

VIA ELECTRONIC SUBMISSION

October 30, 2023

Douglas W. O'Donnell
Deputy Commissioner for Services and Enforcement
U.S. Department of the Treasury
Internal Revenue Service
1111 Constitution Ave. NW
Washington, DC 20224

Re: Comments of Construction Industry Coalition to the Treasury Department and Internal Revenue Service on Reg-100908-23, Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements

Dear Mr. O'Donnell:

The undersigned organizations submit the following comments to the U.S. Treasury Department and Internal Revenue Service in response to Reg-100908-23, Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements, published in the Federal Register on Aug. 30, 2023.¹

The IRS/Treasury notice of proposed rulemaking requests public comments on proposed regulations affecting an estimated \$270 billion worth of increased tax credit or deduction amounts available for taxpayers constructing clean energy projects conditioned on satisfying prevailing wage and registered apprenticeship (collectively, PWA) requirements established by the Inflation Reduction Act of 2022.

The undersigned organizations appreciate the opportunity to provide feedback on this proposed rule, hereinafter referred to as the PWA NPRM.

Many members of the undersigned organizations have successfully built all aspects of “clean” and renewable energy projects of the types under the pre-IRA tax code—which generally provided for tax incentives of 30% of investments in qualifying projects—such as solar, wind, geothermal, carbon sequestration, electric vehicle charging stations and other types of clean energy construction. However, the IRA dramatically altered clean energy project tax incentives by reducing credit/deduction incentives to a baseline of 6% in sections 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E and 179D of the updated Internal Revenue Code. Under the IRA, clean energy developers are now eligible to receive the full 30% tax incentive—five times the value of the new baseline tax incentives for these projects—but only if they meet the onerous and unclear PWA requirements outlined in the PWA NPRM and discussed in these comments.²

¹ <https://www.federalregister.gov/documents/2023/08/30/2023-18514/increased-credit-or-deduction-amounts-for-satisfying-certain-prevailing-wage-and-registered>.

² The increased credit provisions in sections 45L and 45U do not contain apprenticeship requirements, but are included in NPRM PWA descriptions for the sake of simplicity.

The regulatory process that has led up to the PWA NPRM has led to confusion for the construction industry, developers, investors, financiers and other stakeholders in the clean energy ecosystem, and has needlessly increased costs, delayed the construction of clean energy projects and exacerbated challenges facing the construction industry. We look forward to an IRS final rule that addresses several confusing aspects of the IRA, the initial IRS guidance from 2022 and this PWA NPRM that has raised more questions rather than provided answers. The IRS must provide regulatory clarity to facilitate progress on clean energy construction projects dependent on enhanced tax incentives available only if developers meet the IRA's PWA requirements.

Many members of the undersigned organizations have participated in federal and federally assisted projects subject to Davis-Bacon prevailing wage requirements. However, many members of the undersigned organizations are not familiar with the peculiarities of Davis-Bacon Act regulations and wage determinations administered by the U.S. Department of Labor—particularly when union rates and union work rules and job classifications apply when the DOL adopts a collectively bargained wage and benefits rate as prevailing—and may be unlikely to pursue work subject to these requirements on clean energy projects that have traditionally been procured by private sector owners/developers free from prevailing wage requirements. The IRS should expect the new IRA PWA policy and longstanding unclear DOL rules specific to prevailing wage to needlessly reduce competition from experienced contractors and increase costs on clean energy projects.

Likewise, many members of the undersigned organizations participate directly in the construction industry's government-registered apprenticeship ecosystem. GRAPs are a critical part of an all-of-the-above solution to workforce development. However, the current GRAP system is not meeting the needs of the construction industry and is not widely used by contractors already building clean energy projects. The most recent data from the DOL indicates roughly 200,000 to 250,000 people are enrolled in government-registered apprenticeship programs and only 40,000 to 45,000 participants completed these programs in 2022.³ At current rates of completion, it would take 12 years of government-registered apprenticeship program completions to meet the industry's 546,000-person shortage of skilled labor needed just for 2023.⁴

The undersigned organizations have concerns about the ability of the GRAP system to accommodate new demands for GRAP participants—as well as GRAP classrooms, instructors and administrators—as a result of the new IRA PWA policy and other efforts promoting and requiring GRAPs in Biden administration regulations and notice of funding opportunities for trillions of dollars worth of forthcoming infrastructure projects receiving federal and federal assistance.

Likewise, some members of the undersigned organizations do not participate in GRAPs and may be unwilling to do so on clean energy projects that have traditionally been free from GRAP participation and utilization requirements because they have been private projects. We

³ See the U.S. DOL's new Interactive Apprenticeship Data resource launched in 2023 to view construction industry registered apprenticeship data: <https://www.apprenticeship.gov/data-and-statistics>.

⁴ <https://www.abc.org/News-Media/News-Releases/entryid/19933/abc-government-registered-apprenticeship-system-alone-wont-solve-construction-labor-shortage>.

expect the new GRAP requirements in the IRA to also reduce competition, increase costs and lead to delays of clean energy project construction.

The PWA NPRM outlines punitive correction and penalty procedures against clean energy project developers/owners—referred to as taxpayers in the NPRM—for any failure to pay Davis-Bacon prevailing wages. As well as paying back wages to workers to meet the prevailing rate with interest, taxpayers and contractors must also pay a penalty equal to \$5,000 multiplied by the total number of workers that were underpaid.⁵ However, if the IRS deems that this underpayment was due to “intentional disregard,” the back pay to workers is increased to three times the normal sum and the penalty payment is increased to \$10,000 per worker.⁶

The PWA NPRM establishes a similar penalty procedure for failure to meet government-registered apprenticeship program requirements, with a penalty of \$50 multiplied by the total labor hours for which GRAP requirements were not satisfied.⁷ This penalty increases to \$500 per labor hour if the IRS deems the taxpayer or contractor acted with intentional disregard.⁸

The PWA NPRM outlines a number of factors the IRS would consider when analyzing whether a violation was committed with intentional disregard for both prevailing wage⁹ and GRAP requirements.¹⁰ The PWA NPRM states that developers can avoid severe intentional disregard penalties if they have required contractors to sign a project labor agreement (PLA) covering construction activity on the clean energy project seeking enhanced tax credits under the IRA.

In short, the PWA NPRM’s controversial pro-PLA policy coerces owners into requiring discriminatory and inflationary PLAs as protection against violations attributable to unclear rules established in the IRS’s incomplete and inadequate rulemaking on an extremely novel and disruptive application of new policy onto private clean energy construction projects.

The undersigned organizations strongly oppose the PWA NPRM’s waiver of enhanced intentional disregard penalties if a clean energy construction project developer/taxpayer has required its contractors to sign an anti-competitive and inflationary PLA.

This violates the plain text of IRA, which includes no PLA requirement and certainly does not authorize waiver of intentional violations and additional penalties based on a clean energy project developer’s inclusion of a PLA requirement in its solicitation for construction services. Because experienced and qualified nonunion contractors are much less likely to execute PLAs, this problematic policy change arbitrarily establishes unequal treatment for intentional violations made by union contractors and nonunion contractors.

Typical PLA mandates, whether required by government entities or coerced through regulatory policy—as is the case in this NPRM—discourage competition from nonunion contractors, who employ the overwhelming majority of all construction workers, and deny jobs to their existing workforce through several common PLA provisions summarized in these comments.

⁵ <https://www.federalregister.gov/d/2023-18514/p-311>.

⁶ <https://www.federalregister.gov/d/2023-18514/p-319>.

⁷ <https://www.federalregister.gov/d/2023-18514/p-390>.

⁸ <https://www.federalregister.gov/d/2023-18514/p-399>.

⁹ <https://www.federalregister.gov/d/2023-18514/p-323>.

¹⁰ <https://www.federalregister.gov/d/2023-18514/p-401>.

A PLA is a jobsite-specific collective bargaining agreement unique to the construction industry that typically requires companies to agree to recognize unions as the representatives of their employees on that job, use the union hiring hall to obtain most or all construction labor, exclusively hire apprentices from union-affiliated apprenticeship programs, follow union work rules and pay into union benefit and multiemployer pension plans that nonunion employees can't access. This forces employers to pay "double benefits" into their existing plans and union plans, puts them at a significant competitive disadvantage and exposes them to unfunded multiemployer pension plan liabilities. In addition, PLAs typically require construction workers to pay union dues and/or join a union if they want to receive union benefits and work on a PLA project. If they do not satisfy these stipulations, nonunion workers lose an estimated 34% of their wages and benefits to union coffers and benefits plans—making them the victims of wage theft.¹¹

When mandated, coerced or encouraged by government agencies and lawmakers on traditionally private construction projects, PLAs exacerbate the construction industry's estimated skilled labor shortage of more than half a million workers in 2023¹² by unfairly discouraging competition from quality nonunion contractors and their employees, who comprise 88.3% of the private U.S. construction industry workforce.¹³

In addition, PLAs prevent some unionized firms from competing for contracts on a PLA project, because PLAs can interfere with union-signatory contractors' existing union collective bargaining agreements. For example, some union organizations and contracting groups oppose government-mandated PLAs¹⁴ because they force all contractors to hire labor from signatory unions party to the jobsite's PLA. However, collective bargaining agreements with unions not party to a PLA typically prohibit contractors from hiring labor from other unions outside of their agreement.

For these reasons, PLAs on recent federal and federally assisted projects¹⁵ have resulted in reduced competition, increased costs, delays, poor local hiring outcomes and litigation. In addition, multiple studies of hundreds of taxpayer-funded affordable housing¹⁶ and school construction¹⁷ projects found that government PLA mandates increase the cost of construction by 12% to 20% compared to similar non-PLA projects already subjected to prevailing wage regulations.

¹¹ McGowan, John R., Ph.D., CPA, [Government-Mandated Project Labor Agreements Result in Lost and Stolen Wages for Employees and Excessive Costs and Liability Exposure for Employers](#), October 2021.

¹² See www.abc.org/wfshortage.

¹³ See bls.gov Union Members Summary. Jan. 19, 2023, <https://www.bls.gov/news.release/union2.t03.htm>.

¹⁴ Union Leaders and Contractors Oppose Government-Mandated Project Labor Agreements Too, March 1, 2021, <https://tinyurl.com/yc727s58>.

¹⁵ See [Government-Mandated Project Labor Agreement Failures on Federal and Federally Assisted Construction Projects](#), March 10, 2021.

¹⁶ Ward, Jason M., The Effects of Project Labor Agreements on the Production of Affordable Housing: Evidence from Proposition HHH, Santa Monica, California: RAND Corp., 2021. https://www.rand.org/pubs/research_reports/RRA1362-1.html.

¹⁷ See five studies, available at <https://buildamericalocal.com/learn-more/#gmpla-studies>, measuring the impact of PLA mandates on public school construction already subject to state prevailing wage laws in Connecticut (2020), Massachusetts (2006), New Jersey (2019), New York (2006) and Ohio (2017) by the Beacon Hill Institute (<http://beaconhill.org/labor-economics/>); an October 2010 report by the New Jersey Department of Labor and Workforce Development, Annual Report to the Governor and Legislature: Use of Project Labor Agreements in Public Works Building Projects in Fiscal Year 2008 (https://www.nj.gov/labor/forms_pdfs/legal/2010/PLAReportOct2010.pdf); and a 2011 study by the National University System Institute for Policy Research, Measuring the Cost of Project Labor Agreements on School Construction in California (<https://thetruthaboutplas.com/wp-content/uploads/2011/07/Measuring-the-Cost-of-Project-Labor-Agreements-on-School-Construction-in-California-NUSPIR-2011.pdf>).

Simply put, clean energy developers coerced into mandating anti-competitive PLAs by illegal IRS policy should expect to pay more, which ultimately limits the number and quality of clean energy projects.

The undersigned organizations support fair and open competition and oppose PLA schemes on clean energy projects receiving enhanced tax incentives because hardworking taxpayers deserve more efficient and effective policies that will encourage all qualified contractors and their skilled workforces to compete to build long-lasting, quality projects at the best price.¹⁸

We urge the IRS to abandon its illegal and coercive scheme to push clean energy project developers into requiring PLAs. In addition, we urge the IRS to provide clarity to the regulated community in a timely manner on new and disruptive PWA policies so clean energy construction projects relying on enhanced IRS tax credits can break ground.

Respectfully,

American Fire Sprinkler Association
American Pipeline Contractors Association
Associated Builders and Contractors
Construction Leadership Council
Construction Industry Round Table
HR Policy Association
Independent Electrical Contractors
National Center for Construction Education & Research
National Ready Mixed Concrete Association
National Utility Contractors Association
Plastics Pipe Institute
Power and Communication Contractors Association
Small Business and Entrepreneurship Council

¹⁸ Learn more about project labor agreement schemes on our coalition website, <https://buildamericainlocal.com/learn-more/>