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Federal Circuit: Section 1603 grants for wind energy firms, development fees not established

The U.S. Court of Appeals for the Federal Circuit today affirmed findings of the federal claims court that wind energy firms had not satisfactorily provided proof of development fees included in their cost bases for purposes of Section 1603 grants from the U.S. Treasury Department.

The case is: *California Ridge Wind Energy, LLC v. United States*, 2019-1463, 2019-1465 (Fed. Cir. May 21, 2020). Read the Federal Circuit's [decision](#) [PDF 144 KB]

Summary

The plaintiffs (both wind energy firms) each owned a windfarm that was put into service in 2012. Then, each company applied for a cash grant from the federal government, based on specified energy-project costs, under Section 1603 of the American Recovery and Reinvestment Tax Act of 2009 (Pub. L. No. 111-5). These grants are thus referred to as "Section 1603 grants" and were issued by the U.S. Treasury Department.

One company requested a Section 1603 grant of approximately \$130 million and the other a Section 1603 grant of approximately \$137 million. Treasury awarded each company the Section 1603 grants, but in lower amounts than had been requested. Treasury rejected the claimed amounts for the Section 1603 grants as unjustified (rejecting the full amounts of certain development fees included in the submitted cost bases). Each company filed suit in the U.S. Court of Federal Claims for the difference between the amounts they had been paid as grants and the amounts they asserted were due to them under Section 1603. The government counterclaimed, alleging that the two firms had actually been over-paid their Section 1603 grants.

The Court of Federal Claims held for the government. The court determined that the firms had failed to show that the subject development agreements had economic substance, and concluded that the agreements were "sham transactions." The companies then appealed to the Federal Circuit.

On appeal, the sole issue was whether the two firms had proved that their proposed development fees, in the amounts claimed, were properly included in their cost bases. Noting that the trial court had found that they did not, the Federal Circuit today affirmed. As the appellate court observed:

We read the Court of Federal Claims opinion as finding that the amounts stated in the development agreements do not reliably indicate the development costs. That finding is not clearly erroneous. It is sufficiently supported by at least the round-trip nature of the payments; the absence in the agreements of any meaningful description of the development services to be provided; and the fact that all, or nearly all, of the development services had been completed by the time the agreements were executed.

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