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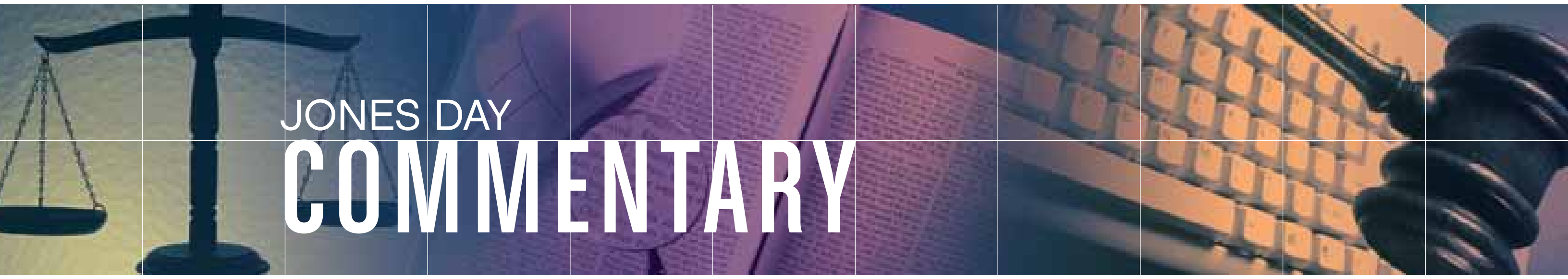

U.S. DEPARTMENT OF ENERGY REVISES LOAN GUARANTEE PROGRAM AND ISSUES NEW SOLICITATION FOR INNOVATIVE ENERGY TECHNOLOGIES

The U.S. Department of Energy ("DOE") has taken action in recent weeks to improve and accelerate two federal loan guarantee programs established to spur energy-related project development and construction. Congress created the original loan guarantee program under Section 1703 of Title XVII of the Energy Policy Act of 2005 ("EPACT") to encourage commercial use in the United States of innovative energy technologies that avoid, reduce, or sequester air pollutants or greenhouse gas emissions (the "1703 Program"). Earlier this year, in the American Recovery and Reinvestment Act of 2009 (the "Recovery Act"), Congress created a temporary loan guarantee program under Section 1705 of Title XVII of EPACT that is focused on providing loan guarantees to conventional renewable energy, electric transmission, and leading-edge biofuel projects that commence construction no later than September 30, 2011 (the "1705 Program"). To date, however, DOE's solicitations for eligible projects have resulted in the issuance of only a handful of loan guarantees under the 1703 Program.

In an effort to facilitate the issuance of additional loan guarantees and bring more projects into commercial operation, DOE recently proposed revisions to its regulations for the 1703 Program and concurrently announced a second-round solicitation for prospective loan guarantee applicants under the 1703 Program for energy efficiency, renewable energy, and advanced transmission and distribution projects (the "1703 Renewables Solicitation").

PROPOSED REGULATIONS

DOE's proposed revisions to the regulations governing the 1703 Program, if finalized, will change the way DOE secures and arranges collateral for the loan guarantee obligations. Importantly, DOE plans to roll back the requirement that, as a condition of any loan guarantee, the government receives a first-priority security interest in all project assets and other pledged collateral. The proposed rules would give DOE staff the discretion to determine the appropriate collateral package and intercreditor arrangements for each project. Statements in DOE's recent solicitation for transmission projects indicate that DOE will take a similarly flexible approach in crafting the collateral requirements for projects under the 1705 Program.

NEW SOLICITATION

The recent 1703 Renewables Solicitation provides up to $8.5 billion in loan guarantee authority and requests applications for eligible projects in energy efficiency, renewable energy, and advanced transmission and distribution that employ new or significantly improved technology that is not in general use. A technology is "in general use" if it is used in three or more commercial projects in the United States and has been in operation in each such commercial project for at least five years. Foreign ownership or sponsorship of a project is permissible so long as the project is located in the United States, including the District of Columbia and any United States territory.

In addition, it is also permissible for a project that meets the eligibility requirements of the 1705 Program (the "1705 Eligible Project") to submit an application in connection with the 1703 Renewables Solicitation so long as the following requirements are met, among others:

- The project employs a new or significantly improved technology.
- The project is reasonably likely to commence construction on or before September 30, 2011. A project has "commenced construction" if it has (1) received all necessary licenses, permits, and local and national environmental clearances necessary to proceed; (2) completed all preconstruction design and prototype testing; and (3) engaged all required contractors and ordered all necessary essential equipment and supplies so that the physical construction of the project may commence on or before September 30, 2011.
- The project meets the requirements of the Davis-Bacon Act by providing reasonable assurance that all laborers and mechanics employed in the performance of the project, including those employed by contractors and subcontractors, will be paid wages at rates not less than those prevailing on similar work in the locality of the project.
- The project complies with the "Buy American" provisions of the Recovery Act, which require that all of the iron, steel, and manufactured goods used in a public project be produced in the United States.
- The project will be subject to the requirements of the National Environmental Policy Act ("NEPA"). DOE will evaluate the project and determine the appropriate level of NEPA review required (*i.e.*, whether an environmental assessment or environmental impact statement will be required). Lead times for this requirement will need to be factored into the applicant's project development process.

Under the authority of the Recovery Act, DOE will make available up to $2.5 billion under the 1703 Renewables Solicitation to pay the credit subsidy costs of loan guarantees made for 1705 Eligible Projects, of which $500 million will be set aside for leading-edge biofuel projects. The credit subsidy cost is the net present value of the estimated cost to the federal government of the loan guarantee as determined under the applicable provisions of the Federal Credit Reform Act of 1990. Appropriations are not available to cover the credit subsidy costs associated with the 1703 Renewables Solicitation for projects that are not 1705 Eligible Projects, and such costs would need to be paid for by the applicant.

APPLICATION PROCESS

Like other loan guarantee solicitations under EPACT, the application for the 1703 Renewables Solicitation is divided into Part I and Part II. The Part I submission is expected to provide DOE with a summary-level description of the project, project eligibility, financing strategy, and progression to date in critical-path schedules to enable DOE to determine the overall eligibility of the project. The Part II submission consists of detailed project information upon which DOE will make its determination as to whether to negotiate a term sheet to issue a guarantee. A mandatory criterion that DOE will use during its Part II review is whether the project provides a reasonable prospect of repayment of the guaranteed obligation and any other project debt. DOE will also consider the extent to which private financing on standard commercial terms is available to the project without the benefit of a loan guarantee.

For this solicitation, DOE has scheduled a rolling application process with seven submission rounds. For the first submission round, Part I of the application is due on September 14, 2009, with Part II of the application due on November 13, 2009. The following six submission rounds are then staggered through 2010; for the seventh round, the due date for Part I of the application is August 24, 2010, with Part II due on December 31, 2010. Although applicants that apply in earlier rounds may have an advantage because DOE will not guarantee available funds for loan guarantees through all seven rounds of the application process, DOE has also stressed the importance of submitting complete and well-documented applications for projects where substantial progress has been made in the development process instead of prematurely submitting applications for the purpose of lining up earlier in the queue.

FEES AND COSTS

In connection with submitting an application under the 1703 Renewables Solicitation, the applicant will be responsible for the following fees:

- **Application Fee:** Twenty-five percent of the nonrefundable application fee must be submitted with the Part I submission, and the remaining 75 percent must be submitted with the Part II submission as shown in Table 1 on the next page.
- **Diligence Fee:** The applicant will be responsible for paying the fees and expenses of DOE's independent consultants and outside legal counsel in connection with the applicant's project.
- **Credit-Rating Agency Fee:** For projects where the estimated total project cost exceeds $25 million, the applicant must provide a preliminary credit assessment for the project, if the project is proposed as a project finance structure, or the borrower's most recent corporate credit rating, if the project is proposed as a corporate finance structure, in each case, from a nationally recognized rating agency without giving effect to the DOE loan guarantee. The applicant will be responsible for paying the fee of the credit-rating agency. Also, lead times for obtaining this preliminary credit-rating assessment for Part II will need to be factored into the applicant's application process.
- **Credit Subsidy Cost:** As indicated above, appropriations are not available to cover the credit subsidy costs associated with the 1703 Renewables Solicitation for projects that are not 1705 Eligible Projects, and such costs would need to be paid for by the applicant. The applicant may not finance this payment of the credit subsidy cost through funds obtained from the federal government or through a loan made or guaranteed by the federal government.
- **Facility Fee:** Twenty percent of the nonrefundable facility fee is due upon execution of the term sheet with DOE for the loan guarantee, and the remaining 80 percent is due upon the closing of the loan guarantee as shown in Table 2 on the next page.
- **Maintenance Fee:** A maintenance fee to cover DOE's administrative expenses is expected to be in the range of $50,000 to $100,000 per year payable each year or in a lump-sum amount discounted to net present value, as negotiated.

OTHER DEVELOPMENTS

These are just some of the preliminary details a prospective applicant should know about the proposed revisions and solicitation under the 1703 Program. In other developments, DOE also recently released a solicitation under the 1705 Program for large-scale transmission projects that are expected to commence construction by September 30, 2011. DOE will make available up to $750 million under this solicitation to pay credit subsidy costs. The deadline for submitting Part I of the application for this solicitation is September 14, 2009, with Part II of the application due on either October 26, 2009; December 10, 2009; or January 25, 2010. In addition, DOE has stated that it anticipates issuing an additional solicitation offering loan guarantees in support of smaller-scale transmission projects under the 1705 Program. DOE is also expected to release in the near future its long-awaited regulations under the 1705 Program and an additional solicitation for conventional renewable energy. We will continue to monitor these developments. This DOE web site—http://www.lgprogram.energy.gov/index.html—also provides helpful information.

TABLE 1

Loan guarantee amount	Total application fee amount	25% of application fee due with Part I	75% of application fee due with Part II
<$150 million	$75,000	$18,750	$56,250
$150 million–$500 million	$100,000	$25,000	$75,000
>$500 million	$125,000	$31,250	$93,750

TABLE 2

Loan guarantee amount	Total fee amount
<$150 million	1% of the guaranteed amount
$150 million–$500 million	$375,000 + 0.75% of the guaranteed amount
>$500 million	$1,625,000 + 0.50% of the guaranteed amount

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Dickson C. Chin
1.212.326.7893
dchin@jonesday.com

Thomas C. Havens
1.212.326.3935
tchavens@jonesday.com

Euclid A. Irving
1.212.326.7865
eairving@jonesday.com

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