Testimony of the Mechanical Contractors Association of America (MCAA)

IRS REG-100908-23, RIN-1545-BQ54
Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements

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Testimony of Hon. Earl Pomeroy, Senior Counsel, Alston & Bird, Washington, D.C.

Good Morning. My name is Earl Pomeroy.

For nine terms I represented North Dakota in Congress and served on the Ways and Means Committee and oversight subcommittee. While my time on the dais listening to testimony from the Service is long past, I appreciate the role reversal this morning which allows me to testify to you.

I am here representing the Mechanical Contractors Association of America.
MCAA is a specialty construction employer trades association, representing mechanical construction and service contractors who, operate under building trades collective bargaining agreements, and who work primarily with local unions of the national Plumbers and Pipefitters union.

I will briefly spell out the perspective of these contractors and then yield the balance of time to our expert, Jim Gaffney, owner and CEO of a second generation HVAC contractor doing business out of Philadelphia.

The Inflation Reduction Act launched the most significant new federal incentives for clean energy projects ever enacted. A hugely important dimension of the legislation is its commitment to build back the construction workforce in this country, ensuring labor capacity for projects of this size and complexity.

Unfortunately, there is considerable agreement across the construction industry that the rules as originally proposed by IRS with Labor Department input will not be able to deliver the results you are trying to achieve.

The principle point I want to make this morning is that compliance review relying on back-end, post-project compliance review audits will fall short of achieving the goals you have for the rule.

The public comment file on the IRS currently proposed regulations reveal significant agreement across the construction industry on this point.

Compliance review taking place **after** project completion leaves many critical uncertainties hanging over projects – in the planning, bidding and project performance phases of qualifying projects.

These uncertainties are significant and will discourage contractor interest in project bidding.

Additionally, the goal of ensuring that prevailing wage and apprenticeship requirements are being met must occur before the work is undertaken. Otherwise, it is too late to ensure workers are actually receiving the benefits they deserve as the work proceeds on a project.

Successful project completion requires disciplined front-end planning in both the project acquisition and procurement process. The Department of Labor and IRS rules must recognize the importance of this front-end planning in revised regulations in order to fully achieve the *Inflation Reduction Act* goals.

A new regulatory model encouraging prevailing wage and apprenticeship compliance from the outset of the project in the project planning, acquisition, and procurement phases is the only way to ensure that the Department of Labor and IRS are fully pursuing and achieving the statutory and policy aims of the *Inflation Reduction Act*.

Most construction industry comments on the IRS proposal agree that front-end project compliance incentives, including project interim performance and prevailing wage and apprenticeship compliance safeguards, are required. We agree with this.

We further contend that IRS must incentivize companies through sub-regulatory project guidance and inter-agency mechanisms to ensure that the prevailing wage and apprenticeship aims are achieved and adhered to from the outset of project awards. IRS can do this by issuing clearer guidance on eligibility and responsibility criteria. IRS and DoL should reconsider ways to add specificity in the qualifying project planning and procurement phases to ensure prime contract and subcontract bidding and contracting agreements reflect the full complexity of the PWA performance requirements.

In addition, IRS and DoL should consider ways to adapt a Private Letter Ruling-type preaward compliance review that will provide incentives for qualifying project owners to write full compliance specifications into their contract bidding documents in a manner similar to the incentives allowed in the current proposal for owner use of Project Labor Agreements.

For more specifics on the MCAA position from a union-signatory mechanical contractor who has long experience in public and private sector project markets in Pennsylvania and New Jersey, I'd like to introduce Jim Gaffney, President of Goshen Mechanical Construction in West Chester, Pennsylvania, and MCAA's Chairman of the Government Affairs Committee.

Jim has significant experience on Federal, state, and local public sector projects and he has performed Davis Bacon projects of all types over the course of his long, successful, small

business operation in the Philadelphia area. Jim will advise and focus his testimony on the current state of the market reaction in his area to the *Inflation Reduction Act* project markets.

Testimony of Jim Gaffney, President, Goshen Mechanical, West Chester. PA, and MCAA Government Affairs Committee Chairman

Good morning IRS commissioners. Thank you, Earl.

As Congressman Pomeroy noted, I am Jim Gaffney a second-generation small business specialty mechanical subcontractor in the Philadelphia area.

My company has done new construction projects and mechanical system maintenance and operations/service work for large facilities for a great many private and public sector owners in Pennsylvania and New Jersey over the course of the last 38 years.

I have primary responsibility from my local MCA association in Philadelphia for industry relations working with union-sector and open shop contractors on all types of issues affecting public construction work in the Commonwealth of Pennsylvania; and, I have long been national MCAA's lead contractor advisor on Davis Bacon public contracting issues here in D.C.

The Biden Administration energy project policy is laudable and worthy – and the market is eager for much more specific regulatory guidance from IRA and DoL – which is absolutely essential to meet the statutory and public policy aims of the IRA - I also am active in my community and serve on the board of a community college and joint labor/management apprenticeship training centers that train apprentices, and on college boards that consider large scale construction awards for their campus facilities – many of them of the type that would be entitled to the IRA PWA tax incentives.

My experience – as of now – with all my contacts in the Philadelphia region in the industry – both union-sector and open shop firms – is that the current state of the regulatory regime and lack of guidance, coupled with a high degree of uncertainty on the risk allocation on the IRA PWA regime on projects running between the owner, the prime contractors and subcontractors – does not warrant confidence – or any enthusiasm among large scale, competent and qualified firms that provide quality projects to step in and vigorously pursue IRA energy policy projects with the PWA tax credit incentives.

Robust competition for qualifying projects depends on specific regulatory guidance for quality construction firms to assess the project performance risks and costs and commit resources to competing for that work - Simply put, my competitors in the industry – both union-

sector and open-shop contractors comment to me openly that much more must be done in the regulatory sphere to answer the very broad and deep liability issues surrounding the project flow-down of the complex and poorly directed PWA requirements on those projects – from the owner, to primes and subs for them to understand and price the compliance risks on these jobs.

Competent large-scale union-signatory firms have compliance fairly readily assured because their collective bargaining agreements and joint apprenticeship training sponsorship and participation virtually assures compliance. Because, in virtually all cases, the collective bargaining wage and benefit rates in CBAs will meet or exceed the prevailing rates in any market area or country, and sponsorship and participation in joint apprenticeship programs assures access to apprentices by JATC referral to participating employers in their main crafts.

Lax regulatory and compliance guidance may well cede this market to low-road contractors over high-quality firms that would perform qualifying projects much more competently and productively - But, at the same time, the detriment of competing against firms that don't have that compliance know-how can be very damaging to their company competitiveness and overfall industry standards if regulatory laxity allows non-responsible firms to take a foot hold in that market. In a similar way, some competent and legally compliant open-shop firms have the same competitive concerns. And diffuse concerns about risk allocation and liability right now trouble all competent firms that need to recognize, allocate and manage risk on their jobs, before deploying and risking capital to take up competition for those projects.

In fact, in my experience on a recent community college board, the questions of whether and how to pursue the tax credits on a planned cogeneration project ultimately frustrated and stalled the go-ahead on that project until the regulatory policies become much clearer, if they will.

Furthermore, quite frankly, with the growth of other private and public sector work in the area, including the growing number of Infrastructure Act projects – the industry can well afford to take a passive approach to IRA project bidding – as there is plenty of work in our markets now and into the foreseeable future.

In the same way, project owners badly need more guidance on how to ensure that primes and subs on their IRA energy projects fully understand how to fully comply with the prevailing wage and apprentice utilization rules – up front – so they can advertise their jobs in a stable market where robust competition and up-front compliance will gain them better prospects for successful project completions.

To emphasize – proactively controlling the risks of noncompliance so it can positively affect project competition and project performance ***upfron***t is essential to avoid leaving compliance as

merely an inefficient matter of dispute resolution at the back end of the project – and in that way discouraging quality firms stepping in to bid in the first place.

Realize that with most projects there can be over 21 skilled trades and subcontractors on site, many of whom are only on site for the first few months in a multi-year project. Without having the process in place at the start up the project this will become complicated for everyone.

In a pre-project solicitation IRS Private Letter Ruling-like process, the owner would submit the construction documents with the project construction work broken down by craft along the lines of the of the Construction Specifications Institute MasterFormat document specification for major categories of work, along with estimates of work hours and job classifications, and apprentice hours supporting each element of the construction work. That application would be submitted to a joint IRS/DoL/Wage and Hour/Office of Apprenticeship – Clean Energy Policy Project Working Group that would review each element of the work (perhaps with the owner A/E abstract of the work included), list out the proper work classifications and wage determinations for each section of the specifications, and spot any that are missing at this early stage and provide them too. The Office of Apprenticeship would list all applicable JATCs for each craft in the project workforce area (perhaps more than one JATC for each craft)(in both DoL registered states and SAC states too), and perhaps even have DoL OA gain a preliminary commitment to supply apprentices for that project. That pre-project acquisition planning information of PWA compliance specifications would be sent back from IRS to the project owner intending to claim the PWA credits to then be incorporated in the qualifying project bidding documents by the owner for all prime contract and subcontract bidders to incorporate into their bids and contracts. Such PLR-type reviews should be incentivized for owners in the same way that Project Labor Agreements are treated under the proposed rules.

Also, I should emphasize that MCAA also agrees with all the industry comments that counsel for Davis Bacon–like controls against wage theft, prevailing wage job misclassification, and other widely recognized and documented industry abuses that will drive quality firms out of this market too – unless the regulations are much more proactive – and less passive than merely looking for compliance from the back end of the project.

So, thank you for your time commissioners – and Earl and I and John McNerney, MCAA's counsel who is with us here, look forward to addressing any questions you may have.

Respectfully submitted,

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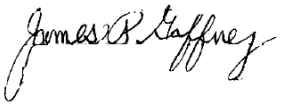

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