

January 2010

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Treasury Releases Grant Program Questions and Answers

The Treasury Department recently released “Frequently Asked Questions and Answers,” providing supplemental guidance under section 1603 of the American Recovery and Reinvestment Act — i.e., the Treasury Grant program for specified energy property (the “Supplemental Guidance”). The Supplemental Guidance consists of answers to 35 questions that were raised with respect to the Treasury Grant program and the Treasury Guidance released previously in July 2009. The Supplemental Guidance confirms a number of key questions summarized in more detail below.

Complete Application Required

The Supplemental Guidance cautions that an applicant should submit *all* of the required documentation at the same time the application is submitted and states that an application will not be considered complete, and the 60-day payment period will not commence, until all required documentation has been submitted. The Supplemental Guidance indicates other documentation might be requested, including but not limited to, power purchase agreements, equipment lease agreements, and certain invoices. The Supplemental Guidance provides specific information regarding the additional documentation — including

paid invoices and other financial documents — to be submitted when the property is placed in service after December 31, 2010, and construction commenced in 2009 or 2010.

Assignments of Payments

The Supplemental Guidance confirms that payments may *not* be assigned to entities other than banks, trust companies, or other financing institutions.

Final Determination

The Supplemental Guidance confirms that once a determination is made by Treasury on an application, that determination is final and no *administrative appeal* is available. The Supplemental Guidance does not discuss whether judicial appeal rights exist (e.g., under the Administrative Procedure Act) or whether an application may be re-submitted after a final determination. However, the Supplemental Guidance states that an application may be withdrawn before a final determination and re-submitted.

Final Costs

The Supplemental Guidance states that applicants should not submit an application until all costs are known and final for a particular property. This answer was provided in the context

of a scenario in which the applicant does not know its final costs at the time the application is submitted.

Eligible Applicants

The Supplemental Guidance confirms that schools, colleges, or universities that are agencies or instrumentalities of a federal, state, or local government, or are organizations described in section 501(c) of the Internal Revenue Code (“Code”) and exempt from taxation under Code section 501(a), are not eligible for payment. In addition, the Supplemental Guidance confirms that manufacturers of specified energy property are not eligible applicants unless they own the specified energy property at the time it is placed in service. Likewise, builders or contractors who install solar systems on residential properties are not eligible for the Treasury Grant unless they continue to own the property. See below for additional guidance provided with respect to systems installed on residential properties.

Receipt of Other Grants or Rebates

The Supplement Guidance confirms that the receipt of other federal or state grants or rebates does not impact an applicant’s eligibility for the Treasury Grant. However, if the rebate or grant *is not includible* in the taxable income of the applicant, a basis reduction may be required. If the eligible cost basis is reduced, the amount of the Treasury Grant also would be reduced. Conversely, if the rebate or grant *is included* in the taxable income of the applicant, no basis reduction is required.

Leases to Tax-Exempt Entities Permitted

The Supplemental Guidance confirms that if the owner of the specified energy property is the applicant and is otherwise eligible, the fact that the property is being leased to an ineligible entity (e.g., governmental entity, section 501(c) entity, tax-exempt partnership, etc.), does *not* impact the eligibility of the owner/applicant provided it is a true lease and not a disguised sale. This confirmation represents a significant difference with the Treasury Grant relative to the investment tax credit rules (which do not permit leases to tax-exempt entities and reduce the tax credit for partnerships with tax-exempt partners). Note, however, that a lease of specified energy property to a tax-exempt entity will affect the depreciation of the property.

Disregarded LLC is the Applicant

The Supplemental Guidance confirms that the “proper applicant” for the Treasury Grant is the owner of the property. Thus, if the owner of the property is a limited liability company that is disregarded for federal tax purposes, the proper applicant is the disregarded limited liability company and not its parent (i.e., the actual taxpayer for federal tax purposes).

Foreign Partners Permitted

The Supplemental Guidance confirms that a partner which is a foreign entity does not make an entity ineligible for the Treasury Grant.

Tax-Exempt Controlled Corporations Permitted

The Supplemental Guidance confirms that a taxable corporation can be an eligible applicant even if it is wholly owned by an ineligible entity. This guidance is consistent with certain statements in the Treasury Guidance. This guidance is different from the investment tax credit rules which do not permit tax-exempt controlled corporations to claim the credit.

Residential Energy Property

The Supplemental Guidance provides that energy property that is used at a residence generally is not eligible for the Treasury Grant. The Supplemental Guidance provides, however, that property used in a building that is used for residential purposes may be eligible if it is subject to depreciation or amortization in lieu of depreciation by its owner — i.e., it must be used in a trade or business or for the production of income. For example, if the applicant is a business that installed an otherwise eligible solar energy system on the roof of a residence that the business rents out for the production of income, the property would be eligible. If, however, the applicant is a homeowner who installed a solar energy system on the roof of his/her home and uses the solar energy property for personal purposes, the property would not be subject to depreciation and therefore would not be eligible.

The Supplemental Guidance also provides that if a business receives a Treasury Grant for energy property used at a residential rental property, and subsequently sells the residential property to the tenant within five years, the Treasury Grant will be subject

to recapture. The Supplemental Guidance explains that the property will cease to be specific energy property when it is sold to a person who cannot depreciate the property because that person will use the property for personal purposes. The Supplemental Guidance confirms that a solar energy system installed on a building that is used as both a residence and a place of business may be eligible for a Treasury Grant based on the portion of the basis of the solar energy property used for business purposes. The portion that is used for business purposes must be demonstrated by either a separate meter, an allocation based on square footage or other reasonable means.

Puerto Rico Property

The Supplemental Guidance confirms that property that is used predominantly in Puerto Rico (or any other U.S. possession) *may* be eligible for the Treasury Grant if it owned by a *domestic corporation or U.S. citizen*. Property that is owned by a Puerto Rican or non-U.S. company apparently would not be eligible. Likewise, the corporation must not have an election in effect under Code section 936 and the U.S. citizen must not be entitled to the benefits of section 931 or section 933 of the Code.

Used or Refurbished Parts

The Supplemental Guidance explains that for property to be eligible for the

Treasury Grant, the original use of the property must begin with the applicant. In the case of used or refurbished parts, if the cost of any used parts in a facility is less than 20% of the total cost of the facility, the property will not be considered “used” for purposes of determining original use.

Other Provisions of Law Not Applicable

The Supplemental Guidance confirms that neither the “Buy American” provisions in the American Recovery and Reinvestment Act nor the requirements of the Davis-Bacon Act apply to the Treasury Grant program.

Read the [Supplemental Guidance](#).

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