

## V&E Energy Industry Series

# Key Considerations in Preparing to File a DOE Loan Guarantee Application

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# Introduction

## Looking at the Loan Guarantee Program from Three Perspectives

- Regulatory
- Finance
- Special Recovery Act Concepts

# Program Status

## Two Distinct Programs

- 1703
  - Created by EP Act 2005
  - Projects that “avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gasses; and employ new or significantly improved technologies”
  - Borrower pays Credit Subsidy Fee
- 1705
  - Created by the Recovery Act
  - Renewable energy systems, electric transmission, leading edge biofuels
  - DOE pays Credit Subsidy Fee

# Program Status *(cont'd)*

## Two Existing Funding Opportunity Announcements (“FOAs”)

- Projects That Employee Innovative Energy Efficiency, Renewable Energy, and Advanced Transmission and Distribution Technologies (“Innovative FOA”)
  - 1703 Program
  - Nine categories of technologies
  - Projects that also meet 1705 requirements may receive credit subsidy fee

# Program Status *(cont'd)*

- Electric Power Transmission Infrastructure Investment Projects (“Transmission FOA”)
  - 1705 Program
  - Eight categories of projects

## Additional FOAs Expected

- Commercial renewable energy systems
- Electric power transmission system projects
- “Cash for Clunkers” casts doubt on future FOAs

# Eligibility – Threshold Determinations

## 1703 Threshold Determinations

- Project will be outside the U.S.
- Project is not ready to be employed commercially in the U.S., cannot yield a commercially viable product or service, does not have the potential to be employed in other commercial projects, and is not or will not be available for further commercial use in the U.S.
- The entity issuing the loan or other debt obligations is not an “Eligible Lender or other Holder”
- Project is for demonstration, research, or development
- Applicant will not provide an equity contribution

# Eligibility – Threshold Determinations *(cont'd)*

## Additional 1705 Threshold Determinations

- Project will not commence construction by 9/30/2011
  - Borrower must have received all necessary licenses, permits, and environmental clearances necessary to proceed; has engaged all required contractors and ordered all necessary equipment and supplies; and has completed all pre-construction design and prototype testing so that physical construction may commence
  - Note on Timing: 1703 and 1705 require projects to undergo NEPA review
- Project will not create or retain jobs in the United States

# Eligibility – Commercial Technology

“Commercial Technology” means:

- installed and in use in three or more commercial projects
- in the United States
- in the same general application as in the proposed project, and
- has been in operation at each commercial project for a period of at least five years.

Transmission FOA requires commercial technology.

Innovative FOA forbids commercial technology.

Upcoming renewable FOA will likely require commercial technology.

# Eligibility – New or Significantly Improved Technology

New or Significantly Improved Technology means technology:

- that is concerned with the production, consumption, or transportation of energy and that is not a commercial technology;
- that has either (i) only recently been developed, discovered, or learned; or (ii) involves or constitutes one or more meaningful and important improvements in productivity or value in comparison to commercial technologies in use in the U.S.

Relevant only for guarantees under 1703 program

# Eligibility – FOA-specific Criteria

Innovative FOA specifies nine technology categories

- Illustrative list of the types of technologies that may fit each category
- Manufacturing projects or stand-alone projects

Transmission FOA requires that a project meet one of eight specific technical criteria

- *E.g.*, the project has at least 30 miles of transmission cable under water

## Innovative FOA Evaluation Factors

- Financial Review
  - Creditworthiness (30%)
  - Construction Factors (10%)
  - Legal and Regulatory Factors (10%)
- Technical Review
  - Technical Relevance and Merit (15%)
  - Applicant Capabilities, Technical Approach and Work Plan (20%)
  - Environmental Benefits (15%)

## Transmission FOA Evaluation Factors

- Financial Review
  - Creditworthiness (50%)
  - Construction Factors (10%)
  - Legal and Regulatory Factors (10%)
- Technical Review
  - Technical Relevance and Merit (10%)
  - Technical Approach/Work Plan (10%)
  - Environmental Benefits (10%)

# Financing Plan

- Project Finance 101
- Not financeable in this market *or any market?*
- Build model; sensitivities
- “Substantial” equity financing
- Banks or FFB

# Financing Plan *(cont'd)*

- Regulation-compliant structure
  - Correct amount of support, lien structure, other gov't support.
- Hallmarks of classic project finance
  - Reserves, waterfalls
- Credit rating requirement

# Technology Description and Rights

- DOE will be very interested in the technology
  - FOIA
- “New or innovative” claim must be defensible
  - Either way, must be feasible on a commercial level.
- Demonstration project typically needed
  - But the project being funded not a demo!
- Clean energy benefits are vital
- Shore up technology rights

- **Contracting Structure / Market Analysis**
  - Thinking like a PF banker/lawyer
  - If deviating from EPC wrap & LDs, must defend based on . . .
    - Economic justification
    - Market justification
    - Practical justification
  - Even so, it's 2009 . . .
  - Other major operational contracts (O&M, interconnects, etc.)
  - Counterparty consents
  - IE

- **Contracting Structure / Market Analysis**
  - Typical considerations apply
    - Creditworthy counterparties
    - Long term contracts better
    - Consistency with the model
    - Overall understanding of the market
  - Commodity Hedging
  - Market Analysis Report
  - Put together “contracts matrix”

# Permitting

- *September 30, 2011 for 1705*
  - Consider what is necessary for stage of the project
  - But not all risks will be acceptable
- Put together “permits” matrix
- Other governmental approvals
- Land acquisition
- NEPA
  
- General Point: SWOT Analysis

# Recovery Act Concepts

- Wage Rates
- Reporting
- Buy American

# Recovery Act Section 1606: Wage Rates

Notwithstanding any other provision of law and in a manner consistent with other provisions in ***this Act***, all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or ***assisted in whole or in part by and through the Federal Government pursuant to this Act*** shall 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 in accordance with subchapter IV of chapter 31 of title 40, United States Code. . . .

# Davis-Bacon Implementation

- “[T]his Act” refers to all funding in the “appropriations provisions” in Division A of the Recovery Act
- Subchapter IV, Chapter 31 of title 40, U.S. Code refers to the Davis-Bacon Act, which applies to construction-related work
- “Notwithstanding any other provision of law” explicitly overrides any limitation to Davis-Bacon coverage that may be contained in other Davis-Bacon related Acts
  - *E.g.*, if a project is funded under multiple statutes, the Recovery Act wage rate requirements apply if **any** Recovery Act assistance is provided for the project

# Davis-Bacon Requirements

- All laborers and mechanics employed in performance of the project will be paid prevailing wages
  - Includes contractors' and subcontractors' employees
- Department of Labor establishes prevailing wages – not less than those prevailing on similar work in the project locality
- Applicant required to make representations and certifications of compliance
  - Loan Guarantee Agreement
  - Closing condition
  - Each disbursement

# Davis-Bacon Compliance

- Insert clause at 29 C.F.R. § 5.5(a) in all contracts, subcontracts and agreements with entities employing laborers and mechanics
- Applicant is responsible for compliance by contractors, subcontractors and others
- Agency oversight and ultimately, Department of Labor oversight
- Potential False Claims Act liability
- Potential suspension and debarment consequences

# Recovery Act Section 1512: Reporting

- Section 1512(c) of Division A of the Recovery Act requires, as a condition of receipt of funds, quarterly reporting on the use of funds
- Award official will insert a standard reporting requirement in all awards funded in whole or in part with Recovery Act funds, except for those that are classified, awarded to individuals, or awarded under mandatory and entitlement programs
- Recipients are required to report information relating to jobs creation and retention resulting from the project, within 10 days after the end of each quarter

# Mechanics of Reporting Requirements

- Agencies are responsible for ensuring that their recipients timely report information required under the Recovery Act
- Information from the reports will be made available to the public
- Recipients must maintain current registrations in the Central Contractor Registration (<http://www.ccr.gov>) at all times during which they have active federal awards funded with Recovery Act funds; a DUNS number (<http://www.dnb.com>) is one of the requirements for registration in the Central Contractor Registration
- Reporting instructions provided online at <http://www.FederalReporting.gov>

# Recovery Act Section 1605: Buy American Mandate

- None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a **public building or public work** unless all of the iron, steel, and manufactured goods used in the project are produced in the United States
- Certain exceptions/waiver permissions
  - inconsistent with public interest
  - insufficient available United States quantities
  - Increase cost of overall project > 25%
- Section shall be applied in a manner consistent with United States obligations under international agreements

# Buy American Requirements

- All of the iron, steel, and manufactured goods used in the project are produced or manufactured in the United States
- Production in the United States of the iron or steel used in the project requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives
- There is no requirement with regard to the origin of components or subcomponents in manufactured goods used in the project, as long as the manufacturing occurs in the United States

# Public Building or Public Work

- Public building and public work means a public building of, and a public work of, a governmental entity (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)
- Public buildings and public works may include, without limitation: bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, **power lines**, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works
- Note: Federal Acquisition Regulation (procurement) has a different definition: “with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency”

# Buy American Noncompliance

- Corrective actions
- Removal and replacement of the unauthorized foreign iron, steel, and/or manufactured goods
- Withholding cash payments (distributions) pending correction of the deficiency
- Suspending or terminating the award
- Withholding further awards
- Potential False Claims Act liability
- Report to the agency suspending or debarring official
- Referral for criminal investigation

**Questions?**