



Client Alert

May 18, 2010

Treasury Clarifies "Commencement of Construction" for Energy Project Cash Grants

Energy independence is a major American policy goal. On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (the "Act"). One objective of the Act is to provide incentives for renewable energy projects.

Grant Overview

Section 1603 of the Act's tax title appropriates funds for payments to persons who place in service specified energy property during 2009 or 2010, or after 2010 if construction commences no later than December 31, 2010 and the property is placed in service by a certain date known as the credit termination date. Depending on the type of energy property placed in service, the credit termination date is either January 1 of 2013, 2014 or 2017.

The grant program provides a grant in lieu of tax credit equal to 30 percent of the qualifying project property costs for solar, wind, biomass, geothermal, fuel cell, waste energy, hydropower, and marine power projects, and 10 percent of the project costs for microturbines, thermal heat pump systems, and combined heat and power systems.

As the December 31, 2010 deadline is looming, the meaning of the term "commencement of construction" is significant for any person hoping to receive the grant.

Treasury and IRS Updates

The Treasury recently announced a significant clarification to the grant program. The clarification updates the definition of "commencement of construction" for projects that must commence construction by December 31, 2010 to qualify for the grant.

Commencement of Construction

1. Physical Work of a Significant Nature

The Treasury's revised guidance helps grant applicants determine whether the project has commenced construction before the end of 2010. In general, construction commences when physical work of a significant nature begins. The Treasury expanded and revised its previous guidance to confirm that both on-site and off-site work may be taken into account for purposes of determining that physical work of a significant nature has begun. As an example, the revised guidance states that significant physical work for a wind turbine begins at the project site when the foundation is excavated, anchor bolts are set into the ground, or concrete pads are poured. In addition, the example provides that physical work of a significant nature also begins when wind turbine equipment and components begin to be manufactured off-site.

Physical work of a significant nature does **not** include preliminary activities such as planning or designing, securing financing, exploring, researching, clearing a site, test drilling of a geothermal deposit, test drilling to determine soil condition, or excavation to change the contour of the land (as distinguished from excavation for footings and foundations).

2. Written Binding Contracts

Work performed for an applicant by a third person will be taken into account in determining whether significant physical work has begun only if the two parties have entered into a binding written contract. Under Treasury guidelines, a contract is considered binding if it meets the following conditions: (1) it is enforceable under state law; (2) damages are not limited to five percent or less of the total contract amount; (3) the contract does not provide for a full refund of the contract price in case of breach or cancellation; (4) any condition in the contract is not within the control of either party; and (5) only insubstantial changes to terms and conditions of the contract may be made by the parties.

3. Safe Harbor

Treasury guidance also provides a safe harbor to determine whether physical work of a significant nature has begun. Under the safe harbor, physical work of a significant nature is treated as beginning when more than 5 percent of the total costs of the qualifying property has been paid or incurred. In order to avoid any uncertainty, our recommendation is that grant applicants clearly document that more than 5 percent of the total costs of the energy project has been paid or incurred prior to December 31, 2010.

Questions about this client alert can be directed to your usual Armstrong Teasdale contact attorney or any of the following attorneys:

Daniel Cooper / 314-621-5070
dcooper@armstrongteasdale.com

Robert Reeser / 314-621-5070
rreeser@armstrongteasdale.com

Cary Levitt / 314-621-5070
clevitt@armstrongteasdale.com

Roger Walker / 314-621-5070
rwalker@armstrongteasdale.com

This alert is offered as a service to clients and friends of Armstrong Teasdale LLP and is intended as an informal summary of certain recent legislation, cases rulings and other developments. This alert does not constitute legal advice or a legal opinion and is not an adequate substitute for the advice of counsel.

ADVERTISING MATERIAL: COMMERCIAL SOLICITATIONS ARE PERMITTED BY THE MISSOURI RULES OF PROFESSIONAL CONDUCT BUT ARE NEITHER SUBMITTED TO NOR APPROVED BY THE MISSOURI BAR OR THE SUPREME COURT OF MISSOURI.

Trouble Viewing? Click [here](#). | [Unsubscribe](#) from our mailing list

Don't miss Armstrong Teasdale's news and updates — please add armstrongteasdale@armstrongteasdale.com to your contact list or address book.