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CLIENT ALERT

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Applicants Prevail in Section 1603 Grant Litigation

Section 1603 of the American Recovery and Reinvestment Act of 2009 ("Section 1603") provides grants (a "Treasury Grant") for "specified energy property," which includes property for the production of electricity from solar, wind, geothermal, biomass and certain other renewable resources. In order to claim a Treasury Grant, project owners must file an application with the Treasury Department detailing the type of project and the costs properly capitalized into the basis of the property. If the statutory requirements are met, applicants are entitled to a Treasury Grant equal to 30 percent of the basis in their property (10 percent in the case of certain types of property). Treasury has denied applications or has reduced the amount of the Treasury Grant paid with respect to a number of solar energy projects on the grounds that the project costs are in excess of expected market value. The Treasury Grant program provides no administrative appeal. Thus, applicants may be forced to litigate denials or reductions of Treasury Grants made by Treasury.

Recently, in a case of first impression, the U.S. Court of Federal Claims held in *ARRA Energy Company I et al. v. United States*, docket no. 10-84C, that it has jurisdiction to hear claims relating to Treasury's denial of applications for Treasury Grants under Section 1603. The case represents the first litigated denial of a Treasury Grant application and is an important development under Section 1603. A copy of the *ARRA Energy* case is attached here.

In *ARRA Energy*, the plaintiffs sought more than $2.3 million in damages incurred as a result of Treasury's denial of their applications for reimbursement grants pursuant to Section 1603 of the Act. The plaintiffs paid more than $7.7 million to purchase and place in service 25 mobile solar power-generating systems. The plaintiffs applied for Treasury Grants for the property. The plaintiffs provided Treasury with cost data and appraisals supporting the value and cost basis in the property. Treasury declined to pay the grants on the grounds that the plaintiffs failed to document sufficiently their claimed basis in the properties. Treasury informed plaintiffs that its action was final and that any further action would need to be pursued through the judicial process.

The plaintiffs filed suit in the Court of Federal Claims asserting jurisdiction under the Tucker Act, a general jurisdictional statute applicable to the Court of Federal Claims, on two alternate bases: (1) Treasury violated Section 1603 in denying their applications, because that statute is a "money-mandating source of law," and (2) Treasury's denial of their Treasury Grant applications breached an express or implied-in-fact contract between the plaintiffs and the government. The government filed a motion to dismiss the claims on the following bases: (1) Section 1603 was *not* a money-mandating source of law; (2) Treasury had discretion beyond the statutory requirements to deny Treasury Grant applications; (3) Section 1603 was designed to subsidize future expenditures instead of compensating plaintiffs

for their past injuries or labors; and (4) the plaintiffs had failed to state a claim upon which relief can be granted with respect to the contract claims.

The Court of Federal Claims examined the Section 1603 and held: "In short, section 1603 requires the government to award grants in the amount of thirty percent of the basis of solar property placed into service during 2009 or 2010 [and, as extended, 2011], provided that all of the requirements set forth in that section have been satisfied." The court determined that the factual requirements to qualify for the Treasury Grant under Section 1603 were limited to (i) the requirement that the property be "specified energy property," which includes solar energy property, and (ii) the property be placed in service within the required timeframes (e.g., 2009, 2010 or 2011).

The Court of Federal Claims characterized Treasury's role in determining whether those requirements have been met with respect to applications as purely "ministerial." The court rejected the government's argument that it had discretion to deny an application, if those statutory requirements were satisfied. In other words, Treasury does not have discretion under Section 1603 to develop additional requirements beyond those stated in Section 1603. The court noted that the two statutory requirements appeared to be satisfied, since there was no reasonable dispute that the systems qualified as "specified energy property" and were timely placed in service in 2009.

The Court of Federal Claims indicated that Treasury was not required to accept applications where an applicant had "miscalculated" or "misrepresented" the basis of its property. However, "it has no discretion to reimburse an applicant for less than, or more than, thirty percent of the correct basis of the property." Thus, the court indicated that the plaintiffs had properly applied for the correct basis in their applications — the plaintiffs had supported the cost basis with two independent valuation reports, one submitted with the initial application and one submitted in response to Treasury's inquiry after the applications were submitted.

The Court of Federal Claims further rejected the government's argument that Section 1603 was designed to subsidize only future behavior. Rather, Section 1603 was designed to reimburse applicants for costs that have been already incurred. Accordingly, the court held that it had jurisdiction over the plaintiffs' claims that Treasury had violated Section 1603 in denying their applications and denied the government's motion to dismiss with respect to those claims.

The Court of Federal Claims held that it also had jurisdiction, for similar reasons, with respect to the plaintiffs' contract claims. However, the court determined that the plaintiffs had failed to adequately state a claim for relief under their contract claims. Accordingly, the court granted the government's motion to dismiss with respect to the plaintiffs' contract claims.

The Court of Federal Claims did not address whether the plaintiffs were entitled to the money damages they claimed or otherwise address the substantive merits of their case. The decision was limited only to the jurisdictional issues. However, the court's analysis of Section 1603 provides a preview that plaintiffs ultimately will prevail on the merits.

The *ARRA Energy* case comes on the heels of a troublesome turn in the manner in which Treasury is administering the Treasury Grant program. In the case of solar properties, Treasury has developed unpublished, internal program policies that have resulted in substantial reductions in the applied-for amounts in many Treasury Grant applications. Treasury's policies are directly at odds with well-established federal income tax principles that are applicable under Section 1603 to Treasury Grants for determining an applicant's basis in property. In many cases, Treasury has derived arbitrary, statistical information to evaluate the "cost basis" of projects. Treasury has indicated informally that its decisions are "final" and "non-appealable," creating significant uncertainty in the renewables industry. The *ARRA Energy* case provides a valuable judicial remedy for affected applicants.

The tax controversy team at Hunton & Williams LLP consists of a cross-practice group with significant experience in energy tax credits and Section 1603 Treasury Grants, tax controversy and litigation. Hunton & Williams LLP is well positioned to assist Treasury Grant applicants resolve disputes with Treasury. Please contact us if you require assistance with Treasury's denial of a Treasury Grant application.

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