DON'T LET THE SUN SET ON YOUR OPPORTUNITY TO OBTAIN A GRANT FOR A SOLAR INSTALLATION

By: Hesser G. McBride, Jr. and Anthony Wilkinson *Sept 2011*

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Time is running out to take advantage of the Department of the Treasury's Section 1603 grant for the installation of solar electric generation systems. For those property owners or lessors contemplating taking advantage of the unlimited potential of harnessing the power of the sun, the opportunity to receive a substantial amount of cash from the Federal government will soon expire. Under Section 1603 of the American Recovery and Reinvestment Tax Act of 2009, the Department of the Treasury reimburses eligible applicants for a portion of the expense of "specified energy property" used in a business. Such property includes equipment that uses solar power to generate electricity as well as the tangible property that is an integral part of the solar power generation activity. For solar energy property, the amount of the grant is thirty percent (30%) of the basis of the property, usually the cost including installation expenses and excluding depreciation adjustments. As an example, a $2 million solar project could result in a $600,0000 check from the United States not long after the facility is placed in service. Given the recent decline in the value of solar renewable energy certificates ("SRECs"), which are the principal mechanism to fund solar installations, many solar projects are not likely to be economically viable without the grant. Below, we provide an overview of how to take advantage of this limited time opportunity.

Applicants must take action before the end of 2011 in order to qualify for the Section 1603 grants. One way to maintain eligibility is to ensure that specified energy property is "placed in service" before December 31, 2011. "Placed in service" means that the property is ready and available for its specific use. Below, we address the meaning of "specified energy property" and then we identify an alternative mean of qualifying for a Section 1603 grant even if property is placed in service after 2011.

An applicant must be the owner or lessee of the specified energy property and responsible for placing it in service. (Lessees are advised to consult legal counsel regarding the special regulatory provisions applicable to leased property.) Qualified energy property must be tangible personal property for which depreciation or amortization is allowable. It must also be an integral part of the activity performed by the qualified facility, meaning that it must be directly used on site as an essential part of the activity. As an example, qualified property that generates electricity includes storage devices, power conditioning equipment, transfer equipment, and parts related to the functioning of those items but does not include any electrical transmission equipment, such as transmission lines and towers, or any equipment beyond the electrical transmission stage, such as transformers and distribution lines.

There are two major categories of property that qualify as specified energy property, property described in Section 45 of the Internal Revenue Code ("IRC") and property described in Section 48. (We note that as a consequence of receiving a Section 1603 grant, an applicant must forego production or investment tax credits under Sections 45 and 48 with respect to such property.) The classes of Section 45 qualified facilities include wind, biomass, geothermal, landfill gas, trash and hydropower. The classes of Section 48 qualified facilities include solar, geothermal, fuel cell, microturbine, combined heat and power systems, small wind, and geothermal heat pump. Note that Section 48 qualified facilities must meet certain performance and quality standards prescribed by the IRC and Treasury regulations.

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Applicants for Section 1603 grants may still qualify even if the specified energy property is placed in service after 2011 as long as construction of the property begins between January 1, 2009 and December 31, 2011 and the property is placed in service by a certain later date, ranging from January 1, 2013 to January 1, 2017, depending upon the type of property. For solar property, that later date is January 1, 2017.

Construction begins when physical work of a significant nature begins. In order to reduce the risk of misinterpreting this standard, applicants may rely upon a "Safe Harbor" in the regulations for Section 1603 or upon certain prior guidance promulgated by the Treasury Department. However, the specifications in the prior guidance and the Safe Harbor are complex and legal counsel may be required in order to understand them properly. But, in general, such work begins when more than five percent (5%)of the total cost of the property has been paid or incurred.

Opportunities to receive direct cash payments from the Federal government for development projects are few and far between and will only become rarer as time passes. Only a few months remain before the end of 2011. If you are seriously considering a solar project for your business or property, it important to move expeditiously to start construction on a solar project in order to qualify for a Section 1603 grant.

If you have any questions regarding your solar project, or would like further information on qualifying for a Section 1603 grant, please contact Hesser G. McBride, Jr. at hmcbride@wilentz.com or (732) 855-6113.

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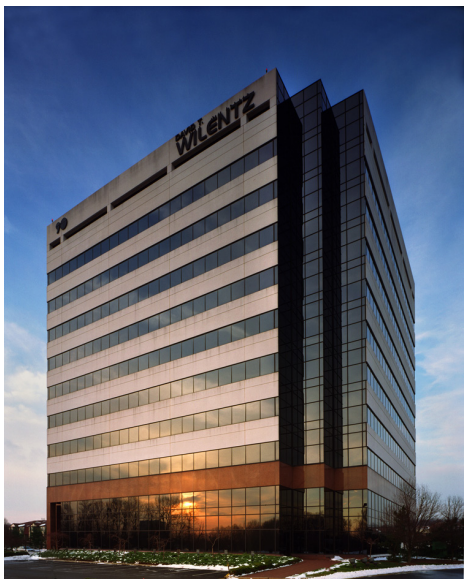

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