



## DOE Financial Assistance Agreements

Van Ness Feldman assists clients with all types of financial assistance agreements with the Department of Energy (DOE), including the type of cooperative agreements used in conjunction with the Smart Grid grants for which selections were recently announced. Van Ness Feldman has considerable experience with large, complex DOE-supported energy projects, and has deep expertise in energy law matters. Moreover, a number of our members have had experience working within the DOE at senior levels. For all of these reasons, Van Ness Feldman is in an excellent position to assist clients in moving from selection to final award.

### *Key Issues*

Grant recipients that do not have a history of involvement with DOE financial assistance awards may find the applicable rules and requirements a bit baffling. The cooperative agreement typically includes the following key elements:

- A Notice of Financial Assistance Award (a cover sheet summarizing the terms of the grant)
- A statement of the scope, schedule and budget for the project
- A lengthy set of terms and conditions
- Special terms and conditions related to American Recovery and Reinvestment Act (ARRA) funding (if applicable)
- Standard intellectual property provisions
- Incorporation of DOE Financial Assistance Regulations by reference
- A Federal Assistance Reporting Checklist

Some of the elements are subject to negotiation. Others may not be negotiable, but determining their applicability to a particular project may require dialog with the DOE contracting officer. In our experience, the areas that deserve particular attention include:

- *Finalization of Scope, Schedule and Budget.* The parameters of the project are defined in the Statement of Project Objectives (or SOPO) and are managed and reported against the agreed upon scope, schedule, and budget.
- *Identification of Allowable Costs for Non-Federal Contribution.* While cost sharing awards typically contemplate reimbursable cash expenditures by the awardee, there may be opportunities for DOE to treat third party and/or in-kind contributions as allowable cost-share.

- *Protection of Intellectual Property and Rights in Data.* Where awardees are bringing confidential data or existing IP to a project (including from a vendor), or where new IP may be created during the course of the project, careful consideration must be given to DOE's practices regarding the designation, receipt, use, and ownership of data and IP related to the project.
- *Property Management Requirements.* Under the default terms in the DOE financial assistance regulations, DOE may be entitled to the return of project property or compensation at the end of a DOE-funded project. Moreover, property purchased with Federal funds may not be encumbered without prior DOE approval. Reaching agreement on these issues before finalization of the award may be critical.
- *Establishment of Reporting Requirements.* Project reporting obligations arise under the cooperative agreement and DOE regulations and may include management reports, scientific and technical reports, financial reports, property certifications, and closeout reports (the last of which should be negotiated at the outset). In addition, ARRA may impose additional reporting requirements on awardees. Awardees may have to adopt new internal reporting systems for compliance.
- *Flow-down Requirements.* Awardees must be aware of the impact of its DOE award on third party service and equipment providers. So-called "flow down requirements" may be applicable to such vendors, and the burden is on the awardee to ensure that specified obligations are included in their contractual arrangements with vendors.

Van Ness Feldman has experience in counseling clients on all of these areas.

### *Our Capabilities*

Van Ness Feldman brings substantial experience to bear in assisting clients with DOE financial assistance. We have successfully represented clients in DOE funding initiatives for many years. We currently serve as project counsel to the FutureGen Industrial Alliance, which is developing a multi-billion dollar, zero-emission, coal-fired power plant under a DOE cooperative agreement. We have supported a number of clients in developing successful applications for ARRA funding, and we are now counseling clients on the legal, regulatory and contractual issues associated with ARRA funding and DOE financial assistance agreements. Finally, eight of our professionals have worked at DOE in senior positions, giving them important insights into the workings of the Department.

Whether in the form of a grant, loan guarantee, tax credit, or other financial assistance, Van Ness Feldman can provide a full range of services, including:

- Negotiating and documenting financial assistance arrangements;
- Assisting in defining project scope and technical specifications;
- Negotiating and drafting confidentiality and other data protection agreements;
- Counseling on intellectual property provisions;
- Assisting with specification of and compliance with reporting requirements, performance metrics, and similar ongoing requirements;
- Counseling on supplier and contractor flow down requirements;

- Counseling on issues associated with National Environmental Policy Act (NEPA) requirements in the award process; and
- Providing overall strategic guidance, including collaboration with our clients' technical personnel, financial executives, investors, and any other outside advisors.

In addition to our specific expertise with regard to federal financial assistance, we have deep experience in assisting clients with taking projects from conceptualization through commercial operation. This experience includes advising on joint ventures and partnerships, site control, regulatory strategy and approvals, environmental permitting, and project input, offtake, and all commercial agreements.

*For more information*

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