Webinar Q&A
CHP Alliance - SMACNA - SMART

If you have additional questions, please contact William Sherman at williams@dgardiner.com.

I. TAX QUESTIONS

1. Do nontaxable entities need to sell the tax credit or does the IRS send a check?

The transferor will provide transferee with applicable registration number and all related info needed for the transferee to claim the credit.

2. Does paying for engineering or placing orders for equipment with a deposit count for the 5% portion to start the project for ITC capture?

Paying for any actual legit expenses of the actual project would count towards the 5%. Be careful to pay expenses that are easily traceable to your specific project.

3. What is meant by "associations with foreign countries will be frowned upon" when applying? If a company is a US subsidiary of a non-US parent company, does that somehow mean that you will be less likely to get approved?

It is unclear, but I personally believe they would give preference to a US-based and owned company. They are looking to keep all benefit here on US soil.

4. Do you have any insight into an exception for the Domestic Content bonus requirement if there is not a comparable product built in the US? At this time there are no >40% electric efficient biogas genset built in the US. Also, there are no >3MW biogas gensets built in the US. If there is an exception it would help with digester projects using Mannheim gensets.

Currently no exception. If there was a total delivery where partial was in the US and part was from outside, the supplier would have to figure out how much of the components used in the qualified property was manufactured in the US., and you would have to work with their suppliers for that info. Here is an example of how to determine that percentage from the Department of Energy:

The following example, adapted from the IRS guidance, illustrates how to calculate the domestic content percentage for a project:

- A PV system has two manufactured products, both manufactured in the United States: Manufactured Product 1 and Manufactured Product 2 (see Table below).
- Both components of Manufactured Product 1 (Component 1A and 1B) are produced in the United States. The total cost of Manufactured Product 1 is $100.
- Manufactured Product 2 has three components, but only Component 2A and 2B are produced in the United States. Component 2C is produced internationally. The total cost of Manufactured Product 2 is $200, but together, Component 2A and 2B are $80.
- The total direct cost of Manufactured Product 1 & 2 is $300.
- The total direct cost of **domestic** manufactured products and components is $180. That includes all of the costs of Manufactured Product 1 ($100) because all of its components are of U.S. origin, and the direct costs of Component 2A & 2B ($80).
- The domestic content percentage of this project is therefore 180/300, or 60% and therefore would satisfy the adjusted percentage rule.

Direct Costs of Manufactured Products 1 and 2

Asset	Cost
Manufactured Product 1	$100
Component 1A	$30
Component 1B	$45
Manufactured Product 2	$200
Component 2A	$30
Component 2B	$50
Component 2C	$100

A taxpayer must submit to the IRS a statement certifying that each applicable project for which the taxpayer is reporting a domestic content bonus credit amount meets the steel, iron and manufactured product requirements and must keep records substantiating the assertion.

5. Can a developer or owner purchase a 10-year or 20-year maintenance contract and roll it into the capital costs to increase the ITC amount? For example, if I am purchasing a CHP or battery system that has a capital cost of $10MM with an annual maintenance cost of $0.5MM

per year (includes major equipment replacement/rebuild within the 20-year contract), can I purchase the system with a 20-year maintenance contract (20 years x $0.5MM = $10MM) that I roll into the purchase price so that my capital expense for equipment plus 20-year maintenance contract is now $20MM with the intention that I can get $6MM (30% ITC on $20MM) as opposed to purchasing the equipment only for $10MM and only getting $3MM ITC. Is there any language in the IRA that would distinguish maintenance or other traditionally non-capital expense as a non-ITC cost. If maintenance is allowable as a capital expense, would the entire $10MM for maintenance need to be paid up front?

That could be a very aggressive approach to take. If an auditor comes in and compares the cost a similar project and determines the cost is twice as high, it could be an issue. As far as the wording, the requirement for the cost to be eligible is that the property must be depreciable or amortizable. This tells me that if the property comes with a "mandatory" maintenance cost that is part of the upfront cost of the property to be amortized, there is a case to be made for that cost to qualify.

II. LABOR QUESTIONS

6. Where can folks find SMACNA and SMART's joint comments concerning labor standards and IRS guidance notices?

The joint comments are available here.

7. How can you find qualified apprentices? Where do you locate/contact the RAPs (registered apprenticeship programs)? Through SMACNA/SMART regional chapters?

The Department of Labor recently launched a workforce map, which links to all SMART apprenticeship programs across the country (as well as other apprenticeship programs for electricians, etc). The map is available here: https://blog.dol.gov/2023/07/13/introducing-the-high-road-to-the-middle-class-map.

8. What happens when the apprentice shows up, but the journeyman does not? In this case we are paying for an apprentice, but the apprentice-journeyman ratio was not met for that day. Do we get credit for those hours worked by the apprentice(s)?

In the apprenticeship portion of the IRA, it states in .03 Example: "On EACH DAY that a qualified apprentice performed construction work on the facility for the taxpayer, the applicable requirements for apprentice-to-journeyworker ratios of the DOL or the applicable State Apprenticeship Agency were met."

9. What forms will be required to prove compliance with prevailing wage?

Thus far, the November 2022 guidance specifies the records that must be retained to establish compliance with the prevailing wage and apprenticeship utilization requirements, but Treasury and the IRS have not issued any forms.

10. What forms will be required to prove compliance with apprenticeship?

Apprentices must be individually registered in a bona fide apprenticeship program registered with ETA's Office of Apprenticeship (OA) or with a State Apprenticeship Agency (SAA) recognized by the OA. The November 2022 guidance does not require additional forms.

11. Should the EPC contractor or the developer be the apprenticeship program sponsor?

Under the IRA's apprenticeship utilization requirements, apprentices must be enrolled in a registered apprenticeship program. There is no specification as to sponsor.

12. How do Davis-Bacon provisions differ from prevailing wage provisions?

The Davis-Bacon Act is a federal law, enacted in 1931, requiring laborers and mechanics be paid "prevailing wages" on covered public works projects. Prevailing wage is defined in 29 C.F.R. 1.2(a) as follows:

> "The *prevailing wage* shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question. If the same wage is not paid to a majority of those employed in the classification, the *prevailing wage* shall be the average of the wages paid, weighted by the total employed in the classification."

The NPRM, issued on March 18, 2022, proposes the following definition of prevailing wage:

> "Prevailing wage. The term ''prevailing wage'' means: (1) The wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question; (2) If the same wage is not paid to a majority of those employed in the classification, the prevailing wage will be the wage paid to the greatest number, provided that such greatest number constitutes at least 30 percent of those employed; or (3) If no wage rate is paid to 30 percent or more of those so employed, the prevailing wage will be the average of the wages paid to those employed in the classification, weighted by the total employed in the classification."

Please note that the above answer pertains to federal prevailing wages. There are state and local laws in some states and municipalities that govern prevailing wages for state and local projects.