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VIA ELECTRONIC SUBMISSION

www.regulations.gov
IRS-2022-51
Office of Associate Chief Counsel
United States Department of Treasury

Re: Notice 2022-51

Associate Chief Counsel:

Construction Innovations LLC ("CI") hereby submits the following comments to the Department of Treasury ("Treasury") and the Internal Revenue Service ("IRS") (collectively the "Agencies") in response to Treasury and IRS's request for comments in Notice 2022-51.

About Construction Innovations

Construction Innovations is a United States manufacturer with over 600 employees and manufacturing operations based in Sacramento, California. CI is the industry leader in manufacturing comprehensive electrical and communications system packages and components that support safe and efficient field assembly of utility scale solar and energy storage power plants. From the connections at the photovoltaic modules to the point of interconnection with the utility grid, CI engineers, designs, and manufactures a variety of systems, components, and subcomponents. Examples of CI's manufactured products include power conversion stations, AC electrical systems, DC electrical systems, and substations. Some aspects of Treasury and the IRS's future guidance concerning Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 ("IRA"), will directly impact CI's ability to sell its manufactured components and systems and will also influence decisions on significant expansion of its manufacturing and subsequent creation of US manufacturing jobs. CI submits comments only on those portions of the IRA and related Notice.

Prevailing Wage Requirement

Question Section 3.01(1) - Is guidance necessary to clarify how the Davis-Bacon prevailing wage requirements apply for purposes of §§ 45(b)(7)(A)?

COMMENT-

Yes. The Department of Labor's Wage and Hour Division ("DOL") is currently considering comments on its Notice of Proposed Rulemaking published in the Federal Register on March 18, 2022, at 87 Fed. Reg. 15698. The DOL's proposed rule introduces more than 50 potential significant changes to the Davis-Bacon Act ("DBA"), including how prevailing wage requirements apply under the DBA. Given this uncertainty to the underlying law in general, for purposes of applying §§ 45(b)(7)(A) and 48(a)(10), CI submits the Agencies should clarify a central issue.

CI requests guidance that Sections 45(b)(7)(A) and 48(a)(10) do not cover work performed at manufacturing facilities. This is consistent with DBA which applies to "mechanics and laborers employed **directly upon the site of the work**." 40 U.S.C. § 276a(a) (emphasis added). As previously ruled, "'site of the work' clearly connotes [application to] a geographic limitation." *Building & Const. Trades Dep't, AFL-CIO v. U.S. Dept of Labor Wage Appeals Board (Midway)*, 932 F.2d 985, 990 (D.C. Cir. 1991). DOL's current and proposed regulations also make this distinction, explicitly stating covered activity does not include "manufacturing, [or] furnishing of materials." 29 C.F.R. § 5.2. As stated in *Midway*, that work performed at a secondary site, not specifically for the construction of the end-product, would not be covered and therefore not subject to the prevailing wage rate. Given work meeting these particular circumstances is not covered under a typical David-Bacon application, we suggest guidance that it is also not covered under § 45(b)(7)(A).

Domestic Content Requirement

Question Section 3.03(1)(a) - What regulations, if any, under 49 C.F.R. § 661 (such as 49 C.F.R. §§ 661.5 or 661.6) should apply in determining whether the requirements of section §§ 45(b)(9)(B) and 45Y(g)(11)(B) are satisfied? Why?

COMMENT-

49 C.F.R. § 661 is directly cited by the IRA for determining if a component of the end product facility is produced in the United States. This section references § 661.3 for definitions of the relevant terms. CI submits these sections and related Federal Transit Administration ("FTA") interpretation of these sections determine the application of the IRA's domestic content provisions. To that end, the application of 49 C.F.R. § 661 requires categorizing items used in the manufacturing of the end product into one of three areas: the end product itself; the components/systems of the end product, and the subcomponents of the components/systems. *See* U.S. Dept. of Transp., Fed. Transit Admin., Guidance Letter re: Applicability of FTA's Buy America Rules to a Traffic Signal System (June 8, 2011) pp. 3-4 ("Guidance Letter").

In applying this previous guidance to the work contemplated under section §§ 45(b)(9)(B) and 45Y(g)(11)(B), the end product would be the qualifying facility because it is the end result of all contributed and interconnected items with a function. *See* Appendix A to 49 C.F.R. § 661.3. The qualifying facility – i.e., the solar power plant – is comprised of several separate systems and other components.

These systems are themselves considered components. *See e.g.*, Guidance Letter, *supra*. While these systems are comprised of several items delivered directly to the worksite, they are considered components of the end product when connected by piping, transmission devices, electrical cables or circuitry and contributed together to perform a clearly defined function. 49 C.F.R. § 661.3. Examples of relevant systems for a solar power plant would be the AC collection system, DC collection system, power conversion stations, and the PV substation.

Section 661.3 distinguishes systems from separate end products by considering the operation of those items. Facilities operated independently of the other associated parts in the system, such as a transmission facility owned and controlled by a utility company, and a battery or energy storage facility, are separate end products and therefore should not be considered a system or component of the qualified facility. *Id*.

Similar to systems, individual components are those items directly incorporated into the end product at the final assembly location. *Id*. (emphasis added). In contrast, subcomponents are other items ***not*** directly incorporated into the end product. Subcomponents are not considered when determining the origin of the components or systems. Guidance Letter, *supra*. Subcomponents may be combined together to form a component through additional processes that take place at the final site. 49 C.F.R. § 661.11. Given the complex processes performed on site of a solar power plant, CI submits the Agencies should clarify how a component may be manufactured at the final assembly location.

Question Section 3.03(1)(d) - What records or documentation do taxpayers maintain or could they create to substantiate a taxpayer's certification that they have satisfied the domestic content requirements.

COMMENT-

In implementing Buy America requirements, the Federal Transit Authority requires certifications of compliance through 49 C.F.R. § 661.6. CI submits that any components used to meet the domestic content requirement should be accompanied by a certificate stating its country of origin. Given the large quantity of different manufactured products used in the end product's construction, the Agencies should issue guidance permitting good faith reliance on a manufacturer's statements or corresponding certificate for the country of origin of the manufactured products used as components of the qualified facility.

Question Section 3.03(2)(a) - Does the term "component of a qualified facility" need further clarification? If so, what should be clarified and is any clarification needed for specific types of property, such as qualified interconnection property?

COMMENT-

Yes. The Agencies should issue guidance that facilities operated independently of the other associated systems of the end product, such as a transmission facility owned and controlled by a utility company, are separate end products and therefore not components or systems of the qualified facility.

Question Section 3.03(2)(c) and (e) - 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? **(e)** Does the treatment of subcomponents with regard to manufactured products need further clarification? If so, what should be clarified?

COMMENT-

Yes. Guidance should confirm that the Agencies will conform to previous FTA interpretation of 49 C.F.R. § 661 by disregarding the origin of subcomponents should those subcomponents be substantially transformed or merged into a new and functionally different article at a manufacturing plant or following delivery to the end product site. Further, the IRA states that when evaluating the offered domestic content for obtaining the bonus credit, the analysis is to be done on "the manufactured products which are components of a qualified facility upon ***completion of construction***." §§ 45(b)(9)(B)(i)(emphasis added). This understanding of a subcomponent and manufactured product should be read together in a consistent manner through guidance by the Agencies.

The Agencies should clarify the difference, if any, between a component of the end product and a component of a manufactured product. Many products manufactured at a US facility will ultimately be incorporated into larger systems at the end product site to complete construction. Given the IRA explicitly notes domestic content is evaluated at the completion of construction, this suggests that the components of manufactured products are subcomponents, and therefore not considered for domestic content. CI submits the Agencies should issue guidance so stating.

Conclusion

As a United States manufacturer of products directly used in utility scale solar projects, CI seeks guidance from the Agencies consistent with the IRA, previous FTA guidance, and without unnecessary administrative cost of compliance. We submit the above recommendations will result in these goals.

Sincerely,

Tyler Freiberger
Centre Law & Consulting, LLC