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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: RIN 1545-BQ54, Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements

As a construction industry contractor directly affected by the Inflation Reduction Act's government-registered apprenticeship and prevailing wage requirements that must be satisfied to unlock the full value of enhanced tax incentives for clean energy construction projects, I write to the Internal Revenue Service in response to the above-referenced proposed rule published in the Federal Register on Aug. 30, 2023, at 88 Fed. Reg. 60018.

B & I Contractors, Inc. is a large Mechanical, Plumbing and Electrical Contractor with $200,000,000 in sales and 750 employees supported by Office/Warehouse facilities in Fort Myers, Tampa and Tamarac, Florida. We perform many services on projects which qualify for IRA funding including but not limited to HVAC Thermal Storage Systems, PV Solar, Hot Water Solar, battery systems, etc.

On Aug. 30, 2023, the IRS published a proposed rule to further implement prevailing wage and apprenticeship requirements for taxpayers seeking tax credits for clean energy construction under the Inflation Reduction Act.

I am extremely concerned about the impacts this proposed rule will have on my business, the construction industry and critical clean energy infrastructure projects across the nation. This rulemaking will increase overall construction costs. It will create new regulatory burdens, costs, risk and regulatory uncertainty that will discourage quality and experienced contractors—especially small and disadvantaged businesses—from bidding on contracts for projects receiving tax credits under the IRA.

Prevailing Wage Requirements

I am deeply troubled by the IRA's imposition of prevailing wage requirements on clean energy construction projects. Specifically, the notice of proposed rulemaking states that taxpayers must ensure construction workers on projects receiving the IRA tax credits shall be paid at prevailing rates as determined under the Davis-Bacon Act.

These requirements are likely to needlessly increase construction costs and delay clean energy construction projects, as well as discourage participation from small businesses. I am also concerned that the proposed rule fails to provide clarity on how prevailing wage regulations will be enforced.

Unfortunately, by relying on Davis-Bacon Act prevailing wages, the proposed rule is setting IRA wage standards, using a process that many in the construction industry have long recognized is extremely flawed and inaccurate. Research has demonstrated the inflationary impact of existing prevailing wage laws on construction costs, and the same impact can be expected for projects receiving IRA tax credits under the proposed rule.

The IRS's enforcement of prevailing regulation will also cause confusion regarding worker classification. The U.S. Department of Labor has applied union work rules and job descriptions to any classification for which the union rate "prevails." Contractors frequently struggle to comply with these work rules, as they are found in union collective bargaining agreements that are often not available publicly. Ultimately, nonunion contractors are penalized for using commonplace definitions of classifications like "carpenter," "electrician" and "roofer" due to complex and confusing union classifications. A lack of regulatory clarity has caused confusion by government, contractor and private-sector stakeholders. This will lead to needless added risk for contractors on IRA projects, reducing competition, especially from small businesses.

If prevailing wage requirements must be implemented, the IRS should align them with long-standing DOL regulations, including recent updates in the August 2023 final rule, to avoid confusion. Wage rates should be established for the entire project when construction contracts are awarded, not when construction starts. The beginning of construction can be delayed for months after the award. Applying new wage rates at that point would be extremely disruptive to our bids and create unnecessary financial risk and uncertainty.

Government-Registered Apprenticeship Program Requirements

The IRA requires that construction contractors use apprentices enrolled in government-registered apprenticeship programs, commonly known as GRAPs, to receive the full IRA tax incentives that are 500% greater than baseline tax incentives. This includes a requirement that contractors use apprentices from GRAPs for 12.5% of all construction work hours in 2023—and 15% of all construction work hours in 2024 and thereafter—on qualifying clean energy projects seeking the enhanced tax incentives. All contractors with four or more employees on a jobsite must utilize at least one registered apprentice.

I am very doubtful that my firm and other qualified contractors we work with will be able to access sufficient GRAP-enrolled apprentices to meet these requirements. Additionally, the IRS must provide further clarity on how these rules will be implemented.

While GRAPs represent one useful tool for workforce development, the vast majority of construction contractors utilize workforce development strategies outside of the GRAP system. Training programs not registered with the government that involve partnerships between employers, trade associations, colleges, trade schools and community workforce development partners are vital to upskilling the construction workforce, yet are overlooked by the IRA's policy favoring GRAPs. The public would be better served by promoting an all-of-the-above approach to workforce development, as at current rates of completion, it would take 12 years for all construction industry GRAPS to supply the estimated 540,000 skilled construction workers needed just in 2023.The proposed rule's GRAP requirements are therefore likely to pose serious challenges for contractors.

Further, the final rule must provide clarity on the time period of when the total percentage of apprenticeship hours worked in relation to total construction hours must be calculated. My understanding is that the calculation would be made at the conclusion of the project. This would make sense because only then will the "total labor hours" of construction work performed on the project be known. It would be impossible to maintain a steady 15% of all construction work hours performed by apprentices at all times during a project because of the sequencing and nature of construction activity.

I would also request that the proposed rule allow contractors to use the apprenticeship ratio from either where the GRAP is registered *or* the state where the IRA project in question is being performed. This would be helpful to many multistate contractors and small businesses as they navigate complicated regulations.

Our rules in the state of Florida are in compliance with State and Federal Guidelines which is one reason my company has over 60 apprentices currently enrolled and working towards their Journeyman Licenses. Imposing different rules makes not sense given the success of our current system and will create an undue burden on contractors who work on these projects.

Good Faith Effort Exception

While I appreciate the IRS's attempt to provide a Good Faith Effort Exception from these apprenticeship requirements, I am concerned that this exception is not workable as currently proposed. To receive the GFEE, taxpayers and contractors must submit a written request for GRAP-enrolled apprentices to a qualifying program with a practice of placing apprentices with employers that is denied or ignored for five business days.

This exception does not align with the work practices of most nonunion contractors, which make up the vast majority of the construction industry and employ more than 88% of the U.S. construction workforce. Instead, the GFEE caters exclusively to union contractors, who pull from a pool of apprentices enrolled in a union-affiliated GRAP.

This approach may not be available to nonunion firms enrolled in GRAPs. Instead, such firms typically sponsor an existing employee classified as apprentice in an association, community-based or employer-run GRAP. We do not typically pull apprentices from a shared pool of apprentices. The proposed GFEE does not align with the practices of a significant majority of firms employing the construction workforce.

In addition to reworking the GFEE to align with industry practice, the IRS must provide clarity on how the GFEE will play into the final GRAP labor hour calculation. I would recommend that all of the hours performed under a GFEE and firms with less than four employees be eliminated from the project's total labor hours of construction (the denominator) so apprenticeship utilization (the numerator) can be achieved without additional regulatory burden.

Project Labor Agreements

One of the most anti-competitive and costly aspects of the proposed rule is that it would allow taxpayers to avoid severe intentional disregard penalties if they have required contractors to sign a project labor agreement.

I am strongly opposed to this provision incentivizing PLAs. It blatantly establishes disparate treatment of intentional violations made between union contractors, which are generally advocates of PLAs, and nonunion contractors, which are much less likely to execute PLAs. Typical PLA mandates discourage competition from nonunion contractors and often prevent us from using our existing workforce.

Government-mandated PLAs would drastically decrease the value of the IRA's tax credits. They needlessly increase the cost of construction by 12% to 20% and steal up to 34% of wages from the few nonunion workers allowed to work on a PLA jobsite.

Most PLAs require that nonunion companies must obtain most or all employees from union hiring halls. This means our company could not use most or all of our existing employees whose safety, training, productivity and quality is already quantified. This provision excludes more than 88% of the U.S. construction workforce from working on IRA clean energy construction projects because they choose not to belong to a union.

Additionally, PLAs often require that all apprentices on the project come from union-affiliated GRAPs. This means our future workers enrolled in qualified GRAPs will be excluded from working on IRA projects that require PLAs simply because the GRAP is not affiliated with a union.

PLAs require contractors to follow union work rules specified in each collective bargaining agreement of each construction union party to the PLA. This means we must abandon efficient labor utilization practices such as "multiskilling" and assign work based on inefficient, confusing union work rules.

Typical PLAs require nonunion companies to pay their workers' health and welfare benefits to union trust funds, even though these companies may have their own bona fide benefits plans. Workers cannot access any of their benefits accrued during the life of the PLA project in union plans unless they decide to leave their nonunion employer, join a union, work for union-signatory contractors and receive enough work and remain in good standing with the union until vested. Research suggests this loss in wages and benefits reduces nonunion employees' paychecks by 34% on PLA projects. Because few nonunion employees choose to join a union after working on a PLA project, companies typically end up paying benefits twice—once to the union plans and once to the existing company plans—to ensure employees have direct access to earned retirement and benefits assets and to keep their existing employees happy with their current employer in the face of a competitive labor market. Nonunion contractors must factor this double benefits cost into their bid, which research suggests increase nonunion contractors' wage and benefits costs by an estimated 35%, needlessly putting them at a competitive disadvantage against union contractors that are not saddled with these unnecessary costs.

In addition, paying into underfunded and mismanaged union-affiliated multiemployer pension plans may expose merit shop contractors to substantial pension withdrawal liabilities. Depending on the health of a union-managed multiemployer pension plan, signing a PLA could bankrupt a contractor or prevent it from qualifying for construction bonds needed to build future projects for the federal government and other clients.

Finally, PLAs force nonunion construction workers to accept union representation and even pay union dues and fees or join a union as a condition of employment. Employees lose the right to freely choose whether affiliating with a union is right for them, because this decision is made by their employer.

I urge the IRS to withdraw provisions incentivizing PLAs to avoid restricting competition on IRA projects. However, if the IRS insists on making the mistake of including this incentive, the agency should at least require the following provisions for all qualifying PLAs to mitigate their negative impact:

- The PLA must not limit participation of a contractor's existing workforce in any way.
- The PLA must permit both union and nonunion GRAP participation.
- The PLA must permit contractors to utilize their own work rules that are independent of union collective bargaining agreements and any union collective bargaining agreements included in the PLA.
- The PLA must not require contractors to pay into union benefits funds as long as contractors have bona fide benefits and are satisfying Davis-Bacon prevailing fringe benefits standards.
- The PLA must not require workers to join a union or pay any fees or dues to a union for any reason.

Given the fact that more than 97% of Florida's Construction Workforce are Merit Shop Businesses it is clear that any PLA would likely result in less competition and more project delays.

Additional Compliance Burdens and Related Costs

The proposed rule's estimate of the regulatory cost of this rulemaking to my business is not accurate and exposes the government's lack of understanding of the added costs imposed by regulation on the construction industry. The proposal's erroneous regulatory cost estimate assumes affected firms will need two hours annually to display prevailing wage rates and request apprentices. It will take my company much longer than two hours to implement the proposed rule on any projects receiving the IRA tax credit.

We have already spent many hours to read and understand the proposed rule and has required multiple people across my company to read and interpret the rule and seek legal advice. Once finalized, the rule will require additional time to read, review and operationalize the new regulations into our payroll, compliance and work practices.

Setting up Project Accounting Teams to apply these new and unnecessary rules would result in waste and bureaucratic delays that will cause many contractors to avoid projects with IRA Incentives attached.

Reconsider This Flawed Proposed Rule

This proposed rule would have significant negative impacts on my business, the construction industry as a whole, clean energy production and taxpayers. The proposed rule would further increase costs and compliance burdens for the construction industry that is building clean energy projects at a time when we are facing an industrywide workforce shortage of 540,000 in 2023 alone.

At B & I we support Apprenticeship by paying for 100% of the costs and also awarding completion bonuses to all of our participants. We are building the next generation of Skilled Workers through these efforts. The rules and regulations included in the IRA are unnecessary and do not encourage quality or efficiency. To the contrary they are truly intended to benefit special interests who are otherwise unable to compete in the free market. This in turn will add cost and time to these projects making it less attractive for owners and contractors to pursue investing in these technologies.

For the reasons outlined above, I strongly request that the IRS reconsider aspects of this proposed rule that will cause increased costs, project delays and continuing confusion among the regulated community. The IRS must instead promote clear, consistent rules that welcome competition from the entire construction industry on important clean energy infrastructure projects.

Thank you for the opportunity to comment on this matter.

Respectfully,

Gary H. Griffin, CEO
B & I Contractors, Inc.
GaryG@BandIFlorida.com
2701 Prince Street
Fort Myers, FL 33916