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The New “FIPP” Program for DOE Loan Guarantees: Mobilizing Private Capital for Renewable Energy Projects

by Carol M. Burke and Jane Wallison Stein

The Department of Energy (“DOE”) has announced the Financial Institution Partnership Program (“FIPP”), its much anticipated Loan Guarantee program for renewable energy systems that use commercial technologies to generate electricity or thermal energy. It implements DOE’s mandates under Section 1705 of Energy Policy Act of 2005 (“EPAct”), which was added to the EPAct by the American Reinvestment and Recovery Act of 2009 (“ARRA”).

FIPP is the newest tool in the DOE’s expanding toolbox. DOE’s press release characterizes FIPP as “a streamlined set of standards designed to . . . leverage private sector expertise and capital” for the funding of eligible projects. FIPP is modeled on similar programs used by other U.S. government agencies. Some have questioned whether this makes sense in light of the greater complexity of the projects contemplated to be financed by the DOE.

The core concept of the proposal is to attract private financial institutions to be co-lenders with DOE. The private “Lead Lender” is required to be the applicant, to perform the needed financial and other due diligence for a proposed project, and then certify to DOE as to the accuracy and completeness of the information provided in the application. It is not yet clear how financial institutions will respond to the certification requirements, or whether the costs and risks of the program could outweigh its interest rate advantages as compared with competing financing options.

The Program Generally

The Solicitation commits up to \$750 million to pay the “credit subsidy costs” (i.e., the estimated cost to the government of providing the federal guarantee). This is expected to support up to \$8 billion in loans for eligible projects, which include wind, solar, biomass (closed-loop and open-loop), geothermal, landfill gas, trash, and hydropower. A further solicitation will be announced later for renewable energy component manufacturing projects.

There are some notable changes in the regulations applicable to FIPP as compared with earlier programs, among them the elimination of the one technology/one sponsor rule, and barring of the Federal Financing Bank's 100% guaranteed financing alternative.

Application and Selection Process

There are 10 submission deadline dates (or rounds) for a completed application, the earliest being November 23, 2009, and the latest January 6, 2011. The applications will be evaluated by DOE on a continuous basis, and will be evaluated competitively against the other applications. Key drivers will be NEPA compliance, the ability to begin construction by September 30, 2011, job creation and preservation, and feasibility of the project's funding plans. As with other DOE programs with multiple rounds, there is no guarantee that funding will remain available after the first round.

FIPP Guarantee and Debt Limits

The program has a maximum per-project debt limit of 80% of eligible project costs, and an 80% limit on the DOE-guaranteed portion of principal and interest. The program requires projects to have a rating of at least BB, which could be a significant hurdle for limited-recourse project financings of renewable energy systems. The Solicitation contemplates conventional project- and corporate-financing structures, but expressly excludes tax-oriented financing structures.

Under the terms of the Solicitation, a holder of the debt is required to continue to hold the debt through completion of construction and for two years thereafter. However, the Solicitation and related documentation expressly permit the debt to be transferred by the holder to an affiliate, a wholly-owned special purpose entity or an entity managed by the holder, and permit beneficial interests in the debt to be transferred, thereby creating flexibility in how other lenders and sources of capital can share in the risk of the guaranteed obligation.

Due Diligence Responsibility and Reporting Requirements

Under FIPP, the Lender-Applicant is required to analyze the proposed project as if the financing were not guaranteed by the DOE. The DOE will then use that analysis as the basis for its evaluation. The Lender-Applicant's review is expected to include all project aspects, including financial viability, technical efficacy, legal structure, risk allocation and mitigation, etc.

In its application, the Lender-Applicant is required to certify that "the data and information submitted and the representations made in the application and any attachments to the application are true and correct, to the best of the Lender-Applicant's knowledge and belief after due diligence, and that the Lender-Applicant has not omitted any material facts." If financial institutions agree to issue such certifications, the costs and risk exposure of both the evaluation and the certification will be passed through to the borrower, who will take them into account in evaluating competing options for financing.

Fees and Costs

The Solicitation specifies various application fees, facility fees and maintenance fees. Also, while the DOE plans to rely on the evaluation of the Lender-Applicant, the DOE reserves the right to also engage outside advisors, at the borrower's expense, to assist it in its evaluation of the project.

The Way Forward

The DOE efforts to date in meeting the challenges presented by the ARRA are impressive. FIPP is but one example of DOE's efforts to address some major roadblocks. However, the success of FIPP in mobilizing private capital in support of DOE's loan guarantee program will depend critically on whether private financial institutions and borrowers are able to structure competitive financing arrangements and provide the due diligence assurances assumed by FIPP.

FIPP solicitation includes more than 130 pages of very detailed information on application requirements and evaluation criteria. As the latest in a series of solicitations issued by DOE's Loan Guarantee Office based on EPC Act Title XVII and related Regulations, the FIPP solicitation includes requirements similar to earlier solicitations. Applicants should make sure they are familiar with the interpretative background of the precedent regulations as a basis for interpreting the requirements of the FIPP program.

For more information on the details of the FIPP program, please contact one of the attorneys listed below.

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