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DOE Issues Updates to Its Loan Guarantee Programs

By Mark J. Riedy, Robert H. Edwards Jr., and Ariel I. Oseasohn*

In this article, the authors explain the U.S. Department of Energy's updates to the Loan Guarantee Solicitation for Applications for Renewable Energy and Energy Efficiency Projects as well as to the Loan Guarantee Solicitation for Applications for Advanced Fossil Energy Projects.

The Loan Program Office ("LPO") of the U.S. Department of Energy ("DOE") recently introduced a number of important updates to the Loan Guarantee Solicitation for Applications for Renewable Energy and Energy Efficiency Projects[1] (the "Renewable Energy Program") as well as to the Loan Guarantee Solicitation for Applications for Advanced Fossil Energy Projects[2] (the "Advanced Fossil Program") (together, the "Solicitations"). The Solicitations were issued pursuant to Title XVII of the Energy Policy Act of 2005. These updates include the recent extension of the submission deadlines for Part 1 and Part 2 of the applications, the payment schedule of applicable fees under the Facility Plan,[3] and clarification concerning the prohibition against using additional federal support concurrently with the loan guarantee.

SUBMISSION DEADLINES

On June 22, 2016, the LPO issued supplements to the Solicitations, effectively extending the submission deadlines for Part 1 and Part 2 applications for both Solicitations. Pursuant to the foregoing supplements, Part 1 and Part 2 must be submitted no later than November 30, 2016. This new deadline supersedes the previous deadlines—July 13, 2016 and October 19, 2016, for Part 1 and Part 2 of both Solicitations, respectively.

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1 Solicitation Number: DE-SOL-0007154.

2 Solicitation Number: DE-SOL-0006303.

3 A plan whereby DOE supports, under one loan guarantee application, the financing of a single project comprised of multiple phases or the installation of multiple facilities.

FEES AND COSTS

According to the provisions of the Solicitations, an applicant is required to pay various fees and costs to the LPO in connection with facilitating a loan guarantee. Namely, an application fee of $150,000 to $400,000 is due in separate payments: $50,000 on the submission date of Part 1, and $100,000 on the submission date of Part 2, as long as the senior debt is at or below $150,000,000. If in excess of this amount, the Part 2 application fee is $350,000. Also, the applicant must pay a facility fee of one percent or 1.6 percent of the total amount of the senior debt, if such debt is at or below $150,000,000 or if such debt exceeds $150,000,000, respectively. The facility fee is due according to the following schedule: 25 percent on the conditional commitment execution date, and 75 percent on the closing date. Additionally, an annual maintenance fee of up to $500,000 (depending on the amount of the guaranteed senior debt) is due each year in advance.

Each applicant also must be responsible for paying the fees and expenses incurred by DOE's independent consultants and outside legal counsel in connection with such applicant's project. Furthermore, each applicant under the Solicitations generally must bear the full credit subsidy cost ("CSC") associated with the requested loan guarantee. However, if the project qualifies as an "Eligible Project" under the Appropriations Act of 2011 for the Renewable Energy Program, the applicant will bear the CSC up to seven percent of the total senior debt, and DOE will bear the CSC above seven percent of the senior debt (capped at $17,000,000). In the Advanced Fossil Program, the applicant must pay the entire CSC without any DOE offset. The CSC represents the net present value of the estimated long-term cost to the U.S. government of a loan guarantee, as determined under the applicable provisions of the Federal Credit Reform Act of 1990.

The CSC is due in its entirety upon reaching closing of the loan guarantee. This requirement may be particularly taxing for applicants pursuing the Facility Plan. In such cases, the project developer generally seeks to secure lending in advance for all phases or facilities comprising the project, but draw down on such loan in tranches, pursuant to a certain time or progress schedule with respect to the construction of each phase or facility. These applicants, in practice, intend to use a fraction of the overall guaranteed loan initially, but previously were required to pay 100 percent of the CSC at closing of the overall DOE Facility Plan loan, causing liquidity and cost difficulties. In order to assist these applicants, the LPO recently published an answer under the online Frequently Asked Questions ("FAQs") section of the Solicitations, permitting multiple conditional commitments, phase-by-phase or facility-by-facility, for each tranche of the underlying Facility Plan loan. Furthermore, the LPO now would allow the applicant to pay, upon subsequent closing of each respective portion of the overall Facility Plan loan, only the CSC associated with such tranche for that particular phase or facility.

It is important to note, however, the clear risk associated with adopting the new CSC payment schedule pursuant to the foregoing LPO clarification in the event that the applicant does not close the entire Facility Plan loan in one financial closing and pay all associated fees and costs. In this regard, while the execution of each phase or facility commences in reliance on the validity of the financial underpinnings supporting the entire project, a meaningful portion of such Facility Plan loan under the Solicitations remains in "conditional commitment" status, and is subject to Congressional removal of LPO funds, expenditure of all LPO funds and/or termination due to finalized competing commitments (i.e., closings) from other applicants in the event the LPO funds diminish substantially.

FEDERAL SUPPORT

Subject to limited exceptions that are set forth in each of the 2009 and 2011 Appropriations Acts, DOE was unable to issue loan guarantees to projects that already use other federal financial support, such as grants, loans and loan guarantees from federal agencies or entities, contractual commitments with federal agencies or entities (such as off-taking a project's products or services, acquisitions or leases by federal agencies or entities, and other federal arrangements), or any other federal financial measure that supports the project.

In an answer issued recently under the LPO FAQs section of the Solicitations, the LPO clarified that the effective date for the foregoing prohibition is now the date the applicant submits the certification required by the DOE in connection with obtaining an approval from the Director of the Office of Management and Budget to issue the loan guarantee. This step occurs 30 to 60 days prior to the date of execution of a loan guarantee agreement between the applicant and DOE. This important clarification affords applicants more time, flexibility, certainty, and funding (where appropriate). By allowing applicants to spend or use previously obtained federal support until such an advanced stage in the loan guarantee application process, applicants have more time to make any additional, necessary financial arrangements to effect the financial closing of the particular DOE loan guarantee.