

# DOE's Open Window for Loan Guarantees for Conventional Renewable Energy Generation Projects

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The U.S. Department of Energy announced on October 7, 2009 the first Loan Guarantee Program solicitation under its new Financial Institution Partnership Program (FIPP) to provide project financing for renewable energy generation projects under the Section 1705 program created by the Recovery Act.<sup>1</sup> The FIPP requires co-financing with commercial lenders. This memo reviews the scope of the solicitation, its key terms, some key issues for participating commercial lenders, and the application process.

## Scope of the Solicitation

### Qualifying Technologies

This solicitation offers guarantees of up to 80% of the principal of, and interest on, project financing for:

- (i) renewable energy generation systems
- (ii) that embody commercial technologies
- (iii) with simple financing structures, and
- (iv) a credit rating of at least 'BB' from Standard & Poor's or Fitch or 'Ba2' from Moody's.

Examples of eligible projects include wind facilities, closed-loop biomass facilities, open-loop biomass facilities, geothermal facilities, landfill gas facilities, trash-to-energy facilities, hydropower facilities, including incremental hydropower, and solar facilities.

Section 1705 qualifying projects that are excluded from this solicitation include: (i) commercial technology manufacturing projects (which are to be the subject of an upcoming solicitation); (ii) innovative technology projects (both generation and component manufacturing as well as leading edge biofuels projects), all of which are covered by the solicitation that was issued July 29, 2009, and remains open; and (iii) non-innovative transmission projects, which

were the focus of another July 29 solicitation that closed September 14.

Intriguingly, the definitions of commercial projects qualifying under the current solicitation and innovative projects under the July 29 solicitation overlap. Under this solicitation, "the proposed technology [must have] been installed in and is being used in three or more commercial projects *anywhere* in the same or substantially similar general application as in the proposed project and has been in operation in such commercial projects for a period of at least *two years*".<sup>2</sup> Under the July 29 solicitation for innovative technology projects, projects must use a technology that has not been "used in *three or more* commercial projects *in the United States* ... for a period of at least *five years*".<sup>3</sup> Thus, a project of a type of which at least three examples have been operating for at least two years somewhere in the world, but with fewer than three projects operating for more than five years in the United States, would qualify under both the currently outstanding July 29 solicitation for innovative projects and also this new solicitation for commercial technology projects.

### Simple Financing Structures

This solicitation focuses on projects offering simple financing structures. It states:<sup>4</sup>

[F]or this Solicitation, the Guaranteed Obligation is 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-

<sup>1</sup> "Section 1705" refers to Section 1705 of the Energy Policy Act of 2005, which was added by the Recovery Act.

<sup>2</sup> Solicitation, page 78 [emphasis added]; see also page 36.

<sup>3</sup> Final Rule, sec. 609.1 [emphasis added].

<sup>4</sup> Solicitation, page 8.

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oriented investment structures.

The final clause suggests that tax equity may not find a home in transactions under this solicitation. Elsewhere, the solicitation also notes that “applications that contemplate second-lien financing will be disfavored.”<sup>5</sup>

Although DOE notes that it “expects to issue loan guarantees to support projects primarily using limited or nonrecourse project finance structures,”<sup>6</sup> corporate financings are apparently not out of the question. In discussing documentation requirements, DOE states that it “expects that the financing documentation between the Lender-Applicant and the proposed Borrower with respect to the proposed project will be typical of an arm’s-length, commercially negotiated *project financing*, or *corporate financing that meets the objectives of Title XVII*.”<sup>7</sup> In discussing credit ratings, the solicitation provides that a project “is 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.”<sup>8</sup> So, it seems that corporate as well as limited recourse financing structures should pass muster.

### **Refinancings**

A key question is how far a project can have advanced and still qualify under the solicitation. Completed projects are not eligible for a loan guarantee. Neither will DOE issue loan guarantees to refinance projects that have been “fully financed.” For earlier stage projects, DOE states:<sup>9</sup>

If 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.

A commitment for construction financing that, by its terms, converts to term financing upon completion of construction is considered a commitment for post-construction financing and would preclude access to a loan guarantee. It would

appear from this that funding construction with equity or with bridge financing that has an equity backstop would leave the door open to DOE financing.

### **Available Funding**

The volume of financing that can be supported by the solicitation is limited by the \$750 million allocated to cover the credit subsidy costs of guarantees. The DOE projects in its press release announcing issuance of this solicitation that this allocation will suffice to support a disappointingly small \$4 billion to \$8 billion in guarantees, but this may either overstate or underestimate the financing ultimately available.

On one hand, it is not completely clear that the DOE can deliver the full \$750 million on offer. After (x) the \$2 billion cash-for clunkers raid on the Loan Guarantee Program’s \$5.935 billion credit subsidy appropriation, (y) the allocation of \$2.5 billion for Section 1705 innovative projects under the July 29 solicitation, and (z) the allocation of \$750 million for transmission projects under the other July 29 solicitation, only \$715 – not \$750 – million appears to remain available. DOE must be counting on either re-allocating some of the previously offered credit subsidy or having the shortage mooted by Congressional action that would restore some or all of the cash-for-clunkers transfer.

That DOE must have some such thing in mind is suggested by the repeated references in this solicitation to a subsequent Section 1705 solicitation to support renewable energy component manufacturing projects. Absent restoration of such funds, DOE has no remaining appropriation to fund such a further solicitation. Though it may not be the sort of thing that a federal agency can comfortably discuss in a solicitation, the expectation of Congressional action could be well founded. Current reports are that the House leadership will seek full restoration of the cash-for-clunkers transfer in the upcoming Defense Department appropriations bill.

If the original appropriation is restored, the benefit under the solicitation will depend on DOE amending the current allocation, but the result could easily increase available funding by an order of magnitude.

On the other hand, even without restoration of the original appropriation, the DOE’s estimate of \$4 to \$8 billion may underestimate the available financing. Some involved with preparation of the FIPP thought that the appropriate

<sup>5</sup> Solicitation, page 18.

<sup>6</sup> *Ibid.*

<sup>7</sup> Solicitation, page 20 [emphasis added].

<sup>8</sup> Solicitation, page 9 [emphasis added].

<sup>9</sup> Solicitation, page 10.

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credit subsidy allocation for projects meeting the minimum credit requirements of the program would permit something closer to \$15 billion in financing. While the actual utilization of credit subsidy is not determined until financings close, there may be more here than was reported in the press release which may have been intentionally conservative. And, of course, if the appropriation is restored, then available financing resources could expand dramatically.

### Statutory Requirements

#### *Recovery Act Requirements*

##### *Commencement of Construction*

DOE focuses, both as an eligibility factor and a ranking factor, on a project's ability to make the September 30, 2011, deadline for commencing construction. Under the solicitation, the commencement of construction requires that:<sup>10</sup>

- (i) the 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 as, in each case, can reasonably be considered necessary so that physical construction of the Eligible Project may begin (or, if previously interrupted or suspended, resume) and proceed to completion without foreseeable interruption of material duration and
- (ii) such physical construction (including, at a minimum, excavation for foundations or the installation or erection of improvements) at the primary site of the Eligible Project has begun (or resumed).

##### *Other Recovery Act Requirements*

The solicitation details certain other requirements with which all Section 1705 borrowers must comply. These include Davis Bacon wage requirements (pursuant to which Davis Bacon compliant wages must be paid to on-site construction laborers and mechanics), Recovery Act reporting requirements and, for projects that are "public

works," the Buy American requirements.<sup>11</sup>

#### *Energy Policy Act of 2005 Requirements*

Numerous fundamental requirements for the DOE Loan Guarantee Program that apply to other Section 1703 and 1705 solicitations also apply here, such as:

- the Guaranteed Obligation cannot exceed 80% of project costs (so that, under this solicitation, with a guaranteed portion not exceeding 80% of the Guaranteed Obligation, the DOE will not guarantee financing for more than 64% of project costs);
- the project must offer DOE a "reasonable prospect of repayment" (although, with each project under this solicitation requiring a BB credit rating, the likelihood of a proposal not meeting this criterion seems remote);
- the project must be located in the United States (or its territories); and
- the project must create or retain jobs in the United States (or its territories).

#### *National Environmental Policy Act*

The DOE needs to complete an environmental analysis in compliance with NEPA before issuing a loan guarantee. The feasibility of doing so in time for projects to meet the construction deadline has been a widespread concern. At least two ways forward are being explored. One is to implement an accelerated process, which may require legislative changes. Discussions between the DOE and the White House's Council on Environmental Quality continue on this front. Another has been to permit projects to commence construction in advance of receiving NEPA clearance, taking the risk that the clearance, and thus DOE funding, never materialize.

### Lender Issues

#### *Lender-Applicants*

Part I and Part II applications will be filed by a prospective project lender rather than by a borrower or project sponsor. The "Lender-Applicant" should be prepared to become both the "Lead Lender" and the "Administrative Agent" for the debt facility. The Lender-Applicant will need to commit in the Part I application that it intends to submit a Part II

<sup>10</sup> Solicitation, page 126.

<sup>11</sup> Solicitation, pages 10-12.

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application and to pursue a loan guarantee to closure.<sup>12</sup> DOE will determine whether, based on a Lender-Applicant's Part I application, the Lender-Applicant qualifies as a Lead Lender. DOE will provide formal notice of that determination.<sup>13</sup>

### Holders

The Guaranteed Obligation must be funded by one of more "Holders." To qualify as a Holder a financial institution must satisfy the following criteria:<sup>14</sup>

1. 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);
2. not be delinquent on any Federal debt or loan;
3. be legally authorized to enter into loan guarantee transactions authorized by Title XVII and Attachment G and be in good standing with DOE and other Federal agency loan guarantee programs; and
4. 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.

Holders are expected to analyze projects and receive their internal approvals for funding DOE-guaranteed loans according to their standard credit procedures.<sup>15</sup>

### Lead Lenders

At least one Holder (typically the Lender-Applicant) must be a "Lead Lender." The qualifications to be a Lead Lender are the same as being a Holder, except that a Lead Lender must also:<sup>16</sup>

1. 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

2. 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.

While no minimum participation requirement is specified, "it is expected that the Lead Lender's funding commitment under the proposed Loan Agreement will represent a substantial portion of the Guaranteed Obligation."<sup>17</sup>

### Administrative Agents

The Lead Lender must also serve as "Administrative Agent," with responsibilities to administer conditions precedent to disbursement, report to DOE any adverse developments with respect to the project, maintain the collateral in good order, and notify DOE of any payment defaults. The Administrative Agent will not be permitted to resign from performance of those responsibilities without DOE's prior consent.<sup>18</sup>

The Administrative Agent is obliged, under the terms of the form loan guarantee agreement that DOE provides on its web page (and whose terms are declared to be non-negotiable<sup>19</sup>), broadly to indemnify the DOE. Section 4.07 of that form provides:

The Administrative Agent shall 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 under this Guarantee Agreement. This indemnity is well out of the mainstream of commercial norms. DOE will need to re-think it if any Administrative Agents are to be expected to sign on to the program.

### DOE Guarantee

The solicitation offers a full faith and credit United States Government guarantee for up to 80% of the principal of, and interest on, project loans. The guarantee does not, however, extend to breakage costs, make-whole amounts, prepayment premiums, default interest or indemnities, the

<sup>12</sup> Solicitation, page 21.

<sup>13</sup> See Solicitation, page 15.

<sup>14</sup> Solicitation, page 133.

<sup>15</sup> Solicitation, page 7.

<sup>16</sup> Solicitation, page 134.

<sup>17</sup> Solicitation, page 122.

<sup>18</sup> Solicitation, pages 124 and 133.

<sup>19</sup> The Solicitation provides: "The form of the Loan Guarantee Agreement may not be altered by a Lender-Applicant." See page 121.

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payment of which will be subordinated to debt service in a default scenario.<sup>20</sup> DOE believes, however, that funding arrangements can be structured so that such costs will play little or no role.

DOE will make an initial defaulted payment within 60 days of demand by the Administrative Agent. Subsequent scheduled payments will, in the case of variable rate obligations, be accelerated and paid immediately or, in the case of fixed rate obligations, be paid on the originally scheduled due dates.<sup>21</sup>

### *Financing Terms*

In the words of the solicitation:<sup>22</sup>

It is DOE's intent and expectation that Lender-Applicants will have flexibility to structure Guaranteed Obligations so as to optimize access to private debt capital and achieve the lowest possible cost of funds for an Eligible Project.

There are, however, a number of constraints. For instance:<sup>23</sup>

a Guaranteed Obligation and the DOE's loan guarantee must be structured as a single, unified interest such that the Guaranteed Obligation benefits from the DOE's loan guarantee on an undivided basis.

That obligation, may, however, "be divided into two or more loans or tranches, provided that no more than 80% of any tranche or loan is covered by DOE's loan guarantee. For example, a Guaranteed Obligation may be divided into loans or tranches which accrue interest at a fixed rate or a floating rate, which have different tenors or amortization schedules, or which carry different prepayment rights."<sup>24</sup>

The term of the loan can be up to the lesser of 30 years or 90% of the useful life of the assets financed.

The interest rates must also be determined by DOE, in consultation with the Treasury Department, to be reasonable, taking into account interest rates "prevailing in the private sector for similar obligations of comparable risk

guaranteed by the Federal government."<sup>25</sup>

The terms of the financing should include "usual and customary reserves" for expenses incurred by the DOE or the lender(s) in connection with events of default.

### *Placement of the Guaranteed Obligations*

Months of discussion about the nature of risk-sharing to be required from participating commercial lenders in order to assure an adequate alignment of interests between those lenders and the DOE have resulted in terms that are somewhat open-ended, and quite flexible, but that preserve an opportunity for the DOE to make case-by-case judgments as to the adequacy of that risk-sharing.

### *Transfer Restrictions*

Transfers of interests are not as restricted as they might appear on first glance. Holders are permitted, but only with DOE's prior written consent ("which shall not be unreasonably withheld or delayed") to transfer their interests in a Guaranteed Obligation:

(A) until the second anniversary of the commercial operation date, "to (i) another current Holder, (ii) an affiliate of the transferring Holder which meets the qualifications to be a Holder under Attachment J, or (iii) a special purpose entity wholly owned and controlled or exclusively managed by the transferring Holder;"<sup>26</sup> and

(B) thereafter, to any other entities that would themselves qualify as Holders – i.e., financial institutions not in bad standing one way or another with the federal government and having (or having access to) experience regarding projects like that of the borrower.

Thus, it might appear that transfers of interests (i) require DOE consent and (ii) can occur outside the initial lender group only two years after project completion. This is true with respect to the primary obligation issued by the borrower and partially guaranteed by DOE, but neglects the full range of options.

<sup>20</sup> Solicitation, pages 122 and 129.

<sup>21</sup> Solicitation, page 129.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Solicitation, page 95.

<sup>26</sup> Solicitation, page 131.

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The solicitation also states:<sup>27</sup>

Holders, however, will be free to effectively separate and convey *indirect* interests in the guaranteed and unguaranteed portions of a Guaranteed Obligation by transferring to other investors economic or beneficial interests, but not legal rights, in the Guaranteed Obligation and DOE loan guarantee, including, for example, by means of granting loan participations or issuing covered notes.

This language appears to permit unregulated transfers of interests at the only level that transfers are likely to occur. The direct interests in the Guaranteed Obligation, in which transfers are regulated, are unlikely ever to need to be transferred. Those interests are in an 80%-guaranteed instrument. As has been recognized by both lenders and the DOE since the FIPP was first conceived, no natural market exists for such partially guaranteed instruments. The expectation has always been that the guaranteed and unguaranteed aspects of the Guaranteed Obligation would somehow be "stripped" so that fully guaranteed instruments could be sold into the market for USG securities with the non-guaranteed portion being placed with lenders with an appetite for project risk.

The quoted language sets the stage for how stripping can occur. It cannot occur in the primary obligation, since any direct transfers of interests in it are required to include proportionate pieces of both the guaranteed and unguaranteed aspects.<sup>28</sup> Rather, the stripping must occur synthetically, by issuing indirect interests, such as, as suggested in the solicitation, "granting loan participations or issuing covered notes."<sup>29</sup> The DOE-guaranteed note could, for instance, be held in a special purpose vehicle that then issues two classes of interests in the note, with one class benefiting from payments under the guarantee and one

class not so benefiting. The former would be placed in the market for U.S. agency paper and the latter with commercial project lenders, such as banks, insurance companies or pension funds.

### *Intercreditor Arrangements*

The solicitation outlines intercreditor arrangements that address what had been a key concern of lenders – that the DOE, with potentially non-commercial motivations, would have absolute control in workout scenarios. The solicitation provides that each affected Holder would need to consent to:<sup>30</sup>

- (i) changes in interest rates, amortization schedule, final maturity or Holder indemnity rights against the Borrower,
- (ii) any change affecting the senior secured ranking of the Guaranteed Obligation or the priority of payments under the Loan Agreement, or
- (iii) any release of collateral the result of which could reasonably be expected to leave the Guaranteed Obligation less than fully secured.

DOE, which presumes it will be the majority lender, reserves the right to decide to enforce against collateral or, for some period of time, to refrain. If DOE has not accelerated and foreclosed 90 days following a payment default, the majority of the Holders (the commercial lenders) can insist on an opportunity to discuss the situation with the DOE. If DOE has not acted after 180 days, the commercial lenders can, by unanimous decision, require acceleration and foreclosure. After 270 days of DOE inaction, the commercial lenders can require acceleration and enforcement with a two-thirds vote.

Intriguingly, in the event tradeable interests are indirectly issued as discussed above, the sole Holder would be the vehicle holding the partially-guaranteed note so that the "Holders" would always necessarily act unanimously. The terms on which the Holder would be instructed to act could be designed without regard to the voting terms specified by DOE in the solicitation.

If the DOE intends to grant an amendment of or waiver under the Loan Agreement, or to accelerate the project debt and exercise of remedies, DOE will ("other than in exigent circumstances") notify the Administrative Agent and provide

<sup>27</sup> Solicitation, page 130 (emphasis added).

<sup>28</sup> In the language of the solicitation: "a Holder's rights under the Loan Guarantee Agreement shall not be transferred at any time, in whole or in part, disproportionately from such Holder's rights under the Loan Agreement such that DOE's loan guarantee would apply to a greater percentage of the transferee's interest in the Guaranteed Obligation than the guaranteed percentage applicable to the Guaranteed Obligation overall." Solicitation, page 130.

<sup>29</sup> *Ibid.*

<sup>30</sup> Solicitation, page 123.

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the Holders with a reasonable opportunity express their preferences, although that DOE's actions "shall nonetheless be undertaken in its sole discretion."<sup>31</sup>

Disconcertingly, at one point the solicitation asserts that "Upon the making of demand for payment under the Loan Guarantee Agreement, whether resulting in a lump sum payment or installment payments, DOE will become subrogated to all of the Holders' right, title and interest in, to and under the Guaranteed Obligation and all related loan documents, other than with respect to certain excluded claims."<sup>32</sup> Presumably, since the Guaranteed Obligation includes the unguaranteed portion held by the lenders, the intent of this language is that the lenders assign to DOE their interests in the *guaranteed portion* of the Guaranteed Obligation, not their whole interest.

The solicitation notes that DOE is looking to the "Lender-Applicants" to analyze "the proposed Borrower's ability to repay the Guaranteed Obligation and any other project debt." There is, of course, not likely to be "any other project debt" because collateral cannot be shared outside of the Guaranteed Obligation. Note, however, that "Guaranteed Obligation" does not refer to the guaranteed portion of a project loan but rather to a project loan any portion of which is guaranteed by DOE. Thus, the non-guaranteed portion of the Guaranteed Obligation funded by commercial lenders under this solicitation will be supported *pari passu* with the DOE by the collateral package.

### Application Process

The application process entails Part I and Part II filings. DOE will review the Part I application and then provide the Lender-Applicant with an indication as to whether filing a more fulsome Part II filing would be wise. DOE targets a decision on Part II applications within 60 days following the applicable Part II deadline.

Although more complex than had been expected when the FIPP was first conceived, this approach is a compromise between the DOE's preference only to spend time on fully baked applications carrying a commercial lender's commitment, on one hand, and, on the other, the commercial lenders' preference not to devote time to an

application until they have some indication that the DOE would be prepared to support the transaction. With the chosen approach, DOE will confirm the project's eligibility based on the Part I application, which will not be particularly burdensome to prepare or, given the \$12,500 Part I application fee, expensive to submit. Nonetheless, given DOE's decision to rank each cohort of Part II applications and, given at least the current shortage of appropriated funds to support qualified projects, the overall process still has more of the flavor of a tough competition or a lottery than a secure source of financing for qualified projects.

### Part I Submissions

The required elements of the Part I submission are detailed in Attachment A to the solicitation. It seeks a broad overview of the technical aspects of the project, sufficient for DOE to determine the project's eligibility for a guarantee under this solicitation. It also seeks an environmental review of sufficient depth for DOE to commence its analysis of the process likely to be required to comply with NEPA and to determine the prospects that NEPA clearance can be achieved prior to the September 30, 2011, deadline for commencing construction. The required data will largely be prepared by and available from the project sponsor(s).

There is no limit to the number of submissions that a Lender-Applicant can file. Consequently, unlike prior solicitations, there is no limit to the number of projects that a sponsor could submit (through one or more Lender Applicants) for DOE financing.

### Part I Evaluation Criteria

The criteria on which DOE will evaluate Part I applications include:<sup>33</sup>

- (i) ascertaining its responsiveness with respect to the Threshold Determinations<sup>34</sup> ... and completeness of information supplied in accordance with the instructions in Attachment A1 and the requirements of this Solicitation,
- (ii) determining whether the Lender-Applicant meets the requirements of a Lead Lender as set forth in Attachment J to the Solicitation,
- (iii) evaluating whether the proposed project

<sup>31</sup> Ibid.

<sup>32</sup> Solicitation, page 130

<sup>33</sup> Solicitation, page 17.

<sup>34</sup> See Solicitation, pages 8-12.

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- constitutes an Eligible Project, subject to validation during DOE's review of the Part II submission,
- (iv) assessing 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 the National Environmental Policy Act ("NEPA") and of the likelihood of the project's completing the NEPA review process by such date, and
  - (v) a preliminary assessment of whether the proposed project is expected to meet the objectives and parameters of this FIPP Solicitation, including the parameters set forth in Attachment A1, Section I.B.5 (subject to further validation in the Part II submission).

One apparent improvement under this solicitation is the DOE's apparent increased openness to responding to questions from prospective Part I applicants. DOE has been of the view that procurement regulations preclude communication with particular applicants while a solicitation remains opened for applications. The solicitation notes that "[d]uring each round of Part II reviews, communications from Lender-Applicants to DOE are generally not permitted with regard to an application."<sup>35</sup> This at least suggests that DOE may be more open to fielding questions from applicants during the Part I process.

### **Part II Submissions**

Unless DOE responds to the Part I application by discouraging further pursuit of a guarantee, the Applicant-Lender will be expected to file a Part II application by one of the following dates and to accompany that filing with payment of the remaining balance of (\$37,500) of the application fee. The schedule of Part II due dates and, given DOE's intended 60-day review period, target response dates is:<sup>36</sup>

Part II Submission Due Dates	DOE's Target Notice Dates
November 23, 2009	January 22, 2010
January 7, 2010	March 8, 2010
February 22, 2010	April 23, 2010
April 8, 2010	June 7, 2010
May 24, 2010	July 23, 2010
July 8, 2010	September 7, 2010
August 23, 2010	October 22, 2010
October 7, 2010	December 6, 2010
November 22, 2010	January 21, 2011
January 6, 2011	March 7, 2011

The solicitation notes that "Lender-Applicants making submissions in earlier rounds of Part II reviews will enjoy a first mover's advantage in terms of order of priority of review." The extent of that advantage, or how exactly it might arise, is not, however, completely clear. The comment may reflect the risk that the program will simply run out of resources, a likely scenario especially if the Congress does not restore the cash-for-clunkers transfer. On the other hand, there is a cost for being an early participant in a new program whose policies and procedures are necessarily still being worked out, with problems being newly identified and yet to be solved. The optimal moment to pass through the FIPP arguably remains to be seen.

The solicitation raises the possibility of timing glitches in the application process. It provides that "[a] Part I submission may be filed at any time prior to the Lender-Applicant's filing of its Part II submission."<sup>37</sup> However, since the Lender-Applicant is only to file its Part II application "after DOE notifies the applicant [in writing] regarding its Part I submission,"<sup>38</sup> and DOE does not promise any particular processing time for Part I applications, it is unclear whether an applicant will be in a position to meet any particular Part II deadline. One can hope, however, given the reasonably straightforward issues confronted in the Part I applications, DOE's responses will come reasonably quickly

<sup>35</sup> Solicitation, page 15.

<sup>36</sup> Solicitation, page 16.

<sup>37</sup> Solicitation, page 14.

<sup>38</sup> Solicitation, page 17.

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and will accommodate sponsor efforts to meet a particular Part II deadline.

The required elements of the Part II submission are detailed in Attachment A to the solicitation. Most will be prepared by and available from the project sponsor(s). Required reports that may involve third parties include the engineers report and the environmental report. The Part II submission is also required to include the rating agency's preliminary credit assessment

The Part II submission will be a denser document than some observers had expected given the DOE's plan substantially to rely on the commercial lender's diligence and decision to accept a portion of the debt on a non-guaranteed basis. In fact, the scope of the Part I and Part II submissions together are substantially identical to what DOE has required in prior solicitation rounds where no co-financing was involved. There is, however, some basis for expecting the DOE's review to be, as planned, more expeditious than if the co-lenders were not involved. DOE notes that, while it reserves the right to recruit technical and legal consultants, it does not expect to do so for projects under this solicitation. Consequently, it seems that DOE's review will be abbreviated relative to solicitations outside of the FIPP.

### **Part II Evaluation Criteria**

In reviewing Part II applications, DOE will:

- (i) evaluate the financing plan;
- (ii) assess the financial viability of the project;
- (iii) determine the technical efficacy of the project;
- (iv) review the project's legal structure;
- (v) evaluate project risks;
- (vi) review and stress-test the financial model;
- (vii) assess the strengths and weakness of the sponsor(s); and
- (viii) analyze the adequacy of the proposed collateral.

One procedural difference for applications under this solicitation is that DOE will undertake this review without reliance on external engineering, financial, marketing or legal advisers. While earlier discussions of the FIPP contemplated a brief, fatal flaw review by DOE of the due diligence package submitted by the Applicant-Lender, the materials required to be presented could support a more extensive review. Both the facts that DOE intends, however,

to complete the review without resort to external advisors and that DOE targets completion of its review within sixty days suggests that DOE will, as originally planned and discussed with the commercial lending community, be placing substantial reliance on the Applicant-Lender's review and willingness to accept a portion of the financing on a non-guaranteed basis.

### ***Closing the Deal***

For transactions that DOE is prepared to support, the next steps will be conclude a three- or four-way term sheet (borrower, sponsor(s), Lead Lender and DOE). Twenty percent of the Facility Fee will be due upon execution of that term sheet. The balance of the Facility Fee, which totals 0.5% of the amount guaranteed by DOE, will be due from the Applicant-Lender to DOE at financial close. The lenders are free to document the transaction as they think appropriate, provided that the DOE's form loan guarantee agreement as posted on the Loan Guarantee Program's website (<http://www.lgprogram.energy.gov>) must be accommodated without negotiation.<sup>39</sup>

**October 2009**

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<sup>39</sup> Solicitation, page 121.