

Department of Energy Issues Loan Guarantee Solicitation for Projects that Manufacture Commercial Energy Technology Renewable Energy Systems and Components and Initiates New Online Application Portal

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The U.S. Department of Energy ("DOE") Loan Guarantee Program Office recently issued its fourth 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 The new solicitation, "Federal Loan Guarantees for Projects that Manufacture Commercial Technology Renewable Energy Systems and Components" (the "Solicitation"),² invites borrowers to apply for loan guarantees for projects that manufacture commercial renewable energy systems and components in the United States that will commence construction on or before September 30, 2011. In addition, on August 12, 2010, the DOE announced the launch of a new online application portal that is available for use with all open DOE loan guarantee solicitations, including the Solicitation.

The Solicitation seeks applications under Section 1705 for projects that manufacture conventional renewable energy systems, such as energy storage systems and wind turbine systems, blades or solar photovoltaic systems. DOE makes available up to \$750,000,000 of ARRA funding to pay the "Credit Subsidy Costs" of loan guarantees issued under the Solicitation.

Guarantees Available to Renewable Energy System Manufacturing Projects Employing Commercial Technology

The Solicitation sets forth a program for eligible projects to receive loan guarantees from DOE for 100 percent of a loan of senior secured debt

¹ For background on the DOE Loan Guarantee Program, Section 1705 of Title XVII, and DOE's first three 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," our August 3, 2009 client alert entitled "Department of Energy Issues Solicitations for Innovative Technology and Transmission Infrastructure Loan Guarantees," and our October 13, 2009 client alert entitled "Department of Energy Issues Loan Guarantee Solicitation to Lenders for Commercial Renewable Energy Generation Projects." These client alerts are available on the Dewey & LeBoeuf LLP website at www.dl.com.

² U.S. Department of Energy, Federal Loan Guarantees for Projects that Manufacture Commercial Technology Renewable Energy Systems and Components (Aug. 10, 2010), available at <http://www.lgprogram.energy.gov/sol-08-12-10.pdf>.

funded by the Federal Finance Bank (“FFB”). The Solicitation does not contemplate guaranteeing the debt of any other lenders.

Eligible Projects

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

- Wind energy component or system manufacturing facilities;
- Solar photovoltaic component or system manufacturing facilities;
- Concentrated solar power component or system manufacturing facilities;
- Hydropower component or system manufacturing facilities;
- Geothermal component or system manufacturing facilities;
- Other geothermal power cycle component or system manufacturing facilities; and
- Ocean wave, tidal, and river current (e.g., hydrokinetic) component or system manufacturing facilities.

Eligible projects must:

- Be located in the United States;
- Manufacture “Commercial Technology” products, meaning ones that have been used in three or more commercial projects for a period of at least two years within or outside the United States that support the generation of electricity or thermal energy from renewable resources;
- Have eligible project costs greater than \$75 million;
- Be able to obtain a credit rating equivalent of ‘BB’ or better from Standard & Poor’s or Fitch, or ‘Ba2’ or better from Moody’s, as evaluated without the benefit of any DOE guarantee or any other credit support;
- Create or retain jobs in the United States;
- Not be a demonstration, research or development project;

- Be able to commence construction on or before September 30, 2011;³ and
- Otherwise meet all applicable requirements of Title XVII, including Section 1705, the Solicitation, and all applicable requirements of the ARRA.

A project or facility that begins construction before an applicant submits an application may be eligible for a loan guarantee; however, projects that have completed or nearly completed construction by the time an applicant submits any part of an application are not eligible. DOE will not issue loan guarantees to projects that have received a commitment for post-construction financing or to refinance projects that have already been fully financed.

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 of total project costs. For purposes of the Solicitation, DOE will guarantee 100 percent 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, applicants must demonstrate a "significant" level of equity investment in the project, 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.

In addition, the obligation must be repaid by not later than the lesser of (i) 30 years or (ii) 90 percent of the projected useful life of the project's major physical assets.

DOE states that it expects to issue loan guarantees to support projects primarily using senior secured debt benefiting from full recourse to the balance sheet of the applicant and/or a full guarantee from a project sponsor, a creditworthy parent, or a third party acceptable to DOE. The Solicitation provides that, to the extent practicable, DOE may consider limited recourse project financing structures (with full recourse to the

³ "Commencement of construction" means that (i) the applicant 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).

balance sheet of the project sponsor until certain defined completion tests are met) for start-up manufacturing operations. If, however, an applicant proposes a limited recourse financing structure, it must justify the use of such structure in detail and demonstrate that DOE would be protected appropriately against project risks.

The Solicitation states that applicants may utilize the Section 48C advanced energy manufacturing investment tax credits created by the ARRA; however, while the face value of the debt to be guaranteed by DOE under the Solicitation is otherwise permitted to be up to 80 percent of the total project costs, in no case shall the total debt guaranteed by DOE exceed 60 percent of the total project costs for projects receiving a Section 48C tax credit. In addition, the Solicitation explicitly provides that applications demonstrating a low level of reliance upon any federal and non-federal government assistance, including tax credits, to support the financing, construction and operation of a project will be considered more favorably by DOE than those relying upon a higher level of such assistance.

Pursuant to Title XVII, DOE is required 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.

Selection of Applications

DOE has stated that the new Solicitation is intended to “provide greater transparency in application requirements, evaluation processes, schedules and fees.” The Solicitation provides a list of project evaluation criteria and applicant evaluation criteria that will be utilized in analyzing applicants’ submissions, but provides that the absence of one or more of the items listed will not disqualify a project or applicant from consideration. These criteria are similar to what has been required in prior solicitations and include such factors as the appropriateness of the requested loan guarantee given the nature and scope of the project, the amount of project costs, the level of perceived risk associated with the project, the comprehensiveness of the application submitted, the viability of the project without the guarantee, the project’s inability to obtain reasonable private financing, the creation or retention of manufacturing jobs, the project’s importance in expanding the production of renewable energy in the United States, the suitability of the project site, and the effect of the project on United States environmental needs and energy goals.

DOE states that it is seeking applicants who will provide a significant level of equity investment, diligently pursue the project’s objectives, have a low level of reliance on other federal and non-federal governmental

assistance, can provide a high level of safeguards in the event of a default, have the capacity and expertise to successfully operate the project, have the ability to ensure the compliance with applicable laws, have a history of successfully manufacturing and selling systems or components similar to those proposed in the application, if foreign-owned, are capable of providing sales data for their product distribution in the United States market or other mature markets for at least three years, and have the ability to establish or retrofit the types of projects sought in the Solicitation.

The Solicitation provides that fifty-five percent 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 project's economic viability with and without the loan guarantee, the sponsors' financial strength and financial commitment to the project, the sources and use of funds, the applicant's prior experience, the value of the proposed collateral, and DOE's status under the proposed financing as compared to any existing lenders.

Twenty-five percent of the review will be based on the project's technical factors, which include technical relevance, merit and approach, the work plan submitted with the application, the construction plan, and policy considerations.

The remainder of the review criteria will be allocated twenty percent to "Programmatic," which focuses on the legal and regulatory factors and issues associated with the project. 10 percent of this will be based on DOE's evaluation of the project's legal structure and risks, while the remaining 10 percent will be based upon DOE's analysis of the National Environmental Policy Act ("NEPA") issues and review required in order to issue a loan guarantee.

Davis-Bacon Act Prevailing Wages and ARRA Obligations

Because the 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 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.

Loan guarantee recipients 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 a 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 multistate, regional, or interstate entities which have governmental functions).

Environmental Review

As with prior loan guarantee solicitations, DOE must grapple with mandatory 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.

The Solicitation provides that one of the applicant criteria that will be applied by DOE is whether a project can obtain a finding that it is categorically excluded from environmental assessment based on NEPA review. The Solicitation goes on to state, however, that a project with a finding that an EA is required will not be excluded based on the need for more detailed analysis. A project with a finding that an EIS is required “albeit extraordinarily difficult to meet the September 30, 2011 deadline for commencement of construction, will likewise not be excluded assuming DOE can expedite the process for a more detailed environmental analysis.”

Given the September 30, 2011 deadline for the commencement of construction established in the Solicitation, plus the long lead time needed for the completion of DOE’s environmental review, applicants 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 DOE, as well as any other key stakeholders, in the NEPA review process as early as possible.

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 applicants 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, 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, 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.

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, financing strategy, and progress to date

in critical path schedules. The Part II submission must include a significant expansion of these same categories of information and must include information expected to facilitate DOE's review of the complete application.

The Solicitation provides two Part I submission dates: September 30, 2010 and November 30, 2010. All eligible Part I submissions must be made no later than the November 30 deadline. Part II submissions may be filed any time after the DOE notifies an applicant that its Part I submission is complete and that its project or facility has been determined to be an eligible project. There are two Part II submission deadlines: November 30, 2010 and January 31, 2011.

DOE states that, while all Part II submissions will be competitively evaluated against all others submitted during the corresponding round of review, submissions will be reviewed in the order in which they are received and, as such, earlier submissions will have a "first mover's advantage."

DOE has set a non-refundable application fee of \$125,000: twenty-five percent (\$31,250) of which is due with the Part I submission, and the remainder (\$93,750) of which is due with the Part II submission. In addition, applicants are required to pay the fees and expenses incurred by DOE's independent consultants and outside legal counsel used in its evaluation of the project and other aspects of the loan guarantee process.

DOE has made available up to \$750,000,000 of ARRA funding to cover the Credit Subsidy Costs associated with the potential loan guarantees to be issued under the Solicitation and states that it has received a sufficient amount from Congress to cover those costs.

New Online Application Portal

Submission of all applications under the current Solicitation must be made via DOE's new online application portal, announced on August 12, 2010, which can be found at <https://doeloan.com>. All submissions must be made electronically no later than 11:59 pm Eastern Time on the due date for the relevant solicitation round. DOE states that while all applicants for loan guarantees are encouraged to utilize the new portal, applications under any previously issued open solicitations can still be filed in hard copy via Express Mail.

In its press release announcing the online portal, DOE states that the portal is a significant improvement over its previous paper submission requirements, in that the portal guides applicants through the process by making suggestions as to what solicitations are applicable based on the information provided; provides instantaneous guidance as to how to

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.

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increase the likelihood that an applicant will advance to the next phase; and offers comprehensive security features to ensure that submissions can be accessed only by the applicant and DOE. The format of the loan guarantee online application basically tracks the format used in previous solicitations.

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