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The Importance of Being 'Shovel Ready'

Tapping Into Stimulus Dollars for Energy and Environmental Projects

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The American Recovery and Reinvestment Act of 2009, P.L. 111-5 (ARRA), makes billions of dollars available to eligible applicants for a variety of environmental and energy projects, including renewable energy, clean water infrastructure, green building and site remediation/brownfields redevelopment.

Private and public entities alike are eager to tap into public funding sources as a means of weathering the recession. At the same time, an increasing number of entities are in the process of "greening" their everyday practices. From real estate developers interested in enhancing their existing portfolios and providing green contracting services to manufacturers interested in making their operations more sustainable, all businesses are focused on reducing costs and risks associated with energy and resource availability.

This means that clients seeking legal assistance in understanding and applying for various stimulus programs must compete with other applicants to package their environmental and energy projects correctly and submit their applications for funding as soon as possible. Time is of the essence because the available pots of stimulus funds, however big, are nevertheless finite. Furthermore, ARRA provides that all funds shall remain available for obligation only until Sept. 30, 2010, unless the act expressly states otherwise.

GRAB THE SHOVEL

The term "shovel ready" is perhaps the buzzword most closely associated with ARRA since it was signed into law on Feb. 17, 2009. You have likely heard that one of the most critical tasks in putting together



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a successful application for stimulus funds is demonstrating that the project is "shovel ready." But the term itself is not defined or even mentioned in ARRA.

The term does not appear on the Recovery.gov Web site, which provides guidance and updates regarding ARRA's implementation to the public. Nor is it used in the updated "Implementing Guidance" document published on April 3 by the Office of Management and Budget (OMB), which provides guidance to the heads of agencies and departments responsible for carrying out the programs and activities enacted by ARRA.

This article discusses the meaning and importance of the term "shovel ready" and provides guidelines for getting clients' projects "shovel ready."

The term "shovel ready" came into the popular lexicon in December 2008 when then-President-elect Barack Obama began using it in speeches and interviews to advocate for the passage of the stimulus package. Thousands of projects nationwide, he said, were "shovel ready" and only needed federal funds to begin and thereby put people to work and jumpstart the economy. The term took off, but a definition was never provided.

The media, business community and

the general public generally construed "shovel ready" to mean that a project was fully designed and planned, with permits and approvals in place and workers ready to begin immediately after funding was obtained. This interpretation of "shovel ready" sets a high barrier to entry for many entities seeking stimulus funds, because it will be difficult for many entities to get their projects "shovel ready" (if they are not already) given the compressed timeframes associated with many stimulus programs.

For example, the U.S. Environmental Protection Agency and the Department of Energy have already published requests for applications for certain environmental and energy-related stimulus programs with deadlines for submission of applications as soon as late April or early May.

Yet the general understanding of what "shovel ready" means is not fully consistent with ARRA's language. As stated above, ARRA does not use or define the term. Instead, Section 1602 of ARRA provides that "[i]n using funds made available in this Act for infrastructure investment, recipients [meaning the federal agencies and departments that distribute stimulus funds] shall give preference to activities that can be started and completed expeditiously, including a goal of using at least 50 percent of the funds for activities that can be initiated not later than 120 days after the date of the enactment of this Act. Recipients shall also use grant funds in a manner that maximizes job creation and economic benefit."

Section 3(b) of ARRA also provides, "the President and the heads of Federal departments and agencies shall manage and expend the funds made available in this Act so as to achieve the purposes specified in [the Act], including

commencing expenditures and activities as quickly as possible consistent with prudent management.”

JOB CREATION, ECONOMIC BENEFIT

Therefore, ARRA does not explicitly require that projects be “shovel ready” (fully designed and planned, with all permits or approvals in place and workers ready to work) before applications can be considered or stimulus funds can be granted. Instead, there is a preference for projects that can begin immediately.

At the same time, there are factors beyond speed to be considered when awarding stimulus funds, including job creation and economic benefit. To that end, the OMB “Implementing Guidance” document cautions agency and department heads that ARRA’s general principle regarding the use of funds — that funds be made available as quickly as possible consistent with prudent management — “does not constitute a sufficient justification to support award of a federal grant on a non-competitive basis. Agencies are expected to follow the same laws, principles, procedures and practices in awarding discretionary grants with Recovery Act funds as they do with other funds.”

In other words, the agencies have been instructed that funds should not simply be granted to the first “shovel ready” project to request them. But all things being equal, a project that is “shovel ready” would have a competitive advantage over a project that is not, because it would satisfy the government’s preference that activities be started and completed expeditiously.

Further, a project that is closer to being “shovel ready” — perhaps the permits have not been issued, but the administratively complete permit applications have been submitted — would have a competitive advantage over a project that has not yet begun the permitting process.

CASHING IN

How can you help your clients ensure their projects are “shovel ready,” or as close as possible to it?

Typically, clients approach counsel with their project already designed and knowing which contractors will be hired to perform the work. Accordingly, lawyers get involved in two key areas: seeking environmental permits and approvals, such as stormwater construction permits, air permits, residual waste processing permits and zoning approvals; and identifying the best funding opportunities and helping clients draft and submit the requisite applications for stimulus funds.

There are several guidelines to keep in mind when seeking permits and approvals. First, it is essential that the client use experienced environmental professionals, including consultants and attorneys, to put together a permit application that will be deemed administratively complete by the permitting authority on the first submission. (Administratively incomplete applications can fall to the bottom of the pile and lose precious weeks, even months.)

Second, pre-application meetings with the agencies are critical, as they put a face

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on the project and reveal any technical or legal concerns the agency might have so those concerns can be addressed on the front end. Third, permit lead times can be several months long, or even longer, so it behooves your client to submit its permit applications as early as possible. Fourth, take a proactive approach to address and dispel any public opposition to the project.

With regard to identifying funding opportunities, counsel must consider the funding needs associated with the client’s project to target the best stimulus opportunities. For instance, are there environmental assessment and/or remediation needs? Are there underground storage tanks on the property? Is the project in an economically distressed area? Will renewable energy technologies be used?

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When it comes time to draft and submit applications for stimulus funds, one must carefully consider the best way to package the project for the funding application(s). The project must be described not just in terms of what the client intends to build, but in terms of the job retention, job creation and infrastructure improvements that will result (or whatever else the criteria for that specific funding program require).

Even following these guidelines, many open questions remain about how the stimulus programs will be implemented. Details regarding how federal funds will be channeled through federal agencies to both the states and applicants are being released every day. While it is currently possible to take advantage of some funding opportunities for environmental and energy projects, others have not yet begun.

We also anticipate that the agencies distributing funds will be inundated with funding applications, which makes it difficult to predict how, and when, many funding decisions will be made.

Another complicating factor is that the queue for various stimulus funds is already long; the U.S. Conference of Mayors reportedly has put together a list of almost 19,000 “shovel-ready” projects totaling nearly \$150 billion, in anticipation of applying for stimulus funds, and governors across the nation have their own wish lists as well. Despite these obstacles, given the historic amounts of funding available for environmental and energy projects, the time spent pursuing the funds could pay enormous dividends.

The bottom line is that there is going to be intense competition for stimulus funds. In order to be able to compete with other projects, those pursuing stimulus dollars must navigate the unknowns of the stimulus program as it develops. A critical first step towards taking advantage of any available funding opportunities is making sure that eligible projects are “shovel ready” or as close to it as possible. •