

THE CALIFORNIA DEBT LIMIT ALLOCATION COMMITTEE

November 17, 2010

**Consideration of Return of Forfeited Performance Deposit for the SolarPower
Qualified Energy Conservation Bond Project**
(Agenda Item No. 7)

ACTION:

The applicant, CSCDA (on behalf of the project sponsor), requests that the Committee consider the return of the forfeited \$100,000 performance deposit for the SolarPower Energy Generation Facility. The subject application was originally allocated \$58,713,103 in American Recovery and Reinvestment Act – Qualified Energy Conservation Bond authority at the May 26th meeting.

BACKGROUND:

For the May 26th reallocation round, the Qualified Energy Conservation Bond (QECCB) Program received nine (9) complete applications for projects requesting a total allocation of \$306,587,710. However, there was only \$195,710,345 available in QECCB allocation at that time; providing only enough allocation to award authority for the five highest scoring projects. The remaining four applications did not receive their requested amounts, and were placed on an allocation waitlist. The SolarPower project (Resolution ARRA -16) received the highest score in that competitive round, and thus received the full amount of their \$58,713,103 request. CSCDA and the project sponsor, SolarPower, Inc. (SolarPower), were given the issuance deadline of August 24, 2010.

On August 10, 2010, CDLAC staff received a letter from SolarPower, both: 1) requesting the extension of the issuance deadline for their companion Recovery Zone Facility Bond (RZFB) allocation (Resolution ARRA-11); and 2) waiving (returning) the awarded QECCB allocation and requesting the waiver of the forfeiture of the corresponding performance deposit. For both allocations, SolarPower cited the continuing difficulties in negotiating a final power participation agreement (PPA) with their intended client. In returning the QECCB allocation (but not the RZFB allocation), SolarPower stated that there wouldn't be sufficient time to close this transaction.

Subsequent to the receipt of the August 10th letter, CDLAC staff independently learned that there was an undisclosed federal tax credit eligibility issue for SolarPower's QECCB project. CDLAC staff then sought confirmation from CSCDA staff, who confirmed this issue with SolarPower. On August 24, 2010, the CDLAC Executive Director denied SolarPower's request to waive the forfeiture of its performance deposit, as required under Section 7.V. of the previous CDLAC Procedures, Section 5054 of the current CDLAC Emergency Regulations, and Section 8869.84 (e) of the California Government Code.

On September 21, 2010, SolarPower sent another letter to CDLAC, both: 1) waiving (returning) the awarded RZFB allocation and requesting the waiver of the forfeiture of the corresponding performance deposit; and 2) providing further detail on the necessity for the return of its QECCB allocation and reiterating its request to waive the forfeiture of that award's performance deposit. In the letter, SolarPower provided an explanation of the tax credit eligibility issue, and cited that as a contributing factor to their inability to issue the QECCB allocation by the CDLAC-imposed issuance deadline. While the CDLAC Executive Director approved the request to waive the forfeiture of the \$100,000 performance deposit associated with RZFB allocation (due to the PPA issue), the CDLAC Executive Director has maintained his earlier decision denying the waiver request for the QECCB allocation.

There is no appeal process for performance deposit determinations; however, the Committee does have the ultimate authority under statute to make a final determination on whether or not a performance deposit can be returned to an applicant when no bonds are issued.

DISCUSSION:

The intent of the performance deposit is to insure that bond issuers make use of the limitedly available private activity bond allocation awarded to them for a given project or program. Once allocation is provided by the Committee, the bond issuer must make all effort to complete the issuance of the bonds or risk losing their deposit. Section 8869.84 (e) of the California Government Code states that if a bond issuer awarded private activity bond allocation from CDLAC ultimately issues bonds in an amount less than what was awarded by the Committee (or no bonds at all), then a proportional share of the performance deposit held for that issuance shall be forfeited to CDLAC. This potential loss of the performance deposit is clearly highlighted in the CDLAC Application Package, the CDLAC Regulations, and the individual Committee Approval Resolution Cover Letters.

As provided for under the Government Code, CDLAC permits an applicant to request the waiver of the forfeiture of the performance deposit if the allocation is not used to issue the bonds. For a waiver to be approved, the CDLAC Executive Director subjects the request to two tests: 1) was the issue or event that prevented the issuance of the bonds unforeseen; and 2) was the issue or event wholly outside the control of the applicant and project sponsor. A request must pass both tests.

For the subject project, CDLAC only learned on its own that the federal tax credit conflict was the true issue impacting the financial feasibility of the project and causing SolarPower to return the awarded allocation. This critical issue was not disclosed in both the original application for the Committee to consider, nor later in the August 10th SolarPower letter explaining why the allocation needed to be returned. However, SolarPower has admitted that they were informed of this issue by both their tax advisors and bond counsel prior to the submission of the CDLAC application, but had hoped to receive a favorable clarification from the U.S. Treasury prior to the bond issuance deadline. This situation was later confirmed by SolarPower staff via a phone conversation on September 21st and in a follow-up letter dated that same day.

Given the facts associated with this waiver request, the CDLAC Executive Director determined that the request did not meet the first test (i.e. that the issue was unforeseen), but did meet the second test (i.e. that the issue was out of the control of the project sponsor). SolarPower was fully aware of the tax credit conflict and its potential to prevent the project from moving forward and using the QECCB allocation. Since the request didn't meet the first test, the request was denied.

It should be noted that this project was awarded QECCB allocation in a competitive round, with four (4) other worthy projects not receiving an allocation at that time. Once SolarPower did return their allocation, those four waitlisted projects did receive allocation; but only after a three month delay. If the tax credit issue had been disclosed, the Committee would have had the ability to consider its potential effect on the feasibility of the SolarPower bond transaction.

RECOMMENDATION:

Staff recommends the denial of the request to return the forfeited performance deposit for the SolarPower, Inc. American Recovery and Reinvestment Act – Qualified Energy Conservation Bond application (Resolution ARRA-16).