Alerts and Updates

DOE ANNOUNCES NEW LOAN GUARANTEES FOR CONVENTIONAL RENEWABLE ENERGY PROJECTS

October 16, 2009

On October 7, 2009, the U.S. Department of Energy ("DOE") released a new solicitation for applications for renewable energy projects under its loan guarantee program. Unlike previous DOE solicitations, which focused on loan guarantee applications to support new or innovative technologies not in general use in the marketplace, this new solicitation targets applications for conventional renewable energy projects such as wind, solar, biomass, geothermal and hydropower. In addition, this solicitation initiates a new Financial Institution Partnership Program ("FIPP") in which proposed borrowers do not apply directly to the DOE, but rather work with qualifying financial institutions that apply to the DOE for a loan guarantee. The total amount of funding under this new solicitation is $750 million, which the DOE envisions supporting from $4 billion to $8 billion in new renewable energy projects.

The "Loan Guarantee Solicitation for Applications for Commercial Technology Renewable Energy Generation Projects" is yet another implementation of Section 406 of the American Recovery and Reinvestment Act of 2009 ("ARRA").[1] ARRA Section 406 added to DOE's pre-existing loan guarantee program under Section 1703 of the Energy Policy Act of 2005 to create a new program under Section 1705 for rapid deployment of renewable energy and electric power transmission projects (the "Section 1705 Loan Guarantee Program"). The Section 1705 Loan Guarantee Program is aimed, in part, at bolstering confidence in borrower repayment obligations associated with such projects.

Commercial Technology

This solicitation invites the submission of applications from "Lender-Applicants" (discussed below) for partial, risk-sharing loan guarantees from the DOE in support of debt financing for renewable energy systems located in the U.S. that generate electricity or thermal energy using "Commercial Technology." The solicitation defines a "Commercial Technology" as a technology installed anywhere in the world and operating for at least two years in at least three commercial projects in the same or substantially similar general application as in the proposed project.[2]

This is contrasted with the DOE solicitation described in our August 5, 2009 Alert, which targeted "New or Significantly Improved Technology"—technology concerned with the production, consumption or transportation of energy that specifically "is *not* a Commercial Technology" (emphasis added). Although some of the technology used in the renewable energy marketplace has been employed for some time, the statutory language for loan guarantees for "New or Significantly Improved Technology" was broad enough to apply to some of that technology. The current solicitation, however, clearly targets currently employed technology for participation in the Section 1705 Loan Guarantee Program.

Lender-Applicants Under the Financial Institution Partnership Program

What makes the new DOE solicitation particularly interesting is the establishment of the FIPP. The FIPP implements part of the Section 1705 Loan Guarantee Program, but does not replace or change any fundamental requirements. The DOE envisions the FIPP as "a set of additional standards and procedures" designed to assist DOE in implementing the program in a more time-sensitive manner. The DOE believes that the FIPP will "leverage the human and financial capital of private sector financial institutions by accelerating the loan application process." With hopes of expediting the loan guarantee process, DOE will work with "Lender-Applicants" within the following guidelines:

1. A "Lender-Applicant" is a financial institution (or one of a group of financial institutions chosen to represent them for this purpose) that satisfies certain requirements and that funds and holds all or part of a DOE-guaranteed obligation. When a loan guarantee is issued at closing, the Lender-Applicant becomes the "Lead Lender." Each guaranteed obligation is generally expected to have one Lead Lender who will act as the Lender-Applicant and the administrative agent, and perform the servicing of the guaranteed obligation. The FIPP loan guarantee will be partial and risk-sharing, and the Lender-Applicant and other participating financial institutions (as applicable) will be required to share in a significant amount of the risk of the guaranteed obligation on a *pari passu* basis with the DOE as guarantor. Lender-Applicants and other qualified "Holders"[3] are expected to evaluate, and receive credit approval for, the guaranteed obligation in accordance with their standard internal credit policies and procedures for comparable senior debt transactions and as if the guaranteed obligation were not partially guaranteed.
2. The Lender-Applicant will have the lead role in developing the overall financial structure of the proposed project and the specific terms of the guaranteed obligation in the usual and customary manner of a lead lender or underwriter of a senior credit facility. However, under the FIPP, the Lender-Applicant is also expected: (a) to ensure that the guaranteed obligation and the associated documentation accommodate the requirements of the Section 1705 Loan Guarantee Program in addition to the usual and customary provisions that a reasonable and prudent lender would ordinarily require; and (b) to describe in detail the syndication, placement, distribution and other aspects of funding the guaranteed obligation, and demonstrate how the proposed plan complies with the

objectives and parameters for use of the guarantee under the FIPP, including certain parameters set forth in the solicitation.

3. In order to participate in FIPP, a financial institution will be required to qualify in accordance with standards related to its role in the financing of the guaranteed obligation. Qualifications for Lead Lenders and Holders under the FIPP are described in the solicitation. The DOE cautions that such qualifications are specific to this particular solicitation, and may be different for its contemplated future solicitation for commercial renewable manufacturing projects under the FIPP.
4. Under the FIPP, Lead Lenders will also have direct, continuing obligations to the DOE and its agents, such as the "Master Servicer" (as described in an attachment to the solicitation), for servicing and monitoring the guaranteed obligation and the project being financed.

Financing Considerations

Loan guarantees issued under the Section 1705 Loan Guarantee Program must satisfy specific finance requirements that must be addressed by the Lender-Applicant in response to this solicitation. For example, the face value of the debt guaranteed by the DOE under the Section 1705 Loan Guarantee Program is limited to no more than 80 percent of total project costs, and the borrower and other involved principals must have made, or will make, a significant equity investment in the project. In addition, for this solicitation the guaranteed obligation is expected to be "traditional" senior secured debt, structured in accordance with customary market terms applicable to a high-quality, limited or non-recourse, long-term, energy project finance transaction and not modified to accommodate tax-oriented investment structures. The DOE will not assume pre-construction risks under this solicitation.

Eligible Projects

In addition to being a Commercial Project located in the U.S., "Eligible Projects" must:

- Be reasonably likely to commence construction on or before September 30, 2011;
- Meet all applicable requirements of the Section 1705 Loan Guarantee Program, the ARRA and the solicitation; and
- Be expected to have, whether structured on a project finance or a corporate finance basis, a credit rating from a nationally recognized rating agency of at least an equivalent of "BB" from Standard & Poor's or Fitch or "Ba2" from

Moody's, as evaluated without the benefit of any DOE guarantee or any other credit support which would not be available to DOE.

Types of Eligible Projects include wind, closed-loop biomass, open-loop biomass, geothermal, landfill gas, trash-to-energy, solar, and hydroelectric facilities (including incremental hydropower).

An Eligible Project must commence construction no later than September 30, 2011. If it does not, the DOE is not authorized to enter into a loan guarantee agreement for the project and must terminate any outstanding loan guarantee agreement or conditional commitment, without any further obligation to the Lender-Applicant, the proposed borrower or any project sponsor.

Applications

Applications must be filed online in two parts:

1. Part I of the application may be filed at any time prior to the filing of Part II, and is expected to provide the DOE with a summary-level description of the project and its creditworthiness, the project's eligibility, financing strategy, compliance with the proposed funding plan, progression to date supported by critical path schedule, and the Lender-Applicant's eligibility to be a Lead Lender.
2. Part II of the application is to be filed in two parts, and requires much more detail. The solicitation established 10 optional filing dates for the first part of Part II, the first of which is on November 23, 2009. The last part of Part II must be filed by January 6, 2011.

For Further Information

If you have questions about this Alert, please contact Benjamin L. Israel in our Washington, D.C. office, any other member of the Renewable Energy and Sustainability Practice Group or the attorney in the firm with whom you are regularly in contact.

As required by United States Treasury Regulations, you should be aware that this communication is not intended by the sender to be used, and it cannot be used, for the purpose of avoiding penalties under United States federal tax laws.

Notes

1. The ARRA was signed into law by President Obama on February 17, 2009.

2. *See* 10 C.F.R. § 609.2.

3. *See* 10 C.F.R. § 609.2.