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IN THE UNITED STATES COURT OF FEDERAL CLAIMS U.S. COURT OF FEDERAL CLAIMS

W.E. PARTNERS II, LLC,)
2525 West Firestone Lane) No.
Vancouver, WA 98660)

Plaintiff,)

vs.)

THE UNITED STATES OF AMERICA,)

Clerk, U.S. Court of Federal Claims)
717 Madison Place, NW, Room 103)
Washington, D.C. 20005)

Defendant.)

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COMPLAINT

NOW COMES W.E. Partners, LLC, through counsel, and for its Complaint against the United States of America (the "Government") for violation of Section 1603 of the American Recovery and Reinvestment Tax Act of 2009 ("Section 1603"), states and alleges as follows:

NATURE OF THE ACTION

1. This litigation arises from the Government's violation of its mandatory statutory and regulatory obligations to Plaintiff, who has placed in service specified energy property under Section 1603.

JURISDICTION

2. This Court has jurisdiction over the subject matter of this action pursuant to the Tucker Act, 28 U.S.C. § 1491. The statutory basis for invoking jurisdiction is Section 1603, which specifies that the Secretary of Treasury "shall...provide a grant" to persons placing "specified energy property" into service.

3. This controversy is ripe because the Secretary of the Treasury has issued a final adverse determination regarding Plaintiff's eligibility to receive payments under Section 1603.

PARTIES

4. W.E. Partners II, LLC is a limited liability company formed pursuant to the laws of the State of North Carolina.

5. In 2011, Plaintiff placed into service, as required under Section 1603, an open-loop biomass facility that qualified as specified energy property, as defined in Section 1603. Plaintiff applied for reimbursement grants under Section 1603 and met all of the requirements detailed in that statute.

6. The Defendant is the Government, acting through the United States Department of Treasury ("Treasury").

STATUTORY AND REGULATORY FRAMEWORK

7. On February 17, 2009, President Barack Obama signed into law the American Recovery and Reinvestment Act of 2009. The purposes of this Act included the following: to preserve and create jobs and promote economic recovery, to assist those most impacted by the recession, to provide investments needed to increase economic efficiency by spurring technological advances in science and health, and to invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits.

8. Section 1603(a) of the American Recovery and Reinvestment Tax Act of 2009 states, in part, that upon application, the Secretary of the Treasury "shall, subject to the requirements of this section, provide a grant to each person who places in service [during 2009, 2010, or after 2010 if certain conditions are met] specified energy property to reimburse such person for a portion of the expense of such property."

9. Section 1603(b) states that the amount of the grant "shall be the applicable percentage of the basis of such property."

10. Section 1603(c) states that the Treasury "shall make payment" of a grant during the 60-day period beginning on the later of (1) the date of the application for such grant, or (2) the date the specified energy property for which the grant is being made is placed in service.

11. Section 1603(d) defines "specified energy property" using cross-references to provisions in section 45 of the Internal Revenue Code of 1986 ("IRC"). An open-loop biomass facility is a qualified energy resource and is included in the definition of "specified energy property" in Section 1603.

12. Section 45(d)(3) includes an open-loop biomass facility as a "qualified facility." As such, an open-loop biomass facility is included in Section 1603's definition of "specified energy property."

13. Section 1603(b)(2)(A) provides that, for a qualified facility, the applicable percentage of basis is thirty percent. The basis on which the grant is determined is the same as the basis for purposes of the tax credit under Section 48 of the IRC, *i.e.*, the cost of the property. Therefore, for a qualified facility, the amount of the grant is thirty percent of the cost of the qualified facility.

14. Section 1603(h) of the American Recovery and Reinvestment Tax Act of 2009 states that Congress has appropriated to the "Treasury such sums as may be necessary to carry out this section."

15. The Treasury has issued guidance ("Treasury Documents") in the form of the following documents regarding the 1603 grant program:

(a) "Payments for Specified Energy Property in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009- Program Guidance" ("Program Guidance").

(b) "Payments for Specified Energy Property in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009-Terms and Conditions".

(c) A sample application form.

(d) A document instructing Certified Public Accountants regarding their responsibilities when certifying costs of a facility in connection with a grant application.

(e) A list of frequently asked questions and answers.

16. The Program Guidance provides that "specified energy property" must be "tangible property (not including a building) that is an integral part of the facility." The Program Guidance further states that the tangible property must be "both used as an integral part of the activity performed by [the] qualified facility and located at the site of the qualified facility . . . Property is an integral part of a qualified facility if the property is used directly in the qualified facility, is essential to the completeness of the activity performed in that facility, and is located at the site of the qualified facility."

17. Pursuant to IRS Notice 2008-60, an open loop biomass facility includes all integrated boilers:

01 Components of Facility. (1) In general. For purposes of 45(d)(3), an open-loop biomass facility is a power plant consisting of all components necessary for the production of electricity from open-loop biomass (and, if applicable, other energy sources). Thus, a qualified open-loop biomass facility includes all burners and boilers (whether or not burning open-loop biomass), any handling and delivery equipment that supplies fuel directly to and is integrated with such burners and boilers, steam headers, turbines, generators, and all other depreciable property necessary to the production of electricity. The facility does not include (i) property used for the collection, processing, or storage of open-loop biomass before its use in the production of electricity, (ii) transformers or other property used in the transmission of electricity after its production, or (iii) ancillary site

improvements, such as roadways and fencing, that are not necessary to the production of electricity. Each power plant that is operated as a separate integrated unit is treated as a separate facility for purposes of §45(d)(3).

FACTUAL ALLEGATIONS

18. Plaintiff is involved in the business of manufacturing and installing biomass power cogeneration facilities ("Power Systems"). The project at issue is a new 495 eKW open-loop 1,800 hp biomass power facility constructed on the Perdue AgriBusiness manufacturing complex in Lewiston, NC. The project is a biomass cogeneration facility, exporting excess electricity, via an interconnection agreement, to Dominion Power and process steam to Perdue. The facility utilizes renewable biomass fuel in the form of logging "Hog Fuel" (bark, sawdust, shavings, and forest slash) and agricultural residue such as peanut hulls, soybean hulls, and cotton gin residues. Switch gear and an electrical power interconnect point was installed to permit synchronous operations for delivery of electrical power to the existing plant network as well as to export to Dominion Power. The low pressure turbine exhaust steam is conveyed to the Perdue AgriBusinesses' adjacent facility. The biomass-fired co-generation boiler system produces over 63,000 pph of saturated steam at 330 psig for delivery to the back pressure steam turbine, for final delivery of steam at 135 psig to Perdue's rendering plant providing heat for various steps in their rendering process. The scope of this project includes a complete steam generation system, from live floor fuel handling through the exhaust stack/electrostatic precipitator (ESP) of the boiler system with the boilers, fuel storage and auxiliary electrical equipment being housed in an integrated single purpose structure. As a cogeneration facility (providing both heat and electricity), an engineering analysis was conducted which evaluated various steam and power generation options. The system chosen, a saturated steam boiler system with back-pressure turbine, provided the best solution given the operating requirements of both

Dominion Power and Perdue AgriBusiness. As such, the system was designed so that 100% of the high pressure, saturated steam would be directed across the back-pressure turbine, with the low pressure exhaust from the steam turbine generator being directed to the steam host facility.

19. The electricity produced by the facility is used in operating the on-site plant, with excess electricity being sold to Dominion Power.

20. The Power Systems use renewable biomass in the form of logging "Hog Fuel" to create electricity.

21. The Power System that Plaintiff manufactured qualifies as specified energy property within the meaning of Section 1603. The Power System generates electricity from renewable biomass; the Power System was created by Plaintiff as the first user; the Power System is depreciable; and there are no regulations providing performance or quality standards.

22. The Power Systems manufactured by Plaintiff also meet the additional requirements of the Treasury Documents. The Power System constitutes a qualified facility. The property in the Power System qualifies as tangible property that is integral to the Power System. The property is integral to the activity performed by each facility and is contained within each facility. The property is used directly in each facility, is essential to the completeness of each facility, and is contained within each facility.

23. On June 25, 2012, Plaintiff submitted its application to Treasury for the Power System, reflecting a qualified cost basis of \$9,037,769, and payment in the amount of \$2,711,331 (30%).

24. The application Plaintiff submitted to Treasury complied with the Treasury's requirements for applying for 1603 reimbursements. Plaintiff timely filed its application after the Power System was placed in service. Each application contained all required information and

signatures and Plaintiff provided all required and requested information. Plaintiff met all applicable deadlines.

25. In response to several requests from Treasury, Plaintiff provided supplemental information. This information included explanatory comments from expert Bill Carlson, of Carlson Small Power Consultants.

26. Plaintiff met all conditions required by Section 1603 for its application. Plaintiff was entitled to receive the grants mandated by Section 1603 for the energy property that was the subject of its application. This grant should have totaled thirty percent of Plaintiff's basis in the Power System. Plaintiff was entitled to a grant in the amount of \$2,711,331.

27. On December 9, 2012, however, the Treasury, by email, issued an award letter, approving a grant of only \$943,754, only slightly more than 10% of Plaintiff's qualified cost basis. The decision said:

We have reduced the payment to match the adjusted cost basis by removing the costs associated with generating heat in excess of that required for the turbine generator, which are ineligible costs.

The decision contained no further explanation or support for the Treasury's conclusion. Nor did the decision identify any other basis for reducing Plaintiff's grant.

28. The decision was arbitrary, capricious, and incorrect because Plaintiff's facility did not generate "excess heat" as 100% of the generated saturated steam is passed from the boiler to the steam turbine generator and the cost basis submitted contained only qualified and eligible costs.

CONTROVERSY AND RIPENESS

29. The Treasury notified Plaintiff that its application did not qualify for a payment of 30% under Section 1603 on December 9, 2012. The notification was the final agency action on the application.

30. The determination was erroneous.

31. Plaintiff has exhausted all administrative remedies.

CLAIM FOR RELIEF

COUNT ONE

(Violation of Statutory and Regulatory Mandates To Make Payments)

32. Plaintiff realleges and incorporates ¶¶ 1-31, inclusive, as if set forth fully herein.

33. As part of its obligations under the American Recovery and Reinvestment Tax Act of 2009, and/or its obligations under its Regulatory Guidance interpreting that Act, the Treasury is required to, subject to certain statutory and/or regulatory conditions, "provide a grant to each person who places in service specified energy property to reimburse such person for a portion of the expense of such property."

34. Plaintiff is a qualified applicant as it submitted its application to the Treasury in conformity with the terms of Section 1603 of the American Recovery and Reinvestment Tax Act of 2009 and the terms of Treasury's Regulatory Guidance.

35. The United States' failure to provide a grant to Plaintiff in the amount of thirty percent of the basis of the Power System is a violation of the statute and Treasury's guidance, and Plaintiff has been damaged thereby.

36. Treasury has failed and refused, without justification and despite demand therefore, to perform as it is obligated.

37. Treasury's evaluation of Plaintiff's submission and failure to provide the 30% grant to Plaintiff under Section 1603 were arbitrary and capricious.

38. Treasury violated its statutory obligations to the extent that its Program Guidance exceeds the authority granted, or violates limitations imposed, by Section 1603.

39. Because Treasury acted in disregard of its statutory and regulatory mandates, Plaintiff has been damaged because Plaintiff was not awarded the Section 1603 grant to which it was entitled.

WHEREFORE, Plaintiff respectfully asks this Court to enter judgment in its favor and against Defendant and to:

(a) Award Plaintiff monetary relief in the amount of the grant to which Plaintiff is entitled under Section 1603: \$1,767,577, representing the 30% grant amount applied for (\$2,711, 331), less the amount previously awarded (\$943,754);

(b) Vacate the Treasury's final determination regarding Plaintiff's applications for the 1603 grants;

(c) Award such other and further relief as justice may require.

PRAYER FOR RELIEF

40. Plaintiff hereby respectfully requests that judgment be entered in its favor as follows: That the Court grant judgment in Plaintiff's favor in the amount of \$1,767,577, together with pre- and post-judgment interest, and for such court costs, litigation expenses, and attorneys' fees as are available under applicable law, and for such other relief as this Court may deem necessary and proper.

Dated: January 18, 2013.

Respectfully submitted,

W.E. PARTNERS II, LLC

By:  _____

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