



July 2009

The Job Isn't Over 'Til the Paperwork's Done
Post-award chores abound
for successful stimulus applicants

Joseph Di Scipio
discipio@fhhlaw.com
703-812-0432

If you are lucky and perseverant enough to be awarded broadband stimulus funds, your travails are not yet over. In fact, they may just be beginning. Awardees under both BIP and BTOP must comply with a number of post-award requirements. We're providing a thumb-nail introduction to those requirements below. As you review the various post-award obligations, keep in mind the stern admonition, at least for BIP winners, that in the event of failure to comply with the terms of an award, "RUS may exercise rights and remedies." That vague but menacing threat is intended to ensure that winners carefully comply with the various post-award requirements.

BIP Requirements – Let's first take a look at highlights of the post-award requirements for BIP winners. If you are a BIP winner, you will have to comply with all "reasonable" RUS requests to support ongoing monitoring efforts. That means, for example, that at all times during business hours RUS and its minions may (with appropriate notice) inspect the broadband system and any other property encumbered by the mortgage or security agreement and review and make copies of all of your stuff (both written and electronic). The mortgage and security agreements secure the government's investment in your assets, just as a bank would collateralize a commercial loan by taking a lien on your property.

To regularize accounting, BIP winners must adopt a GAAP system of accounts that is acceptable to and approved by the RUS (we'll leave out the jokes about what the government knows about accounting). Awardees must submit annually an audited financial statement prepared by a CPA approved by the RUS and a report on compliance and a management letter. In addition to the BIP-specific and general Recovery Act requirements (covered below), BIP winners must submit within 30 calendar days at the end of each quarter, balance sheets, income statements, statements of cash flow, rate package summaries, and the number of customers taking broadband service on a per community basis, utilizing RUS's Broadband Collection and Analysis System (BCAS). There are numerous other BIP-specific quarterly and annual reporting requirements, but suffice it to say that the government intends to monitor its investment

very closely. These requirements persist for three years from the date of the award.

BTOP Requirements – As a general rule, the sale or lease of any of the award-funded broadband facilities is prohibited. There are, of course exceptions (which require notice to the requisite agencies). Sales or leases will be approved if: (1) adequate consideration is given, and (2) the buyer or lessee agrees to fulfill the terms and conditions of the project; and (3) either (a) the sale or lease was included in the initial application and was included in the proposal for funds or (b) the requisite agencies waive the provision for any sale or lease occurring after the tenth year from the date of issuance of the grant/loan. None of this, however, is intended to limit awardees from leasing facilities to another service provider for the provision of broadband service. As a practical matter, we cannot envision that RUS would want – or have any reason – to prevent alienation of these properties so long as the purposes of the stimulus money continue to be served by the buyer.

As with BIP winners, the NTIA has the right to inspect the broadband system and any other property funded by the system and make copies of everything. An audit may be conducted at any time.

Finally, all BTOP Broadband Infrastructure awardees that offer Internet access service to the public for a fee must participate in the State Broadband Data and Development Grant Program. This program gathers data on: (1) the availability of broadband service within the service area (with different reporting requirements for the wireline and wireless based systems); (2) the residential average revenue per user; (3) the first point of aggregation for last mile connection points like remote terminals and cable headends; (4) middle connection points; and (5) a list of community anchor institutions to which service is provided.

General Reporting Requirements – Both BIP and BTOP awards (loans, grants, loan/grant combinations) are subject to all statutes and regulations regarding reporting on Recovery Act funds. Note that if Recovery Act funds are combined with other funds, awardees must account for the RUS or NTIA funds separately. The awardee and any subcontractor must report to the relevant agency: (1) the total amount of Recovery Act funds received; (2) the amount of those funds that were used or obligated to projects; (3) a detailed list of those projects (with specific reporting requirements); and (4) detailed information on any subcontracts or subgrants awarded by the awardee which must include the elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (register with the CCR database at <http://www.ccr.gov/>). Recovery Act reports are due ten days after the end of the quarter in which the award was issued and each quarter thereafter until a final report is made at the end of three years. Failure to timely report could result in suspension of further payments until the awardee

complies with reporting requirements. At this point, it will come as no surprise that unknown additional reporting requirements will be specified at the time the award is issued.

In addition to the general reporting requirements, there are also specific BTOP Broadband Infrastructure Awardees and Public Computer Center Awardees which we do not include here, but are available for review in the Notice of Funds Availability.

The bottom line here is that, like most everything else in life, cashing in on the stimulus program is a process that isn't over until the paperwork is done – and in this case, the paperwork will keep coming and coming for years after the award. Successful applicants must be ready to maintain fastidious records and be prepared to open those records up to the government at any time.