



## DOE Issues Loan Guarantee Solicitation for Renewable Generation Projects, Launches Financial Institution Partnership Program

*By V&E lawyers Jo Ann Biggs, John S. Decker, Craig S. Kornreich, and Christopher J. Terhune*

On October 7, 2009, the Department of Energy (DOE) issued a solicitation (Solicitation) for loan guarantee applications under its new Financial Institution Partnership Program (FIPP) for Renewable Energy Generation Projects. Under the Solicitation, DOE will guarantee loans made by qualifying financial institutions to commercial generation projects using renewable energy, including hydropower. The Solicitation is limited only to generation projects – not manufacturing projects – using “Commercial Technology,” which is technology in use in three or more commercial projects similar to the proposed project for at least two years. DOE has made available \$750 million in funding from the American Recovery and Reinvestment Act to cover the credit subsidy fee associated with the loan guarantees and expects to be able to guarantee between \$4 and \$8 billion in loans. A later Solicitation will offer loan guarantees for manufacturing projects related to Commercial Technology for renewable energy generation.

In this first Solicitation for projects that are sponsored by an "eligible lender," DOE is hoping to partially share the risk of the loan guarantees and to expedite the Loan Guarantee process by relying on the financial institutions to perform an analysis of a borrower's ability to repay the loan. To that end, DOE has structured this Solicitation so that the applicants are financial institutions, not project developers. Those financial institutions will have the lead role in developing the overall financial structure of the proposed project and the specific terms of the loan guarantee. DOE has also broadly defined "eligible lender" to cast a wide net for potential Lender-Applicants.

DOE has increased the documentation requirements for Part II submissions in some respects. For example, the Lender-Applicant must submit an extensive information memorandum about the project, as well as a "very detailed term sheet" for the guaranteed obligation. The Solicitation also expresses a preference for drafts or executed versions of critical path contracts, rather than summaries. Assembling the documentation will require projects to be more advanced commercially and financially prior to the submission of an application than in previous loan guarantee solicitations.

### **1. Solicitation Description**

The Solicitation represents DOE's first implementation of the FIPP, or “bring your own banker” program. Under the FIPP, the applicant for the loan guarantee is not the sponsor of the renewable energy generation project, but a qualified financial institution (or the lead lender of a group of institutions). Upon the issuance of the guarantee, the Lender-Applicant becomes the “Lead Lender” for the project and will serve as the administrative agent and service the loan, which includes enforcing conditions precedent, collecting payments, ensuring that collateral obligations are met, and providing regular reports to DOE.



DOE hopes that the FIPP will enable it to be faster processing loan applications by relying on these financial institutions to develop the overall structure of the project and demonstrate how the guarantee fits within the parameters of the solicitation. The lead lender will have continuing obligations to DOE regarding servicing and monitoring of the project. DOE will guarantee up to 80 percent of the principal and interest on the loan obligation with the remaining debt unguaranteed. A guaranteed obligation may be split into two or more loans or tranches, provided that no more than 80 percent of any loan or tranche is covered by DOE's loan guarantee. Holders of the loan may separate and convey indirect (*i.e.*, economic or beneficial) interests, but not legal rights, in the guaranteed and unguaranteed portions through loan participations or covered notes. Legal assignment is restricted until two years after the project commences operations.

Loans guaranteed by DOE are 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 documentation produced must conform substantially in scope, quality and detail with the documentation typically produced during the course of an arm's length, commercially negotiated project or commercial financing of this scale.

More than one application may be submitted by a given Lender-Applicant.

## 2. Eligible Projects

Projects eligible under the Solicitation are renewable energy generation projects that: (1) will be built and operated in the United States using a commercial technology; (2) are reasonably likely to commence construction on or before September 30, 2011;<sup>1</sup> (3) meet all applicable requirements of Title XVII of the Recovery Act (including the Davis-Bacon Act and the Buy American requirements) and the Solicitation; (4) the entities issuing the loan or debt obligation for that project qualify as Eligible Lenders;<sup>2</sup> (5) are supported by a significant equity contribution; and (6) are 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 a credit rating equivalent of 'BB' from Standard & Poor's or Fitch or 'Ba2' from Moody's as evaluated without the benefit of a DOE loan guarantee or any other credit support that would not be available to DOE. The Solicitation lists the following as "illustrative project types":

- Wind facility;
- Closed-loop biomass facility;
- Open-loop biomass facility;
- Geothermal facility;
- Landfill gas facility;
- Trash-to-energy facility;
- Hydropower facility, including incremental hydropower; and
- Solar facility.



DOE will not issue a loan guarantee to support or refinance projects that have already been fully financed.

### **3. Two-Part Application Process**

Applications submitted under the Solicitation are to be divided into two parts. The Part I application is to provide a summary level description of the project, its creditworthiness, and the project's eligibility, as well as a description of the financing strategy and how the proposed funding plan complies with the objectives and parameters of the Solicitation. The application must also describe the project's progression in critical path activities and schedules, its readiness to proceed and commence construction, and the Lender-Applicant's eligibility to be a Lead Lender.<sup>3</sup> The Part I application must also include a letter of commitment from the Lender-Applicant stating that it intends to pursue a loan guarantee to close and to submit a Part II submission, indicating the planned due date for the particular round of Part II reviews in which the Lender-Applicant wishes its project to receive DOE consideration. The Applicant must pay 25 percent of the non-refundable \$50,000 application fee (\$12,500) when it makes its Part I submission.

DOE will review each Part I application to determine its compliance with the applicable requirements, including a determination of the level of review/approval required under the National Environmental Policy Act (NEPA) and the likelihood of the project's completion of the NEPA review process before September 30, 2011. DOE will then notify each Lender-Applicant in writing of its assessment. Part I submissions may be filed at any time prior to the filing of a Part II submission and will be reviewed on a continuous basis.

A Lender-Applicant may only file a Part II submission after it has received DOE's assessment of its Part I submission. Those assessments are intended to assist Lender-Applicants in their decision as to whether to proceed with the cost and effort of completing Part II. There are ten rounds of review for Part II submissions with the earliest due date being November 23, 2009 and the last being January 6, 2011. DOE will competitively evaluate all Part II submissions during any round against all filings submitted during that round. The Lender-Applicant may file the Part II submission at any time after receiving DOE's notification regarding its Part I submission, but applicants making submissions in earlier rounds will enjoy a first mover's advantage in terms of order of priority of review. The remaining 75 percent of the application fee (\$37,500) must be paid contemporaneously with the Part II submission.

### **4. DOE Evaluation Criteria**

After receiving a Part II submission, DOE will conduct an evaluation of both the Part I and Part II submissions based on the following factors and consistent with the weightings listed on the following page:

Factors	Weighting
<b>Programmatic</b> – project’s ability to serve the programmatic purposes of the Recovery Act; readiness of project for financing/likely speed to closing; size of project; simplicity of project’s financing structures; risks from potential legal and regulatory issues	35 percent
<b>Creditworthiness</b> – project’s capacity to provide a reasonable prospect of repayment; the availability of other Federal and State incentives; financial strength of the project, with special emphasis on security of revenues and expenses; technical, construction, and operations issues	45 percent
<b>Financing and Funding Plan</b> – ability of the Lender-Applicant and the proposed holders to successfully execute the financing plan and funding plan for the guaranteed loan or debt obligation; term of key offtake and supply contracts; availability of funds from the intended sources of project debt and equity; Lender-Applicant’s experience in executing similar financing plans.	20 percent

**5. Fees**

In addition to the \$50,000 Application Fee, the Lender-Applicant will be required to pay 20 percent of the Facility Fee when a Term Sheet approved by the Credit Review Board has been executed by the Lender-Applicant and the proposed Borrower. The Facility Fee is ½ of one percent of the guaranteed amount. The remaining 80 percent of the Facility Fee is due at closing. The Maintenance Fee is payable by the Borrower annually in advance to cover DOE’s administrative expenses in servicing and monitoring the Loan Guarantee Agreement during the construction, startup, commissioning, and operational phases of the project. DOE expects this fee to range between \$10,000 and \$25,000 per year.

Borrower will also be responsible for paying the fees and expenses of any agent, such as a “Master Servicer,” engaged by DOE in connection with Borrower’s project. DOE’s Master Servicer is to be paid on a quarterly basis pursuant to a fee agreement to be entered into at closing between Borrower and the Master Servicer. The Master Servicer will be responsible for servicing and monitoring the guaranteed loan or debt obligation during the construction, startup, commissioning and operation of the project. Although DOE does not plan to utilize independent consultants and outside legal counsel for assistance in this loan guarantee process, if it chooses to, then the proposed borrower or a Project Sponsor will be responsible for paying the fees and expenses of any consultants and legal counsel engaged by DOE.

The law requires DOE to receive either an appropriation or a cash payment from an applicant for the credit subsidy cost of a loan guarantee. That cost represents the net present value of the estimated long-term cost to the U.S. government of the loan guarantee. Because DOE has received an appropriation under the Recovery Act for the credit subsidy costs associated



with the potential loan guarantees issued under this Solicitation, DOE plans to pay directly the credit subsidy cost at or before the closing for qualifying projects.

## 6. Specified Terms and Conditions

Attachment I to the Solicitation contains 10 pages in which certain terms and parameters for loans eligible to receive loan guarantees from DOE under the FIPP Solicitation are described. Some of those terms and conditions must be incorporated into the proposed loan structure and documentation. For example, one of the required terms is that, with certain exceptions, the claims of the debt holders and DOE shall be *pari passu* with one another, and distributions shall be made on a *pro rata* basis, including with respect to principal and interest to the extent DOE becomes subrogated to the holders' rights therein by reason of payment under the Loan Guarantee Agreement. Additionally, with the exception of certain specifically delineated items, DOE will have considerable control over amendments to and enforcement of the loan documentation.

*For more information, please contact Vinson & Elkins lawyers [Jo Ann Biggs](#), [John Decker](#), [Craig Kornreich](#), or [Christopher Terhune](#). Visit our website to learn more about Vinson & Elkins' [Energy](#), [Energy Regulation](#), and [Climate Change Regulation](#) practices. If you are interested in related topics, visit our [Stimulus Act Insights](#) website.*

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<sup>1</sup> The Solicitation defines “commencement of construction” as follows: (1) 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; and (2) such physical construction (including, at a minimum, excavation for foundations or the installation or erection of improvements) at the primary site has begun or resumed.

<sup>2</sup> An “Eligible Lender” is any person or legal entity formed for the purpose of, or engaged in the business of, lending money that is not debarred or suspended from participation in a Federal contract or a non-procurement activity, not delinquent on any Federal debt or loan, legally authorized to enter into loan guarantee transactions, in good standing with the DOE and other Federal agency loan guarantee programs, able to demonstrate or have access to experience in originating and servicing loans for commercial projects similar in size and scope to the project under consideration, and 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.

<sup>3</sup> Attachment J of the Solicitation provides that to qualify as a Lead Lender, an entity must: (1) not be debarred or suspended from participation in a Federal Government contract or participation in a non-procurement activity; (2) not be delinquent on any federal debt or loan; (3) be legally authorized to enter into loan guarantee transactions and be in good standing with DOE and other Federal agency loan guarantee programs; (4) be able to demonstrate, or have access to, experience in originating and servicing loans for commercial projects similar in size and scope to the project under consideration; and (5) 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.

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