

## Alternate Guaranty Process September 16, 2009

### Overview

In keeping with their previously established policy, the EDCs will allow any potential bidder to submit an alternate form of guaranty for the EDCs' consideration. Alternatively, a potential bidder can utilize the safe harbor provided by the standard form of guaranty appended to the BGS Supplier Master Agreements. This standard form of guaranty is substantially the same as that accepted by the NJ BPU in all previous BGS Auctions.

Any potential bidder can apply to use an alternate form of guaranty. Please note that any alternate form of guaranty, as is the case with the standard form of guaranty, must be a financial guaranty. While alternate forms of financial guaranty may be acceptable, performance guaranties are not acceptable.

The process for submitting an alternate form of guaranty and the ground rules for the EDCs' consideration of alternate forms of guaranty are as follows:

1. The EDCs will consider alternate forms of guaranty only if the guaranty is for unlimited liability. The standard guaranty has a liability limit.
2. The EDCs have specified a list of minimum requirements that any alternate form of guaranty must satisfy. This list is provided below under the heading: "Minimum Requirements for the Alternate Form of Guaranty".
3. The Auction Manager will receive the alternate form of guaranty and supporting documentation, remove any information identifying the proposing party, and forward the documents to the EDCs' Credit and Application Committee and to outside counsel retained on behalf of the EDCs. The EDCs' Credit and Application Committee will determine, with the consultation of outside counsel as necessary, whether the alternate form of guaranty provides sufficient assurances of payment, taking into account the following general considerations:
  - a. whether the alternate form of guaranty conforms to the minimum requirements identified by the EDCs;
  - b. whether the alternate form of guaranty provides substantially similar credit protections to the credit protections provided to the EDCs by the standard form of guaranty; and
  - c. whether the alternate form of guaranty includes defenses in favor of the guarantor not found in the standard form of guaranty.

The EDCs' Credit and Application Committee may also identify specific changes that would permit the alternate form of guaranty to be acceptable. The EDCs' Credit and Application Committee will inform the Auction Manager of its decision.

4. The Auction Manager will inform the proposing party of the EDCs' Credit and Application Committee decision. The Auction Manager will inform the proposing party of any specific changes that may be required for the proposed alternate form of guaranty to be acceptable to the EDCs. Proposing parties may be given an opportunity to resubmit the alternate form of guaranty with changes identified by the EDCs' Credit and Application Committee. Alternate forms of guaranty that have been resubmitted may be rejected if they do not include the changes identified by the EDCs' Credit and Application Committee.
5. An alternate form of guaranty approved through this process will be acceptable to all EDCs. This alternate form of guaranty may be used for purposes of the 2010 BGS Auctions and may be used for future BGS Auctions barring changes in applicable law or Board approved changes to the BGS Auction Process.

## **Minimum Requirements for the Alternate Form of Guaranty**

Set forth below are the minimum requirements that must be met in order for any alternate form of guaranty to be acceptable to the EDCs. As stated above, in determining whether an alternate form of guaranty is acceptable and provides sufficient assurances of payment, the EDCs' Credit and Application Committee takes into account several general considerations, including whether the alternate form of guaranty fulfills the following minimum requirements:

1. Guaranty must be an unconditional guaranty of payment of all amounts due by the BGS Supplier to the EDC under the BGS Supplier Master Agreement. To clarify the meaning of the term "unconditional guaranty of payment", sample language is provided in the last section of this document. The BGS Supplier Master Agreement must be expressly identified and the satisfaction of obligations through performance may not be authorized.
2. Guaranty may be terminated upon not less than thirty (30) days advance written notice to the EDCs and termination shall not discharge liabilities and obligations of the guarantor that have been incurred up to and including the effective date of the termination. The termination of an alternate guaranty shall be effective only upon the receipt of substitute security or credit support, which is acceptable to the EDCs.
3. Guaranty must not be subject to any monetary limit.
4. Guaranty must be accompanied by a certification from the guarantor that the alternate form of guaranty, subject to changes needed to conform to these minimum requirements or to the specific requirements of the EDCs set forth in any requested modification, has been in general use by the submitting party in its ordinary course of business over the past twelve (12) months.
5. Guaranty must be a guaranty of payment and not of collection.
6. Guaranty must include a reinstatement clause that reinstates the guarantor's obligations if, at any time, the EDCs must disgorge any guaranteed payments. A sample clause that is acceptable to the EDCs is provided in the last section of this document.
7. Guaranty must include a subrogation clause. A sample subrogation clause that is acceptable to the EDCs is provided in the last section of this document.
8. Assignment of the guaranty shall not be permitted except with the prior written consent of the EDC, which consent shall not be unreasonably withheld, except in the case that the successor guarantor meets certain qualifications. Sample assignment language that is acceptable to the EDCs is provided in the last section of this document.

9. The proposing party must provide an enforceability opinion, with respect to the alternate form of guaranty, from its outside counsel. The enforceability opinion must be from a law firm of national (i.e., United States) standing. The proposing party must name the law firm that is offering the enforceability opinion in its submission. The enforceability opinion must not be weaker than would be the industry norm and must contain only those qualifications that would be typical. The opinion shall name the EDCs and explicitly state that the EDCs are entitled to rely on the opinion. The enforceability opinion must not be qualified by or conditioned on any of the following:
  - a. the valid existence and good standing of the parties to the BGS Supplier Master Agreement;
  - b. the power and authority of the proposing party and guarantor to execute, deliver, and perform their respective agreements;
  - c. due execution of the BGS Supplier Master Agreement and the alternate form of guaranty; or
  - d. that the BGS Supplier Mater Agreement is legal, valid, binding, and enforceable against all parties.

At the time that the proposing party submits its alternate form of guaranty and supporting documentation, the opinion may be unsigned. If the proposing party becomes a winner in the BGS Auctions, in order for this alternate form of guaranty to be used by the proposing party, at the time of submission of the alternate form of guaranty, the enforceability opinion must be provided duly signed and on letterhead of a law firm of national standing.

## **Previously Approved Alternate Forms of Guaranty**

A potential bidder that had secured approval for an alternate form of guaranty for the 2009, 2008, 2007, or 2006 BGS Auctions and that wishes to use the same alternate form of guaranty can renew this approval for the 2010 BGS Auctions by submitting:

- The alternate form of guaranty for the 2010 BGS Auctions;
- The enforceability opinion for the 2010 BGS Auctions;
- A certification that the text of the alternate form of guaranty for the 2010 BGS Auctions is exactly the same as the alternate form of guaranty that had been previously approved for the 2006, 2007, 2008 or 2009 BGS Auctions;
- A certification that the text of the enforceability opinion for the 2010 BGS Auctions is exactly the same as the enforceability opinion that had been previously approved for the 2006, 2007, 2008 or 2009 BGS Auctions.

If a potential bidder submits the materials as specified above, the alternate form of guaranty will be approved for the 2010 BGS Auctions without further re-evaluation. If a potential bidder had secured approval for an alternate form of guaranty for the 2009, 2008, 2007, or 2006 BGS Auctions but is unable to provide the materials as specified above, the potential bidder must resubmit the alternate form of guaranty and all supporting documentation as specified in the Minimum Requirements for the Alternate Form of Guaranty section above and these materials will be re-evaluated by the EDCs' Credit and Application Committee according to the criteria set forth in this document.

## **Timetable**

The EDCs urge all potential bidders that wish to secure approval of an alternate form of guaranty in advance of the BGS Auctions to submit their alternate form of guaranty and supporting documentation according to the following timetable. This timetable ensures that potential bidders are aware of whether their alternate forms of guaranty have been accepted before Part 1 Applications are due. Alternate forms of guaranty that are not submitted in compliance with the following timetable will be rejected.

**The deadline to submit an alternate form of guaranty, with all supporting documentation, is noon (EPT) on October 27, 2009.** A potential bidder that had secured approval for an alternate form of guaranty for the 2009, 2008, 2007, or 2006 BGS Auctions and that is applying to renew this approval must submit its materials by this date as well.

By October 28, 2009, the Auction Manager will inform a potential bidder applying to renew its approval for a previously approved alternate form of guaranty whether its approval is renewed. If the approval is not renewed, the potential bidder will be afforded an opportunity to resubmit its alternate form of guaranty and supporting documentation as specified in the Minimum Requirements for the Alternate Form of Guaranty section above by noon (EPT) on October 30, 2009 for re-evaluation by the EDCs' Credit and Application Committee.

By November 4, 2009, the Auction Manager will inform a proposing party whether it must modify its alternate form of guaranty for it to be acceptable to the EDCs. A proposing party will have no less than two (2) business days to incorporate any necessary changes and resubmit the alternate form of guaranty. **The deadline for resubmitting the modified alternate form of guaranty and supporting documentation is noon (EST) on November 6, 2009.**

The Auction Manager will provide the proposing parties with written notice of the EDCs' Credit and Application Committee decision on or before November 10, 2009.

<b>Activity or Decision Point</b>	<b>Timing</b>
Deadline to submit alternate form of guaranty and all required documentation (both new alternate forms of guaranty and renewal of previous approval)	Noon (EPT), October 27, 2009
Auction Manager informs a proposing party that had previously secured approval for its alternate form of guaranty whether the approval is renewed	October 28, 2009
Deadline to submit alternate form of guaranty and supporting documentation for parties whose approval of a previously accepted alternate form of guaranty is not renewed	Noon (EPT), October 30, 2009
Auction Manager informs remaining proposing parties of status of submission	November 4, 2009
Deadline to submit required modifications or revisions to the alternate form of guaranty or supporting documentation	Noon (EST), November 6, 2009
Auction Manager informs remaining proposing parties of the EDCs' decision	November 10, 2009

## Sample Language

The Alternate Guaranty Process is designed to give potential bidders some flexibility while at the same time assuring adequate credit protection for the EDCs. The EDCs have included sample language for the purpose of clarifying certain aspects of the minimum requirements for alternate forms of guaranty. This language is not required, but would be deemed acceptable to the EDCs. The EDCs reserve the right to reject alternate forms of guaranty that do not contain language that, in the EDCs’ view, provides substantially comparable protections to the language set forth below:

<b>Subject</b>	<b>Sample Language</b>
Unconditional Guaranty	“Guarantor agrees that its obligations hereunder are unconditional and will not be discharged except by complete payment of all amounts due under the BGS Supplier Master Agreement(s), irrespective of any claim or dispute as to the BGS Supplier Master Agreement’s validity, regularity or enforceability, or the lack of authority of the bidder to enter into the BGS Supplier Master Agreement.”
Reinstatement	“This Guaranty shall remain in full force and effect or shall be reinstated if, at any time, any payment guaranteed in this Guaranty is invalidated, rescinded, or must otherwise be returned by the EDCs, in whole or in part, as a result of being declared fraudulent, preferential, or otherwise avoidable, or upon the insolvency, bankruptcy, or reorganization of the Bidder or otherwise, as though such payment had not been made.”
Subrogation	“Guarantor shall not exercise any rights, which it may acquire hereunder byway of subrogation, as a result of payment hereunder, until all due and unpaid obligations to the EDCs under the BGS Supplier Master Agreements shall have been paid in full. Any amount paid to the Guarantor in violation of the preceding sentence shall be held by Guarantor for the benefit of the EDCs and shall forthwith be paid to the EDCs to be credited and applied to the due and unpaid obligations. Subject to the foregoing, upon payment of all such due and unpaid obligations, the Guarantor shall be subrogated to the rights of the EDCs against Company with respect to such obligations, and the EDCs agree to take at the Guarantor’s expense such steps as the Guarantor may reasonably request to implement such subrogation.”

<b>Subject</b>	<b>Sample Language</b>
Assignment	<p>Guarantor may not assign its rights nor delegate its obligations under this Guaranty, in whole or in part, without the prior written consent of the EDCs, and any purported assignment or delegation absent such consent is void, except for an assignment and delegation of all of Guarantor’s rights and obligations hereunder to a Successor Guarantor. For purposes of this paragraph, a “Successor Guarantor” means a partnership, corporation, trust or other organization in whatever form that succeeds to all or substantially all of the Guarantor’s assets and business and that assumes all of the Guarantor’s obligations hereunder by contract or operation of law; provided, that, such Successor Guarantor shall have a long-term unsubordinated debt rating that is not lower than the lesser of (i) A2/A or (ii) the rating of the Guarantor immediately prior to such assumption.</p>