

April 29, 2013

IRS Clarifies “Binding Written Contract” Definition in Renewable Energy Tax Credit Begun Construction Guidance

On April 25, 2013, the Internal Revenue Service updated guidance issued on April 15, 2013, that explained how to satisfy the new “begun construction” requirement for the renewable energy section 45 production tax credit (PTC) and the election to claim the section 48 investment tax credit (ITC) in lieu of the section 45 PTC. That update to Notice 2013-29 revises the definition of a “binding written contract” by adding that a contractual provision that limits damages to an amount equal to at least 5% of the total contract price will not be treated as limiting damages to a specified amount.¹

As noted in our earlier coverage of Notice 2013-29, unlike the section 1603 Treasury grant program guidance regarding binding contracts, the initial Notice’s binding contract provisions did not allow for any liquidated damages.² Under the initial Notice, a binding written contract is defined as a contract that is enforceable under local law against the taxpayer or predecessor and does not limit damages to a specified amount (for example, by use of a liquidated damages provision). The IRS corrected Notice 2013-29 by aligning it with the 1603 Treasury grant guidance, allowing for liquidated damages above a specified threshold.

The updated Notice also now cross-references, in regard to the binding contract provision, the Treasury regulations under section 168 regarding binding contracts for purposes of the bonus depreciation rules. That cross-reference provides some basis for relying on binding contract guidance in the bonus depreciation context to determine whether a contract will be treated as binding for purposes of the begun construction guidance in the updated Notice.



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work

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¹ For a copy of the updated Notice, click [here](#).

² For a copy of our earlier Legal Alert, click [here](#).