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Sustainable Construction: Navigating NYSERDA Grants

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As part of the ambitious goals of New York State's Climate Leadership and Community Protection Act (CLCPA), including 100% zero-emission electricity by 2040 and a complete emissions reduction (no fossil fuels) in New York by 2050, real estate owners and developers ("stakeholders") are faced with the daunting and costly task of bringing their existing buildings and new projects within compliance.

To alleviate this burden, the New York State Energy Research and Development Authority (NYSERDA), through the establishment of The Clean Energy Fund, has committed to funding a significant number of incentive programs and grants directed at stakeholders seeking to increase energy efficiency, develop renewable energy, and achieve emissions reduction.

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However, like the stringent requirements of a typical construction lender or public grant, the NYSERDA terms and conditions include certain obligations that stakeholders must negotiate and navigate while administering their construction projects.

This article provides a guide for working through the applicable terms and conditions, while maintaining the balance between the autonomy of the stakeholder versus compliance and administration of NYSERDA's project requirements.

Terms and Conditions

NYSERDA grants provide important financial incentives and funding for energy efficient projects, though retrofitting, retro-commissioning, de-carbonization and electrification of new and existing buildings.

As part of the grant process, stakeholders should thoroughly understand the grant requirements with which they and their contractors (of every tier) must comply throughout the project. The terms and conditions often include a strict project schedule with firm expiration dates tied to the availability of the funding, which do not readily carve out unforeseen circumstances, such as force majeure or contractor delays, or failure on the part of NYSERDA to timely provide its required signoffs.

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From a cost standpoint, NYSERDA often attempts to lock-in a fixed budget and stipulated billing rates in the grant agreement; however, it is important to ensure that such billing rates, including potential annual increases, of contractors, design professionals and consultants are properly incorporated into the grant. Additionally, NYSERDA's audit, invoicing and payment terms often require a level of detail that is greater than the level of detail provided by stakeholders' vendors.

The subcontracting procedures set forth in NYSERDA grants are also more stringent than the typical lender requirements imposed on prime contractors, including NYSERDA's right to approve all subcontractors. Owners and their prime contractors also cannot terminate a subcontract without NYSERDA's permission, unless a substitute subcontractor is accepted by NYSERDA, in its sole discretion. The stakeholder should also reserve the right to fund the remainder of the project and retain the subcontractors should NYSERDA elect to terminate the grant.

From an insurance standpoint, stakeholders must ensure that the strict insurance requirements in the grant can be satisfied by all third parties retained directly or indirectly by the stakeholders, including any subcontractors. NYSERDA does not typically cover the cost of a builder's risk or all-risk policy for the stakeholder. Nonetheless, stakeholders are strongly encouraged to consult their risk managers and brokers regarding the procurement of such coverage.

Lastly, NYSERDA ultimately reserves the right in the grant to issue stop work orders on ten days' notice, for convenience, which could significantly impact projects, especially when there are various third parties engaged for the project.

Each subcontract agreement must properly flow-down the suspension and termination provisions of the grant, including the allotted cost and schedule impacts. Otherwise, stakeholders could be on the hook for any other termination or demobilization costs.

Objectives v. Stakeholders' Interests

Although NYSERDA grants provide an enormous benefit to stakeholders, NYSERDA has its own set of publicly driven objectives. To meet these objectives, NYSERDA designates its own project manager, who is tasked with overseeing the project. Accordingly, the stakeholder's project team must coordinate with NYSERDA's project manager, including with respect to as-built drawings, submittals and approvals at each stage of the project.

Additionally, NYSERDA's project manager reserves the right to opine on the design documents; therefore, each stakeholder must require the design team to work closely with NYSERDA, despite the fact that the stakeholder is the ultimately beneficiary of the work itself and all associated warranties.

With respect to the overall budget approved by NYSERDA, there may be certain cost overruns, as is the case with almost any project. While there is a change order process in the grant, there is no guarantee that additional funds will be awarded. Therefore, stakeholders must take extra care in their dealings with contractors and expressly provide that any change orders must be approved by NYSERDA in writing, otherwise any such related claims are waived.

When there is a co-share amount contributed by the stakeholder, the stakeholder may be required to contribute on a dollar-for-dollar basis during the project, and may have to cover any shortfalls with change orders or otherwise that are not included in the grant.

NYSERDA has been hesitant to increase funding due to inflation or other market conditions; therefore, stakeholders should account for such considerations in the grant application and award process.

Upon completion of a successful project, NYSERDA requires submittal of a final report indicating the energy-efficient results of the project. Stakeholders must require its project team to keep track of all studies, findings, predictions and models during the project.

Stakeholders must balance these requirements with the need to identify and maintain the confidentiality of any proprietary information (including on the subcontractor or consultant level), which could harm the stakeholder, or its project team, if made public by NYSERDA.

Conclusion

Although stakeholders continue to face challenges in their efforts to comply with federal, state and local climate laws and with reducing their carbon footprints, NYSERDA, itself and in partnership with Con Edison and other utility companies, has successfully revamped its incentive programs to be far more consistent with state and local emissions requirements.

Through the engagement of an experienced sustainability team, stakeholders are encouraged to take advantage of the many NYSERDA programs to achieve compliance and contribute towards the overall investment in sustainable infrastructure for New York.