

Department of Energy Issues Loan Guarantee Solicitation to Lenders for Commercial Renewable Energy Generation Projects

October 14, 2009

On October 7, 2009, the U.S. Department of Energy (“DOE”) Loan Guarantee Program Office issued its third loan guarantee solicitation under the American Recovery and Reinvestment Act of 2009 (“ARRA”), which added a new Section 1705 “Rapid Deployment” program for commercial technologies to Title XVII of the Energy Policy Act of 2005 (“Title XVII”).¹ Unlike DOE’s earlier loan guarantee solicitations, the new solicitation, “Federal Loan Guarantees for Commercial Technology Renewable Energy Generation Projects Under the Financial Institution Partnership Program” (the “Solicitation”),² is not aimed at borrowers and project sponsors. Instead, DOE invites *eligible lenders* to apply for partial loan guarantees in support of debt financing for commercial renewable energy generation projects in the United States that commence construction on or before September 30, 2011.

Seeking applications for the financing of conventional renewable energy generation projects, such as solar, wind, geothermal, biomass and incremental hydropower, the Solicitation is the first under Section 1705 to provide loan guarantees for commercial, *non-innovative* renewable energy projects. DOE makes available up to \$750,000,000 of ARRA funding to pay the “Credit Subsidy Costs” of loan guarantees issued under the Solicitation which, it states, will cover the government’s cost of loan guarantees to support approximately \$4 to \$8 billion in lending from the private sector for eligible projects.

Financial Institution Partnership Program

The Solicitation sets forth a program for eligible lenders to apply for partial, risk-sharing loan guarantees, termed the Financial Institution Partnership Program (“FIPP”). DOE explains that FIPP is a focused and consolidated set of standards designed to accelerate DOE’s loan guarantee underwriting process and leverage private sector expertise and capital for the funding of eligible projects.

¹ For background on the DOE Loan Guarantee Program, Section 1705 of Title XVII, and DOE’s first two Section 1705 loan guarantee solicitations, please see our March 2, 2009 client alert entitled “Update: American Recovery and Reinvestment Act of 2009: Energy Provisions and Summary Chart” and our August 3, 2009 client alert entitled “Department of Energy Issues Solicitations for Innovative Technology and Transmission Infrastructure Loan Guarantees.” These client alerts are available on the Dewey & LeBoeuf LLP web site at www.dl.com.

² U.S. Department of Energy, Federal Loan Guarantees for Commercial Technology Renewable Energy Generation Projects Under the Financial Institution Partnership Program (Oct. 7, 2009), available at <http://www.lgprogram.energy.gov/CTRE.pdf>.

Under the terms of the Solicitation, applications will be accepted only from qualifying financial institutions, or one institution acting as the lead representative for a group of financial institutions (“Lender-Applicants”) that will fund and hold all or a portion of a loan to owners of commercial renewable generation projects (“Borrowers”). Borrowers may not apply directly for a guarantee, but instead must team up with such Lender-Applicants in the submission of an application. The Solicitation provides that Lender-Applicants will be expected to evaluate, and receive credit approval for, the entirety of the loan in accordance with their standard internal credit policies and procedures for comparable senior debt transactions and as if the obligation were not partially guaranteed. Lender-Applicants will have the lead role in developing the overall financial structure of the proposed project and the specific terms of the loan package, in the usual and customary manner of a lead lender or underwriter of a senior credit facility.

Eligible Lenders

Participating lenders (“Holders”), which include Lender-Applicants and other institutions that would hold an interest in the guaranteed loan, are eligible to participate in the Solicitation if they:

- Have not been debarred or suspended from participation in a federal government contract or participation in a non-procurement activity;
- Are not delinquent on any federal debt or loan;
- Are legally authorized to enter into loan guarantee transactions; and
- Can demonstrate or have access to experience in participating in loans for commercial projects similar in size and scope to the project under consideration.

In addition, “Lead Lenders” also must:

- Be able to demonstrate or have access to experience in originating and servicing loans for commercial projects similar in size and scope; and
- Be able to demonstrate experience or capability as the lead lender or underwriter by presenting evidence of its participation in large commercial projects or energy-related projects or other relevant experience.

Each application under the Solicitation is required to have at least one Holder meeting the requirements of a Lead Lender, which will act as the administrative agent under the loan agreement and the loan guarantee agreement. A Lender-Applicant may submit applications on behalf of more than one project at a time.

Finance Considerations

DOE's regulations implementing Title XVII place several restrictions on loan guarantees that will apply to all guarantees issued under the Solicitation. The amount of the total project debt is limited to no more than eighty percent (80%) of total project costs. In addition, for purposes of the Solicitation, DOE will guarantee no more than eighty percent (80%) of the maximum aggregate principal amount of, and interest on, the total project debt during its term.

While the regulations do not set a minimum equity contribution percentage, the Borrower must make a "significant" equity contribution, which must be in cash and cannot be funded by the remaining non-guaranteed portion of the loan or other government loan or grant programs or assistance. Equity contributions must be funded in advance of or concurrently with the debt for a project.

In addition, the obligation must be repaid by not later than the lesser of (i) 30 years or (ii) 90 percent (90%) of the projected useful life of the project's major physical assets. The non-guaranteed portion of the loan must be repaid on a pro-rata basis, and may not be repaid on a shorter amortization schedule than the guaranteed portion.

DOE states that it expects to issue loan guarantees to support projects primarily using non-recourse or limited recourse project finance structures and that the debt structures submitted should utilize "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. While the Solicitation states that acceptable debt structures may not be "modified to accommodate tax-oriented investment structures," it is not clear whether customary loan agreement terms that provide for limits on foreclosure rights of the lenders in certain circumstances will be construed as structural modifications that "accommodate tax-oriented investment structures" and therefore prohibited. The Solicitation does, however, permit financing plans that utilize other federal or state credits, including tax credits. It is unclear whether, and to what extent, however, reliance on such subsidies may be viewed as a negative factor when an application is evaluated.

In addition, DOE is required under Title XVII to assure that the obligation bears interest at a rate that does not exceed an appropriate level taking into account the range of interest rates prevailing in the private sector for similar obligations of comparable risk guaranteed by the federal government.

Lender-Applicants are required to assume a significant amount of the risk for a portion of the loan on a *pari passu* basis with the DOE as guarantor.

The Solicitation provides that the project debt and the loan guarantee must be structured as a single, unified interest such that the debt benefits from the loan guarantee on an undivided basis. Holders are prohibited from transferring their rights under the Loan Agreement separately from their rights under the Loan Guarantee such that the transferee would have a greater percentage of its loan covered by the guarantee than the guaranteed percentage applicable to the guaranteed obligations overall. Holders, however, are “free to effectively separate and convey indirect interests in the guaranteed and unguaranteed portions of a Guaranteed Obligation by transferring to other investors economic or beneficial interests, but not legal rights, in the Guaranteed Obligation and DOE Loan Guarantee, including, for example, by means of granting loan participations or issuing covered notes.” Within these parameters, therefore, a Holder should be able to issue bonds, collateralized debt obligations, or similar instruments fully backed by the Loan Guarantee, so long as the Holder remains the party that is in privity with the DOE and the Administrative Agent under the Loan Agreements and, thus, retains liability for its obligations thereunder.

Under the form of Loan Guarantee Agreements to be used in connection with a Loan Guarantee, DOE holds a number of rights with regard to actions of the Administrative Agent and the Holders. For example, DOE has the exclusive right to exercise all voting and control rights available to the Lenders, including with regard to any amendments, waivers, acceleration and exercise of remedies, with Holder consent being required with regard to customary one-hundred percent (“100%”) voting matters. Administrative Agents are prohibited from resigning or transferring their rights or obligations without the prior written consent of the DOE. In addition, for the first two years after the project commercial operation date, Holders are prohibited from selling their interest in the debt and Loan Guarantee without the DOE’s prior written consent, except to an affiliate or another Holder. These restrictions likely will be viewed negatively by prospective lenders and may result in lenders’ requiring higher interest rates than they would agree to in the absence of such restrictions.

Eligible Projects

The Solicitation is limited to renewable energy generation projects and includes a non-exclusive list of eligible project types:

- Solar facility
- Wind facility
- Closed-loop biomass facility
- Open-loop biomass facility
- Geothermal facility
- Landfill gas facility

- Trash-to-energy facility
- Hydropower facility, including incremental hydropower

Eligible projects must:

- Be built or operated in the United States;
- Employ a “Commercial Technology,” meaning one that has been used in three or more commercial projects for a period of at least two years within or outside the United States;
- Be funded by an eligible lender;
- Not be a demonstration, research or development project;
- Receive a credit rating from a nationally recognized rating agency of at least a credit rating equivalent of ‘BB’ from Standard & Poor’s or Fitch or ‘Ba2’ from Moody’s, which must be based on an assumption that the project would not receive a loan guarantee; and
- Be able to commence construction on or before September 30, 2011.³

Projects that have completed construction are not eligible for a loan guarantee. DOE will not issue loan guarantees to support or refinance projects that have already been fully financed. If a project has begun construction before the issuance of a loan guarantee, it may be eligible for a loan guarantee unless it has received a commitment for post-construction financing, which includes construction financing that, by its terms, converts to term financing upon the completion of construction.

Application Process and Application Fee

As in previous loan guarantee solicitations, the Solicitation utilizes a two-part application process. The Part I submission is expected to provide DOE with a summary level description of the project and its creditworthiness, project eligibility, lender eligibility, financing strategy, progress to date in critical path schedules, and the Part II application deadline by which the Lender-Applicant plans to submit its Part II application. The Part II submission must include an Information Memorandum containing a significant expansion of these same categories of information, and must include information expected to facilitate DOE’s review of the complete application. Applications are

³ "Commencement of construction" means that (i) the Borrower has completed all pre-construction engineering and design, has received all necessary licenses, permits and local and national environmental clearances, has engaged all contractors and ordered all essential equipment and supplies as, in each case, can reasonably be considered necessary so that physical construction of the project may begin (or if previously interrupted or suspended, resume) and proceed to completion without foreseeable interruption of material duration and (ii) such physical construction (including, at a minimum, excavation for foundations or the installation or erection of improvements) at the primary site of the project has begun (or resumed).

expected to describe in detail the syndication, placement, distribution and other aspects of funding the loan package and demonstrate how the proposed plan complies with the objectives and parameters for use of the guarantee under the Solicitation.

DOE expects Lender-Applicants to have performed: a thorough analysis and due diligence of the proposed project's financing plan, financial viability, technical efficacy, and legal structure, as well as to have identified, assessed and estimated the impact of risks associated with the project; performed financial model reviews and stress-testing; assessed strengths and weaknesses of the project sponsors; and analyzed the proposed collateral for the project. Accordingly, DOE states that its review will primarily focus on an examination and confirmation of the credit analysis that the Lender-Applicant includes in its application. Despite this statement, however, the application is required to contain a significant quantity of information and material addressing each of these areas, similar to what has been required in previous DOE loan guarantee solicitations.

Part I submissions may occur any time after the date of issuance of the Solicitation and before the submission of an applicant's Part II submission. DOE encourages applicants to submit the basic application form as soon as practicable, with the balance of the Part I submission to follow. There are ten Part II submission deadlines, beginning on November 23, 2009 and ending on January 6, 2011.

DOE is using a rolling review and award process; therefore, applicants who complete and submit their Part II applications in earlier rounds will have a "first mover's advantage." An applicant may submit Part II of its application at any time after DOE provides notification that the Part I submission is complete, but no later than January 6, 2011. DOE will endeavor to review each Part II application and inform Lender-Applicants of its decision within two months of the application submission due date. DOE may push an incomplete Part II submission back to a later round for review, which could affect an applicant's competitiveness for being offered a term sheet/conditional commitment, depending on how quickly DOE selects successful applicants in earlier rounds and the applicant pool in each round.

DOE has set a non-refundable application fee of \$50,000 (\$12,500 of which is due with the Part I submission, and the remainder with the Part II submission). In addition, DOE states that it does not expect to use independent consultants and outside legal counsel for diligence, underwriting and other aspects of the loan guarantee process under this Solicitation, as it has in the past; however, if the DOE does incur any fees or costs in connection with the retention of such consultants or counsel, they will be the responsibility of Borrower. The amount of such fees and costs can be included in projects costs.

DOE has made available up to \$750,000,000 of ARRA funding to pay the Credit Subsidy Costs of loan guarantees issued under the

Solicitation and states that it will pay such costs “subject to the availability of funds;” presumably meaning that if such funds run out before all selected projects have closed, the Lender-Applicant will be liable for payment of those costs.

Selection of Applications

Forty-five percent (45%) of the merit review for applications will be based on the creditworthiness of the project. To evaluate creditworthiness, DOE will focus its review on application information demonstrating the financial strength of the project, with a particular emphasis on security of revenues and expenses. Overall, this information must demonstrate that the project is viable and capable of generating sufficient revenue to make payments on the loan.

The remainder of the review criteria will be allocated thirty-five percent (35%) to “Programmatic” (readiness of the project for financing, speed to closing, size of the project, simplicity of project and financing structure, and legal and regulatory factors); and twenty percent (20%) to “Financing and Funding Plan” (the ability of the Lender-Applicant and the Holders to successfully execute the financing and funding plans). DOE will consider whether the project meets the FIPP objectives, such as the extent to which the “buy and hold” intention of the Holders is co-aligned with DOE’s long-term risk exposure.

Greater weight will be given to applications that rely upon a smaller guarantee percentage, all else being equal. Applications that contemplate second-lien financing will be disfavored.

Davis-Bacon Act Prevailing Wages and ARRA Obligations

Because this Solicitation is issued pursuant to Section 1705 of Title XVII, all loan guarantee recipients must provide DOE with assurances that laborers and mechanics employed in the performance of the project will be paid wages at rates not less than those prevailing on projects of a character similar in the locality, as determined by the Secretary of Labor pursuant to the Davis-Bacon Act.

DOE has limited the application of the prevailing wage requirement based on the nature of work performed by the laborer/mechanic and the scope of the work site. Specifically, the prevailing wage requirement is limited to contracts for work involving the “construction, prosecution, completion or repair” of the project. Such work may include, among other things, altering, remodeling and installing items on the work site that were manufactured off-site; painting and decorating; manufacturing on the site of the work; and certain transportation between locations that are considered part of the site of the work. Covered work is that which is manual or physical in nature, such that persons who primarily do administrative, executive or clerical tasks generally would be excluded from the prevailing wage requirement. The requirement extends only to wages for labor on the

“site of the work,” which includes the physical place(s) where the building or work specified in contracts will remain or other sites that are specifically established for the construction of the project.

Given the expense that may be associated with the Davis-Bacon Act requirement, DOE expects Lender-Applicants to take the cost of compliance into account when preparing financial modeling. In addition, loan guarantee recipients must insert standardized contract clauses into all contracts, subcontracts, and agreements for project work that will utilize laborers/mechanics, so existing contracts, subcontracts and agreements may need to be modified.

Borrowers also will be subject to significant reporting requirements pursuant to the ARRA, including maintaining and furnishing records showing Davis-Bacon Act compliance and the quarterly reporting requirements under Section 1512 of the ARRA, which focus on disclosure of the use of funds for activities that create or retain jobs.

Limited projects may be subject to the ARRA’s “Buy American” requirement, directing that iron, steel and manufactured goods used in the project must be produced in the United States. The Buy American requirement, however, applies only to projects that constitute public buildings or public works of a governmental entity (*i.e.*, the United States; the District of Columbia; commonwealths, territories and minor outlying islands of the United States; State and local governments; and multi-State, regional or interstate entities which have governmental functions).

Environmental Review

As with prior loan guarantee solicitations, DOE must grapple with mandatory National Environmental Policy Act (“NEPA”) review requirements that it assess a project’s environmental impacts. NEPA mandates that DOE take a “hard look” at the direct and indirect environmental impacts associated with a given project to determine whether an environmental assessment (“EA”), followed by a finding of no significant impact (“FONSI”) is appropriate for a project or, in the alternative, whether it is necessary that an environmental impact statement (“EIS”) be prepared. During this mandatory review, reasonable alternatives to the proposed project also must be considered.

Given the September 30, 2011 deadline for the commencement of construction established in the Solicitation and the long lead time needed for the completion of DOE’s environmental review, Lender-Applicants and Borrowers should promptly make arrangements for the preparation of their environmental report so as not to delay the loan guarantee approval process. It will be imperative for applicants to engage the DOE, as well as any other key stakeholders, in the NEPA review process as early as possible. Clearly, DOE was mindful of the

need for applicants to act quickly; no doubt this is why applicants are given the freedom to select their EA contractor.

A combination of DOE's regulations, DOE and Council on Environmental Quality ("CEQ") guidance, and past determinations by DOE and other federal agencies should provide ample guidance to applicants looking to determine whether their projects have the potential to follow the fast track (EA/FONSI) route or whether an EIS will be necessary. In addition, it would be advisable for Lender-Applicants and Borrowers to solicit DOE's feedback on whether an EA/FONSI or EIS will be required for a project as early on in the process as possible. To accomplish this goal, however, Lender-Applicants should complete the evaluation of any potential environmental impacts associated with the project prior to and/or during the Part I application process. Completing this analysis as soon as possible will ensure that DOE and interested stakeholders are engaged and understand the potential environmental impacts associated with the project and, if necessary, can work with the applicant to avoid or minimize and mitigate such impacts and obviate the need for an EIS. The use of information previously supplied in order to support prior environmental impact assessments prepared by state and other federal agencies is another method by which applicants can expedite environmental review of their project. In our experience, the DOE may adopt an EA or EIS prepared for a project by another federal agency and, in most instances, will not second guess determinations made by state environmental agencies related to potential environmental impacts.

Finally, despite DOE warnings that applicants with projects requiring an EIS will be unlikely to complete the NEPA review process before September 30, 2011, Lender-Applicants should not automatically assume that the NEPA process cannot be completed in time. There are several options that can hasten the NEPA process available to DOE and the Lender-Applicants, including the use of an informal applicant-driven process to solicit input of key public and private stakeholders prior to the filing of the Part I and Part II submissions. In many instances, use of such a "pre-application process" will efficiently resolve potential environmental issues associated with a project prior to any formal consideration of the project by a federal agency. Specifically, we have found the pre-application process, even when informal and applicant-driven, is particularly well-suited to address the need for adjustments in a given project's design in order to avoid or minimize and mitigate its environmental impacts.

For more information, please contact the following individuals, or your Dewey & LeBoeuf relationship attorney.

In New York:

Junaid Chida at +1 212 259 6308 or jchida@dl.com

John Klauberg at +1 212 259 8125 or jklauberg@dl.com

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

No part of this publication may be reproduced, in whole or in part, in any form, without our prior written consent.

© 2009 Dewey & LeBoeuf LLP
All rights reserved.

For further information on Dewey & LeBoeuf, please visit www.dl.com

*Bill Lamb at +1 212 259 8170 or blamb@dl.com
Richard Shutran at +1 212 259 6710 or rshutran@dl.com*

In Washington, DC:

*Julia Dryden English at +1 202 346 7911 or jenglish@dl.com
Hugh Hilliard at +1 202 346 7962 or hhilliard@dl.com
Cathy McCarthy at +1 202 346 8753 or cmccarthy@dl.com
Ahren Tryon at +1 202 346 8059 or atryon@dl.com*

In Los Angeles:

*Michael O. Duff at +1 213 621 6531 or mduff@dl.com
Sean M. Moran at +1 213 621 6175 or smoran@dl.com*

In Houston:

Charles Moore at +1 713 287 2086 or cmoore@dl.com