[Bond Case Briefs]

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BUILD AMERICA BONDS - INDIANA

[Indiana Municipal Power Agency v. United States]

United States Court of Federal Claims - July 23, 2021 - Fed.Cl. - 2021 WL 3123777 - 128 A.F.T.R.2d 2021-5316

Public-sector power providers filed suit against United States, claiming violation of statutory duty, under American Recovery and Reinvestment Act (ARRA), and breach of contract by IRS failing to refund 35% of interest payable under their Direct Payment Build America Bonds (BABs) that they had issued under authority of ARRA.

Government moved to dismiss for failure to state claim.

The Court of Federal Claims held that:

- Claims were within Tucker Act jurisdiction;
- Refunds of interest under BABs were subject to sequestration;
- Issuers' characterizations of payments could not prevent sequestration;
- Sequestration reduced amount of refunds owed to issuers; and
- Government contract was not formed for refund payments.

Issuers of Direct Payment Build America Bonds (BABs), under American Recovery and Reinvestment Act (ARRA), asserted claims against United States that were within Tucker Act jurisdiction, for alleged violation of statutory duty under ARRA and breach of contract by failing to refund 35% of interest payable under BABs, since ARRA was separate money-mandating statute that created payment obligation on government, and issuers alleged nonfrivolous claim of contract with United States.

Statute providing funding for tax refunds to pay issuers of Direct Payment Build America Bonds (BABs), under American Recovery and Reinvestment Act (ARRA), did not constitute "appropriation Act," but rather authorized "direct spending," and thus, issuers' refunds of 35% of interest payable for their BABs were subject to sequestration, under Budget Control Act and American Taxpayer Relief Act, that permanently canceled budgetary resources, including direct spending, defined as budget authority provided by law other than appropriation Acts, since BABs were not statutorily listed as program exempted from sequestration.

Issuers of Direct Payment Build America Bonds (BABs), under American Recovery and Reinvestment Act (ARRA), could not preserve from sequestration full payment of tax refunds of 35% of interest under their BABs, by characterizing payments as "overpayment" of taxes or as "obligated funds," since payments to bond issuers were funded through statute that was subject to sequestration with respect to tax refunds to issuers of BABs, and government did not obligate funds for life of BABs, as obligation arising from BABs arose not when they were issued but only after IRS timely received and processed government form from issuers, so government's payment obligation did not extend beyond year processed.

Government was statutorily required to reduce its payment obligations for tax refund of 35% of interest payable to issuers of Direct Payment Build America Bonds (BABs), under American Recovery and Reinvestment Act (ARRA), due to subsequent enactment of Taxpayer Relief Act, imposing sequestration that permanently canceled budgetary resources, including direct spending such as funding for tax refunds to pay issuers of BABs, since spending cuts implemented by later-enacted Taxpayer Relief Act and Budget Control Act were irreconcilable with ARRA's 35% payment rate and reduced government's payment obligation by sequestration.

Government did not intend to create contract to be bound to pay tax refund of 35% of interest payable to issuers of Direct Payment Build America Bonds (BABs), under American Recovery and Reinvestment Act (ARRA), that did not frame authorized payments under BABs as contractual obligation, but rather, merely set forth payment program for issuers of qualifying BABs.

Issuers of Direct Payment Build America Bonds (BABs) waived any argument based on additional documents to establish existence of contract with United States, where issuers did not plead contract based on those documents in their amended complaint, they did not raise that argument in opposition to government's motion to dismiss, and they disclaimed that argument at oral argument.