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Controversy – Cash Grant Disputes and Related Disagreements

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Agenda

- Background of 1603 Grant Program
- Current Status/Statistics
- Annual Performance and Compliance Reporting
- Areas of Controversy
- Inspector General
- Litigation
- Informal Settlements
- Future of Litigation/1603 Grant Program

Background of 1603 Grant Program

- Section 1603 of American Recovery and Reinvestment Act of 2009
 - Provided a cash grant in lieu of the investment tax credit (ITC) or production tax credit (PTC)
 - Begun construction/placed in service requirements
 - Eligible technologies and grant percentages
 - Program Guidance, FAQs, Begun Construction FAQs

Current Status/Statistics

- About \$23 Billion paid out to-date
- Approximately 98,000 applications
- Sequestration rate moves from 7.2% to 7.3% on October 1, 2014.
 - Was 8.7% prior to October 1, 2013
- New focus in reviewing applications on partnerships involving safe harbor equipment owners
 - Was safe harbor equipment timely acquired?
- Full-scale review of begun construction test

Annual Performance and Compliance Reporting

- Information may be shared with IRS
 - Was 1603 grant was properly obtained?
 - Was 1603 grant (and corresponding basis adjustment) properly reported for federal income tax purposes?
- Performance reports (4) are due no later than 21 days following the first anniversary that the property was placed in service
 - Name, owner, location,
 - Number of jobs retained
 - Annual production
 - Installed nameplate capacity

Annual Performance and Compliance Reporting *(cont.)*

- Certify that a “disqualifying event” has not occurred:
 - The property has not been disposed of to a disqualifying person
 - The property continues to qualify as specified energy property

Areas of Controversy

- Placed in service date
- New facility/original use
- Eligible basis
 - Developer fees
 - Valuation
- Dual-use property
- Ineligible costs

Inspector General

- Final Inspection Report, December 17, 2013
 - IRS Compliance Initiative Project (CIP)
 - LB&I – 16 reviewed; significant issues in 8
 - SB/SE – 83 reviewed; changes identified in 51
 - Recommendation – Establish indicator on taxpayer accounts that received 1603 grant
- Audit Reports
 - Several issues identified

Informal Settlements

- Correspondence/Negotiations with Treasury
 - Treasury Economists
 - Valuation
 - Front end (IDRs) vs. back end
- Examples
 - Wind
 - Solar
 - Biomass/Cogen

Current Litigation

- 20 cases currently in litigation in the Court of Claims
- Most cases focused on the amount of the grant, not the eligibility
- In at least 2 cases, Treasury has counter-sued for fraud
 - ARRA Energy- dismissed with prejudice after counter suit
- Variety of cases including solar, wind, biomass, cogen, fuel cells (some examples):
 - Alta Wind I, et. al. v. U.S.
 - Court stayed summary judgment motions and granted the government's request for discovery regarding cost basis of grant eligible assets in wind projects in suits to determine the amount of cash grants due to applicants for investments

Current Litigation (*cont.*)

- W.E. Partners
 - Biomass cogen facility haircut for ineligible costs
- Sequoia Pacific
 - Solar leasing value in discovery
- Blue Heron
 - Solar projects haircut by half
- Clean Fuel
 - Biomass facility ineligible under 80/20 test

Future of Litigation/1603

- Applicants waiting on the sidelines to see how current cases shape up
- Applicants have 6 years to file a claim before the statute of limitations closes
- Reviews of applications are decreasing
- Compliance related issues increasing



Questions?



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