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Energy

Energy Credit Program Participants Laud Government Effort, Offer Critique

by Lauren Gardner

Participants in the application process for the $2.3 billion tax credit program for advanced energy equipment manufacturers applauded the government for its work after the Oct. 16 deadline, but some critiqued the crunch to submit materials on time and last-minute revisions and clarifications.

John Gimigliano, principal-in-charge of KPMG LLP's Energy Sustainability Tax practice, said his office worked on preparing or reviewing about 16 applications for the credit, which was administered by the departments of Treasury and Energy. Many companies turned to the final application after the preliminary application deadline in September, making that month "pretty much a crush of trying to get them done," he told BNA Oct. 19. KPMG reviewed some applications that exceeded 550 pages, Gimigliano said.

Laura Jones, a partner at Hunton & Williams, Richmond, Va., and her office helped several companies with their applications in a review and advisory role. Some companies reached out to her in the preliminary stages of the process, while others only contacted her office a few weeks ago, she told BNA Oct. 20.

The Treasury and Energy departments announced the program Aug. 13 and described it in Notice 2009-72 (155 DTR GG-1, 8/14/09). It was intended to distribute credits up to either a cap of $2.3 billion or until the end of two years, whichever threshold is reached first, though many practitioners have said they would be surprised if all of the credits were not allocated in this round.

The 2009 economic recovery legislation (Pub L. No. 111-5) added Section 48C to the Internal Revenue Code, which opened a 30 percent credit to the manufacturers of solar panels, wind turbines, biodiesels, and other mechanisms used in the production of clean energy.

The government set a Sept. 16 deadline for a short preliminary application that required minimal information. The final application, which was due Oct. 16, could be a maximum of 30 single-spaced pages, with an attached spreadsheet and a series of appendices permitted. Practitioners had expressed concern about the constraints the limited time period may have placed on taxpayers interested in applying (171 DTR G-1, 9/8/09).

Stimulus Intent

Congress tried to make the credit program a short process because of its intent as a stimulus, and Treasury was trying to abide by the congressional intent in keeping the application time limited, KPMG's Gimigliano said. The departments of Treasury and Energy "tried to be very fair" in how they put the program together, he said.

The application process was relatively mechanical, with data on job creation and other items required to be "force-fed" into a spreadsheet provided by the Department of Energy so the government could juxtapose such data from the different industries against each other, Gimigliano said.

Some feedback Gimigliano said he has heard about that process is that it does not provide individual companies the opportunity to tell the story behind their projects because it forces everyone into the same format. Practitioners are sympathetic to the enormous task the government has to develop a reasonably objective method to assess the applications against each other, he said.

"I think they get a lot of credit for trying to come up with a program like that," Gimigliano said. The application process was relatively mechanical, with data on job creation and other items required to be "force-fed" into a spreadsheet provided by the Department of Energy.

Many practitioners are watching to see if this process of assessing all applicants the same way will work out like the government thought it would, he said.

The tight deadlines were appropriate in light of the stimulus, Jones said. It took a few months to get the program in place, she said, and the government now has a couple of months to review a large number of applications before it is supposed to notify taxpayers by Jan. 15, 2010, whether their applications were successful.

For legislation enacted in February, "that's one of the fastest programs I've ever seen," Jones said.

Applicants received a lot of support from both the Treasury and Energy departments, Bob Beisner, a vice president at SolarWorld Industries America, Hillsboro, Ore., told BNA Oct. 20. The Energy Department hosted some helpful conference calls and answered questions online, he said.

During the application process, companies would take a first shot at trying to fill in the required fields, Gimigliano said. But because the process was so massive, many relied on accounting and law firms to manage the process and help ensure that they satisfied all the requirements, he said. Most companies found that getting some third-party help was in their best interest to complete the application, Gimigliano said.

Beisner said SolarWorld used some outside law firms to help the company review the applications. The company was able to submit all the materials on time, he said, adding that his firm did not have to answer many complex technical questions for the application due to the nature of the solar industry.

SolarWorld applied for a credit allocation for a 500-megawatt expansion at an existing facility in Hillsboro, Ore., worth between $200 million and $300 million, Beisner said. The application process for an expansion of an existing facility is "a little more straightforward" than the process for someone putting together an application for a greenfield or brownfield site, he said. A greenfield site is one where a company has to start construction at a "rudimentary level," whereas a brownfield site is one where an old manufacturing site is converted into a clean energy facility, Beisner said.

Last-Minute Corrections, Clarifications

One critique Hunton & Williams's Jones had concerned an error the Energy Department made on the application's spreadsheet.

The department sent an e-mail to all applicants on Oct. 15, the day before the final applications were due, with a revision of the spreadsheet. "Until you really start working with something, there are some errors that you just don't realize until you try to" fill in the spreadsheet, Jones said.

Energy Department officials said they would correct the spreadsheet calculations for applicants who had already filed their final applications, but some of them resubmitted their applications using the revised spreadsheet so they could present the new numbers themselves, Jones said.

SolarWorld's Beisner said the spreadsheets in the application worked well for his company. The firm had to modify the spreadsheet due to the government error, but because the company's application was fairly straightforward, "it really presented few problems for us," he told BNA.

There was also some confusion about what the actual deadline was for the final application, Jones said. The Department of Energy first said applications must be received by Oct. 16, which was not correct because the postmark rule under tax code Section 7502 was supposed to apply, she said. The department clarified last week that applicants had to have their submissions postmarked by Oct. 16, Jones said.

There were a few "fire drills and crises" the week of the application deadline, Jones said, adding that it would be interesting to see how many people filed preliminary applications but decided not to file a final application. Many of the applications her firm saw were "phonebook size" by the time the final application was complete, as it included a spreadsheet, business and financial plans, and appendices, she said.

An Energy Department spokeswoman told BNA Oct. 21 that the department does not have an estimate yet on how many applications were received and will announce further information once it is available. “The Department is pleased with the response it has received from the community and is currently still reviewing applications,” spokeswoman Tiffany Edwards said.

Jones said one aspect of the application process that she did not like was its general lack of transparency. While the Department of Energy did lay out criteria and policy factors for the program, applicants and practitioners do not know how exactly it will evaluate these items, she said. It is not clear if government officials will actually read all of the business and financial plans that companies filed, or if they will use some sort of formula based on the data compiled from the spreadsheets, Jones said, noting the requirement that applicants submit an electronic version of their applications on compact disc.

“I would like more transparency as to DOE’s decisionmaking process,” Jones said.

Future Reallocations a Possibility

Gimigliano and Jones said they think it is a distinct possibility that some credits will be thrown back into the allocation pool in the future—it is just a question of how much and when. Gimigliano said he thinks the Internal Revenue Service will especially scrutinize companies that receive the credits, and those that cannot prove they incurred the qualifying expenditures could see their credits reduced proportionally.

There are several ways for these credits to be reallocated—some companies will not be able to finish their projects, and others may see their financing fail to come through, Gimigliano said. If this tax credit is oversubscribed as much as practitioners think it is, he said he thinks there will be an effort to get Congress to replenish the fund.

“I think there will be a lot of pressure on Congress to do that,” Gimigliano said.