

Unexpected Budget Cuts For Renewable Energy

Law360, New York (September 28, 2012, 1:46 PM ET) -- The Budget Control Act of 2011 requires Congress to enact a plan to reduce the deficit by \$1.2 trillion. If that does not occur, automatic federal budget cuts, known as “sequestration,” are to be triggered starting in fiscal year 2013; such cuts would result in across-the-board budget cuts for many government programs.

Congress has yet to enact such a plan, and, given the current political climate, it is not entirely clear whether such a plan will be enacted in time to avoid the mandatory budget cuts. Facing the prospect that sequestration may become a reality, Congress enacted the Sequestration Transparency Act of 2012 (P.L. 112-155), which requires the U.S. Office of Management and Budget to submit a plan to Congress outlining the across-the-board cuts. The OMB’s report was released on Sept. 14, 2012.

The OMB’s report contained a significant surprise for the renewable energy industry: The U.S. Department of the Treasury’s grant program enacted in Section 1603 of the American Recovery and Reinvestment Tax Act of 2009, as amended, is subject to sequestration. Weeks before the OMB report, treasury officials had informally indicated that they did not believe that the treasury grant was within the scope of sequestration, and none of the grant guidance published on the treasury’s webpage indicated that sequestration was in the offing.

The report characterizes the treasury grant as a “nondefense function” subject to a “mandatory” 7.6 percent sequestration. Sequestration of the treasury grant would reduce the deficit by \$279 million in the 2013 fiscal year.

It appears that the treasury grant available for each eligible renewable energy project will be “scaled down” by 7.6 percent. Therefore, rather than the treasury grant being 30 percent of “eligible basis,” it will be 27.72 percent (i.e., 30 percent less than 30 percent multiplied by 7.6 percent, or 2.28 percent) of eligible basis. Thus, for example, if a renewable energy project with \$100,000 of treasury grant-eligible basis would have received a \$30,000 treasury grant, it appears that the project will now be entitled to receive only a \$27,720 treasury grant.

However, the report does not expressly describe any particular methodology, and the actual implementation of the reduction could be different.

Further, the effective date of the sequestration is not specified. For instance, what if a renewable energy project files a preliminary grant application prior to Oct. 1, 2012, is placed in service prior to Dec. 31, 2012, and files a final grant application in early January 2013? Is such a project subject to sequestration?

Further, what if the renewable energy project files a preliminary grant application prior to Oct. 1, 2012, is placed in service on Nov. 1, 2012, and also files a final application on Nov. 1, 2012? If treasury complies with the statutory requirement that it pay grants within 60 days of receipt of the final application, the grant would be paid in 2012.

However, assume that 59 days after it receives the final application, treasury opts to request a copy of an ancillary project contract that is not required by the instructions to the application, but treasury feels that it is relevant in determining the amount of the treasury grant. It is treasury's practice that the 60-day period is restarted once the additional information is provided. Therefore, the treasury grant would now be paid in 2013. Is such a payment a fiscal year 2013 expenditure subject to sequestration?

In terms of the treasury grant program receiving some relief from the application of sequestration, the OMB has authority with respect to how sequestration will take effect. However, it is not clear yet to what extent it will defer to treasury with respect to the grant program. Thus, both agencies should be consulted on these matters. The other avenue for relief is that Congress, at any time, can amend the Budget Control Act, which triggers sequestration.

--By David K. Burton and Joshua R. Williams, Akin Gump Strauss Hauer & Feld LLP

David Burton is a partner and Joshua Williams is a senior counsel in Akin Gump's New York office.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2012, Portfolio Media, Inc.