Coronavirus Impact on Economic Development Credit and Incentive Agreements

Article By:

Lynn A. Gandhi

David G. Cabrales

With the economic disruption of the COVID-19 pandemic certain to continue through the end of 2020, now is the time to consider the impact of the virus on year-end reporting obligations, particularly those that relate to existing economic development credit and incentive agreements. Most credit and incentive agreements contain company obligations for employment levels, taxable revenue, and/or capital investment that may have been impacted by a variety of pandemic-related factors including: stay at home orders, limited re-opening restrictions, reduced demand, and supply chain disruptions. Before your company finds itself facing potential noncompliance, consider the below questions.

Does your Company have credit and incentives agreements for state and local discretionary tax credits, grants, forgivable loans, abatements, or other awards?

These agreements often have reporting and compliance deadlines which are managed at the local level. With restricted operations, work-from-home, and telecommuting, those responsible for collecting and reporting the necessary information may be engaged by higher priority assignments to ensure the safety of employees and customers.

Can your Company meet the established obligations?

Full and partial shutdowns, reductions in force, decreased product demand, supply chain challenges, and logistic workarounds have increased the difficulties in forecasting employment levels and capex expenditures. If your company is preparing workforce and revenue forecasts for use in other areas of the company's operations, those forecasts should be compared against future obligations under existing credit and incentive agreements.

Does the agreement have a force majeure, market conditions, recession, or termination provision?

Such provisions can provide opportunities to renegotiate obligations to the satisfaction of both parties without public exposure or the threat of litigation.

Have you communicated a consistent message to all the stakeholders, including the governmental entity?

Especially with larger awards, governmental entities routinely review company media releases, analyst reporting, and other publicly available information about companies. If there are concerns, have they been the subject of a media release, analyst call, or other public release? If so, have they been effectively communicated to the governmental entity?

Would your company benefit from renegotiating or terminating the agreement?

Coupled with the uncertainly that will continue into 2021, opportunities may exist to obtain benefits that will extend beyond 2020. As the economic impact of the pandemic drags on, governmental entities will likely be approached by more and more companies seeking to revise or terminate economic development credit and incentive agreements. Thus, early engagement with a governmental entity might result in a more receptive audience and a potentially better outcome.

In summary, it is important for recipients of economic development credit and incentive awards to review their current obligations under such agreements and consider the options that are available to proactively address, and mitigate the risk associated with, noncompliance and potential defaults.

National Law Review, Volume X, Number 188