

To: NAESCO Members
From: Donald Gilligan
Re: Status of SEP and EECBG Funding
February 12, 2010

This memo is designed to provide information to companies that have pending projects that expect funding from the SEP and/or EECBG programs. The information is based on NAESCO meetings with Congressional staffers and US DOE officials, DOE Guidance documents issued in the last few weeks, quarterly reporting by US DOE and conference speeches delivered by US DOE officials during the past three weeks.

While the memo highlights each of the compliance requirements and process issues that are slowing down dissemination of the federal monies to a crawl in real world terms, the takeaway is to stay on top of any applications your company has in place with the relevant government entity and make sure all paperwork is being provided to the relevant federal or state review office in as timely a fashion as possible.

Please reply to the recent Request for Information issued by DOE about the degree to which the product used in ESCO projects may meet some of the review exceptions and might ultimately permit projects to go forward without at least some of the compliance reviews currently required. This RFI was sent to NAESCO members earlier this week.

The Guidance documents referred to in the memo are available on the NAESCO website at: <http://www.naesco.org/resources/arra/default.htm> or on the DOE website at http://apps1.eere.energy.gov/state_energy_program/recovery_act_program_guidance.cfm

Overview

It is useful to put the SEP and EECBG funding in perspective of the overall ARRA program. According to the official federal government website (www.recovery.gov), as of January 29, about 35% of the ARRA funds (\$272 billion of the appropriated \$787 billion) have been paid out by the federal government.

DOE reports that it has paid out about 6.5% (\$2.1 billion of the authorized \$32.7 billion) of its ARRA funding. The “authorized” figure does not include the Loan Guarantee program, another \$4 billion. (www.energy.gov/recovery/)

Drilling down further to the programs that are administered by the Office of Energy Efficiency and Renewable Energy (EERE), the figures are \$16.8 billion authorized and \$687 million spent (about 4%).

Detail on SEP and EECBG Programs

At the NASEO conference last week, DOE officials provided further detail about the status of funding in the SEP and EECBG programs. Before you look at the numbers, make sure you understand the categories that DOE uses in its program accounting, as follows:

Authorized: Funding that Congress approved in the ARRA.

Awarded (also called Obligated or Committed): Funds that DOE has awarded to state (SEP) or local government (EECBG) grantees. Awarded funds are often subject to *Conditions* (see discussion below) and cannot be spent until the Conditions are removed.

Obligated by Grantees: Funds that have been committed by grantees (state and local governments) to specific programs (*e.g.*, public buildings retrofits) or specific projects (*e.g.*, high school ESPC project). Obligated funds are often subject to *Conditions* (see discussion below) and cannot be spent until the Conditions are removed.

Spent (also called Costed): Funds that have actually been paid by the federal government to the state and local government grantees. This does not mean that the funds have actually been paid by the grantees to sub-grantees, ESCOs, contractors and/or other vendors.

SEP Program

The figures presented on the SEP by Mark Bailey from US DOE at the NASEO conference last week are as follows:

Authorized: \$3.1 billion
Awarded: essentially all
Completed NEPA review (see *Conditions* discussion below): \$1.7 billion
Obligated by States: \$545 million
Spent: \$44 million (1.4%)

EECBG Program

The figures presented on the EECBG program by Mark Johnson of US DOE at the NASEO conference last week are as follows:

Authorized: \$3.2 billion
Authorized for formula grants: \$2.7 billion
Authorized for competitive grants (*e.g.*, Retrofit Ramp-up): \$454 million
Awarded: \$2.3 billion
Awarded without conditions: \$834 million
Obligated by grantees: about \$500 million
Spent: \$78 million (2.9% of formula grants)

Interpreting the Numbers

DOE has been scrambling for the last year to re-organize and staff up to handle the unprecedented size of the SEP and EECBG programs, which grew from less than \$50 million in FY09 to about \$6.3 billion for FY10-11. In order to accelerate the process, DOE decided to award virtually all of the funds to the grantees, subject to *Conditions* (see below). DOE's reasoning was that this approach would allow the grantees to begin their own competitive grant processes in parallel with DOE's working to resolve the *Conditions*, rather than wait until after DOE's resolution of the *Conditions* to begin their processes. So it takes a fair amount of digging to find out how much money from a particular award can actually be spent now.

- DOE reports that all of the SEP money has been awarded to the 56 eligible states and territories, and more than half has completed NEPA review (see *Conditions* below). The SEP application process is simpler than the EECBG process, because states have been running modestly funded SEP program for three decades, and the ARRA applications have the same types of programs. About 55% of the SEP grant funding has cleared NEPA review (one of the major *Conditions*), but it is not clear how much of the funding has cleared all reviews.
- DOE reports that about 85% of the \$2.7 billion EECBG formula funding has been awarded to 2,359 state and local government applicants. The EECBG applications are more complex than SEP applications, because the EECBG program had not been funded before ARRA, and the EECBG applications require two steps -- an initial application and a local government energy strategy. Very few local governments had experience with developing energy strategies and DOE was not staffed to review the number of applications it received. When DOE reports that about \$834 million, or about 31% of the \$2.7 billion, has been awarded without conditions, we think that means that these grantees have cleared the first review (applications), but not the second review (strategies). The rules of the EECBG program allow the grantees to receive a small portion of their funding to pay for the completion of their strategies, so it appears to NAESCO (but this is just a guess) that the majority of the funds spent to date have been spent on the strategies, not on programs or projects.

Who's to Blame?

With this record of performance, the blame game between the grantees and US DOE, which has been largely behind the scenes for a few months, has now broken out in public. Last Friday, the *Wall Street Journal* ran an article featuring DOE Secretary Chu blaming the states in his testimony before a Senate Committee, and Phil Giudice, Director of the Massachusetts Division of Energy Resources and President of NASEO, blaming DOE. This article essentially repeated the exchange during a panel at the Midwestern Energy Efficiency Alliance (MEEA) in mid-January, which featured a DOE staffer blaming the states and the states blaming DOE.

The immediate result of this public finger pointing seems to be that NAESCO's advocacy of more money in the pending Jobs Bill for MUSH market retrofits has hit a brick wall. Congressional staffers simply don't believe that additional money can be put to work in a timely fashion.

Conditions

There are four major issues that constitute the Conditions are holding up the distribution of SEP and EECBG funding. These issues involve the application of longstanding federal statutes to the SEP and EECBG programs. Though these statutes may seem like an annoyance to ESCOs, it is important to recognize that each represents the culmination of a long political battle, and each represents established national policy supported by substantial constituencies. A brief description of each issue and its current status is provided below. In reviewing this information, bear in mind that addressing the issues is a complex effort that often involves several steps.

- In the first step, DOE made an assessment about the extent to which each statute applies to the programs. In its initial program guidance documents and Federal Opportunity Announcements issued last winter, DOE cautioned SEP and EECBG applicants to assume that all four statutes applied to their programs.
- In the second step, after DOE came to grips with the staggering number of reviews it might have to conduct (every program and project submitted by every applicant), it reviewed the statutes to determine if it might be able to determine that certain types of programs or projects are really exempt from one or other statute, and are thus subject to Categorical Exemptions (CX in DOE shorthand).
- In the third step, after it issues guidance on Categorical Exemptions, which is an ongoing process, DOE reviews the applications to determine that the proposed programs or projects comply with the guidance and are Categorically Exempt. This review may be as simple as the grantee filing an affidavit stating that it is in compliance, or it may involve a thorough review by the assigned DOE contract officer or specialized compliance staff.
- In the fourth step, which actually runs in parallel with the third step, DOE reviews on an individual basis the programs and projects that are not Categorically Exempt.

National Environmental Protection Act (NEPA)

NEPA requires either Environmental Assessments (EA) or Environmental Impact Statements (EIS) for any project involving federal funding that "may have a significant impact on the human environment." NEPA compliance is the responsibility of DOE, not the state or local government grantees, so DOE is being very cautious. NEPA is sacred to the environmental community, who are the natural allies of the EE community on most issues, but who will not broach

any shortcuts on NEPA review of ARRA funding, for fear that such shortcuts are “the camel’s nose under the tent” that will begin to undermine NEPA.

It is fair to say that DOE has been overwhelmed by the amount of work required to assure NEPA compliance. Before ARRA very few SEP projects required NEPA review, since most state SEPs involved studies and energy audits rather than large-scale project funding. Before ARRA, there were no EECBG projects. Under ARRA, DOE has already completed 5,000 NEPA reviews, according to the DOE General Counsel, but there is still a significant backlog. DOE issued a guidance document on NEPA in late December (see URL below), which contains several types of Categorical Exemptions. DOE realized in mid-January that the National Renewable Energy Laboratory (NREL) in Golden, CO was a real bottleneck and dispatched a SWAT Team from DOE HQ to try to break the jam.

http://apps1.eere.energy.gov/state_energy_program/doe_guidelines_nepa.cfm

Bottom Line: Any project that requires a full EIS, such as a large green field solar panel installation, will probably not get approved in a timely fashion. Projects under \$2 million that involve only standard EE retrofits inside a building are probably CX. Keep checking with your state Energy Office to make sure that they are submitting the required paperwork to DOE. Offer to help the Energy Office complete the paperwork. Then stay on top of the Energy Office to make sure they are getting timely responses from DOE.

Davis-Bacon (Prevailing Wage)

ARRA requires that any project receiving ARRA funding comply with the Davis-Bacon Act, which means that all workers on the project must receive prevailing wages. ESCOs working in the MUSH market or in federal markets are familiar with this requirement, since it has been in place for decades in many jurisdictions, and generally have systems and procedures in place to handle the necessary bookkeeping and reporting. ESCOs that specialize in the residential market may have little or no experience with Davis-Bacon, since it has not previously been applied there. Until ARRA, low-income weatherization programs were exempt from Davis-Bacon, but that exemption was removed under ARRA.

Davis-Bacon is very important to organized labor, which has a powerful voice in the Obama Administration. Unions have been involved in negotiating with both the Department of Labor (which enforces Davis-Bacon) and with DOE, which has been trying to figure out how to apply Davis-Bacon to ARRA programs. The result of this negotiation was the establishment of a new wage rate category for Weatherization workers who are not skilled tradesmen.

DOE issued guidelines for the application of Davis-Bacon in late December and early January (see attached documents). These guidance documents refer users to the Department of Labor (www.wdol.gov) for the applicable wage rates in a jurisdiction. Further information can be found at the following URL:

http://apps1.eere.energy.gov/state_energy_program/recovery_act_program_guidance.cfm

Bottom Line: Davis-Bacon applies to all ARRA projects except residential projects in which a homeowner gets a direct rebate and/or financing. Appliance rebate programs are also exempt. Davis-Bacon is enforced by the Department of Labor, not DOE, and the responsibility for compliance is on the ARRA grantee, which will usually assign that responsibility, as a contract term, to the ESCO or contractor that is implementing the project.

Buy American

The DOE guidance document on the Buy American provision of ARRA (issued in late December) is the clearest presentation of the issue. Here are the relevant excerpts.

“The Buy American provision in the American Recovery and Reinvestment Act of 2009 (section 1605 of Title XVI), provides that, subject to three listed exceptions, none of the funds appropriated or otherwise made available by the Act may be used for a project for the construction, alteration, or repair of a public building or public work unless all the iron, steel, and manufactured goods used are produced in the United States.

1. The first exception is that applying the Buy American Recovery Act provisions would be inconsistent with the public interest.

The definition of “inconsistent with public interest” shall be interpreted by DOE on a case-by-case basis when considering waiver requests.

2. The second exception is that the iron, steel and relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality (“Nonavailability”).

The definitions of “sufficient and reasonably available quantities” and “of a satisfactory quality” shall be interpreted by DOE on a case-by-case basis when considering waiver requests. Applicants and recipients who would like to request a waiver of the Buy American requirements for their project based on its nonavailability, should prepare their request in accordance with the instructions provided in CFR 176.140(c), and summarized below.

3. The third exception is that the inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent (“Unreasonable Cost”).

The definitions of “sufficient and reasonably available quantities” and “of a satisfactory quality” shall be interpreted by DOE on a case-by-case basis when considering waiver requests.”

Since this guidance document was issued, DOE has announced that it is considering the possibility of Categorical Exemptions for certain types of

equipment that meet either the second or third exceptions above. DOE has said that it will shortly decide (before Snowmageddon, it was supposed to be this week) to issue Categorical Exemptions for fluorescent ballasts, CFL bulbs and LED bulbs.

DOE also issued a Request for Information, asking SEP and EECBG grantees, as well as all other program stakeholders, to submit detailed data on equipment they believe meets one or more of the exceptions. The RFI was issued last week. Responses are due next Thursday, February 18.

If you respond to the RFI, please send a copy of your response to NAESCO, so that we can track and consolidate the information from all of the ESCOs. This will enable us to follow up with DOE and to make ESCO responses more effective, by, for example, combining responses from several ESCOs about a particular type of equipment into a single response that contains all of the information that DOE requests.

Bottom Line: If you have a project that needs equipment that you think meets the criteria for a Buy American exception, which is not included in any Categorical Exemptions that may be issued, you will have to apply for a waiver. As noted above, DOE is evaluating these waiver requests on a case-by-case basis. Information on how to apply for a waiver can be found at the following URL:

http://www2.eere.energy.gov/recovery/buy_american_provision.html

National Historic Preservation Act (NHPA)

The final issue that may delay some SEP and/or EECBG projects is Historic Preservation. It is not clear to NAESCO how big an issue this is in the field, so we would like to get feedback from ESCOs.

Section 106 of the National Historic Preservation Act requires entities using federal funds in historic properties or potentially historic properties to submit appropriate documentation to the State Historic Preservation Office (SHPO) prior to completion of work to ensure that there is no adverse affect on the property. A historic property is identified as on or eligible for the National Register of Historic Places. There are levels of significance required for eligible properties, but the minimum requirement is an age of 50 years or older.

While a relatively few MUSH market buildings are on the National Register, a large number are potentially eligible because they are more than 50 years old. DOE does not control this issue; it is in the hands of the State Historic Preservation Offices (SHPO). DOE announced at the NASEO conference that it has negotiated a national MOU with the SHPOs to exempt home retrofit projects from review.

As with other *Conditions* discussed above, the problem with Historic Preservation is that the responsible agencies, in this case the SHPOs, do not seem to have been

prepared for the volume of work that ARRA requires. They have never before dealt with a federal program that provides energy efficiency retrofit funding for hundreds of potentially historic buildings.

On February 11, DOE issued a Guidance document on Historic Preservation that establishes a streamlined procedure for state and local government grantees to use to conform to the provisions of Section 106 of the NHPA. The Guidance document is based on the August 2009 delegation of DOE responsibility for NHPA compliance to the State Historic Preservation Officers (SHPO) and the February 5 agreement between DOE and the national Advisory Council on Historic Preservation (ACHP) describing an expedited process for handling NHPA compliance.

The expedited process involves several steps. *Note that if a grantee has already established a process with the SHPO, that process supersedes this Guidance. So if your project has already cleared NHPA review, or is in the review process, you will not have to start the review again.*

- The state SHPO executes a Programmatic Agreement (PA) with DOE and DOE incorporates the terms of the PA into each SEP and EECBG grantee's award contract. Grantees will include these PA terms into each sub-grantee's award. DOE has provided a template PA as part of its February 11 Guidance.
- The template PA specifies that most measures (called "undertakings" in the legal language) in ESCO projects are exempt from NHPA review. In simple terms, if you cannot see the measure from the street, it is exempt. The list of exempt measures for SEP and EECBG projects is contained in Appendix B to the template PA. The SHPO is not required to submit any documentation to DOE on the exempt measures. The ESCO may be required to submit documentation to the grantee verifying that its project measures are on the exempt list.
- If a project measure is not on the exempt list, then it goes through a detailed review process that is outlined in the PA. ESCOs may wish to consider dropping non-exempt measures from their projects.

Bottom Line: ESCOs who are implementing projects in buildings older than 50 years should check with their grantee or sub-grantee to understand if the state SHPO has executed the Guidance PA or has an alternate NHPA compliance process in place. ESCOs should then understand exactly what documentation is required by the SHPO. See the following URL for SHPO contact information: <http://www.ncshpo.org/find/index.htm>. ESCOs may want to offer to complete the necessary documentation for the grantee or sub-grantee to ensure that the documentation is submitted in a timely fashion and the project is not delayed.

DOE Hotlines and Information URLs

DOE has established several hotlines and information lines to enable grantees to get fast answers to program implementation questions. We think that these hotlines and information lines are only available to grantees or their designees, such as an ESCO that is helping a local government with its EECBG application or energy strategy. But it might help if ESCOs draft an inquiry for the grantee to submit to one of the hotlines.

Award and contract issues -- DOE General Counsel: gchotline@hq.doe.gov

Historic Preservation issues: historicpreservation@go.doe.gov

NEPA Compliance Officers (NCO) contact information--
http://apps1.eere.energy.gov/state_energy_program/doe_guidelines_nepa.cfm