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Client Alert

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CLARIFYING COMMENCEMENT OF CONSTRUCTION: TREASURY PUBLISHES NEW Q&A

Section 1603 of the American Recovery and Reinvestment Act of 2009 directs the United States Treasury to pay cash grants (“Cash Grants”) to owners (and, in some cases, lessees) of certain renewable energy property the construction of which begins in 2009 or 2010 and which is completed before specified outside dates. Program Guidance published by Treasury in July 2009 and revised in March 2010 (the “Guidance,” a copy of which can be found [here](#)) addresses when construction of eligible property will be viewed as having commenced for purposes of qualifying for a Cash Grant. On Friday, June 24th, Treasury published a series of questions and answers (the “Q&As”) to further clarify how they will apply the “Commencement of Construction” requirement. A copy of the Q&As is attached.

BACKGROUND

To be eligible for the Cash Grants, applicants must commence construction of eligible projects before January 1, 2011. Given the fast-approaching deadline, a great deal of attention and consideration has been paid to this requirement for projects that will not be completed before the end of the year. The Q&As expand upon the general rules expressed in the Guidance that construction of eligible property will be treated as having commenced when “physical work of a significant nature” has begun or when costs have been paid or incurred that satisfy a 5% “safe harbor.” We discuss below the most important changes and clarifications set forth in the Q&As. (Our previous Client Alerts on the Guidance can be found [here](#) and [here](#).)

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Physical Work of a Significant Nature

Probably the most important news in the Q&As is a warning that “Treasury will closely scrutinize any construction activity that does not involve **a continuous program of construction or a contractual obligation to undertake and complete within a reasonable time, a continuous program of construction.**” Treasury provided this warning in the context of acknowledging that laying the foundation for a single wind turbine generator will satisfy the requirement that construction has commenced for a 50-turbine project. This seemingly new anti-abuse requirement that work done be part of a “continuous program of construction” likely will cause project sponsors and investors to rely more often on the 5% safe harbor.

The Q&As provide additional examples of what constitutes physical work of a significant nature while, at the same time, clarifying the boundary between eligible electrical generation equipment and ineligible transmission assets. For example, the Q&As clarify that physical work on a transformer that steps up the voltage of electricity produced at a facility is considered physical work of a significant nature because such equipment is specified energy property. In contrast, work on a transmission tower does not count as physical work of a significant nature because transmission equipment is not specified energy property.

Another example outlined by the Q&As addresses roads built on the construction site. Roads integral to the qualified facility (e.g., onsite roads that move materials to be processed and roads to operate or maintain the facility) are specified energy property. Starting construction on these integral roads will satisfy the commencement of construction standard. However, roads that provide access to the site and roads used solely for employee and visitor vehicles do not constitute specified energy property, and thus commencing construction of such roads cannot be counted as beginning construction.

Similarly, clearing land or erecting fences does not qualify as physical work of a significant nature; nor does dismantling an existing facility to build a new one.

As outlined in the Guidance, the Q&As provide that physical work of a significant nature performed by a third party for the applicant pursuant to a binding written contract only will count towards the commencement of construction standard if the work is commenced after the contract is entered into. If an applicant enters into a binding written contract with a supplier that produces the same goods for multiple customers, the contractor must be able to demonstrate that work has begun with respect to property that will be delivered to the applicant. For this purpose, the contractor may use any reasonable and consistent method to allocate work between customers. Moreover, the production or manufacture of goods that are in the inventory of the manufacturer before an applicant has entered into a contract to purchase those goods cannot be counted as physical work of a significant nature.

5% Safe Harbor

The 5% safe harbor, as outlined in the Guidance, provides that commencement of construction is deemed to occur when **more than 5%** of the total construction costs are paid or incurred. Without elaboration, the Q&A states that the 5% safe harbor will be satisfied when **5% or more** of the total project costs are paid or incurred.

In general, costs are not treated as incurred for purposes of the safe harbor until purchased property or services are delivered or title to the property passes to the applicant (the so-called “economic performance” rules). If an applicant seeks to rely on the work of a contractor to satisfy the 5% safe harbor, the applicant may treat costs as paid or incurred when costs are paid or incurred by the contractor. Applicants also may count costs paid or incurred by a supplier that manufactures property or components for the applicant pursuant to a binding written contract. As in the case of the standard discussed above relating to physical work of a significant nature, costs must be incurred after the binding written contract is entered into and must be reasonably allocated to the specified energy property of the applicant. Costs incurred by a component supplier to a contractor will not be treated as incurred until the components are provided to the contractor (not as the costs are paid or incurred by the supplier).

Treasury also has clarified that the cost of components will be treated as having been incurred when title to the components is transferred to the applicant, even though the components may be stored at the manufacturer’s premises.

Additionally, the Q&As repeat the rule expressed in the Guidance that it is **not** sufficient to show that an applicant reasonably expected costs incurred by December 31, 2010 to exceed 5% of the project costs. Rather, the costs incurred must be equal to or greater than 5% of the actual total cost of the specified energy property. But, if a project includes multiple units of specified energy property and less than 5% of the cost of the eligible property in the entire project has been incurred before year’s-end, an applicant can elect to treat the project as including less than all the units of property and apply for a Cash Grant on that lesser number.

Proof

In order to establish that physical work of a significant nature has begun on a project with an anticipated cost of \$1 million or more, the applicant must provide a report from an independent engineer, signed under penalties of perjury, describing the project’s eligibility (including construction schedule, budget, description of work that has commenced, and invoices for work performed). To establish eligibility under the 5% safe harbor for such a project, the applicant must submit a statement from an independent accountant, signed under penalties of perjury, attesting to the accounting method used and including a detailed description of the costs that have been paid or incurred, evidence of these costs (invoices or other records) and an estimate of the total cost of the specified energy property. When the applicant seeks to rely on costs paid or incurred by a contractor, the application must also include a copy of the binding written contract and a statement from the contractor, signed under penalties of perjury, attesting to the costs paid or incurred and that they are allocable to the applicant’s project.

**PAYMENTS FOR SPECIFIED ENERGY PROPERTY IN LIEU OF TAX CREDITS
UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009**

FREQUENTLY ASKED QUESTIONS AND ANSWERS
“BEGINNING OF CONSTRUCTION”

Q1. How does an applicant demonstrate that construction has begun on a project in 2009 or 2010?

A1. There are two ways to show that construction has begun. One is to begin physical work of a significant nature. The other is to meet a 5% safe harbor.

Physical Work of a Significant Nature

Q2. What does it mean to begin physical work of a significant nature?

A2. This means that physical work on the specified energy property has started. Physical work of a significant nature includes any physical work on the specified energy property at the site. Physical work of a significant nature also includes physical work that has taken place under a binding written contract for the manufacture, construction, or production of specified energy property for use by the applicant's facility provided the contract is entered into prior to the work taking place.

Q3. What is included in specified energy property in the case of a qualified facility described in section 45 of the Internal Revenue Code?

A3. In the case of a qualified facility described in section 45, specified energy property is limited to tangible personal property and other tangible property used as an integral part of the activity performed by the qualified facility and located at the site the qualified facility. For such a facility, specified energy property includes property integral to the production of electricity, but does not include property used for electrical transmission. Thus, physical work on a transmission tower located at the site is not physical work of a significant nature because the transmission tower is not part of the qualified facility. However, physical work on a transformer that steps up the voltage of electricity produced at the facility to the voltage needed for transmission is physical work of a significant nature because power conditioning equipment is part of the qualified facility.

Q4. How much physical work is required? Is laying the foundation for one wind turbine that is part of a larger wind farm sufficient?

A4. In general any physical work on the specified energy property will be treated as the beginning of construction even if such work relates to only a small part of the facility, but see Q5/A5 below.

Q5. Once physical work has begun, must physical work on the project be continuous to satisfy the requirement that construction has begun? For example, if a single foundation for a wind turbine is laid in 2010 but no other physical work on a 50 turbine project takes place until 2012, has the requirement been met?

A5. Treasury will closely scrutinize any construction activity that does not involve a continuous program of construction or a contractual obligation to undertake and complete within a reasonable time, a continuous program of construction. Disruptions in the work schedule that are beyond the applicant's control (for example, unusual weather or a site at which work can only be performed during certain seasons) will be taken into account in determining whether or not an applicant has undertaken a continuous program of construction.

Q6. Is starting work on roads physical work of a significant nature?

A6. Only work on specified energy property is physical work of a significant nature for purposes of showing that construction has begun. In the case of a qualified facility described in section 45, roads on the site that are integral to the qualified facility are specified energy property; these include onsite roads that are used for moving materials to be processed (for example, biomass) and roads for equipment to operate and maintain the qualified facility. Starting construction on these roads constitutes the beginning of construction. Roads for access to the site, or roads used solely for employee or visitor vehicles are not specified energy property; starting construction on these roads is not starting physical work of a significant nature on specified energy property.

Q7. Is preliminary work such as clearing land, obtaining permits or putting up fencing physical work of a significant nature?

A7. Preliminary work such as clearing land and obtaining permits is not physical work of a significant nature on specified energy property. Erecting a fence (or beginning to erect a fence) is not the beginning of physical work of a significant nature because, generally, fencing is not an integral part of the qualified facility.

Q8. An applicant plans to build a new facility for the production of electricity from wind power. The facility will be constructed on an existing wind facility site. In order to construct the new wind facility, the existing facility will be dismantled and removed. If an applicant begins to remove portions of the existing facility has physical work of a significant nature commenced?

A8. No. Generally, the cost of removal is associated with the property being removed or is capitalized to non-depreciable land. Removal of the existing turbines and towers is preliminary work and, therefore, does not constitute physical work of a significant nature on specified energy property.

Q9. Is the construction at the site of a building that will be used for operations and maintenance physical work of a significant nature?

A9. Because a building is not specified energy property, construction of a building is not physical work of a significant nature. However, the following structures are not treated as buildings for this purpose: (1) a structure that is essentially an item of machinery or equipment, or (2) a structure that houses property used as an integral part of a qualified activity if the use of the structure is so closely related to the use of the housed property that the structure clearly can be expected to be replaced when the property it initially houses is replaced. See Treas. Regs. § 1.48-1(e)(1).

Q10. Is test drilling of a geothermal deposit considered physical work of a significant nature?

A10. Test drilling for a geothermal deposit is a preliminary activity and is not physical work of a significant nature.

Q11. When is a contract binding?

A11. To be binding, a contract must be enforceable under state law. Additionally, the contract terms cannot limit damages in the event of a breach to less than 5% of the total contract price.

Q12. What is included in work performed under a binding written contract?

A12. Work performed under the contract includes only work that takes place after the binding written contract is entered into. The work is treated as physical work of a significant nature only if it is work on property that will become specified energy property of the applicant. For example, if a contractor is manufacturing solar panels specifically for the applicant under a binding written contract, any physical work on those panels is physical work of a significant nature on specified energy property of the applicant. If an applicant has a binding written contract with a contractor who is manufacturing solar panels for a number of customers, physical work on the panels would only be considered work performed under the applicant's binding written contract if the contractor can reasonably demonstrate that physical work has started on panels that will become specified energy property of the applicant. The contractor may use any reasonable, consistent method to allocate work it performs among its customers. Whether a method is reasonable depends on all the relevant facts and circumstances.

Q13. If an applicant purchases components or other parts from the inventory of a vendor under a binding written contract entered into before January 1, 2011, has physical work of a significant nature begun?

A13. No. Work performed under a contract does not include work to produce components or parts that are in existing inventory or are normally held in inventory by a manufacturer.

Q14. If physical work takes place pursuant to a binding written contract on property manufactured, constructed or produced for the applicant's project but the specific site for the project will not be identified prior to the deadline for submitting initial applications (or the site changes after an initial application is submitted), has physical work of a significant nature begun?

A14. If the work performed otherwise meets the requirements for physical work of a significant nature and work on the project is continuous (see Q5/A5), the fact that the specific site of the project has not been identified at the time of the initial application (or changes after the initial application) does not impact whether or not construction has begun.

5% Safe Harbor

Q15. How is the 5% safe harbor met?

A15. An applicant meets the 5% safe harbor if the applicant pays or incurs 5.00% or more of the total cost of the specified energy property before the end of 2010.

Q16. What does "paid or incurred" mean?

A16. The term "paid or incurred" generally means paid or incurred within the meaning of Treas. Regs. §1.461-1(a)(1) and (2). That is, costs are taken into account when cash-method taxpayers "pay" them and when accrual-method taxpayers "incur" them. A cost is generally "incurred" for tax purposes when 1) the fact of the liability is fixed, 2) the amount of the liability is determinable with reasonable accuracy, and 3) the economic performance test (see Treas. Regs. §1.461-4) has been met with respect to such cost. Although the specific reference to the §461(h) economic performance rules was deleted in the revised Program Guidance, the economic performance rules continue to apply in determining whether costs have been incurred. The 5% safe harbor contained in the Program Guidance includes a single exception to the general principles that are used to determine when amounts are "incurred." Under general rules for property manufactured, constructed, or produced for the applicant by another person under a

binding written contract that is entered into prior to the manufacture, construction, or production of the property, the cost of such property is treated as “incurred” when the property is provided to the applicant. The exception is that for periods before the property is provided to the applicant, costs incurred with respect to the property by such other person are treated as costs of the property that are incurred by the applicant when the costs are incurred by such other person.

Q16A: When are costs paid or incurred by the person providing the property to the applicant under a binding contract?

A16A: Costs are paid or incurred by the person providing property to the applicant as that person pays or incurs costs in connection with providing property to the applicant. For example: In 2010, accrual-method taxpayer W enters a binding written contract to provide a wind turbine to A in June 2012. In 2010, W, pursuant to a contract with Y, pays Y to provide parts in May 2012 for use in the wind turbine. W’s employees provide W with services necessary to design and plan for the production of the wind turbine in 2010 and with services to manufacture (assemble) the wind turbine in 2012. W incurs the cost to design and plan for the production of the turbine assembly in 2010, incurs the costs for the parts in May 2012 when Y delivers the parts to W, and incurs the costs for W’s employees to assemble the wind turbine in 2012. See § 1.461-4(d)(4), § 1.446-1(c)(1)(ii), and Example 3 of § 1.461-4(d)(7) of the Income Tax Regulations. For purposes of determining whether A has met the 5% safe harbor, A may only include the costs incurred by W to pay its employees to plan and design the turbine in 2010.

Q17. If title to the property has passed to the applicant, but the property remains in storage at the manufacturer’s site, has the property been provided to the applicant?

A17. Property is provided to the applicant either when title to the property passes to the applicant or when it is delivered to or accepted by the applicant, depending on the applicant’s method of accounting. In addition, property that the applicant reasonably expects to be provided within 3-1/2 months of the date of payment will be considered to be provided on the payment date. See, generally, Treas. Regs. §1.461-4(d)(6).

Q18. In the case of property manufactured, constructed, or produced for the applicant by another person (the supplier) under a binding written contract that is entered into prior to the manufacture, construction, or production of the property, how does the applicant determine what costs have been paid or incurred on its behalf by the supplier? (Note that this Question and Question 19 assume that the supplier uses the accrual method of accounting)

A18. The applicant may rely on a statement by the supplier as to the amount incurred by the supplier with respect to the property to be manufactured, constructed, or produced for the applicant under the binding written contract. The supplier may use any reasonable, consistent method to allocate the costs incurred by the supplier among the units of property to be manufactured, constructed, or produced by the supplier. Only costs incurred by the supplier after the binding written contract is entered may be reasonably allocated to the property manufactured, constructed, or produced under that contract. The economic performance rules apply to determine when costs have been incurred by the supplier. The exception described in Q16/A16 does not apply in determining when costs are incurred by the supplier. Thus, if components are manufactured for the supplier by a subcontractor, the cost of those components is incurred only when the components are provided to the supplier and not as the subcontractor pays or incurs the costs of manufacturing the components.

Q19. An applicant may enter into a binding written contract for multiple units of property to be manufactured, constructed, or produced for the applicant by another person under a binding written contract that is entered into prior to the manufacture, construction, or production of the property. How does the applicant allocate the costs paid or incurred with respect to the contract to the units of property acquired pursuant to the contract?

A19. Costs incurred when property is delivered to the applicant are allocated to such property. Costs that are treated under Q16/A16 as incurred when incurred by the supplier with respect to the property are allocated to the property with respect to which the supplier incurred the costs. The supplier may use any reasonable method to allocate the costs it incurs among the units of property manufactured, constructed or produced by the supplier and to allocate the units of property it produces among its customers. Whether a method is reasonable depends on all the relevant facts and circumstances. In addition, property that the supplier reasonably expects to receive from a subcontractor within 3-1/2 months of the date of the supplier's payment to the subcontractor is considered to be provided by the payment date. See, generally, Treas. Regs. §1.461-4(d)(6).

Q20. A developer may enter into a binding written contract for multiple units of property to be manufactured, constructed, or produced for the developer by another person under a binding written contract (a "master contract") that is entered into prior to the manufacture, construction, or production of the property. The developer may then assign its rights to certain units of property to an affiliated special purpose vehicle (generally, a limited liability company) that will own the project for which such property is to be used and will apply for the payment. Such assignment typically is represented by a new contract (the "project contract") between the special purpose vehicle and the person manufacturing, constructing, or producing the property. An adjustment is then made to the master contract between the developer and the person manufacturing, constructing, or producing the property to reflect the assignment. Assume costs paid or incurred with respect to the master contract between the developer and the person manufacturing, constructing, or producing the property are considered to have been paid or incurred in 2009 or 2010 for purposes of determining whether construction has started. For purposes of determining whether construction has started, may these costs then be allocated to the special purpose vehicle if its project contract and the master contract, as adjusted, both reflect this assignment?

A20. Costs that are allocated to the property under the principles of Q19/A19 are treated as costs of the property notwithstanding the substitution of the project contract with respect to such property.

Q21. What happens if the project's costs are more than expected? Is it sufficient to show that an applicant reasonably expected costs paid or incurred before the end of 2010 to be 5% of the project costs?

A21. No. To satisfy the 5% safe harbor applicants must demonstrate that costs paid or incurred before the end of 2010 are equal to or greater than 5% of the actual total costs of the specified energy property. However, if the applicant's project includes multiple units of specified energy property, an applicant can opt to apply for a payment based on some, but not all, units of property. For example, if an applicant incurs \$10,000 in costs in 2010 for specified energy property in a 5 turbine wind farm anticipating total costs for specified energy property of \$500,000 but the actual total costs of specified energy property amount to \$600,000, the safe harbor would not be satisfied. However, the applicant can opt to apply for a payment based on the costs of 3 turbines and would satisfy the safe harbor if the \$10,000 of costs incurred in 2010 relates to the 3 turbines and their total cost does not exceed \$500,000.

Q22. An applicant demonstrates that the applicant meets the 5% safe harbor as of December 31, 2010, with respect to a facility. The facility will not be placed in service until 2012. Must the applicant continue to work at the site in 2011 in order to qualify for payment in 2012?

A22. No.

Process

Q23. Under what circumstances and when is an applicant required to submit an application demonstrating that construction has begun?

A23. All applications must be submitted by the statutory deadline of October 1, 2011. For property that has been or will be placed in service in 2009 or 2010, an application demonstrating that construction has begun is not required. For property that is placed in service after December 31, 2010, but before October 1, 2011, applicants need only submit a single application demonstrating both that construction began on the property in 2009 or 2010 and that the property has been placed in service. For property that is placed in service on or after October 1, 2011, applicants must submit a preliminary application by October 1, 2011, demonstrating that construction on the property began in 2009 or 2010. Such applications must then be supplemented at the time the property is placed in service.

Q24. If an applicant submits an application demonstrating that construction has begun, will the applicant receive a response?

A24. Yes. Although we cannot provide assurance that an applicant meets all the requirements for a payment until all facts and circumstances are known (at time the facility is placed in service), we will tell the applicant whether or not the work performed is physical work of a significant nature or, for applicants relying on the safe harbor, whether qualifying costs have been paid or incurred.

Q25. What documentation is required?

A25. For projects relying on “physical work of a significant nature” applicants must document the physical work. For example, to demonstrate that physical work of a significant nature has commenced at the site, applicants should submit a written report from the project engineer or installer, signed under penalties of perjury, describing the project’s eligibility; including a detailed construction schedule; estimated budget for the project and a description of the work that has commenced including any invoices for the work performed. For projects with an anticipated cost basis of \$1 million or more, the report must be from an independent engineer. To demonstrate that physical work of a significant nature has commenced under a binding written contract, applicants should submit a copy of the binding written contract and a statement from the contractor, signed under penalties of perjury, describing the work that has commenced and certifying that the work commenced pursuant to the binding written contract.

For projects relying on the 5% safe harbor, applicants must submit a statement from an authorized representative of the applicant signed under penalties of perjury, or for projects with an estimated eligible cost basis of \$1 million or more, from an independent accountant, attesting to the method of accounting used by the applicant for federal tax purposes (cash or accrual). For applicants that use the cash method of accounting, the statement should state the amount that has been paid before the end of 2010; a detailed description of the costs that have been paid; and

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an estimate of the total cost of the specified energy property and must include evidence of payment such as invoices or other financial records. For applicants that use the accrual method of accounting, the statement should state the amount that has been incurred before the end of 2010; a detailed description of the costs incurred; and an estimate of the total cost of the specified energy property and must include evidence of the costs incurred such as invoices or other financial records. If an applicant is relying on costs paid or incurred by a contractor, a copy of the binding written contract and a statement from the contractor, signed under penalty of perjury, of costs paid or incurred and allocated to applicant's project must be included.

Additional documentation may also be required depending on the facts and circumstances. If additional documentation is required applicants will be notified.

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