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U.S. Court of Federal Claims: Value of anticipated cash grants are separate intangible assets for purchase price allocation purposes

The U.S. Court of Federal Claims held that the value of anticipated cash grants under section 1603 of the “American Recovery and Reinvestment Act of 2009” (ARRA) was a separate intangible asset for purposes of allocating the plaintiffs’ purchase price under section 1060 between grant-eligible tangible property and grant-ineligible intangibles.

The case is: *Alta Wind I Owner Lessor C v. United States*, Nos. 13-402, 13-917, 13-935, 13-972, 14-47, 14-93, 14-174, 14-175, 17-997 (June 20, 2023). Read the Federal Claims Court’s [opinion](#) [PDF 331 KB] (32 pages)

Summary

This decision is the latest development in the ongoing litigation over the amount of cash grants under section 1603 of the ARRA owed to the owner-lessors of six wind farms acquired in sale-leaseback transactions. The purchase price paid by the plaintiffs to acquire the wind farms included a premium reflecting additional value attributable to the facilities’ eligibility for cash grants from the federal government under the section 1603 cash grant program in effect at the time. At issue in the litigation is whether the premium paid to acquire the wind farms is allocable to grant-eligible tangible property, thereby increasing the cash grant amount to which the plaintiffs are entitled, or whether the premium is allocable to a grant-ineligible intangible asset.

In their application for cash grants, the plaintiffs allocated the purchase price premium to grant-eligible tangible property. The federal government awarded the plaintiffs reduced cash grants based on the development and construction costs allocable to the grant-eligible property. The plaintiffs subsequently filed suit in 2013 in the U.S. Court of Federal Claims alleging that they were entitled to over \$200 million in additional cash grants, and the government filed a counterclaim, asserting it overpaid plaintiffs by over \$59 million. In 2016, following a trial on the claims, the court held for the plaintiffs, finding that the purchase price premium was attributable to the turn-key value of the facilities, rather than some intangible asset. The government appealed to the Federal Circuit.

In 2018, the Federal Circuit vacated the lower court’s decision and remanded the case, finding that the trial court improperly determined that section 1060 did not apply to the allocation of the plaintiffs’

purchase price among the assets of the acquired wind farms and improperly excluded testimony by the government's expert. *Alta Wind I Owner Lessor C v. United States*, 897 F.3d 1365, 1376 (Fed. Cir. 2018). Section 1060 and corresponding Treasury regulations generally require use of the residual method to allocate the purchase price of an acquired trade or business among the individual assets acquired in the purchase. Under the residual method, the overall purchase price is allocated on a waterfall basis among seven categories of assets, based on the fair market of the assets in each class.

On remand, the plaintiffs moved for partial summary judgment on the issue of whether the cash grants—and the indemnities associated with them—are separate grant-ineligible assets to which purchase price must be allocated under section 1060. The court denied plaintiff's motion with respect to the indemnities, finding that disputed factual issues precluded a summary judgment ruling.

With respect to the cash grants, the plaintiffs argued, largely based on the statutory language of section 48(d)(3)(B), that the value of the anticipated cash grants is includible in the basis of the grant-eligible property for purposes of determining the amount of the cash grant. It appears the plaintiffs did not argue that the premium was attributable to an uplift in value of the tangible property of the wind farms once they became operational. The government argued that the plaintiffs' interpretation of section 48(d)(3)(B) was circular and inapposite and that the value of the grant itself and the incremental consideration paid for the anticipated cash grants are separate grant-ineligible intangible assets to which fair market value and basis attaches.

The court agreed with the government and denied the plaintiffs' motion, finding that the value of the anticipated cash grants under section 1603 of the ARRA were separate intangible assets for purposes of allocating the plaintiffs' purchase price (and thus basis) under section 1060 between grant-eligible tangible property and grant-ineligible intangibles.

KPMG observation

The court's decision may have implications for transactions involving the acquisition of renewable energy facilities and other types of property eligible for tax credits that, under recently enacted sections 6417 and 6418, can be monetized as cash payments from the federal government or third parties.

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