

Federal Grants and Loans for Renewable Energy and Cleantech Projects

Bill Malley, Perkins Coie LLP
July 2009

AGENDA

- 1 Tracking Funding Opportunities**
 - What competitive grant and loan programs are available for renewable energy and cleantech companies?
 - How can I find out about opportunities?
 - Are all the good opportunities gone?

- 2 Evaluating Funding Opportunities**
 - What should I look for when reviewing a funding opportunity announcement?
 - What decisions will I need to make when developing my proposal?

- 3 Preparing and Filing an Application**
 - What type of information does DOE typically require in an application?
 - How long does it take to prepare an application?
 - How is an application actually filed?

- 4 From Filing to Award**
 - What are the initial steps in DOE's review process?
 - What does "merit review" involve"?
 - What other steps are involved in DOE's decision-making?

- 5 Legal Issues**
 - FOIA: Will my trade secrets and other confidential information be disclosed?
 - IP Rights: Will DOE seek an ownership interest in my IP rights?
 - ARRA Lobbying Restrictions: Can I use a lobbyist? What restrictions apply?
 - ARRA Reporting: What reports must be filed? Are they made public?

- 6 Tips for Applicants**

1 Tracking Funding Opportunities

1.1 What competitive grant and loan programs are available for renewable energy and cleantech companies?

The U.S. Department of Energy administers several programs that provide funding – in the form of grants, loans, or loan guarantees – for renewable energy and cleantech projects. These programs were created under several laws, including the Energy Policy Act of 2005, the Energy Independence and Security Act of 2007, and American Recovery and Reinvestment Act of 2009 (ARRA). Major programs are summarized below.

- In 2005, Congress created the **DOE Loan Guarantee Program**. With funding provided in the Recovery Act, DOE can issue up to \$60 billion in loan guarantees.
 - DOE issued its initial solicitation in 2006 and issued more solicitations in 2008. DOE recently announced the initial recipients of loan guarantees from the 2006 round. Applicants for the 2008 round are still being considered.
 - The DOE is working on measures to expedite this program and to conform to the Recovery Act. DOE is expected to issue additional solicitations this year.
- In 2007, Congress created the **Advanced Technology Vehicle Manufacturing Program**. DOE has authority to issue up to \$25 billion in ATVM loans.
 - DOE issued regulations implementing this program in November 2008. The initial application deadline was December 31, 2008. DOE received more than 70 applications, and rejected approximately two-thirds as incomplete.
 - DOE recently announced conditional commitments to approve ATVM loans to three applicants. DOE is now considering applications on a rolling basis.
- In 2009, as part of the **Recovery Act**, Congress created or expanded funding for a wide range of grant programs. The Recovery Act grant programs vary greatly in size – from less than \$10 million to more than \$1 billion. They include funding for:
 - Renewable energy: biomass, geothermal, solar, wind
 - Industrial energy efficiency
 - Smart grid
 - Electric vehicles
 - Energy-efficient lighting

1.2 How can I find out about these opportunities?

- Easiest for tracking existing opportunities:
 - DOE's Recovery Act site: <http://www.energy.gov/recovery/funding.htm>.
 - DOE's EERE site: <http://www1.eere.energy.gov/financing/business.html>
 - DOE's Loan Guarantee Program: <http://www.lgprogram.energy.gov/>.
 - DOE's ATVM Loan Program: <http://www.atvmloan.energy.gov/>
- Comprehensive listings available at
 - FedConnect: <https://www.fedconnect.net/FedConnect/>
 - Grants.gov <http://www.grants.gov/> (grants only, not loans)
- There are privately operated paid-subscription sites, such as:
 - Economic Recovery Grants Center: <http://www.grantsinfocenter.com/>

1.3 Are all the good opportunities gone?

- Many of the initial deadlines for Recovery Act grants have already passed, or are approaching in the coming weeks (late July through late August). But applicants who do not apply for the current rounds will have additional opportunities.
 - There will likely be additional rounds of solicitations for several of the Recovery Act grant programs – e.g., Smart Grid.
 - The ATVM loan program is accepting applications on a rolling basis (not through solicitations). Applications can be submitted any time.
 - The Loan Guarantee program is likely to be re-launched soon with additional solicitations. It is by far the largest DOE funding program for renewable energy and cleantech businesses.
 - In future legislation, Congress may provide additional funding – for example, there are proposals to double the size of the ATVM loan program (increasing it to \$50 billion)
 - Congress also may streamline the way funding is provided – for example, there are proposals to create a "Clean Energy Deployment Administration" (CEDA). In some proposals, the CEDA would supersede the Loan Guarantee program; in others, CEDA would be separate from that program.

2 Evaluating Funding Opportunities

For most programs, the application process opens when DOE issues a document known as a "solicitation" or "funding opportunity announcement" (FOA).¹ The FOA is typically lengthy (40 to 60 pages) and may include attachments. Deadlines are often very short (45 to 60 days), and extensions – especially for Recovery Act programs – are rare. Therefore, applicants need to be able to review an FOA quickly, and then decide whether to invest resources in filing an application.

2.1 What should I look for when reviewing a funding opportunity announcement?

- The first thing to check is the deadline, of course ... In addition, consider:
- Eligibility of the Applicant. Who is eligible to apply? Are there any restrictions that could limit your ability to apply? Example: ARPA-E prohibited companies "owned or controlled" by foreign entities from applying as the lead applicant.
- Eligibility of the Project. What specific activities are eligible for funding? Does the FOA specifically *exclude* certain activities from funding? How do these parameters match up with the scope of your proposed project?
- "Areas of Interest". Does the FOA identify specific subcategories – sometimes called 'areas of interest' – within which applications will be considered? Are you required to identify a single AOI for your proposal? If so, which one fits best?
- Cost Share. What is the minimum amount that you are required to contribute? This amount must be contributed from non-federal funds. It is typically 50% for grants, but the requirements vary among different programs.
- Award Sizes and Number of Awards. Does the FOA set maximum and minimum levels for award sizes? Does it indicate the likely number of projects that will be funded? This often varies depending on the Area of Interest.
- Evaluation Criteria. What "merit review factors" will be used to evaluate the applications? How well does your proposal match up with these criteria?

¹ In the ATVM loan program, DOE considers applications on a rolling basis. Applications can be submitted at any time. Application requirements are defined in the ATVM regulations, not an FOA.

- Application Elements. What information must be included? Does the application require any specialized reports – e.g., engineer's reports, environmental reports, credit assessments?
- Steps Before an Application is Filed. Is a letter of intent requested or required? Is a pre-application required? How much information is needed for this preliminary step, and what is needed for the application itself? Will DOE provide feedback on the preliminary submittal? If so, in what time frame?
- Steps After an Application is Filed. What are the steps in DOE's review process after applications are submitted? What is the timeframe? Are there additional submittals that may be needed after the application itself is submitted?
- Application Fee. Is an application fee required? For example, the Loan Guarantee program required a non-refundable application fee.
- Certifications and Assurances. What certifications must be made – e.g., regarding payment of "prevailing wage," compliance with lobbying laws, and other matters. Are signatures required, and by whom?

2.2 What decisions are needed when developing the proposal?

In parallel with reviewing the FOA, you will also be making decisions about your own proposal, in relation to the FOA's application requirements and evaluation criteria.

- The "Applicant". The applicant could be a single entity, or there could be a lead applicant with additional team members. The identity of the applicant can be important in establishing eligibility and also may be influenced by application strategy considerations.
- The "Project". The "project" for purposes of the application must fit the eligibility criteria as defined in the FOA. Often, an applicant's internal definition of a project may encompass elements that are eligible for the FOA as well as elements that are not eligible. An eligible "project" needs to be defined, and all of the necessary information – budgeting, etc. – needs to be prepared for that "project".
- The Budget and Schedule. The application typically requires a detailed plan for carrying out the project, including a budget and schedule. The FOA may influence the proposed budget and schedule – for example, the project may need to be initiated and/or completed by a certain date in order to qualify for funding.

3 Preparing and Filing an Application

3.1 What type of information does DOE typically require in an application?

- There is no standard application. Requirements vary among programs, sometimes significantly. Typical requirements include:
 - Application Form. Grant applications require a standard form, the SF-424. It is a standard form, used government-wide, for competitive grant programs.
 - Summary/Abstract. This is typically a one-page document, which provides a high-level overview of the proposed project.
 - Narrative. This document is typically a 10 to 20 page document (page limits vary). It describes the project objectives and the activities to be carried out, and explains how the project fulfills each of the merit review criteria. It is the heart of the application. The FOAs often define in some detail the required elements of the narrative.
 - Project Management Plan. This document is separate from the narrative, and includes much more detail on the implementation of the project – the schedule, spending plan, key milestones, risk management strategies, etc.
 - Funding Plan. The applicant must describe the sources of funds for the non-DOE share of the project's costs. If these funds will be provided by third parties (i.e., not the applicant), the applicant typically must provide commitment letters from those other parties.
 - Budget. The application must include a detailed budget, using a standard spreadsheet provided by DOE (Form SF-424A). This budget must consist solely of costs associated with an eligible "project," including costs to be funded by DOE and costs to be funded by the applicant.
 - Environmental Questionnaire/Environmental Reports. The application must contain information about the potential environmental impacts of the proposed project. This could be simple (a questionnaire) or more detailed (environmental reports), depending on the project. The DOE will use this information as the starting point for complying with NEPA (see below).

- Project Location. The application must include a form that describes the project site – the primary location where the work will be performed.
 - Biographical Information. The application must identify key personnel and provide biographical information about each of them. In some cases, the required information is quite detailed – a full CV, not just basic information.
 - Lobbying Disclosure. This form, known as SF-LLL, must be submitted if the applicant has expended any funds for lobbying in connection with the proposed grant or loan. This form must be signed by the lobbyist.
- For the Loan Guarantee Program and the ATVM program, application requirements are specified in federal regulations. These requirements tend to be more complex, especially the Loan Guarantee program.

3.2 How long does it take to prepare a complete application?

- Preparing an application demands a substantial, sustained commitment of applicant resources. It requires the engagement of senior executives. It is not simple or quick.
- The time needed to prepare a thorough application, fully responsive to DOE's requirements, can range from several weeks to several months.
- A practical reality, for many applicants, is that they only have a few weeks to prepare an application. The feasibility – and wisdom – of filing an application on a rushed basis must be assessed on a case-by-case basis.

3.3 How is an application actually filed?

- The FedConnect web portal, www.fedConnect.net, is a secure website used by the federal government to communicate with businesses and others who are seeking federal contracts or federal financial assistance.
- The FedConnect website is used for:
 - Posting funding opportunities in a searchable format
 - Providing updates to bidders during the application process – e.g., by posting changes to application deadlines

- Accepting applications (applicants actually upload the application forms through the FedConnect website in electronic format).
- For most programs, FedConnect is the only way to file an application. Therefore, it is critically important for applicants to be registered prior to the deadline.
- Registering for FedConnect can be a time-consuming process. Applicants must first obtain a DUNS number, then register in the Central Contractor Registration (CCR) database, and then use their CCR number to register with FedConnect. DOE recommends allowing 21 days to complete this process.
 - DUNS number: <http://fedgov.dnb.com/webform>
 - CCR: <http://www.bpn.gov/ccr/>
 - FedConnect: <https://www.fedconnect.net/Fedconnect/default.aspx>

4 From Filing to Award

4.1 What are the initial steps in DOE's review process?

The process for reviewing an application varies by program, but in most cases the process involves two initial screening steps, before the agency evaluates the merits of the application:

- Completeness Review. The DOE initially reviews applications to determine if the required elements have been included. Applications that are deemed substantially complete are then carried forward for more in-depth review; all other applications are rejected.
- Eligibility Review. At this step, the DOE reviews each application to determine if the *applicant* and the *project* meet the eligibility requirements. The eligibility determination is straightforward in some cases, but complex in others. For example, under the ATVM program, an applicant's eligibility depends on whether DOE considers the applicant to be "financially viable" without the loan. Two large auto-manufacturers were rejected for ATVM loans on this basis.

In a competitive process, applicants can gain substantial strategic advantage simply by surviving these two initial screens – because in many cases, they are then competing with a much smaller field of remaining applicants.

4.2 What does 'merit review' involve?

- Merit Review Criteria. The FOA defines the evaluation criteria that will be used as the basis for a merit review of the competing applications.
- Merit Review Process. The DOE has established a standard merit review process, which is used for all competitive grant applications. This process is intended to ensure that the merit review criteria are applied by independent, objective reviewers with relevant technical expertise.
- Merit Reviewers. The reviewers may be DOE staff, but in many cases they are consultants retained by DOE. The FOAs typically include a statement notifying applicants that DOE may "seek the advice of qualified non-federal personnel" as technical reviewers. All non-federal personnel are required to sign conflict-of-interest statements and non-disclosure agreements.

- Duration of Merit Review. The time needed to complete the merit review process can vary greatly – from several weeks to many months. It depends on the number and complexity of the issues, the quality of the information presented by the applicant, and the DOE's internal procedures and resource constraints.

4.3 What other steps are involved in DOE's decision-making?

The application process also several additional hurdles for applicants, which must be overcome before funding can be approved and released. Key steps include:

- NEPA Review. DOE must comply with the National Environmental Policy Act (NEPA), which requires DOE to consider the environmental impacts of projects that the DOE funds, approves, or undertakes. NEPA compliance is straightforward for projects with little or no impact, which can usually be approved with a Categorical Exclusion (CX). Other projects involve a higher level of NEPA review, known as an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). An EA can take several months to prepare, and an EIS usually takes more than a year. For an EA or EIS, the NEPA process includes public review and comment on the proposed project.
- Financial/Credit Reviews. DOE also conducts an in-depth financial review of the applicant, to ensure that the applicant's financial projections and project budgets are realistic. The nature of this review varies depending on whether the applicant is seeking a grant, loan, or loan guarantee. In the loan and loan guarantee programs, all applications are reviewed by DOE's Credit Review Board prior to approval.

5 Legal Issues in the Application Process²

5.1. Can FOIA be used to force the disclosure of information in an application?

- As a federal agency, DOE is required to comply with the Freedom of Information Act (FOIA). In general, FOIA requires federal agencies to disclose records in the agency's possession, unless those records fall within a specific exemption.
- "Exemption 4" under FOIA allows an agency to withhold "trade secrets and commercial or financial information" that the agency obtains from another person, such as an applicant.
- In the application process, an applicant can designate information that the applicant believes should be withheld under Exemption 4. Before releasing any such information, DOE is required to check with the applicant. Ultimately, DOE makes the call as to what is released.
- Thus, there is a possibility that information deemed confidential by the applicant could be released in response to a FOIA request.

5.2 Will DOE seek ownership of IP rights as a condition of the grant or loan?

- DOE's position regarding ownership of IP rights depends on the nature of the program and the work being funded.
- By statute, DOE has certain rights to an invention that is conceived or first actually reduced to practice under a DOE award. But DOE can waive those rights subject to certain conditions. Thus, the acceptance of DOE funds creates at least the potential for DOE to assert an ownership interest in IP rights.
- The potential for a dispute over ownership of IP rights should be considered early in the process, and certainly before entering into an agreement with DOE.

5.3 What are the restrictions on the communications with agencies?

- Shortly after the Recovery Act was passed, the President imposing restrictions on federal agencies' communications with lobbyists in connection with any grant, loan, or other funding provided under the Recovery Act.

² This section addresses a few of the legal issues that arise in the application process. It is not an exhaustive list.

- The White House Office of Management and Budget (OMB) has issued guidance implementing the President's order. The guidance has been updated several times, most recently on July 24.
- The revised OMB guidance broadens the policy to limit communications with lobbyists and others outside the federal government (not just lobbyists).
- The strongest restrictions apply during the time between filing of an application and the award of funds. During this stage, federal agency officials are prohibited from engaging in "oral communications" that are "initiated" by any person or entity (outside the agency) concerning a pending application, whether or not the initiating party is a federally registered lobbyist.
- It is unclear how this new policy will be implemented in practice, but the policy will likely limit the ability of applicants to maintain regular informal communication with DOE during a crucial stage of the application process.

5.4 What reporting requirements apply under the Recovery Act?

- Section 1512 of the Recovery Act mandates quarterly reporting by all recipients of federal assistance under the Act. These requirements apply to competitively awarded grants and loans, as well as to other forms of assistance.
- On June 22, the OMB issued guidance describing the reporting requirements. The first reporting deadline is October 10, 2009.
- These requirements will apply to all entities that have received an award by that date, even if funds have not yet been distributed under that award.
- The reporting requirements are extensive. In addition to reporting on the amounts received and amounts spent, applicants also must report:
 - Number of jobs "created or retained" with the Recovery Act funds
 - Names and compensation of the recipient's top 5 officers
- The data must be reported to a new web portal, www.FederalReporting.gov, and will be publicly posted within weeks after its submittal on www.Recovery.gov.
- Additional information is available here: http://www.perkinscoie.com/news/pubs_detail.aspx?publication=2179&op=updates

6 Tips for Applicants

1. *Focus on eligibility first.* A threshold issue in any application process is eligibility. If your project isn't eligible, or your company isn't eligible, the application won't make it past the initial screening stage. Therefore, before launching a major effort to prepare an application, it is always prudent to scrutinize the eligibility requirements. If concerns are identified, you may be able to redefine the proposed project – but that becomes more difficult to do if the deadline is approaching.
2. *Define the "project" early, and use that term consistently.* The definition of the proposed project is the core around which the entire application – narrative, budget, management plan, etc. – will be developed. The project must be defined in a way that fully satisfies the eligibility criteria for the program. The term "project" should be used consistently throughout the application.
3. *Make it easy for your reviewers.* An application is a complex document, but there are steps an applicant can take to make it easy for reviewers to review and understand the application. Make it easy for DOE's reviewers to find all of the information required by the FOA; explain important technical concepts in plain English; use consistent terminology; rigorously proofread to eliminate errors and inconsistencies; include appropriate graphic; clearly label confidential information; and comply with all specifications in the FOA regarding the format, labeling, and organization of the application.
4. *Be attentive and responsive, but not pushy.* The filing of an application is the beginning of a process, not the end. After an application is submitted, applicants should be prepared for additional information requests, which can place substantial workload burdens on the applicant. At the same time, applicants must respect DOE's process, culture, and constraints. A respectful approach – grounded in an understanding of DOE's requirements – is prudent in any competitive application process.
5. *Consider potential risks to ownership of your IP.* Acceptance of federal funding could give DOE a claim to ownership of intellectual property generated by activities funded with those grants or loans. In addition, the public disclosure of information about an invention could compromise claims to patentability. The time to consider IP risks is *before* submitting information to the government.
6. *Register early with FedConnect.* With few exceptions, applicants are required to submit their applications through the FedConnect website. Registration with FedConnect can take weeks. Applicants should register well before the deadline.