

WSGR ALERT

OCTOBER 2009

FIPP, FIPP, HOORAY . . . ?

Analysis of and Commentary on DOE's Financial Institution Partnership Program

I. Introduction

On October 7, 2009, the United States Department of Energy (DOE) issued its eighth solicitation (the "FIPP Solicitation") under the Title XVII Loan Guarantee Program, establishing the Financial Institution Partnership Program (FIPP), under which it intends to leverage the private banking industry's expertise in making loans to renewable energy projects. Under this new program, private lenders will apply to DOE for loan guarantees on loans made by private lenders instead of the Federal Finance Bank, and the applicant lender will lead the diligence and documentation processes (as opposed to DOE, which led these processes under previous solicitations). DOE will make available up to \$750 million to pay the credit subsidy costs of loans guaranteed under the FIPP Solicitation.

The FIPP Solicitation likely will be beneficial to the renewable energy and clean technology industries as a whole, although certain aspects will limit the effectiveness of the program for many borrowers. DOE believes that by allowing experienced private lenders to structure, negotiate, and make loans to relatively de-risked "commercial" renewable energy generation project borrowers, the time required for such renewable energy generation projects to obtain DOE-backed financing will be substantially reduced, and that the private lending market for these types of projects will be revitalized. Unfortunately, the FIPP Solicitation still imposes substantial application processes and costs that borrowers who would ordinarily seek

traditional, private-lender project financing do not face. This means that not only will relatively few borrowers have the resources to benefit from this program, but also that each borrower will have to balance the up-front costs of participating in the FIPP against the interest savings over the life of the loans.

This WSGR Alert provides an overview of the FIPP Solicitation, with a focus on what it means for both lenders and borrowers. While we have endeavored to be comprehensive, please refer to the FIPP Solicitation itself for complete rules and application procedures, available at <http://www.lgprogram.energy.gov/CTRE.pdf>.

II. Background and Overview

Congress created DOE's Title XVII Loan Guarantee Program in the Energy Policy Act of 2005. The purpose of the program was to support debt financing of projects that were considered too technologically risky to obtain conventional private-sector funding. Section 1703 of Title XVII required that loans be made and guaranteed only for projects using "new or significantly improved" technologies compared to commercial technologies in service in the United States at the time the guarantee was issued that would also avoid, reduce, or sequester anthropogenic greenhouse gas emissions. Under the regulations applicable to Title XVII, a technology was deemed to be "commercial" if it employed technology installed in more than three other projects in the same or substantially similar application within the United States, for more than five years in each such location.

In February 2009, with the intention of jump-starting the clean technology and renewable energy industry, Congress added Section 1705 to Title XVII, which provided that the Secretary of Energy could guarantee loans for projects commencing construction before September 30, 2011, that constituted renewable energy systems, electric power transmission systems, or leading-edge biofuel projects, and \$6 billion was appropriated to pay the credit subsidy cost and administrative expenses necessary to carry out the loan guarantee program. Section 1705 does not include the requirement that the projects utilize new or significantly improved technology.

The FIPP Solicitation is the third solicitation under the 1705 program and, while it shares many characteristics with its predecessors (including solicitations under the 1703 program), it also contains several substantial and important differences. The most important elements are listed below and subsequent sections of this WSGR Alert examine their applicability and impact.

Parties Involved: The FIPP Solicitation is the first solicitation under the Title XVII Loan Guarantee Program that contemplates loans being made by private lenders instead of the Federal Finance Bank, with DOE taking a limited (80 percent of the loan principal and accrued interest instead of 100 percent) and risk-sharing guarantor role. The lender-applicant is the primary lender for a particular project, and applies to DOE for the guarantee, rather than the project sponsors or developers. In addition, the lender-applicant will have primary responsibility for conducting

Continued on page 2...

Analysis and Commentary . . .

Continued from page 1...

a project's technical due diligence, negotiating loan documentation, and, if the loan and loan guarantee is closed, loan administration and reporting obligations to DOE.

Eligible Technologies: Eligible projects are renewable energy systems that generate thermal or electric energy. Projects must employ "commercial" technologies, defined for purposes of this solicitation only as those that have been in "general use" in any commercial marketplace, within or outside the United States in three or more locations in the same or substantially similar general application as in the proposed project, for a period of at least two years in each such location. This means that projects using renewable energy generation technology that has been employed in three or more locations anywhere in the world for two or more years, but not in the United States for five or more years in three or more locations, could qualify for loan guarantees under the FIPP Solicitation and the also-open renewables solicitation released on July 29, 2009 (DE-FOA-0000140). Such project developers should consider which program offers the greatest likelihood of success, and perhaps the possibility of applying under both solicitations.

Payment of Credit Subsidy Costs, Loan Amounts, and Guaranteed Amounts: As with previous solicitations under Section 1705, the federal government pays, to the extent congressionally appropriated funds are available, the credit subsidy costs for the borrower, where "credit subsidy costs" are the net present value of the estimated long-term cost to the U.S. government of the loan guarantee as determined under the Federal Credit Reform Act. The DOE has set aside \$750 million to pay credit subsidy costs for loans guaranteed under the FIPP Solicitation, which DOE estimates will support between \$4 billion and \$8 billion worth of loans.

The principal amount of the loan guaranteed by DOE may be no more than 80 percent of eligible project costs, with "project costs"

defined as "costs, including escalation and contingencies, that are to be expected or accrued by the borrower and are necessary, reasonable, customary and directly related to the design, engineering, financing, construction, startup, commissioning and shakedown of the project." DOE may guarantee up to 80 percent of the loan (including interest thereon), with the remaining 20 percent of the loan being made on an uncovered basis. The details of project cost calculation are described in Section 609.12 of Attachment G of the FIPP Solicitation.

III. Eligibility Requirements for Lenders and Projects

As stated above, the most novel element of the FIPP Solicitation is its targeting of private lenders as its specified applicants. One result of this shift is placing lenders into the role of gatekeepers that stand between prospective borrowers and government-guaranteed funds. However, only certain lenders and projects qualify for participation in the program.

A. Lender Eligibility

The FIPP Solicitation allows lenders to be "any person or legal entity formed for the purpose of, or engaged in the business of, lending money, including, but not limited to, commercial banks, savings and loan institutions, insurance companies, factoring companies, investment banks, institutional investors, venture capital investment companies, trusts, or other entities designated as trustees or agents acting on behalf of bondholders." Such lenders must satisfy the following requirements, as discussed in Attachment J of the solicitation:

- Not be debarred or suspended from participation in a federal government contract (under 48 CFR Part 9.4) or participation in a non-procurement activity (under a set of uniform regulations implemented for numerous agencies, such as DOE, at 2 CFR Part 180)

- Not be delinquent on any federal debt or loan
- Be legally authorized to enter into loan guarantee transactions authorized by Title XVII and Attachment G (which contains certain required provisions for loan documentation) and be in good standing with DOE and other federal agency loan guarantee programs
- Be able to demonstrate, or have access to, experience in participating in loans for commercial projects similar in size and scope to the project under consideration. For this purpose, "participating" means (a) being a lender in a capacity as a principal with an investment at risk and (b) evaluating such loan investments primarily with regard to long-term credit risk.

Additionally, the lender-applicant (who, upon approval, becomes the lead lender, i.e., the party that will have the lead role in developing the overall financial structure of the proposed project and the specific terms of the guaranteed obligation, as well as fulfilling the additional duties described below) must also:

- 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
- 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.

Lender-applicants proposing to be lead lenders also should be aware of DOE's expectation that "the Lead Lender's funding commitment . . . will represent a substantial portion" of the guaranteed loan.

Continued on page 3...

Analysis and Commentary . . .

Continued from page 2...

After closing, the lead lender also will have loan servicing duties, as described in Section 609.11(c) of Attachment G of the FIPP Solicitation:

- During the construction period, enforcing all of the conditions precedent to all loan disbursements, as provided in the loan guarantee agreement, loan agreement, and related documents
- During the operational phase, monitoring and servicing the guaranteed obligations and collection of the outstanding principal and accrued interest, as well as ensuring that the collateral package securing the guaranteed obligations remains uncompromised
- As specified by DOE, including in Attachment I to the FIPP Solicitation, providing annual (or more frequent) financial and other reports on the status and condition of the guaranteed obligations and the eligible project, and promptly notifying DOE and agents designated by DOE if the lead lender becomes aware of any problems or irregularities concerning the eligible project or the ability of the borrower to make payment on the guaranteed obligations or other debt obligations

The portion of the loan funded by the lender-applicant and other participating lenders without DOE guarantees will be secured by the project collateral on a *pari-passu* basis with DOE as the guarantor. Furthermore, the lender-applicant, acting as administrative agent, must agree to indemnify DOE "from and against any and all costs, losses, liabilities, claims, damages or expenses which may be incurred by or asserted or awarded against DOE in any way relating to or arising out of any action taken or omitted by the Administrative Agent," as described in Section 4.07 of the loan guarantee agreement. Lenders and agents, who usually are protected from liability for their good-faith actions in servicing loans, will be surprised by this provision and may shy away from participating in the FIPP for this reason alone.

Other obligations, duties, and limitations, including restrictions on transfers among lenders and specified intercreditor arrangements, are discussed in Section VI of this WSGR Alert.

B. Project Eligibility

Technology Types

The FIPP Solicitation covers only renewable energy systems that generate electricity or thermal energy using commercial technology. The FIPP Solicitation provides the following nonexclusive list of potentially eligible projects:

- Wind facilities
- Closed-loop or open-loop biomass facilities
- Geothermal facilities
- Landfill gas facilities
- Waste-to-energy facilities
- Hydropower facilities
- Solar facilities

Excluded from the FIPP Solicitation are (a) commercial technology manufacturing projects (which are expected to be the subject of an upcoming solicitation), (b) innovative technology projects (including advanced biofuels projects) that were the subject of a solicitation issued in July 2009 that remains open (see our previous alert on the July 2009 solicitation here: http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert_section1603.htm), and (c) certain transmission projects, which were the subject of a previous solicitation that has since closed.

Other Threshold Requirements

The second set of threshold considerations is elaborated in Section 609.7 of Attachment G of the FIPP Solicitation. As a rule, projects

applying for a guarantee will be summarily denied if:

- the project will be built or operated outside the United States;
- the project is not ready to be employed commercially in the United States or cannot yield a commercially viable product or service in the use proposed in the project;
- any entity or person issuing the loan or other debt obligations subject to the loan guarantee is not an eligible lender as discussed above;
- the project is for demonstration, research, or development; or
- the project sponsor or proposed borrower will not provide an equity contribution.

In addition to these threshold determinations, projects applying for guarantees must have, whether structured on a project finance or a corporate finance basis, a credit rating from a nationally recognized rating agency at least equal to "BB" from Standard & Poor's or Fitch or "Ba2" from Moody's, as evaluated without the benefit of any DOE guarantee or any other credit support that would not be available to DOE. Project sponsors considering participating in the FIPP Solicitation should be aware that obtaining a credit rating is a time-consuming and expensive process, so the importance of this requirement should not be overlooked.

Lastly, final construction on projects that have applied for loan guarantees must commence on or before September 30, 2011. If a project fails to commence construction on or before this date, DOE loses its authorization to enter into any future loan guarantee agreements with the projects and must also "terminate any outstanding agreements or conditional commitments without any further obligation to the Lender-Applicant, the proposed Borrower, or any Project Sponsor." Projects must also not already have been fully financed or be complete. If a project is

Continued on page 4...

Analysis and Commentary . . .

Continued from page 3...

already under construction, then it may be eligible for a loan guarantee unless it has “received a commitment for post-construction financing before issuance” of the loan guarantee. In other words, if a project is already under construction and financed in a traditional construction-to-term project financing, it may not seek a loan guarantee under the FIPP Solicitation.

Furthermore, all projects seeking financing under the FIPP Solicitation must comply with the applicable sections of the Davis-Bacon Act (requiring payment of prevailing wages to laborers and mechanics on Section 1705-guaranteed projects), the Recovery Act (requiring extensive reporting relating to, among other things, numbers of jobs created and retained by the project), and the Buy American Act (requiring in some cases use of U.S.-produced iron, steel, and other manufactured goods for Section 1705 projects). The applicability of the Davis-Bacon Act to the relevant loan agreements is discussed in Attachment H of the FIPP Solicitation.

IV. Process for Obtaining a Loan Guarantee

The FIPP Solicitation divides the process for obtaining a loan guarantee into four phases: application, project evaluation by DOE, term sheet/conditional commitment, and loan guarantee agreement and closing.

A. Application Process

Pre-filing Requirements

Prior to filing any application, lender-applicants and proposed borrowers must complete certain communication requirements, as detailed in Attachment F of the FIPP Solicitation. This is a process that can take up to 21 days and consists of the following steps:

- Obtaining a Dun and Bradstreet Data Universal Numbering System (DUNS) number

- Obtaining a North American Industry Classification (NAIC) number
- Registering with the Central Contract Registry (CCR)
- Registering with FedConnect

Part I Application

The application phase is subdivided into two parts, the details of which are discussed in Section 609.6 of Attachment G of the FIPP Solicitation. Part I is intended to provide DOE “with a summary level description of the project and its creditworthiness, project eligibility, financing strategy and compliance of the proposed funding plan with the objectives and parameters of the . . . Solicitation, progression to date in critical path activities and schedules and readiness to proceed and commence construction, as well as the Lender Applicant’s eligibility to be a Lead Lender.” The Part I submission may be filed at any time prior to a lender-applicant’s filing of its Part II submission, and it must be accompanied by payment of 25 percent (or \$12,500) of the application fee.

Attachment A1 of the FIPP Solicitation describes the required elements of Part I of the application in more detail, dividing it into five sections.

Section A consists of information regarding the application itself. Specifically, it must include a lender-applicant qualification statement (i.e., that the lender-applicant is eligible to become a lead lender), identification and description of the borrower and project sponsors, and lender-applicant point-of-contact information.

Section B is the project description, consisting of an executive summary, a discussion of project eligibility, the project sponsors’ capabilities, a projection and breakdown of the estimated project costs (discussed in Section 609.12 of Attachment G of the FIPP Solicitation), and a discussion of the extent to which the proposed project

meets the objectives of the FIPP Solicitation.

Section C must describe the potential environmental impacts of the project, pursuant to the National Environmental Policy Act (NEPA), and described in further detail in Attachment B of the FIPP Solicitation.

Section D consists of two summaries. The first is a summary of the project’s business plan, including a market analysis, construction plan, operations and maintenance plan, project offtake, and fuel supply (if applicable). The second is a summary of the project’s financing plan, including:

- the timing and amount of funding and repayment of expected debt funding;
- the funding of expected equity investments;
- any funding in anticipation of a cash grant under Section 1603 of the Recovery Act and anticipated uses of such cash grant, if received;
- preliminary term sheet for the guaranteed obligation (including the specified terms and conditions required under Attachment I to the FIPP Solicitation);
- preliminary funding plan for the guaranteed obligation; and
- a list of other federal and non-federal governmental (including state) incentives or other assistance on which the project relies, including grants, tax credits, or other loan guarantees to support the financing, construction, and operation of the project.

Post-Part I Submission Feedback

Following the submission of Part I of an application, DOE will conduct a preliminary review on a rolling basis. DOE will inform the lender-applicant of the results of this

Continued on page 5...

Analysis and Commentary . . .

Continued from page 4...

preliminary review in order to assist the lender-applicant in deciding whether to proceed with Part II of the application. In particular, DOE will seek to:

- ascertain whether the project satisfies the threshold requirements discussed in Section III.B of this WSGR Alert;
- determine whether the lender-applicant meets the requirements of a lead lender;
- evaluate whether the project constitutes an eligible project, as discussed in Section III.B of this WSGR Alert;
- assess the project's readiness to proceed or likelihood to commence construction on or before September 30, 2011, including a determination of the level of review/approval required under NEPA and of the likelihood of the project's completing the NEPA review process by such date, all as discussed in Attachment B of the FIPP Solicitation; and
- make a preliminary assessment of whether the proposed project is expected to meet the objectives and parameters of the FIPP Solicitation.

Part II Application

Part II submissions consist of the items required by Section 609.6 of Attachment G to the FIPP Solicitation that were not due in the Part I submission. Generally, Part II consists of an information memorandum and due diligence information regarding the prospective project, described in detail in Attachment A2 of the FIPP Solicitation. At or before the filing of Part II of an application, the lender-applicant must pay the remaining 75 percent (\$37,500) of the application fee.

Attachment A2 of the FIPP Solicitation divides Part II of the application into six sections lettered A-F. Section A relates to the application itself, requiring:

- a description of any changes or additions to the Part I submission;
- a list of the participants in the project;
- a discussion of the project's satisfaction of the FIPP Solicitation requirements discussed in Section 609.6(b)(27) of Attachment G of the FIPP Solicitation;
- evidence that the signatory of the application has sufficient authority to bind the lender-applicant;
- a statement by the lender-applicant that there is a reasonable prospect that the guaranteed obligation and any other project debt will be repaid in time and in full from project cash flow;
- a written affirmation from appropriate officers of the lender-applicant committing to provide the required debt financing necessary to construct and fully commission the project and certifying the receipt of internal credit approval for the proposed transaction as if the guaranteed obligations were not partially guaranteed that is obtained in accordance with the lender-applicant's own standard internal credit policies and procedures for comparable senior debt transactions; and
- a copy of the equity commitment letter from each project equity investor and a description of the sources of equity.

Section B requires:

- a detailed discussion regarding the eligibility of the project as discussed above, including "[a]n explanation of the likelihood that the project will commence construction on or before September 30, 2011, including a description of (i) the extent to which all required contractors are engaged, (ii) the readiness for delivery of major components and transmission equipment, (iii) the extent to which pre-construction design has been

completed, (iv) the extent to which definitive interconnection agreements have been finalized and executed, (v) the security of the project's fuel supply, if applicable, (vi) the extent to which necessary land rights and state and local permits, as well as environmental clearances necessary to proceed, have been obtained or approved, and (vii) to the extent that any of these items has not been completed, the prospective Borrower's plan and proposed schedule for completing them";

- a detailed estimate and breakdown of total project costs;
- a summary of each participant's prior experience as it relates to projects similar to the one proposed;
- a description of the project sponsors' capabilities, financial strength, and investments in the project;
- a description of the project's organizational structure and personal information about key staff involved with the project for the purposes of background checks;
- a description of the status of potential and actual forms, amounts, and conditions of state and local support for the project;
- copies of all legal opinions and other material reports, analyses, and reviews concerning the project;
- identification of the proposed project location;
- a timeline of the project, including site preparation and first grid connections; and
- validation that the proposed project meets the objectives of the FIPP Solicitation.

Continued on page 6...

Analysis and Commentary . . .

Continued from page 5...

Section C of Part II of the application relates to the technical details of the project. It must describe key contracts and agreements, engineering and construction plans, operating and maintenance plans, a decommissioning plan, a list of permits and approvals required by the project, an independent engineer's report, an environmental report including the status of NEPA review/approval, and a detailed description of the project's insurance coverage.

Section D consists of an information memorandum demonstrating the proposed borrower's expertise, financial strength, and management capabilities, as well as an analysis of the various risks associated with the project, along with risk-mitigation strategies. This section also must include a financial model of the project, a market analysis, summaries of all contractual arrangements, a management plan, an analysis of operational risks and mitigation strategies, a forecast for project offtake, a discussion of fuel supply (if applicable), and a description of the types of jobs expected to be created or retained in the United States as a result of the project. To the extent that the elements in this latter sentence are dealt with in the information memorandum, internal cross-references are considered responsive.

Section E requires the lender-applicant to disclose:

- the background and legal structure of the proposed borrower and each project sponsor and the relationships among them;
- the borrower's relevant legal authority for undertaking the project;
- the sources of funds associated with the project;
- a proposed term sheet;
- audited financial statements of the proposed borrower and project sponsors for the past three years (or during the full time in operation if less);

- a credit history of the parties involved in the project;
- any current, threatened, or pending litigation involving the proposed borrower or any relevant party that relates to issues relevant to the project;
- a closing checklist;
- information on other borrowed funds;
- a description of all assets that will serve as collateral for the guaranteed obligations;
- a private credit rating for the project if project financed, or, if corporate financed, the credit rating of the borrower or any third-party guarantor;
- a statement describing various details of the initial lenders (including the lender-applicant), their expected financing, financial strength, experience with other federal programs, and other material information; and
- copies of all key financing documents.

Lastly, Section F of Part II of the application requires lender-applicants to provide lobbying, debarment, and related certifications and assurances contained in the U.S. Department of Energy Loan Guarantee Certifications and Assurances form, available at http://www.management.energy.gov/business_doe/business_forms.htm.

B. Additional Elements of the Application

In addition to the application described above, DOE also will evaluate each project to determine an appropriate level of NEPA review. The details of this review are disclosed in Attachment B to the FIPP Solicitation. It is worth noting that if a project is determined to "significantly" impact the environment, it requires an Environmental Impact Statement (EIS) created by a NEPA

contractor. Obtaining an EIS potentially entails an 18-24 month processing time. Given that the FIPP Solicitation requires construction of any given project to commence no later than September 30, 2011, the delay inherent in obtaining an EIS may be fatal to a recently initiated project, the projected environmental impact of which is significant. It is also worth noting that the necessity of an EIS may be determined *sua sponte* by DOE after the submission of Part I of an application, even if the borrower or lender-applicant does not believe that the project possesses the requisite environmental impact. Thus, in calculating a timeline, a lender-applicant should take into account not only the time required to prepare an EIS but also the time required for DOE to process Part I of their application.

Regardless of DOE's determination, all applications must include a report analyzing the potential environmental impact of the project, and should include descriptions of:

- the facilities the project intends to create;
- the project location;
- proposed project construction and operation;
- project progression;
- status of other environmental and regulatory reviews, including permitting;
- alternative sites or operating parameters;
- post-operational requirements, to the extent possible; and
- other actions in the project area.

All applications must include language mandated by the Freedom of Information Act and Title 17 of the Energy Policy Act of 2005. The relevant language may be found in Attachment C of the FIPP Solicitation.

Continued on page 7...

Analysis and Commentary . . .

Continued from page 6...

C. Review of the Application

Substantially complete applications are reviewed pursuant to rules described in Section 609.7 of Attachment G of the FIPP Solicitation. This review is conducted subject to periodic deadlines on a first-come, first-served basis. Applicants are encouraged to apply as early as possible, as the amount of money set aside for the solicitation is limited and earlier submissions enjoy a first mover's advantage in terms of priority of review. The deadlines for Part II applications are as follows:

Round	Part II Application Deadline
1	November 23, 2009
2	January 7, 2010
3	February 22, 2010
4	April 8, 2010
5	May 24, 2010
6	July 8, 2010
7	August 23, 2010
8	October 7, 2010
9	November 22, 2010
10	January 6, 2011

Following the receipt of a Part II submission, DOE will evaluate both parts of the applications along the following criteria, weighted as listed below:

Note that the "creditworthiness" factor is given the most weight in the above analysis. In conducting this inquiry, "DOE will consider the proposed project's capacity to provide a reasonable prospect of repayment (the economic viability of the project without the DOE Loan Guarantee, its ability to generate sufficient cash flow to service the proposed Borrower's debt obligations over the life of the Loan Guarantee, etc.) and the availability of other Federal and State incentives other than the DOE Loan Guarantee. DOE also will consider Project Sponsor capability, financial strength, as well as the credibility of the business and financial plans and market factors that could significantly influence the success of the project. This will include consideration of technical, construction and operations issues. In evaluating the risk of cost overruns, DOE will consider whether the Guaranteed Obligation, together with amounts available to the project from other sources, will be sufficient to complete the project."

DOE also will consider the following review criteria, as set forth in detail in Section 609.7 of Attachment G of the FIPP Solicitation:

- To what extent the technology to be employed in the project is a commercial technology and yields a commercially viable project or service in the use proposed in the project
- The extent to which the requested amount of the loan guarantee and the requested amount of guaranteed obligations are reasonable relative to the nature and scope of the project

- The total amount and nature of the eligible project costs and the extent to which project costs are funded by guaranteed obligations
- The amount of equity commitment to the project by the proposed borrower and other principals involved in the project
- Whether there is sufficient evidence that the project sponsor or proposed borrower will diligently pursue the project, including resuming or initiating and completing the project in a timely manner
- Whether and to what extent the proposed borrower will rely upon other federal and non-federal governmental assistance (such as grants, tax credits, or other loan guarantees) to support the financing, construction, and operation of the project and how such assistance will impact the project
- The feasibility of the project and likelihood that the project will produce sufficient revenues to service the project's debt obligations over the life of the loan guarantee and assure timely repayment of guaranteed obligations
- The levels of safeguards provided to the federal government in the event of default through collateral, warranties, and other assurance of repayment described in the application, including the nature of any anticipated intercreditor arrangements

Factors	Detail	Weighting
Programmatic	Readiness of project for financing/likely speed to closing; size of project; simplicity of project and financing structures; legal and regulatory factors	35%
Creditworthiness	The financial strength of the project, with special emphasis on security of revenues and expenses	45%
Financing and Funding Plan	The ability of the lender-applicant and the proposed holders to successfully execute the financing plane and funding plan for the guaranteed obligation	20%

Continued on page 8...

Analysis and Commentary . . .

Continued from page 7...

- The proposed borrower's capacity and expertise to successfully operate the project, based on factors such as financial soundness, management organization, and the nature and extent of corporate and personal experience
- The ability of the proposed borrower to ensure that the project will comply with all applicable laws and regulations, including all applicable environmental statutes and regulations
- The levels of market, regulatory, legal, financial, technological, and other risks associated with the project and their appropriateness for a loan guarantee provided by DOE
- Whether the application contains sufficient information, including a detailed description of the nature and scope of the project and the nature, scope, and risk coverage of the loan guarantee sought, to enable DOE to perform a thorough assessment of the project
- Such other criteria that DOE deems relevant in evaluating the merits of an application
- Evaluation of financing plan: This involves a thorough review of the sources and uses of funds.
- Assessment of financial viability: This is based upon the financing plans submitted with the application and updates, and projections for future financial performance. As noted in the FIPP Solicitation, "an important consideration in the financial viability assessment will be an evaluation of the assumptions underlying projected revenues and expenses and the likelihood that assumed technical performance will be achieved."
- Determination of technical efficacy: This step is based primarily upon the lender-applicant's engineering report, including factors such as environmental impact and infrastructure requirements. This analysis will be influenced by the quality of the engineering report, including the professional credentials of the consultant, scope of the undertaking, and strength of the opinions provided.
- Review of project legal structure: DOE's examination of the project's legal structure will involve analyses of draft and final legal agreements among project participants, including equity owners, financing sources, engineering and construction contractors, operation and maintenance contractors, equipment suppliers, host communities, and any other counterparties of interest. Additionally, this review also will include an analysis of the intellectual property rights of participants in the project to ensure access to necessary technology.

D. Other Considerations

Following its receipt of an application, DOE's review process begins. DOE may (but specifically states that it does not expect to) enlist in connection with its review the services of independent consultants and outside legal counsel, in each case at the expense of the applicant. The cost of such consultants or counsel, if any, may be included in the calculation of total project costs.

DOE's review "will primarily focus upon an examination and confirmation of the credit analysis included in the application, as well as a review to satisfy itself that all requirements under Title 17 (excluding Section 1703), the Recovery Act and the Solicitation are met" and include the following inquiries:

and the extent to which risks have been mitigated.

- Performance of financial model review and stress-testing: "The modeling must quantify the impacts of risks by stress-testing the model to understand how changes in model assumptions can affect the project's capacity to make full and timely repayments of the loan." The model employed by the lender-applicant must be made available to DOE and must include borrower compliance with the Davis-Bacon Act and the Recovery Act. DOE will look to ensure that the model quantifies the impacts of risks by stress-tests to understand how changes in model assumptions can affect the project's capacity to make full and timely repayments of the loan.
- Assessment of strengths and weaknesses of project sponsors: DOE will examine the project sponsors' investment to date and capability to implement the project as proposed from both financial and managerial perspectives. Specific considerations include, but are not limited to, (a) the project sponsors' track record in project development and in the specific technology proposed in the application, (b) the project sponsors' financial strength and resources, (c) the strategic value of the project to the project sponsors, and (d) the experience and expertise of the management team, particularly as it relates to construction management and operation of the proposed project.
- Analysis of proposed collateral: Needless to say, DOE will examine the value of the collateral in detail.

V. Post-Review Procedures

A. Term Sheet/Conditional Commitment

Following a competitive round of review based on the criteria discussed above, the best-qualified applicants in the same Part II round will be offered a term sheet after the

Continued on page 9...

Analysis and Commentary . . .

Continued from page 8...

closing of each round of Part II review. This process is explained in Section 609.8 of Attachment G of the FIPP Solicitation. Upon execution of the term sheet, the lender-applicant must pay to DOE 20 percent of the non-refundable facility fee. The facility fee is defined in Attachment C to the FIPP Solicitation as 0.5 percent of the guaranteed portion of the guaranteed obligation.

Upon acceptance of the term sheet, the lender-applicant and the proposed borrower may enter into a conditional commitment with DOE, subject to statutory limitations on DOE's ability to enter into such a commitment, as detailed in Section 609.8 of Attachment G of the FIPP Solicitation. This commitment will be conditionally binding and include (among others) the following terms:

- Material change qualifiers
- A series of conditions precedent to the closing of the loan guarantee transaction
- Expiration dates
- Termination provisions for failure to pay fees according to DOE's schedule

B. Loan Guarantee Agreement and Closing

The final steps in acquiring a loan guarantee occur at the closing pursuant to Section 609.9 of Attachment G of the FIPP Solicitation. At or prior to the financial closing and execution of the loan guarantee agreement, DOE will pay, subject to availability of funds, the credit subsidy cost for an eligible project, so long as (a) the project retains its eligibility as discussed above, (b) the lender-applicant pays the remaining 80 percent balance of the facility fee, and (c) the borrower pays the non-refundable maintenance fee. This maintenance fee (also referred to as the "Third Fee" in the FIPP Solicitation) is intended to cover DOE's administrative expenses in servicing and monitoring the loan guarantee during construction, start-up, commissioning, and operation of the project. The fee is expected to be in the range of

\$10,000 to \$25,000 per year and must be paid each year in advance, commencing on the closing date of the loan guarantee agreement.

VI. Required Terms and Conditions for Guaranteed Obligations and Loan Guarantee Agreements

The required terms and conditions of the loan guarantees are discussed in Attachments G and I of the FIPP Solicitation. Lenders and borrowers should be aware that the FIPP Solicitation is applicable only to "simple" financing structures, specifically "'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." There are already questions as to what attributes indicate that a particular structure accommodates tax-oriented investment structures, but for now it is best to assume that structures that require tax-equity investors will not qualify for support under the FIPP Solicitation. Lenders and borrowers also should note that the FIPP Solicitation provides that "applications that contemplate second-lien financing will be disfavored."

Loans themselves may be made in two or more tranches (for example, fixed- and floating-rate tranches, or tranches with differing tenors or amortization schedules), but DOE will guarantee only 80 percent of each tranche. Loans must mature before the earlier of (a) 30 years or (b) 90 percent of the useful life of the underlying assets. Although loan terms generally are expected to be negotiated between lender and borrower, interest rates will be determined by DOE, in consultation with the Department of the Treasury. There is no indication of applicable interest rates except that interest rates "prevailing in the private sector for similar obligations of comparable risk guaranteed by the Federal government" will be taken into account when setting the rate. We believe that potential borrowers should assume that interest rates applicable to loans guaranteed

pursuant to the FIPP Solicitation will be significantly higher than interest rates applicable to loans made pursuant to previous solicitation via the Federal Financing Bank.

Attachment I to the FIPP Solicitation identifies key elements of the solicitation and explains their applicability to specific loan guarantees. A list of the subjects of these required terms and conditions found in Section 1 of Attachment I follows:

- Lender participation
- Guaranteed obligations of DOE
- Collateral
- Priorities
- Loan structures
- Voting rights
- Remedies
- DOE fees and expenses
- Credit subsidy costs
- Conditions precedent, representations, and warranties
- Agents
- Progress reports and financial statements
- Freedom of Information Act
- Choice of law and submission to jurisdiction
- Certain provisions mandated by the Recovery Act

Section 2 of Attachment I describes the specifics of the loan guarantee agreement. Most of its content has been covered in previous sections of this WSGR Alert. However, it is worth focusing on two of the terms of the loan guarantee, as they play

Continued on page 10...

Analysis and Commentary . . .

Continued from page 9...

substantial roles throughout the duration of the guaranteed loan and alter its operation in a manner divergent from more traditional project financings. The first of these is the restrictions placed on transfers of loan participations and the second is intercreditor agreements between DOE and the private lenders who are participants in the loan.

A. Transfer Restrictions

Unlike traditional project finance transactions, loans guaranteed under the FIPP may not be freely transferred. Per Attachment I of the FIPP Solicitation, lenders may not transfer their interests in the guaranteed loan “during the period from closing date to the date the Eligible Project enters into commercial operations plus two years” without DOE’s prior written consent, which will not be unreasonably withheld or delayed. Even with such consent, such a transfer may only be made to (i) another current lender, (ii) an affiliate of the transferring lender that meets the qualifications to be a lender (as discussed above in Section III.A of this WSGR Alert), or (iii) a special-purpose entity wholly owned and controlled or exclusively managed by the transferring lender. After the restricted time period expires, lenders may transfer their interests without DOE consent, provided that the recipient itself qualifies as a permitted lender.

Potential lenders also should be aware that transfers of interests in guaranteed loans are addressed extensively in Section 5 of the loan guarantee agreement, which details and extends the restrictions discussed in the FIPP Solicitation.

B. Intercreditor Arrangements

The various intercreditor arrangements discussed below are designed to address lenders’ potential concerns regarding DOE’s roles as both enabler of the renewables industry (pursuant to which it might be more willing than private lenders to waive defaults, grant waivers, and otherwise act in a borrower-friendly manner) and as guarantor of potentially risky loans (pursuant to which it

might otherwise insist on absolute control over workout situations and restructurings, to the detriment of the private-sector lenders). These arrangements are described in Attachment I of the FIPP Solicitation.

With respect to priority of liens, the liens of lenders and DOE are deemed to be “*pari passu* with one another and distributions [following, for example, a foreclosure] will be made on a *pro rata* basis.”

Furthermore, Attachment I requires DOE to obtain the consent of the affected holders for significant amendments to the loan documentation, including:

- changes in interest rates, amortization schedule, final maturity, or holder indemnity rights against the borrower;
- any change affecting the senior secured ranking of the guaranteed obligation or the priority of payments under the loan agreement; or
- any release of collateral, the result of which reasonably could be expected to leave the guaranteed obligation less than fully secured.

If a borrower defaults, then the following rules apply:

- In the event that DOE does not accelerate the maturity of the guaranteed obligation and exercise remedies against the borrower and the collateral within 90 days following such payment default, then a majority in interest of the lenders may require that DOE meet and discuss with them (telephonically or otherwise) their preferred course of action, provided that DOE’s exercise of its rights, including the right to continue forbearance, nonetheless will continue to be in DOE’s sole discretion
- In the event that DOE does not accelerate and exercise remedies within

180 days following a payment default, then the lenders by unanimous vote may take action to accelerate the guaranteed obligation and exercise remedies

- In the event that DOE does not accelerate and exercise remedies within 270 days following a payment default, then two-thirds in interest of the lenders may vote to accelerate and exercise remedies

VII. Implications for the Renewable Energy Industry

The FIPP Solicitation is a welcome addition to DOE’s suite of grant and loan guarantee programs, but in the end may turn out to be a bit underwhelming. What was supposed to be a program pursuant to which DOE would rely heavily on private-sector lenders to determine which projects deserve federal loan guarantees has instead become a program where, even after an experienced project finance lender has committed to lend funds to the project, the lender and borrower also must obtain a credit rating for the project (which is unusual for project finance transactions involving banks and increases the time and expense of the financing process) and then again must pass muster in a competitive process before DOE’s internal and possibly external reviewers. Project developers and lenders, therefore, face multiple opportunities to be rejected by DOE for a loan guarantee during what is already a long and expensive process between the project developer and private lender. Project developers and borrowers might therefore be excused for either (a) wondering whether it would be better to seek a guarantee from DOE of a loan funded by the Federal Financing Bank (as has been the case to date under the Section 1703 and 1705 programs), or (b) skipping the DOE loan guarantee process entirely and working with private-sector lenders on a non-guaranteed basis, on the assumption that interest costs will not be that much greater and will be offset by savings of time and money obtained by not working through the FIPP program.

Continued on page 11...

Analysis and Commentary . . .

Continued from page 10...

In the end, the FIPP seems most suited to very long-term (10-plus-year) loans made by non-bank lenders (such as life insurance companies) who previously were restricted to investing only in investment-grade projects. With the FIPP, these lenders now can invest in "BB"-rated projects (thereby expanding their universe of projects), while also collecting interest on a U.S. government-guaranteed obligation at a rate higher than would otherwise be applicable to Treasury bills and other government obligations. In this case, all parties win. The project developer gets long-term debt at a favorable rate and

the non-bank lender gets a higher yield on a traditionally low-yielding portion of its overall investment portfolio.

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