iii), in the case of any failure by the taxpayer to satisfy the requirement under subparagraphs (A) and (C) with respect to the construction, alteration, or repair work on any qualified facility to which subclause (I) does not apply, makes payment to the Secretary of a penalty in an amount equal to the product of--
(aa) $50, multiplied by
(bb) the total labor hours for which the requirement described in such subparagraph was not satisfied with respect to the construction, alteration, or repair work on such qualified facility.
(ii) **Good faith effort.**--For purposes of clause (i), a taxpayer shall be deemed to have satisfied the requirements under this paragraph with respect to a qualified facility if such taxpayer has requested qualified apprentices from a registered apprenticeship program, as defined in section 3131(e)(3)(B), and--
(I) such request has been denied, provided that such denial is not the result of a refusal by the taxpayer or any contractors or subcontractors 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 after the date on which such registered apprenticeship program received such request. (emphases added)

The apprenticeship requirements are new. Further, TerraPower is concerned – presumably like many other taxpayers investing in the energy transition – that there will not be enough qualified apprenticeship programs or enough qualified apprentices available for the specialized work involved in constructing the Facility. TerraPower asks that the waiver remedy be clarified so that taxpayers can be sure whether they have satisfied it.

The “good faith effort” language potentially has a gap in it that could make it functionally useless. Under the language, there is no period of time by which a qualified apprenticeship program must accept or deny a request. There is a requirement to “respond” within 5 business days. But one reading of the word “respond” could be the receipt of an auto-generated email message from an email inbox acknowledging the request. The guidance should make clear that the request must be accepted or denied within 5 business days AND that the program must make a specific apprentice available with the necessary training for the specific job within a reasonable period of time – for instance two weeks.

Further, given the untested and sweeping nature of these new rules we encourage the IRS to consider delaying the issuance of guidance to give more time for an adequate number of qualified apprenticeship programs to be established.

Domestic Content

In the case of projects eligible for tax credits under section 45Y and section 48E, there is a 10% increase in the available credit – the so-called "domestic adder" provision – if the projects are constructed with a specified amount of materials produced in the United States.

There has been a good deal of confusion regarding the requirement that 100% of the steel and iron used in a project must be manufactured in the United States.

The statutory language is as follows:

(9) **Domestic content bonus credit amount.**--
(A) **In general.**--In the case of any qualified facility which satisfies the requirement under subparagraph (B)(i), the amount of the credit determined under subsection (a) (determined after the application of paragraphs (1) through (8)) shall be increased by an amount equal to 10 percent of the amount so determined.
(B) **Requirement.**--
(i) **In general.**--The requirement described in this clause is satisfied with respect to any qualified facility if the taxpayer certifies to the Secretary (at such time, and in such form and manner, as the Secretary may prescribe) that any steel, iron, or manufactured product which is a component of such facility (upon completion of construction) was produced in the United States (as determined under section2 661 of title 49, Code of Federal Regulations).
(ii) **Steel and iron.**--In the case of steel or iron, clause (i) shall be applied in a manner consistent with section 661.5 of title 49, Code of Federal Regulations.
(iii) **Manufactured product.**--For purposes of clause (i), the manufactured products which are components of a qualified facility upon completion of construction shall be deemed to have been produced in the United States if not less than the adjusted percentage (as determined under subparagraph (C)) of the total costs of all such manufactured products of such facility are attributable to manufactured products (including components) which are mined, produced, or manufactured in the United States. (emphasis added)

IRC 45(b)(9).

A similar rule applies under sections 48 and 48E.

We would like the guidance to make clear that the requirement that all manufacturing processes of steel and iron materials must occur in the United States does not apply to steel or iron materials used as components or sub-components of manufactured products; we think this is consistent with the rules under 49 CFR § 661.5.

49 CFR 661.5 provides as follows:

(a) Except as provided in § 661.7 and § 661.11 of this part, no funds may be obligated by FTA for a grantee project unless all iron, steel, and manufactured products used in the project are produced in the United States.
(b) All steel and iron manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives.
(c) The steel and iron requirements apply to all construction materials made primarily of steel or iron and used in infrastructure projects such as transit or maintenance facilities, rail lines, and bridges. These items include, but are not limited to, structural steel or iron, steel or iron beams and columns, running rail and contact rail. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured products or rolling stock, or to bimetallic power rail incorporating steel or iron components.
(d) For a manufactured product to be considered produced in the United States:
(1) All of the manufacturing processes for the product must take place in the United States; and
(2) 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. (emphasis added)

In applying this rule, it is important to know how "manufactured product" and "component" is defined.

49 CFR 661.3 provides further definitions as follows:

Manufactured product means an item produced as a result of the manufacturing process.

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

Component means any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location.

It is opaque to taxpayers how these rules fit together. We suggest that the guidance include real-world examples of the steel and iron requirements with respect to the types of projects that qualify under section 45/45Y and section 48/48E. For instance:

Advanced reactor components including pumps, piping, fuel transfer machinery, modular components and other reactor components manufactured off-site including the reactor vessel itself should be considered manufactured components under this guidance. Any U.S. steel or iron requirements should only apply to materials used in the construction of advanced reactor at the final site.

The IRA includes a waiver of the domestic content requirements under certain circumstances, which should be clarified. The statutory language is as follows:
(12) PHASEOUT FOR ELECTIVE PAYMENT.—

(A) IN GENERAL.—In the case of a taxpayer making an election under section 6417 **with respect to a credit under this section, the amount of such credit shall be replaced with—**
(i) the value of such credit (determined without regard to this paragraph), multiplied by
(ii) the applicable percentage.
(B) 100 PERCENT APPLICABLE PERCENTAGE FOR CERTAIN QUALIFIED FACILITIES.—In the case of any qualified facility—
(i) which satisfies the requirements under paragraph (11)(B), or
(ii) with a maximum net output of less than 1 megawatt (as measured in alternating current), the applicable percentage shall be 100 percent.
(C) PHASED DOMESTIC CONTENT REQUIREMENT.—Subject to subparagraph (D), in the case of any qualified facility which is not described in subparagraph (B), the applicable percentage shall be—
(i) if construction of such facility began before January 1, 2024, 100 percent,
(ii) if construction of such facility began in calendar year 2024, 90 percent,
(iii) if construction of such facility began in calendar year 2025, 85 percent, and
(iv) if construction of such facility began after December 31, 2025, 0 percent.
(D) EXCEPTION.—
(i) IN GENERAL.—For purposes of this paragraph, the Secretary shall provide exceptions to the requirements under this paragraph if—
(I) the inclusion of steel, iron, or manufactured products which are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent, or
(II) relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.
(ii) APPLICABLE PERCENTAGE.—In any case in which the Secretary provides an exception pursuant to clause (i), the applicable percentage shall be 100 percent.

IRC 45(b)(10).

A similar rule applies under sections 48 and 48E.

The waiver section is found only under the rule providing a phase-out of the direct pay provision. There is a statutory reference to “this paragraph” that arguably means it doesn’t apply to the 10% domestic content adder. We ask that the guidance make clear that the waiver process is available for purposes of the 10% domestic content adder, and further, that the waiver process can be applied for on an industry-wide basis rather than on a project-by-project basis.

Finally, we note that the IRA cross-references to the so-called “Buy America” provisions promulgated by 49 CFR 661. We recommend that, for purposes of satisfying the domestic adder provision, the IRS accepts as adequate documentation the documentation that was accepted under the Buy America provisions.

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