Hunton & Williams — Client Alert

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DOE Unveils Financial Institution Partnership Program to Provide Loan Guarantees to Conventional Renewable Energy Generation Projects

A much-anticipated solicitation to provide loan guarantees to support "commercial technology" renewable energy generation projects — such as wind, solar, biomass, geothermal, and incremental hydropower — that are prepared to "commence construction" by September 30, 2011, was released by the U.S. Department of Energy (DOE) on October 7. The solicitation is part of the Obama administration's continued efforts to encourage the development of renewable energy resources to produce clean, low-carbon electricity and stimulate the economy through the creation of domestic green jobs.

Applicants must submit a two-part application. Part I of the application may be submitted at any time and will be reviewed by the DOE on a rolling basis. Assuming an applicant survives Part I, the first due date for Part II applications is November 23, 2009, with nine additional Part II rounds to continue through January 6, 2011. However, as with other DOE solicitations, there is no guarantee that funding will remain available after the first round. There is no limitation on the number of applications that an applicant may submit.

As expected, the solicitation establishes a novel Financial Institution Partnership Program (FIPP) that is intended to issue loan guarantees expeditiously to renewable energy generation projects using proven technologies and conventional financing. Under the FIPP, DOE will partner with eligible financial institutions and rely substantially on their expertise in evaluating and underwriting projects. DOE will protect the taxpayer interest by ensuring that participating financial institutions share in the risks of any guarantee. The face value of the debt guaranteed by DOE is limited to no more than 80 percent of total project costs, and the borrower and other principals involved in the project must make a significant equity investment in the project.

The FIPP will be funded under the American Recovery and Reinvestment Act (the "Recovery Act"), which authorizes DOE to guarantee loans to support, among other things, "shovel ready" renewable energy systems that generate electricity or thermal energy. Pursuant to the solicitation, DOE has committed up to $750 million in funding to pay the "credit subsidy costs" of guarantees for such projects, *i.e.*, the net present value of the loan's estimated long-term cost to the government. DOE believes that the FIPP will support between $4 billion and $8 billion in lending.

The Recovery Act originally provided approximately $6 billion to pay credit subsidy costs associated with loan guarantees. Roughly a third of that funding, however, was subsequently reallocated to fund the popular "Cash for Clunkers" program. Although congressional leaders have expressed a desire to restore the reallocated funding, they have not yet done so. DOE has previously issued loan guarantee solicitations to support "innovative" renewable energy technology and electric transmission infrastructure projects and has dedicated $3.25 billion of the remaining Recovery Act funding to them. The agency has stated that an additional solicitation will be forthcoming to support loan guarantees for conventional renewable energy manufacturing projects.

The FIPP Process

Unlike all previous solicitations issued pursuant to the DOE loan guarantee program, applicants under the FIPP will not be borrowers or project sponsors but financial institutions ("Lender-Applicants"), or one of a group of financial institutions. This approach is intended to permit DOE to work directly with qualified financial institutions, streamlining the loan guarantee application process, expediting loan underwriting, expanding senior credit capacity for the financing of eligible projects, and, through risk-sharing, limiting the financial exposure of U.S. taxpayers.

Borrowers and project sponsors are expected to work closely with the Lender-Applicant in developing an application, but DOE will look to the Lender-Applicant to play the leading role in developing the financial structure for a proposed project. Upon receipt of an application, DOE will evaluate the Lender-Applicant's analysis of the proposed borrower's ability to repay the loan and other project debt, as well as the borrower's ability to meet the statutory and policy goals of the DOE loan guarantee program. Similarly, DOE will review the Lender-Applicant's ability to satisfy DOE's loan underwriting criteria. Importantly, the Lender-Applicant will be required to share in a significant portion of the risk of the guaranteed loan in order to ensure that its interests are aligned with those of DOE and U.S. taxpayers.

In order for a financial institution to be eligible to apply under the FIPP as a Lender-Applicant, it must first meet the requirements of a "Lead Lender" as set forth in the solicitation and regulations.

Commercial Technology Renewable Energy Generation Projects

Under the solicitation, an eligible project consists of renewable energy systems, including incremental hydropower, that generate electricity or thermal energy ("Commercial Technology Renewable Energy Generation Projects"). This solicitation is not open to other Section 1705 projects, namely manufacturing, transmission, or leading-edge biofuels projects. For illustrative purposes, the solicitation identifies the following types of eligible projects:

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

In order to be eligible, a project must be reasonably likely to commence construction on or before September 30, 2011. This means that: (i) the borrower has completed all pre-construction engineering and design, has received all necessary environmental clearances, has engaged all contractors and has ordered all essential equipment and supplies; and (ii) physical construction at the primary site has begun. This approach is in keeping with the Recovery Act's focus on funding only "shovel ready" projects.

The solicitation is clear that projects that have already completed construction shall not be eligible for a loan guarantee. Nor will DOE issue loan guarantees to support or refinance projects that have already been fully financed. If, however, 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 before issuance of the loan guarantee.

Notably, a project does not have to meet the requirements of Section 1703 of Title XVII, meaning that the project is not required to avoid, reduce, or sequester greenhouse gases, a significant statutory criteria under the loan guarantee program and past solicitations. The application must nevertheless provide sufficient information regarding environmental impacts, as compliance with the National Environmental Policy Act is required. Recipients of DOE-backed loans also will be required to comply with certain requirements mandated by the Recovery Act, if applicable, such as Davis-Bacon Act "prevailing wage" requirements, Buy American provisions, and various reporting obligations.

The solicitation includes more than 100 pages of very detailed information on application requirements and evaluation criteria. For more information on these details please contact Hunton & Williams LLP, through one of the attorney contacts listed on this client alert.