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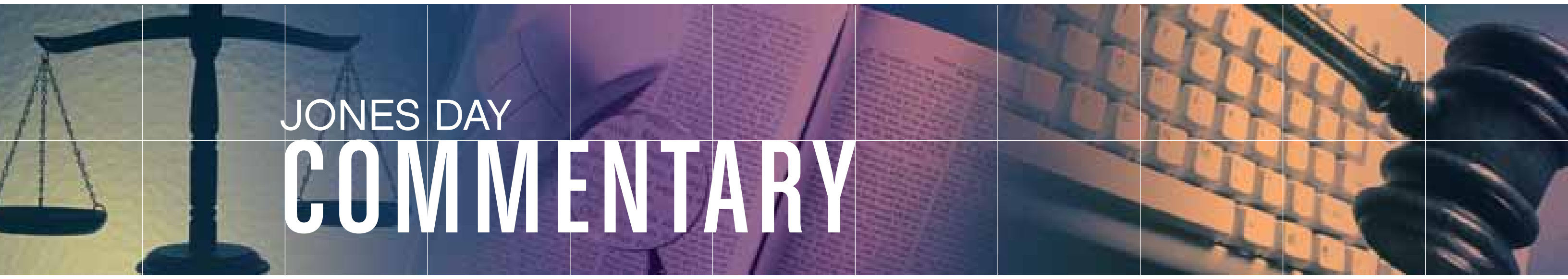

U.S. DEPARTMENT OF ENERGY ANNOUNCES LOAN GUARANTEE PROGRAM TO HELP ACCELERATE FINANCING OF CONVENTIONAL RENEWABLE ENERGY PROJECTS

On October 7, 2009, the U.S. Department of Energy (the "DOE") issued its long-awaited solicitation (the "Solicitation") of applications for loan guarantees to support conventional renewable energy generating projects. The new program, authorized under the American Recovery and Reinvestment Act of 2009 (the "Recovery Act"), invites commercial lender participation in a Financial Institution Partnership Program ("FIPP") that is intended to leverage the expertise and resources of the private capital markets.

Under the Solicitation, eligible lenders ("Lender-Applicants"), rather than project sponsors ("Project Sponsors"), may file applications for "partial, risk-sharing" loan guarantees from the DOE for commercially viable wind, solar, biomass, geothermal, hydroelectric power projects, and other renewable energy generation projects in the U.S. that are expected to commence construction prior to September 30, 2011. The DOE will make available up to $750 million under the Solicitation to pay the credit subsidy costs of such loan guarantees, which could support the issuance of up to $7.5 billion in loan guarantees. The DOE has also taken steps to streamline the review process in an effort to accelerate the granting of loan guarantees to eligible renewable generation projects.

Project Sponsors and their prospective capital providers, however, will need to carefully evaluate whether these program improvements are sufficient to outweigh the many significant challenges presented in seeking a DOE loan guarantee under the Solicitation.

THE FINANCIAL INSTITUTION PARTNERSHIP PROGRAM

In the Solicitation, the DOE describes a new, two-pronged application process for evaluating both the proposed renewable energy project under the Recovery Act's criteria and guidelines, and the eligibility of the Lender-Applicant to satisfy the DOE's loan sourcing and underwriting requirements. This approach differs significantly from other DOE loan guarantee solicitations under the Recovery Act, which have focused solely on the suitability of the specific energy project for a loan guarantee and the financial strength and track record of its sponsors. Indeed, only eligible lenders, and not Project Sponsors, may apply for a loan guarantee under the Solicitation. The "lead lender" eligibility requirements should not, however, prove problematic for leading U.S. and foreign project finance lenders who have been actively involved in nonrecourse financing of renewable energy projects in the U.S.

The FIPP is intended to expedite the loan guarantee process principally by relying heavily on the project credit analysis and financial structuring work performed by the Lender-Applicant. The DOE expects that guaranteed loans will be traditional senior secured debt, structured on customary market term for a "high-quality," limited, or nonrecourse long-term energy project financing.

Significantly, unlike the recent DOE solicitation for high-voltage transmission projects, the Lender-Applicant need not demonstrate that conventional debt financing for the project would not otherwise be available absent a DOE guarantee. This is in keeping with the DOE's goal of attracting renewable energy projects with sound financial plans with the Solicitation.

The DOE has also indicated that projects that have already arranged construction or permanent third-party financing will not be eligible for a loan guarantee. The Solicitation further requires that the debt financing not be "modified to accommodate tax equity financing." Although the meaning of this restriction is not clear, given the DOE's stated preference for relatively simple financing structures, financing plans that rely on tax equity investors (*e.g.*, to monetize depreciation benefits) might well be disfavored.

The Lender-Applicant must agree to fund and hold a "substantial portion" of the guaranteed loan obligation, and the extent of such funding commitment will be a critical factor in the DOE's evaluation. In addition, all holders of guaranteed project debt are restricted from transferring their position during construction and thereafter for a period of two years following commercial operation of the project. Consistent with the DOE's position as the majority creditor, the DOE will generally retain exclusive control over such fundamental lender decisions as the granting of amendments and waivers, acceleration of debt, and the exercise of remedies (including whether to foreclose on collateral). However, in recognition of the fact that lenders will be taking some project risk, the DOE has proposed to consult with debt holders on decisions affecting the guaranteed obligation in the event of default (although the ultimate course of action is still within the DOE's sole discretion).

Claims of lenders will be secured on a *pari passu* basis with the DOE. In this regard, the DOE has proposed revisions to its loan guarantee regulations to facilitate *pari passu* financing structures, without the necessity for loan stripping, with parties that are appropriate co-lenders or co-guarantors. The comment period for the proposed regulations has expired, and they are expected to become final.

The Lender-Applicant also must be qualified to take the lead role in developing the overall financial structure of the renewable energy project. For example, as lead lender, the Lender-Applicant will be solely responsible for syndication, placement, and distribution of the underlying loan and other aspects of the financing program. Restrictions on loan "stripping" that existed in prior DOE solicitations have been dropped, thereby permitting the guaranteed portion of the project debt to be separated from the nonguaranteed portion in connection with the placement or syndication of the debt.

ELIGIBLE PROJECTS

To be eligible for a loan guarantee under the Solicitation, a renewable energy project must meet certain "threshold" criteria. Specifically, an application will be denied if (i) the project will not "commence construction" on or before September 30, 2011, or (ii) the guaranteed obligation (without taking into account the DOE loan guarantee) will not have a credit rating of either "BB" from Standard & Poor's or Fitch or "Ba2" from Moody's. The threshold eligibility standard based on a project's credit quality will effectively require a Lender-Applicant and the Project Sponsor to spend significant time and effort discussing a proposed project with credit ratings agencies prior to submitting Part I of a loan guarantee application. This presents an element of upfront expense to be considered by Lender-Applicants and their Project Sponsors.

For purposes of the Solicitation, "commencement of construction" means that (i) the borrower has completed all preconstruction engineering and design, has received all necessary permits and environmental clearances, and has engaged all contractors and ordered essential equipment as reasonably necessary to proceed with physical construction of the project without foreseeable material interruption, and (ii) such physical construction has actually begun (including, at a minimum, excavation for foundations or construction of site improvements). The express requirement that a project actually "turn dirt" prior to September 30, 2011, in order to qualify for a loan guarantee has not existed in other solicitations under the Recovery Act.

In the Solicitation, the DOE is seeking only applications for renewable energy projects using "commercial technology" and not projects for manufacturing renewable energy components, electric transmission projects, or "leading edge" biofuels projects, which are covered in other DOE solicitations. Eligible commercial generating projects include wind, solar, closed-loop biomass, open-loop biomass, geothermal energy, landfill gas, trash-to-energy, and hydropower. To qualify as a "commercial technology," the equipment must have been installed and be in use in at least three commercial projects anywhere in the world for at least two years *prior to* submission of an application. This requirement for two full years of operating history could raise questions as to the eligibility of conventional renewable generation projects that intend to employ newer or upgraded power generation equipment.

As with other solicitations under the Recovery Act, a project's eligibility requirements also include (i) compliance with the Davis-Bacon Act (*i.e.*, the DOE must receive reasonable assurances that all labor employed in the performance of the construction phase of the project, including those employed by contractors or subcontractors, receive not less than the "prevailing wage" in the locality where the project is situated), (ii) compliance with the "Buy American" provisions of the Recovery Act (requiring that all of the iron, steel, and manufactured goods used in "public projects" be produced in the U.S., consistent with international treaty obligations), and (iii) extensive ongoing reporting obligations for both the Lead Lender and the borrower (as well as for its contractors under the Davis-Bacon Act). Although most applicants should have no difficulty satisfying the "Buy American" provisions (assuming there is no governmental component to the project's ownership or offtake), compliance with Davis-Bacon can be especially complicated and burdensome and can create additional project costs.

THE APPLICATION PROCESS

An application by a Lender-Applicant for a loan guarantee under the Solicitation is divided into two parts. The Part I submission is intended to provide the DOE with summary-level information to enable the DOE to assess whether the project and the Lead Lender meet all applicable threshold eligibility requirements in the Solicitation. Part I information may be submitted early in the lenders' project due diligence process, and there may be advantages to doing so in order to permit the DOE, Lender-Applicants, and Project Sponsors to evaluate a project for any financial, environmental, or other eligibility issues that could lead to an application being rejected by the DOE.

In this connection, the DOE is expected to pre-screen applications based on a project's demonstrated likelihood of avoiding a lengthy environmental review under the National Environmental Policy Act ("NEPA"). To assist the DOE in making this assessment, a Lender-Applicant must submit with Part I a report analyzing the potential environmental impacts of the project in sufficient detail for the DOE to assess the significance of those impacts and the level of NEPA review that will be required for the project (*i.e.*, whether a categorical exclusion applies or whether the preparation of an Environmental Assessment or Environmental Impact Statement will be necessary). This early environmental assessment is another departure from prior DOE loan guarantee solicitations, which instead have required the environmental report to be submitted with Part II and did not have the DOE making a determination of the level of NEPA review until after the application was deemed substantially complete.

In the Solicitation, the DOE specifically sets forth the information that it expects to see in the environmental report for the construction, operational, and post-operational phases of the project. This information includes the size, type, and location of the project; the estimated emissions and waste streams associated with the project; any permitting requirements and their status; any areas of distinction on the site or in nearby areas (including the presence of wetlands, historical sites, floodplains, and critical habitats for endangered species); any mitigating measures considered or used to reduce environmental impacts; alternative sites and operating parameters; and future operational and post-operational considerations. If the DOE ultimately concludes that an Environmental Impact Statement will be required for a project, the DOE will not likely select such a project for submission of Part II because the project probably cannot meet the September 30, 2011, deadline for commencing construction. *It is therefore incumbent upon Lender-Applicants and their Project Sponsors to make an early and accurate assessment of the scope of the likely NEPA review before determining to proceed with a loan guarantee application.*

The DOE will notify a Lender-Applicant when it has (i) made the determination that both the project and the Lender-Applicant meet all the eligibility requirements in the Solicitation, (ii) assessed the project's readiness to commence construction by September 30, 2011 (including the likelihood of completing the requisite review under the NEPA by said date), and (iii) assessed preliminarily whether the project is expected to meet the overall objectives of the Solicitation (subject to further validation in the Part II submission).

Unlike the DOE's prior solicitations, however, there are no specific deadlines for submitting Part I of a loan guarantee application in response to the Solicitation. Rather, a Lender-Applicant may submit Part I information for an eligible project (along with the initial, nonrefundable 25 percent portion of the application fee) at any time prior to the submission of Part II information. As noted below, there are a total of 10 rounds of review for Part II submissions, with the last deadline for filing Part II information occurring on January 6, 2011. The DOE will competitively evaluate each application against others submitted in a given round. Part I information from applicants will be reviewed on a rolling, continuous basis, although parties that apply early may have a "first mover" advantage.

If a Lender-Applicant decides to submit Part II of its application to the DOE, it must be delivered on or before one of the following due dates:

PART II SUBMISSION DUE DATES

November 29, 2009
January 7, 2010
February 22, 2010
April 8, 2010
May 24, 2010
July 8, 2010
August 23, 2010
October 7, 2010
November 22, 2010
January 6, 2011

Part II submissions will be reviewed based on the factors listed in the Solicitation and the following weighted criteria: Programmatic (35 percent), Creditworthiness (45 percent), and Financing and Funding Plan (20 percent). In assessing whether a project serves the "programmatic" purposes of the Recovery Act, the DOE will consider such factors as the likelihood of financial close and whether construction will commence "sooner rather than later," the relative size of the project investment, the simplicity of the financing structure, and the potential legal or regulatory hurdles (*e.g.*, the risk of regulatory delays or lack of public acceptance of the project) that could jeopardize the project's success.

The DOE's evaluation of the "creditworthiness" of a project will focus on whether the project's fundamentals provide "a reasonable prospect of repayment" of the guaranteed loan obligation. In this connection, the DOE will rely heavily on the Lender-Applicant's credit analysis of the certainty of the project's cash flow, the sponsor's financial strength and equity commitment, the risk of cost overruns, and other technical, construction, and operational issues.

With respect to the proposed financing and funding plan, the Solicitation indicates that the DOE will give great weight to applications that seek a smaller guaranteed percentage. The DOE is permitted to guarantee up to 80 percent of the project loan's principal and interest. Since project debt must be not more than 80 percent of total project cost, the DOE loan guarantee would effectively cover up to 64 percent of a project's total cost. This feature of the FIPP is consistent with the DOE's overall objective of favoring those applicants who, through the "buy and hold" requirement, agree to take on significant, long-term financial risk. The Lender-Applicant must also address how it intends to use proceeds of any cash grant being sought in lieu of tax credits, as permitted by Section 1603 of the Recovery Act. The DOE has indicated, however, that it expects such cash proceeds to be used exclusively to pay down project (guaranteed) debt and not be retained by the sponsors. The DOE will also examine the terms of key offtake and supply contracts, the ability of the applicant and sponsor to execute on the financing plan, and the availability of funds from intended sources of debt and equity. Second lien debt financing or other complex financing structures will be disfavored.

The DOE's technical and financial due diligence of the project and its sponsor will be largely confirmatory in nature because, as indicated above, the DOE plans to leverage off the Lender-Applicant's own internal credit analysis of the project. The DOE will not conduct its own due diligence investigation as part of its evaluation of a project application. Nor does the DOE intend (at least initially) to hire its own outside legal or financing consultants, a decision that should both accelerate the project review process and lower the overall transaction cost for Project Sponsors.

Specific aspects of the proposed renewable energy project that the DOE expects the Lender-Applicant to fully address in Part II of its application include the following:

- Evaluate financing plans
- Assess financial viability
- Determine technical efficacy
- Review project legal structure
- Evaluate project risks
- Perform financial model review and stress-testing
- Assess strengths/weaknesses of Project Sponsors
- Analyze proposed collateral

At an appropriate point in the DOE's review process, the DOE may tender a term sheet to the applicant. The execution of the term sheet by the DOE, the Lender-Applicant, and the proposed borrower represents a conditional commitment by the DOE to enter into the guarantee transaction. At the time of execution, a portion of the "facility fee" (see the chart below) is due from the Lender-Applicant. The conditional commitment may be terminated by the DOE at any time, and for any reason, prior to financial closing, and it will be withdrawn if the project fails to "commence construction" by September 30, 2011. At financial closing of the loan guarantee transaction, the DOE will pay the credit subsidy cost of the loan guarantee (which is the net present value of the estimated long-term cost to the U.S. government of the guarantee), the Lender-Applicant will pay the remaining portion of the facility fee, and the borrower must pay the first annual amount of the "maintenance fee."

To make the program more appealing to project developers, the DOE has also reduced some of the upfront fees and other costs of processing loan guarantee applications. The following table sets forth the amount and timing of the various nonrefundable fees payable to the DOE under the Solicitation, and a comparison of these fees to those due in connection with the DOE's prior solicitation under the Recovery Act for electric transmission projects:

LOAN GUARANTEE FEE STRUCTURE

Type of Fee	Fee Amount - FIPP	Fee Amount – Transmission Solicitation
I. Application	$50,000, payable by the Lender-Applicant as follows: (1) with Part I (First Fee) submission: $12,500 (25 percent), and (2) with Part II submission: $37,500 (75 percent)	$800,000, payable as follows: (1) with Part I submission: $200,000 (25 percent), and (2) with Part II submission: $600,000 (75 percent)
II. Facility (Second Fee)	½ of 1.0 percent of Guaranteed Obligation, payable by the Lender-Applicant as follows: (1) upon the signing of a Term Sheet: 20 percent, and (2) at Closing: 80 percent	½ of 1.0 percent of guaranteed portion of Guaranteed Obligation
III. Maintenance (Third Fee)	Expected to be in the range of $10,000 to $25,000 per year and payable by the Borrower, the amount and payment due dates to be specified in the Loan Guarantee Agreement	Expected to be in the range of $200,000 to $400,000 per year, the amount and payment due dates to be specified in the Loan Guarantee Agreement

The DOE's revamped loan guarantee program has the potential to provide substantial benefits to developers of conventional renewable energy projects in terms of a lower overall cost of debt to finance their projects. However, although the DOE has made program improvements in the Solicitation, sponsors and lenders still face a number of challenges to securing a loan guarantee. Parties will need to consider whether the estimated financial benefits (net of program costs) outweigh the risks to the project in going through the application process (including risks from delay in achieving critical project milestones). Lenders are also likely to weigh the advantages of ceding control over key project credit decisions to the DOE in exchange for U.S. government credit support for projects they are otherwise ready to finance. Finally, Project Sponsors, who will inevitably bear the expense of the application process, will need to make an early evaluation of the likely outcome of key threshold issues, such as the credit rating for the project and scope of NEPA review, before proceeding with a financing plan based on an application for a loan guarantee.

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