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Internal Revenue Service
CC:PA:LPD:PR (Notice 2024-9)
Room 5203
Internal Revenue Service
P.O. Box 7604
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Washington, DC 20044

To Whom It May Concern:

The undersigned organizations appreciate the opportunity to write in response to IRS Notice 2024-9, Statutory Exceptions to Phaseout Reducing Elective Payment Amounts for Applicable Entities if Domestic Content Requirements are Not Satisfied (Notice).[1] These comments include responses to Notice section 5, Transition Process for Claiming the Statutory Exception to the Elective Payment Phaseouts, and Notice section 3, Request for Comments.

We understand that implementation of these exceptions, as well as the domestic content requirements themselves, requires a balance between ensuring these provisions have the intended effect while also ensuring that they are not so restrictive or cumbersome as to prevent the use of elective payment entirely, particularly while domestic sources of equipment and materials are in their infancy. While Applicable Entities historically have been precluded from directly utilizing clean energy tax credits, it is our hope that practical regulations implementing the elective-payment rules enacted in the Inflation Reduction Act (IRA)[2] will enable direct access to tax credits, recognizing the availability of domestic content in the marketplace, as well as the timing and nature of project development by Applicable Entities.

Summary

- Elective payment has the potential to spur significant new investments in qualified energy property by Applicable Entities.

- Meeting domestic content requirements for purposes of qualifying for elective payment will be a challenge from a supply chain standpoint, but also as a matter of implementation.

[1] Notice 2024-9, 2024-2 I.R.B. 358, https://www.irs.gov/pub/irs-drop/n-24-09.pdf.
[2] P.L. 117-169, 136 Stat. 1818 (Aug. 16, 2022), § 13801.

- Some Applicable Entities are already sophisticated players in the energy sector, but the vast majority are quite small and/or largely unfamiliar with the space.

- Entities which meet domestic content requirements receive a substantial bonus tax credit, but only Applicable Entities face the penalty of receiving no credit at all if they fail to meet those requirements.

- The effect of Applicable Entities' risk tolerance should not be underestimated on their willingness to undertake qualified energy projects.

- The above points indicate why implementation of the exceptions to domestic content requirements for elective payment must be clear, simple, and certain.

- To meet this goal, we strongly believe that the statute allows, and good policy argues for, project level exceptions to domestic content requirements, rather than an item-by-item exceptions process.

- Based on the likely reliance on delivery of these projects by third party developers, local leaders should be able to make good faith reliance on these developers' estimations of the cost and availability of domestic content for purposes of determining qualification for such an exception.

- The attestation process created in the notice should extended in duration and be a model for compliance going forward, limited to "trusted filers" if compliance concerns require.

We look forward to working with you toward this goal and hope the following comments are helpful in this process.

<u>Background: Signatories</u>

The American Public Power Association (APPA) is the national trade organization representing the interests of the nation's 2,000 not-for-profit, community-owned electric utilities. Public power utilities are in every state except Hawaii. They collectively serve more than 54 million people and account for 15 percent of all sales of electric energy (kilowatt-hours) to end-use customers. Public power utilities are load-serving entities, with the primary goal of providing the communities they serve with safe, reliable electric service at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of the utilities with the long-term interests of the residents and businesses in their communities.

The National Rural Electric Cooperative Association (NRECA) is the national trade association representing nearly 900 local electric cooperatives and other rural electric utilities. America's electric cooperatives are owned by the people that they serve and comprise a unique sector of the electric industry. From growing regions to remote farming communities, electric cooperatives power 1 in 8 Americans and serve as engines of economic development for 42 million Americans across 56 percent of the nation's landscape. Electric cooperatives operate at cost and without a profit incentive.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,069 counties, 40,000 county elected officials and over 3.6 million county employees through advocacy, education, and research.

The Government Finance Officers Association (GFOA) is the professional association of State, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and identifying and promoting best practices. Its more than 24,000 members are dedicated to the sound management of government financial resources.

The National League of Cities (NLC) is the nation's foremost non-partisan network of municipal governments and their leaders, representing all of America's 19,000 cities, towns and villages and more than 218 million people.

The National Special Districts Coalition is the only national organization representing the federal policy interests of special districts across the nation.

Background: Elective Payment and Domestic Content Requirements

Section 6417[3] allows an Applicable Entity[4] to make an election with respect to an applicable credit to be treated as having made a payment of tax equal to the amount of the applicable credit to the Applicable Entity through the regular tax filing process ("elective payment"), thereby effectively receiving a refund of the applicable credit amount. Certain qualified facilities and qualified energy properties (generally referred to as qualified energy projects) must meet domestic-content requirements to receive a credit via elective payment.

To meet the domestic-content requirements, any steel, iron, or manufactured product that is part of the project at the time of completion must be produced in the United States. For purposes of these

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[3] References to a "section" or "§" are to a section of the Internal Revenue Code of 1986, as amended (("Code" or "I.R.C."), unless otherwise specified.
[4] "Applicable Entities" are defined in Code section 6417(d)(1) and generally include tax-exempt public entities such as state and local governments and subdivisions and instrumentalities thereof, electric cooperatives, Indian tribal governments, and the Tennessee Valley Authority. Signatories to this letter represent Applicable Entities.

requirements, steel and iron must be 100 percent produced in the United States. Manufactured products are deemed to have been manufactured in the United States if 40 percent of the total cost of the components and subcomponents of the project is attributable to components that are mined, produced, or manufactured in the United States.[5]

The applicable credits in which the domestic content requirement must be met for elective payment include:

- Section 45 – Electricity Produced from Certain Renewables, etc. (also known as the production tax credit or PTC);
- Section 45Y – Clean Electricity Production Credit (or Clean PTC);
- Section 48 – Energy Credit (also known as the investment tax credit or ITC); and
- Section 48E – Clean Electricity Investment Credit (or Clean ITC).

The above credits further provide three exceptions to the domestic-content requirements for elective payment:

- If the project has "a maximum net output of less than one megawatt [MW] as measured in alternating current"[6] (1 MW Exception);
- If "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"[7] (Increased Cost Exception); or
- If "relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality"[8] (Non-Availability Exception).

A number of federal agencies currently interpret provisions comparable to the exceptions to the domestic content requirements for elective payment. This includes for purposes of implementing the Buy American Act,[9] the "Buy America" provisions of various authorizing statutes,[10] and the Build America, Buy America Act (BABA)[11] (collectively referred to as Buy American provisions, hereafter).

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[5] Under the section 45Y clen energy PTC, the applicable percentage increases over time from 40 percent to 55 percent.
[6] §§ 45(b)(10)(B), 48(a)(13), 45Y(g)(12)(D), or 48E(d)(5).
[7] §§ 45(b)(10)(D), 48(a)(13), 45Y(g)(12)(D), or 48E(d)(5).
[8] Id.
[9] Buy American Act, Pub. L. 72–428, 47 Stat. 1489.
[10] See, e.g., 49 U.S.C. § 5323(j)(1) (Federal Transit Administration), 23 U.S.C. 313 (Federal Highway Administration), 7 U.S.C. 903 (Rural Utilities Service).
[11] Build America, Buy America Act, Pub. L. 117-58, 135 Stat. 429.

The Notice provides transitional guidance and requests comments on the Increased Cost Exception and Non-Availability. Comments are not explicitly sought on the transitional guidance nor for the 1 MW Exception but are offered as part of these comments.

Background: Project Development and Costs

Public power entities and local governments procure goods and services through a variety of industry-accepted practices. Generally speaking, responses to solicitation are considered "responsive" if they comply in all material respects with the solicitation.[12] A "responsible bidder" is one who possess the experience, facilities, reputation, financial resources, and capability to perform the contract.[13]

For lower-dollar items that the purchaser can describe with a high level of specificity, an invitation for bid (IFB) may be the best, simplest approach. For more expensive, complicated projects, particularly where the purchaser does not have the expertise or ability to design or construct the project, a request for proposal (RFP) is often more appropriate. Responses to an RFP are judged primarily on the merits of the applicant and the strength of its proposal, with price generally being a secondary consideration.

Procurement can also be made through a design, bid, build process (DBB), where a design engineer is paid to design a facility to a high degree of specification, and then an IFB or RFP is made for a general contractor to build the facility.

Qualified energy projects expected to be subject to the elective-payment domestic-content requirements will be complicated and expensive. For example, a one MW solar farm could consist of 16 subarrays, each including 10 panel strings, direct current to alternating current (DC to AC) inverters, step-up transformers, monitoring systems, circuit breakers, surge protectors, wiring, junction boxes, and disconnect switches, power conditioning equipment, and racking and other mounting structures. There will certainly be a fair amount of similarity between such facilities, but each will likely require some measure of customization. Additionally, such a facility can cover between five to 10 acres and cost $1.6 million to construct.[14] More equipment – and cost – is required for the facility to have tracking abilities. As the size of the project increases, the complexity and need for customization will also increase.

As such, a qualified energy project to be owned by an Applicable Entity is likely to be designed and built by an outside developer that specializes in the design and construction of such facilities. This developer is likely to be selected through an RFP. Again, such a project could be constructed through a DBB approach, but renewable energy project development has generally not followed this model, and it would seem impractical for all but the smallest of energy projects. However, as will be discussed below, there may be

[12] See, e.g., 48 C.F.R. 14.301(a).
[13] See, e.g. 48 C.F.R. 9.104-1.
[14] https://www.eia.gov/electricity/generatorcosts/ (By way of comparison, a 1 MW diesel generator can cost roughly $500,000 and fit on the back of a tractor trailer.)

developers that prefer to participate up to the point of construction, and then hand off the project to a contractor – selected by the owner – to bring the project to completion.

<u>Notice Section 5, Transition Process for Claiming the Statutory Exception to the Elective-Payment Phaseout</u>

The Notice establishes a procedure for an Applicable Entity to make an attestation that it has made a good-faith determination that it qualifies for the Increased Cost Exception and/or the Non-Availability Exceptions to the domestic-content requirement for elective payment (Good-Faith Determination). This transition process is available for a qualified energy project construction that begins before January 1, 2025. The attestation is to be attached to the form required to be filed to seek elective payment for the qualified project, but the Notice does not indicate the date with respect to which the good-faith determination can, or should, be made.

We appreciate the accommodation the Good-Faith Determination is intended to provide as part of the transition process. However, important clarifications are essential to make this process efficient and effective and should be included in any extension of this process in the future.

First, Treasury could provide further clarity by outlining a set of safe harbor steps that Applicable Entities can take to guarantee they are treated as having made a good-faith determination. For example, Treasury and the IRS could provide a safe harbor in the case of an Applicable Entity that sends out a well-publicized RFP, with a reasonable period for response – perhaps 30 days at a minimum – requesting bids that comply with domestic-content requirements, but allowing responses if the vendor cannot meet those requirements. In such an instance, a lack of responsive and responsible bids would be presumed to meet the conditions of the Non-Availability Exception. Alternatively, under the same scenario, assume the Applicable Entity receives responsive and responsible bids that meet domestic-content requirements, and it also receives responsive and responsible bids that do not meet domestic content requirements. In such a case, the Applicable Entity could then be allowed to compare the price estimates, and insofar as the estimated costs of construction would be 25 percent or more higher for the domestic-content compliant project than for a non-compliant project, then the Applicable Entity would be presumed to have made a good-faith determination that it qualifies for a price exception.

Second, the Notice does not indicate the date with respect to which a Good-Faith Determination can or should be made. As will be discussed below, comparable determinations under other federal programs are made in advance, not after a project is completed. So, for example, the absence of a response to a well-publicized bid for a domestically manufactured product can be taken as proof that the product is not available in sufficient quantity and quality as of the time of the bid. We believe the same should be true here: an Applicable Entity should be allowed to make a Good-Faith Determination at any point that the method it is using for making such a determination allows. Using the example above, the Applicable Entity could make the Good-Faith Determination at the point at which it failed to receive a responsive bid, even though it would not file an attestation to that effect until after the project was placed in service and a return was filed months or years in the future.

Third, the period during which a Good-Faith Determination may be made – for projects the construction of which begins before January 1, 2025 – may be of little use given the realities of project development. Smaller projects may take eight to 18 months of development prior to the beginning of construction, and larger projects will be years in development prior to construction commencing.[15] However, an Applicable Entity cannot sign contracts with project developers or engineering, procurement, and construction (EPC) firms needed for project development without knowing whether the project will meet domestic-content requirements (or one of its exceptions) and thereby qualify for elective payment. For example, one public power utility has a 43 MW upgrade to an existing wind facility for which it would like to begin the procurement process immediately. However, until there are domestic-content rules for when construction will actually begin – likely in 2025 or 2026 – the project is on indefinite hold.

Additionally, projects subject to a National Environmental Policy Act[16] review or a regional transmission organization independent system operator interconnection queue[17] process take several years of development time before reaching a point where domestic products are purchased. Even Applicable Entities with projects under development today would be unable to utilize the attestation process unless at a very mature stage of development.

We strongly encourage Treasury and the IRS to extend the transition process period for as long as possible to end this logjam and allow the domestic market to materialize. Extending the attestation safe harbor for several years would provide more certainty to applicable entities seeking to build and own qualified energy properties.

We would also strongly encourage Treasury and the IRS to rely on a similar attestation process as part of the final regulations under the elective-payment rules, allowing Applicable Entities to make the up-front, good-faith determinations needed to allow a project to proceed, with attestations filed with the return seeking the associated elective payment.

[15] Solar Energy Industries Association, Development Timeline for Utility-Scale Solar Power Plant, https://www.seia.org/research-resources/development-timeline-utility-scale-solar-power-plant.
[16] National Environmental Policy Act, Pub L. 91-190, 83 Stat. 852.
[17] Berkley Lab, Energy Markets & Policy "Queued Up: Characteristics of Power Plants Seeking Transmission Interconnection" https://emp.lbl.gov/queues (finding that since 2000, the typical duration from connection request to project completion has increased from less than two years to a median of five years).

Notice Section 3, Request for Comments

(1) For purposes of the Increased Cost Exception, what factors should be considered in defining the term "overall costs of construction"?

We believe that a number of factors should be considered.

Basis – The most direct approach to determining the "overall costs of construction" would be to align the definition of that term with the concept of basis already incorporated in the energy tax credit provisions. This is a straight-forward approach for an ITC. For a PTC, we recommend that the overall cost of construction be defined as the basis energy property for which the ITC would otherwise be claimed. Again, this should be the cost basis of the qualifying energy property to which the credit is related, not the cost basis for any broader facility associated with the energy property.

Timing – Applicable Entities must know whether they qualify for an exception from domestic-content requirements before they incur financial risks for a qualified project. As a result, we strongly encourage Treasury and the IRS to allow an Applicable Entity to make an upfront and binding determination of cost. For a project being constructed by a third-party developer, such a good-faith determination would be based on the cost of construction estimated by the developer – likely in response to an RFP – at the time the Applicable Entity enters into a binding contract with the developer for the project.

For a project being constructed by the owner, a good-faith determination of the overall cost of construction could be made at any point when the owner can make such a determination of the overall project costs and the project can begin to proceed.[18]

Actual Costs versus Reasonably Expected Costs – We believe guidance should provide that the "overall costs of construction" is an estimate of those costs, rather than the actual costs for the project. The importance of that distinction is necessary to underscore.

Actual costs for a project can be determined at various points, depending on how the project is structured, such as when products are purchased and delivered in advance of construction, when entering a fixed-price contract for the later delivery of those products, or after the project is completed and placed in service. However, it is not feasible to attempt to purchase in advance, or enter fixed-price contracts for, all the products necessary for projects of significant complexity, such as a utility-scale energy project. Likewise, requiring actual costs to be calculated after project completion runs counter to the wording of the Code. Specifically, the Increased Cost Exception is available when using domestic-content "increases" overall project costs by more than 25 percent, not "increased" project costs, indicating that the reference point is not an after-the-fact assessment of actual costs.

[18] As discussed throughout, we do not believe self-construction of such projects is likely in the near-term but is definitely a possibility for certain more sophisticated Applicable Entities over the longer term.

Additionally, basing the forward-looking exception on an accounting of costs *after* completion would mean that a project owner could not know for certain whether the project will qualify for the Increased Cost Exception until after the unit is placed in service months or years after the exception needs to be determined. Conversely, federal grantees routinely rely on cost estimates as part of the grant process.[19]

"Reasonable expectations" is also a well-established concept under regulations governing the private-use rules for tax-exempt municipal bonds.[20] Under the latter, a bond issuer's expectations are reasonable if a "prudent person in the same circumstances…would have those same expectations based on all the objective facts and circumstances."

Factors considered in determining reasonableness include the issuers' "past conduct concerning stated expectations," the "level of inquiry" into factual matters, and the existence of "covenants" requiring implementation of specific expectations. Implicit in these rules is that the issuer is not obligated to know all the "objective facts and circumstances," but rather all the objective facts and circumstances discovered with a good-faith level of inquiry. We believe similar rules could be applied to "reasonably expected overall costs" of a qualified energy project. An important distinction, however, is that the private-use rules are an ongoing obligation of the bond issuer, while we believe strongly that a determination of eligibility for the Increased Cost Exception should, and realistically can only be, applied once at the start of the project.

The latter point is important because, as stated above, products for a project will be purchased over the life of the project. Prices for those products and availability of specific supplies of those products will change periodically over time. This can result in substantial changes in overall project costs and the source of products used in the project. For example, lead times to purchase new distribution transformers have grown from three months in 2018 to two years or more in 2022, according to a survey of public power utilities.[21] As a result, the cost and availability of a transformer today may be materially different from the date it is finally delivered for installation in an energy project. We strongly urge Treasury to provide that such changes do not mean that a project owners' expectations unreasonable when an Increased Cost Exception assessment was initially made based on a good-faith assessment at that time.

Total Cost of Construction versus Total Manufactured Product Cost – IRS Notice 2023-38 announced draft proposed regulations for implementing domestic-content requirements for purposes of determining eligibility for a domestic content bonus credit.[22] That initial guidance indicates that regulations will require the determination of "Manufactured Products Costs," with such costs being exclusive of labor costs. We would strongly urge Treasury and the IRS not to carry over the requirement that costs of

[19] *See, e.g.*, 2 C.F.R. 200.324 (stating that cost estimates are allowed in federal awards).
[20] Treas. Reg. § 1.141-2 - Private activity bond tests, as further defined in Treas. Reg. § 1.148-1 - Definitions and elections.
[21] American Public Power Assn., "Critical Electric Infrastructure and Supply Chain Constraints" (January 2024) at 1.
[22] IRS Notice 2023-38, 2023-22 I.R.B. 872 – https://www.irs.gov/pub/irs-drop/n-23-38.pdf.

manufactured products taken into consideration under the Increased Cost Exception, must be exclusive of labor costs. As has been noted in comments to Notice 2023-38, the determination of labor costs associated with a manufactured product acquired from a third-party is often not determinable, as most supplier treat such information as proprietary, and is therefore not readily available to Applicable Entities.[23]

For purposes of the Non-Availability Exception, what factors should be considered in defining the terms "sufficient and reasonably available quantities" or "satisfactory quality"?

Sufficient – As discussed above, we believe the rules must balance the goal of enforcing domestic-content requirements while also allowing Applicable Entities the reasonable ability to claim elective payment. As such, we urge Treasury and the IRS to consider this balance when defining sufficient and reasonably available quantities. We would request that only a supply of domestic content that can meet the quantity and delivery schedule needed for the project to proceed without delay or disruption should be considered as "sufficient and reasonably available." Additionally, while supplies might become available during construction, we do not think that should undermine a previous Good Faith Determination. Instead, we believe the "reasonable expectations" standard discussed above would serve here as well.

Reasonably available – As will be discussed later, a number of federal agencies currently interpret provisions comparable to the exceptions to the domestic content requirements for elective payment. This includes for purposes of implementing the Buy American Act,[24] the "Buy America" provisions of various authorizing statutes,[25] and the Build America, Buy America Act.[26] Generally, those interpretations find that a product is "reasonably available" if it is made available after an appropriately publicized request such as an IFB or RFP or after research at a level commensurate with the applicant's ability and the scope of the project. We ask that Treasury and the IRS follow this precedent.

Satisfactory quality – An item which can meet the technical and design specifications of the project is of satisfactory quality. Where items are not in line with technical and design specifications, they may still be of satisfactory quality if they are able to be used without significant project redesign or a delay in schedule. In addition, where modifications must be made to accommodate an item not meeting the projects technical and design specifications, the costs associated with those modifications should considered to be part of the "cost" for that item.

[23] The undersigned entities would have strong reservations about the draft proposed regulations announced in Notice 2023-38, if they were to be applied for purposes of determining eligibility for elective payment. However, Notice 2023-38 noted that the draft proposed regulations relate to "the domestic content bonus credit requirements," with no indication as to their potential application to elective payment.
[24] Buy American Act, Pub. L. 72–428, 47 Stat. 1489.
[25] See, e.g., 49 U.S.C. § 5323(j)(1) (Federal Transit Administration), 23 U.S.C. 313 (Federal Highway Administration), 7 U.S.C. 903 (Rural Utilities Service).
[26] Build America, Buy America Act, Pub. L. 117-58, 135 Stat. 429.

(a) Are there existing factors or procedures under other federal programs with different statutory requirements, such as under the Federal Transit Administration's Buy America requirements or the Build America Buy America Act, that Treasury and the IRS should consider in providing guidance on the Increased Cost Exception and the Non-Availability Exception?

As noted above, a number of agencies must interpret the Buy American provisions for federal purchases, grants, and loan programs, including exceptions to these requirements.

Increased Cost Exception – In some instances, Buy America regulations are intended to provide item-by-item exceptions to domestic content requirements when a specific item meets tests similar to the Increased Cost Exception but in the context of a direct federal grant program. For example, the Federal Transit Administration (FTA) provides:

> The Administrator will grant this price-differential waiver if the amount of the lowest responsive and responsible bid offering the item or material that is not produced in the United States multiplied by 1.25 is less than the amount of the lowest responsive and responsible bid offering the item or material produced in the United States.[27]

We strongly believe that the wording of the Increased Cost Exception does not require an item-level assessment and allows for a project-level assessment of increased cost. We note that the Increased Cost Exception refers to domestic "products" increasing overall construction costs by more than 25 percent, not an individual domestic product.

As discussed above, Applicable Entities are unlikely to build their own qualified energy projects larger than one MW in capacity. Instead, they likely will rely on a third-party developer selected through an RFP. Additionally, Applicable Entities cannot reasonably be expected to wait until after a unit is placed in service to determine compliance with domestic content requirements, or qualification for an exception.

As a result, we strongly encourage the final rules to allow for the use of the RFP process for purposes of qualifying for an Increased Cost Exception. Accordingly, an Applicable Entity should be able to issue an appropriately publicized RFP stipulating that proposals should, if possible, meet the domestic-content requirements for elective payment, but could also provide an overall construction cost estimate without the assumption of meeting the domestic-content requirements. Once a successful RFP is chosen, a comparison of the costs of construction for a project that could meet the domestic-content requirements and one that could not be made for purposes of determining whether meeting the domestic-content requirements would increase the cost of construction by more than 25 percent.

In contrast, we strongly believe that the rules should not be interpreted to require the Increased Cost Exception based on an assessment of whether a single item would increase the overall cost of construction

[27] 49 C.F.R. 661.7(d).

by more than 25 percent. In many cases, such an assessment will not be administrable and would impose excessive cost burdens. Moreover, we do not believe an item-by-item assessment is consistent with the wording of the statute and, in most circumstances, it would render the increased cost exception unobtainable because:

- Single specific items do not represent a great enough percentage of overall costs; and/or
- Price difference between a domestic versus non-domestic product may be quite substantial, but still not enough mathematically to increase overall construction costs by more than 25 percent.

For example, solar modules constitute roughly 35 percent of the overall project cost for a utility scale solar project.[28] As a result, domestically manufactured solar modules would have to be more than 70 percent more expensive than foreign manufactured solar modules to increase overall projects costs by more than 25 percent. We do not believe such an analysis is the intent of the provision nor is it how comparable provisions are interpreted in other programs. For example, one of the more stringent implementations of the BABA requirements is by the Government Services Administration (GSA). It provides that BABA requirements will be waived for individual items until the total additional cost of BABA compliance is less than 25 percent of the total project cost.[29]

It is also important to note that the analogous exception under BABA and other federal grant programs are predicated on a one-on-one assessment, where the individual facts and circumstances of the entity constructing the project can be evaluated by the federal agency. Given that the elective-payment option will be broadly applied if reasonable final rules are adopted, Applicable Entities must be able to apply the Increase Cost Exception independently based on generally applicable standards.

Non-Availability Exception – A variety of programs provide a non-availability exception to domestic-content requirements.

For example, under Federal Acquisition Regulations (FAR), a list of domestically non-available articles under the Buy American statute is maintained and updated every five years.[30] A non-availability determination is made "not necessarily (when) there is no domestic source for the listed items, but (when) domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand."[31] A request for comments on updating the list was printed in the Federal Register most recently on May 13, 2020, by the Department of Defense, National Air and Space Administration, and General Services Administration.[32]

[28] https://www.iea.org/data-and-statistics/charts/utility-scale-pv-investment-cost-structure-by-component-and-by-commodity-breakdown
[29] Optional Form 2211, Build America Buy America Waiver Request Data Collection, OMB Control No. 0505-0028m, https://www.gsa.gov/system/files/OF2211-23.pdf#page=4.
[30] 48 C.F.R. 25.104.
[31] 48 C.F.R. 25.103(b)(1)(i)
[32] Advance Notice of Proposed Rulemaking, 48 C.F.R. 25, 85 Fed. Reg. 28,596 (May 13, 2020).

Agencies also make individual determinations of non-availability on a case-by-case basis. A common safe harbor provision for such provisions is provided where a solicitation receives no responsive or responsible bids. For example, the FTA provides that:

> It will be presumed that the conditions exist to grant this non-availability waiver if no responsive and responsible bid is received offering an item produced in the United States.[33]

Likewise, the Office of Rural Utility Services (RUS) within the Department of Agriculture, provides that:

> A lack of responsive and responsible bids to a well-publicized request for bids will be presumed to meet the conditions of a non-availability waiver.[34]

In practice, this has been applied to bids in response to both RFPs and IFBs. For example, RUS recently granted a waiver for an energy storage system project after the requesting entity issued an RFP and received no responses where all the products and construction materials would be domestically produced.

In instances where there is a single source for a product, or where a contract is not required to be bid, rules provide for a more facts-and-circumstances approach. For example, the FTA provides:

> In the case of a sole source procurement, the Administrator will grant this non-availability waiver only if the grantee provides sufficient information which indicates that the item to be procured is only available from a single source or that the item to be procured is not produced in sufficient and reasonably available quantities of a satisfactory quality in the United States.[35]

Likewise, RUS provides that:

> With respect to contracts that are not required to be bid, sufficient evidence must be presented to the Administrator in order to make a determination.[36]

As discussed above, Applicable Entities are unlikely to build qualified energy projects larger than one MW in capacity on their own. Instead, they likely will rely on a third-party developer selected through an RFP. Additionally, Applicable Entities cannot reasonably be expected to wait until after a unit is placed in service to determine compliance with domestic-content requirements, including qualification for an exception to those requirements.

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[33] 49 C.F.R. § 661.7(c)(1).
[34] 7 C.F.R. § 1787.1.
[35] 49 C.F.R. § 661.7 (c)(2).
[36] 7 C.F.R. § 1787.12.

As a result, we strongly encourage the final rules to allow for a no-responsive-bid safe harbor similar to those allowed by FTA and RUS at the item and project level. So, for example, an Applicable Entity could make an appropriately publicized RFP stipulating that proposals should, where possible, meet the domestic-content requirements for elective payment. And, akin to the nonresponsive-bid safe harbor discussed above, the return of no responsive and responsible bids would be enough to make a Good Faith Determination of meeting the requirements of the Non-Availability Exception.

Changes in Facts and Circumstances – As discussed above, Qualified Energy Projects are complex, and the price and availability of specific products will likely change over the years between an initial financial commitment and the final completion of the project. Current programs also take these price and supply risks into consideration. For example, the FTA provides that a non-availability waiver can be granted even if the project owner or developer originally made a good-faith determination that one was not needed, for example, if the domestic content needed to do so is no longer available.

> After contract award, the Administrator may grant a non-availability waiver under this paragraph, in any case in which a bidder or offeror originally certified compliance with the Buy America requirements in good faith but can no longer comply with its certification. The Administrator will grant a non-availability waiver only if the grantee provides sufficient evidence that the original certification was made in good faith and that the item to be procured cannot now be obtained domestically due to commercial impossibility or impracticability. In determining whether the conditions exist to grant a post-award non-availability waiver, the Administrator will consider all appropriate factors on a case-by-case basis.[37]

Trade Agreements – BABA provides that its requirement for the use of domestic content "shall be applied in a manner consistent with United States obligations under international agreements."[38] There is no comparable provision relating to the domestic-content requirements under any of the applicable credits pertaining to elective payment. However, we submit that Treasury could consider anticipating potential conflict with trade partners (as well as any that may already exist and relating to components necessary to energy projects) and include content from trade partners as qualifying as domestic content.

(b) Are there factors or procedures under other federal programs that should not apply for the purpose of the Increased Cost Exception and the Non-Availability Exception, including for reasons related to different statutory requirements and administrative feasibility?

BABA requires agencies to print a written explanation of any waiver being considered and allow a period of at least 15 days for public comment on the proposed waiver. There is no comparable provision under the Code for exceptions sought for domestic-content requirements for elective payment.

[37] 49 C.F.R. § 661.7 (c)(3).
[38] Infrastructure Investment and Jobs Act, P.L. 117-58, 135 Stat. 429, § 70914(e), Nov. 15, 2021 (hereinafter "IIJA").

Based on the number of entities, complexity of projects, and IRS' ability to process elective payment returns – including claimed exceptions -- we believe that this sort of up-front public confirmation process is untenable and should not be included in any final rule. We believe an attestation process, such as the one provided in the transition process discussed above, would work for trusted entities (this concept will be discussed further below).

Moreover, public disclosure of waivers raises several confidentiality and competitiveness issues. First, Code section 6103(c) precludes the disclosure of taxpayer information. Unless the waiver was broadly applied to particular components of an energy project, we are concerned that a waiver based on the assertion of an exception by an Applicable Entity would involve taxpayer information protected under section 6103 and should not be disclosed.

Second, from a policy standpoint, as discussed above, one aspect of whether an item is available "in sufficient and reasonably available quantities" is whether suppliers can make them available in response to a public request, in response to either an RFP or IFB.

Finally, the waiver process for BABA provisions is labor intensive and has not been subjected to the volume of requests that will likely be sought for domestic-content exceptions. For example, the FTA lists just 35 waivers granted between 2014 and 2022: averaging roughly four a year.[39] Likewise the Department of Interior lists four Buy America waivers as having been granted in 2023.[40] In the context of projects qualifying for applicable credits under the IRS, it is not unreasonable to expect that roughly 180[41] qualified energy projects over one MW may seek elective payment, most of which will require domestic-content exceptions.

As a result, we strongly urge Treasury and the IRS to avoid an up-front notice and comment process, which would add considerable administrative burden and further delay Applicable Entity's ability to move forward with qualifying energy projects based on clear rules for applying the domestic-content exceptions.

Likewise, we strongly discourage the use of the additional cost method GSA established for BABA. As discussed above, under this process, an entity must provide documentation of the cost of domestic and non-domestic items to assess whether using domestic-content increases project cost by 25 percent or more and then require an entity to buy domestic items until the costs of doing so reaches the 25 percent threshold. In the context of qualifying energy projects, such a requirement would be incredibly

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[39] Fed. Trans. Auth., Buy America Notices of Waivers, https://www.transit.dot.gov/regulations-and-guidance/buy-america/waivers-granted.
[40] Dept. of Interior, Office of Grants Mgmt., Approved Buy America Requests, https://www.doi.gov/grants/BuyAmerica/ApprovedWaivers.
[41] See a more detailed explanation for this estimate of 180 qualified energy projects in comments to question 7 below.

cumbersome and bear little practical relationship to how products are expected to be purchased for such energy projects.

(c) Are there alternative approaches that could be adopted by the Secretary to allow domestic manufacturers to identify the availability of domestic steel, iron, or manufactured products that may be relevant to the Domestic Content Exceptions?

We do not believe domestic manufacturers should be allowed to intervene on a case-by-case basis in domestic-content exceptions. For example, a supplier should not be able to overturn an entity's Good Faith Determination of a Non-Availability Exception.

First, there must be certainty for those seeking exceptions. Having domestic suppliers second-guessing good-faith efforts to secure contracts undermines that certainty.

Second, if the availability of domestically manufactured goods cannot be discovered with a "well-publicized" RFP, those goods are per se not available at the time of the bid.

Third, a response to an RFP generally includes a limit on the amount of time the requesting entity has to accept the offer. This can be as little as 30 days. Assuming an entity received no responsive and responsible bids and is intending to claim a Non-Availability Exception, a notice and comment period for that Non-Availability Exception could easily last longer than the time limit for accepting the RFP.

Again, a lack of response to a good-faith effort to craft a well-publicized RFP should be sufficient to determine a Non-Availability Exception without after-the-fact interference from suppliers.

If Treasury and the IRS adopt a regime allowing for blanket project-level or item level-waivers by Treasury or the IRS, then domestic suppliers should be permitted to seek to identify the availability of their goods as part of the process. For example, if Treasury is considering whether there are simply not enough domestic materials to meet the domestic content requirements for an offshore wind project, domestic manufacturers should be allowed to present information demonstrating that adequate supplies do exist. However, any such petition must provide concrete evidence that those goods will be available in sufficient quantity and quality to meet the needs of all types and sizes of projects and project developers.

(2) What documentation or other substantiation should be required of Applicable Entities to qualify for the Increased Cost Exception?

The substantiation requirements should be based on documentation available in the ordinary course of business. Such documentation should be simple and easy to obtain to discern whether a reasonable determination can be made that meeting domestic content requirements will increase overall project costs by 25 percent or more. As discussed above, RFP responses or vendor documentation providing a good faith estimate of costs should be sufficient. Where an RFP or IFB process is not used, other evidence of an appropriate level of inquiry, such as written and digital correspondence, price listings, and contemporaneous notes should be treated as adequate substantiation.

(3) What documentation or other substantiation should be required of Applicable Entities to establish that relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality to qualify for the Non-Availability Exception?

As discussed above, non-responsive or responsible RFPs or – if used – IFBs should be adequate proof of non-availability. (See response to Notice section 3(c)(2) above.)

For purposes of the Non-Availability Exception, what factors should be considered "relevant" in defining the term "relevant steel, iron, or manufactured products"?

Treasury and the IRS have proposed defining "energy property" for purposes of the section 48 ITC as components of energy property that are functionally interdependent, or property that is an integral part of energy property.[42] We believe the same could apply in defining "relevant" for purposes of defining "relevant steel, iron, or manufactured products."

Additionally, we believe Treasury and the IRS could look to the U.S. Department of Transportation's (DOT) implementation of BABA by allowing a waiver of "de minimis" items.[43] Specifically, DOT would issue a waiver where:

- The total value of the non-compliant products is no more than the lesser of $1,000,000 or five percent of total applicable costs for the project; or
- The total amount of federal financial assistance applied to the project, through awards or subawards, is below $500,000.

In explaining the need for such a waiver, DOT states: The waiver will allow DOT and its assistance recipients to focus their domestic sourcing efforts on products that provide the greatest manufacturing opportunities for American workers and firms and reduce delays in the delivery of important transportation infrastructure projects that provide jobs and promote economic growth."

The Code already provides – in effect – a de minimis waiver based on the project size through the one MW Exception. However, we believe there would also be a benefit to a waiver where the total value of the non-compliant products is no more than the lesser of $1,000,000 or 5 percent of total applicable costs for the project."

[42] Prop. Treas. Reg. § 1.48-9, 88 Fed. Reg. 82,188 (Nov. 22, 2023).

[43] Waiver of Buy America Requirements for De Minimis Costs and Small Grants, 88 Fed. Reg. 55, 817 (Aug. 16., 2023).

(5) How, if at all, should both the Increased Cost Exception and Non-Availability Exception take into account that not all manufactured products must be mined, produced, or manufactured in the United States in order to meet the domestic content bonus credit requirements?

We would look to the FTA's implementation of Buy American provisions for purposes of rolling stock. Specifically, when an item qualifies for the equivalent of a Non-Availability Exception under the Buy American provisions, then the item is treated as being of domestic origin,[44] including for purposes of whether "more than 60 percent of the subcomponents of that component, by cost, [is] of domestic origin."[45]

We strongly encourage Treasury and the IRS to follow this precedent for purposes of the domestic content requirement for manufactured products. Specifically, an item – or items – that qualify for the Non-Availability Exception, or the Increased Cost Exception should be considered domestic content for purposes of determining whether manufactured product components and subcomponents meet the applicable percentage for purposes of determining whether manufactured products will be deemed to have been manufactured in the United States.

However, as noted above, we believe that the Increased Cost Exception and Non-Availability Exception should be assessed at the project level rather than the item level. This balances the goal of encouraging the use of domestic content while not making the requirement so onerous that elective payment is simply not a realistic option. It also comports the domestic-content exceptions with the most likely method of procurement, a project-level RFP.

(6) What steps should be taken, if any, in implementing the Domestic Content Exceptions to reduce the burden on Applicable Entities?

As discussed above, allowing Applicable Entities to use an RFP process for purposes of determining whether a project qualifies for a Non-Availability Exception or Increased Cost Exception would effectively balance the requirement of a good-faith effort to comply with domestic-content requirements for elective payment while also allowing reasonable exceptions where that content is not available or would increase project costs unreasonably.

Treasury and the IRS could further assist Applicable Entities by providing model language for use in RFPs where the RFP will be used, in part, to substantiate the Applicable Entity's qualification for either exception.

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[44] 49 C.F.R. § 661.7 (f).
[45] 49 C.F.R. § 661.11 (g).

More broadly, project-level non-availability waivers for specific technology types would be beneficial, especially where the lack of domestic supply is well known and all but a few projects will be able to meet the domestic-content requirements. Such an approach would address the burdens and complexities of the elective-payment requirements with respect to domestic content, while not diminishing the incentive effect of the domestic-content bonus credit.

Whether or not the elective-payment rules allow for a project-level waiver, we strongly encourage Treasury and the IRS to provide general non-availability waivers for relevant steel, iron, and manufactured products. This could be done on the same basis as the class determination process provided under the FAR in developing is non-available list as discussed above.

Treasury and the IRS should also permanently extend the attestation process provided in the transition process of the Notice. We understand that concerns about ease of administration must be balanced with adequate enforcement. Enforcement concerns could be addressed by limiting the availability of the attestation process to Applicable Entities with an established a prior history of tax payment – including employment taxes – with the IRS ("trusted entities").[46]

For example, how can the Secretary identify certain steel, iron, or manufactured products that are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality and what process and criteria could be used?

As discussed above, the FAR non-available item list is currently maintained by the Department of Defense, National Air and Space Administration, and General Services Administration. The Department of Commerce, including the U.S. Census Bureau, the United States Trade Representative, the Department of Energy, including the Energy Information Administration, and the National Institute of Standards and Technology Manufacturing Extension Partnership could identify the data necessary to produce similar non-available item list pertaining to qualified energy projects.

We also believe that similar criteria to the FAR non-available list could be used – for example, an item could be considered unavailable if there is not enough domestic supply to meet a threshold amount of domestic demand for such energy project components. That threshold could be set at the domestic-content phase-in amounts. Such an approach would allow qualified energy projects to proceed while domestic products are in short supply, but not reduce the domestic-content bonus credit's incentive effect.

[46] A similar approach was adopted as part of the program to make advanced payments of electric vehicle credits to eligible dealers under Code section 30D, with the dealer registration predicated on being in good standing with respect to all federal tax payments. See, Prop. Treas. Reg. § 1.30D-5(e)(2); RIN 1545-BQ86, 88 FR 70310, Oct. 10, 2023, https://www.govinfo.gov/content/pkg/FR-2023-10-10/pdf/2023-22353.pdf.

(7) How many Applicable Credit Properties are expected to be affected by the phaseout of elective payments each year but for the exceptions process…?

Assuming ready access to a well-defined and reliable exceptions process, the number of applicable credit properties expected to be undertaken by Applicable Entities that will be affected by the phaseout of elective payment will depend on a number of factors, including:

- The total number of Applicable Entities with an appetite for credit eligible projects of more than one MW of capacity; and
- The availability of sufficient domestic content to meet the requirements of the statute.

We believe that most of the power capacity from applicable credit properties will be owned by the nation's 2,000 public power utilities, 63 generation and transmission (G&T) cooperatives, and 832 distribution cooperatives, as well as generation and transmission cooperatives. These entities currently own roughly 15 percent of the nation's generating capacity but own nearly 30 percent of the nation's generating facilities.[47] This mismatch is driven by two factors: First public power and electric cooperative utilities tend to be smaller than for-profit, investor-owned utilities. Second, many of these entities own smaller generating facilities to serve as emergency backup power, or as "peaker plants" to bring online when daily power loads increase and outside market prices for power also increase.

We believe that – all other things being equal – it is not unreasonable to estimate that 30 percent of qualified energy properties could be owned by Applicable Entities. Because many Applicable Entities are smaller, we believe the projects they own will tend, on average, to be smaller, and so Applicable Entities may own substantially less than 30 percent of new generating capacity.

On the one hand, much of the smaller capacity generation currently owned by public power and electric cooperatives and other tax-exempt entities are substantially less expensive and require a substantially smaller geographic footprint than would be required for most qualified credit properties. For example, a one MW solar farm costs roughly $1.4 million and can cover up to five acres of land, while a one MW diesel generator costs roughly $250,000 and can fit on the back of a tractor trailer. Additionally, absent the inclusion of storage, the intermittent power of solar power will not be a ready replacement for backup generation or peaking plants.

On the other hand, the number of potential owners has increased massively. There are roughly 87,000 local governments and roughly 1.7 million tax-exempt entities in the United States. We do not believe that the vast majority of these entities will have the financial ability – or interest – to own a facility with a capacity of more than one MW. For example, of the 1.4 million charitable organizations in the U.S.,, just

[47] Hitachi Energy, Velocity Suite (Generating Unit Capacity dataset) (Filters: Unit Status Code: "Mothballed, Operating, Restarted, Standby," and Plant Country: "United States and US Territories") (accessed Feb. 2024).

107,807 filed a Form 990 and had assets of more than $1 million.[48] Likewise, 84 percent of the nation's cities had a population of less than 10,000 people[49] with average annual budgets of $746 per capita (so, an annual budget of $7.45 million).[50] While smaller entities may seek to own qualified energy projects, they will not likely have the budget or physical space to own a project of one MW or more in capacity. However, for those local governments interested in pursuing facilities with a capacity of more than one MW, the phaseout of elective payment could be a significant obstacle.

In 2022 and the first 11 months of 2023, 1,150 wind, solar, hydropower, and geothermal generating plants (or plant uprates) with more than one MW of capacity were placed into service in the United States, roughly 600 per year.[51] Assuming this trend continues and assuming 30 percent of such facilities are owned by Applicable Entities, we estimate that 180 applicable credit properties will be placed into service per year.

At least in the near term, there appears to be consensus that not enough solar modules, wind turbines, and hydropower turbines are made in the United States to meet the needs of such projects predictably and reliably. To borrow from the FAR, it is not that "there is no domestic source for the listed items," but that for the next several years, there will not be enough for all such projects to have sufficient materials to meet the threshold requirements. These technologies, by far, are the most likely to be used by Applicable Entities. As such, we believe that most, if not all, of the estimated 180 applicable credit properties would be affected by the credit phase out.

However, the domestic-content exceptions process itself also will affect the number of applicable credit properties seeking exceptions. As such, the factors that will affect the number of applicable credit properties that will be affected by the phaseout of elective payment will depend not only on:

- The total number of Applicable Entities with an appetite for credit eligible projects of more than one MW of capacity; and
- The availability of sufficient domestic content to meet the requirements of the statute;

But also on:

- The elective payment process and the ability and willingness of Applicable Entities to navigate it;
- The risk associated with claiming elective payment;

[48] IRS, Statistics of Income Division, Exempt Organizations (Except Private Foundations), November 2023.
[49] U.S. Census Bureau, Annual Estimates of the Resident Population for Incorporated Places in the United States: April 1, 2020 to July 1, 2022 (SUB-IP-EST2022-POP) (May 2023).
[50] National League of Cities, City Fiscal Conditions (2023).
[51] Hitachi Energy, Velocity Suite (Generating Unit Capacity dataset) (Filters: Unit Status Code: "Mothballed, Operating, Restarted, Standby," and Plant Country: "United States and US Territories") (accessed Feb. 2024).

- The ability and willingness of Applicable Entities to overcome the challenges in meeting the documentation and reporting requirements to substantiation they have met domestic-content requirements;
- The ability to qualify for the statutory exceptions to domestic-content requirements; and
- The ability and willingness of Applicable Entities to overcome the challenges in meeting the documentation and reporting requirements to substantiate they qualify for an exception to domestic-content requirements.

Simple, clear processes with upfront certainty as to the results will allow Applicable Entities to participate in such projects at will and as intended by the IRA. Conversely, Applicable Entities will be discouraged from participating in such projects where the process of meeting domestic-content requirements – or the exceptions – is costly and complicated, where the outcome of determinations with respect to domestic content and the exceptions are highly uncertain, or where determinations about compliance can only be made late in a project's development.

While for-profit commercial enterprises might be more willing to undertake such risks, the effect of risk tolerance on project uptake by public power utilities, electric cooperatives, and tax-exempt entities – including governmental entities – should not be underestimated. By way of example, nearly 60 percent of public power utilities have been in operation for a century or longer; nearly 90 percent since at least World War II.

These entities are intended and designed to take into consideration the effect of decisions on the entire community they serve, and not just equity investors. As such, they simply cannot, and will not, gamble on an outcome and hope for the best. This tension is multiplied substantially under the elective-payment regime where – for projects construction of which begins after 2025 – failing to meet domestic-content requirements – or failing to qualify for one of its exceptions – risks losing access to any tax credit entirely.

What are relevant characteristics of such facilities, projects, or technologies (for example, size or other factors) to consider in developing an exceptions process?

As discussed above in "Background: Project Development and Costs," we believe that the cost and complexity of qualified energy projects are likely to exceed those for which an IFB might be appropriate.

(8) What solicitation processes are used by Applicable Entities with respect to qualified facilities or energy projects that have a maximum net output of 1 megawatt or greater…?

Because energy tax credits have not been available to Applicable Entities previously, there is little experience with the procurement of qualified energy projects by them. Likewise, Applicable Entities differ substantially in form and purpose, including governmental entities, electric cooperatives, tax-exempt schools and universities, and charitable organizations, to name a few. As a result, these comments are confined to observations where we have direct knowledge and expertise, which generally relates to governmental and electric cooperative procurement practices.

As a general rule, public procurement operations are regulated with well-established procurement policies.[52] They often make use of compliance tracking to ensure compliance requirements are being met and to identify potential new compliance risks. Public procurement may face several layers of regulation including laws, procurement codes, ordinances, trade agreements, and policies of individual entities. Among other things, these regimes can ensure appropriate levels of access, competition, transparency, and risk mitigation.

Procurement processes for electric cooperatives and local governments are focused on cost, quality, and efficiency. For example, the majority of electric cooperatives are member-regulated by an elected board of directors and follow internally developed procurement procedures that include sole-sourcing limits as well as procedures for IFBs, RFIs, and RFPs. Procurement is heavily influenced by the mission of affordable, reliable, and safe electricity. A subset of electric cooperatives is state regulated. Depending on the state, these cooperatives may be narrowly regulated solely around the electric rates they charge or more broadly regulated around other business practices. Regardless, for equipment and materials procurement in clean-energy projects, either an IFB or RFP process generally will be followed due to the dollar amount of the purchases.

Procurement processes for similarly sized types of entities may look quite similar, whereas they may differ substantially between larger and smaller entities. Larger organizations will have permanent dedicated procurement staff while smaller entities may have no staff dedicated to procurement and compliance. Likewise, smaller entities may seldom make purchases large enough to require more sophisticated procurement processes, such as a design, bid, build process, or RFP. For larger entities such procurement processes will be common.

As discussed above, we believe that qualified energy projects will rely on some form of competitive procurement in sourcing domestic products. As such,

- An Applicable Entity may start directly with a written RFP process, publicly posting online and/or sending it to potential bidders, or in the case of a build-transfer agreement or EPC agreement, this process is performed by the developer or engineering firm.

- An Applicable Entity may seek individual quotes from known or selected bidders without a formal written RFP process, or in the case of a build-transfer agreement or EPC agreement, this is performed by the developer or engineering firm.

[52] *See, e.g.*, National Institute for Government Procurement, Principles and Practices of Public Procurement: Invitation for Bids (IFB) AKA Invitation to Tender (ITT) (2018); and National Institute for Government Procurement, Principles and Practices of Public Procurement: Request for Proposals (RFP) (2020).

- As discussed above, an Applicable Entity instead might rely on a design, bid, build, process by seeking a firm to design a facility and then soliciting bids from third-party contractors to build the facility to the design specifications.

How might [existing solicitation processes] affect their ability to source domestic products…?

As discussed above, governmental and electric cooperative Applicable Entities currently procure goods and services under well-established procurement regimes. The documentation requirements around sourcing domestic products generally are familiar only to Applicable Entities that have received federal grant awards in the past and had to comply with the "Buy America" provisions of various authorizing statutes.

To participate in the IRA clean-energy credits, Applicable Entities will have to update their established procurement regimes and contract monitoring efforts with the newly established domestic-content requirements. The additional searching, sourcing, monitoring, and documentation required to support compliance will increase the administrative costs of Applicable Entities, which will be especially true for smaller entities that lack internal mechanisms to procure, document, and monitor the use of domestic products in qualified energy projects. Best practices in procurement provide for contract monitoring, but most Applicable Entities today focus more on completion of project requirements, timely delivery, or financial performance, than on the sourcing of contractors' supply chains.

How might [existing solicitation processes] affect their ability to determine these products would qualify for the Non-Availability Exception or Increased Cost Exception?

Proven policies and internal controls are in place to ensure acceptable audit thresholds are met by a wide range of public entities. A key aspect of any procurement process is the communication of mandatory technical requirements and the subsequent evaluation of the responsiveness and responsibility to those requirements. Part of that review includes evaluating the bidders':

- Experience;
- Professional abilities;
- Technical approach and methods; and
- Reference checks.

As such, the RFP process can impose technical requirements intended to ensure compliance with a domestic-content requirement and its exceptions and ensure that the winning bid is by a project developer that can be relied upon to meet those requirements. We believe that following such well-regulated processes would be sufficient to sustain a good-faith determination of compliance with the Code.

However, because current national standards for domestically sourced products do not exist in public procurement, standards need to be developed and carefully defined to communicate expectations and eliminate ambiguous requirements. In all cases, specifications need to be provided to the bidders to acquire the necessary information to demonstrate compliance with domestic-content requirements or eligibility for one of the domestic-content exceptions.

Without proper definitions and related guidance, domestic-content requirements could also impose significant risk of bid protest and delays for projects. Bids are required to be awarded to the lowest "responsive" bidder. As discussed above (see, "**Background: Project Development and Costs")**, a bid is responsive if it complies without material deviation from the requirements of the solicitation and the terms and conditions of the proposed contract. Without clear definitions of domestic-content requirements and its exceptions, it will be difficult to evaluate vendor compliance and leave the process open to litigation based on such ambiguities.

Do these solicitation processes provide cost, product origin, and/or product availability information?

An IFB generally includes cost, and/or product availability information, but product origin for commodity type items is typically not sought nor provided.

An RFP does not tend to include item-by-item cost, product origin, or product availability information, though aggregated costs necessary to explain prices may be.

If Applicable Entities use a request for proposal (RFP) or similar solicitation process with respect to qualified facilities or energy projects that have a maximum net output of 1 megawatt or greater:

(a) Is it common for a respondent's proposal to specify whether the steel, iron, or manufactured products that are applicable project components are produced in the United States?

Prior to the IRA and its domestic-content requirements, soliciting this type of information typically is not a common practice for most Applicable Entities. Smaller Applicable Entities and those without significant history in similar procurements, such as grant funded projects, will have no experience with requirements based the domestic sourcing of a product or its supply chain origins.

(b) What is the range of cost information provided in the proposal and is it auditable?

A risk mitigation best practice among public entities is for cost information to be provided and contracts established for the finished product and not for components. Sub-components of cost (such as required to establish the 40-percent threshold for manufactured products under the domestic-content bonus credit guidance) is not normally requested nor provided in procurements conducted by applicable entities. Such information would be a new requirement and compliance standard to the Applicable Entities would have to follow.

(c) Besides bids that are submitted in response to an RFP, could Applicable Entities provide other documentation or information to demonstrate that the applicable project components are not produced in the United States, or are not produced sufficiently or satisfactorily in the United States, or that including applicable project components produced in the United States increases costs by at least a specified percentage?

In theory, an Applicable Entity could conduct independent research to make these determinations. Making these determinations, however, would depend on the definition of domestically sourced products. For example, with global supply chains, products often are not entirely domestically or internationally produced but contain a mix of components from both and determining specific quantifiable definitions would be difficult given the other various industry standards and lack of current method for tracking. Obtaining product information for a third-party vendor can also prove challenging given the proprietary nature of such information, especially labor costs, and vendors are reluctant to share information that can affect the competitiveness of their product.

(d) Who is involved in the procurement process? Do developers or installers contracted through the RFP handle the procurement process for Applicable Entities?

The several procurement scenarios under which elective-payment domestic-content issues will arise are as follows:

First, the Applicable Entity is large and sophisticated enough to self-develop a clean energy project entirely based on its own staff and resources. In this scenario, the Applicable Entity's procurement, engineering, or project management staff, or a combination of those, would handle the procurement process. We do not know of any Applicable Entities pursuing project development in this way, but some have said they may do so eventually with enough experience in project development and ownership.

Second, the Applicable Entity works with either a developer under a build-transfer agreement (BTA) or an engineering firm under an EPC agreement to develop and construct a generation facility that meets the applicable criteria for the qualified energy property. In these two cases, either the developer or the EPC contractor would be selected through an RFP process and would be responsible for acquiring services, materials, and equipment required for the applicable credit property, including adhering to and documenting compliance with domestic-content requirements.

Third, project development may be split, with one firm preparing the project up to the point of construction before another firm selected by the owner takes over for the actual construction. This first firm may be involved in site selection and acquisition, project design and engineering, and even consulting on the construction procurement process. The second firm takes over at the "notice to proceed" to construction and remains on board until handing the project over to the owner. Again, this construction firm would be response for acquiring services, materials, and equipment required for the applicable credit property, including adhering to and documenting compliance with domestic content requirements.

Conclusion

Again, we greatly appreciate the opportunity to submit these comments and look forward to working with Treasury and the IRS toward the successful implementation of elective payment, the domestic content requirements for elective payment, and the exceptions to those requirements.

Sincerely,

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