



November 2009

Stimulus Czars Provide Environmental Guidance, Seek Input on Next Funding Round

Donald Evans
evans@fhhlaw.com
703-812-0430

It is hard (or maybe not so hard) to believe that back in February when the American Recovery and Reinvestment Act was enacted, the administrators at the Departments of Agriculture and Commerce were promising that grants would start to be made in May, with most of the first round funds awarded in June. Here we are fast approaching December and nary a grant for infrastructure projects has been made. To be sure, wizened and calloused observers of the bureaucratic process predicted that it would take considerably longer than the original estimates, but the same wizened and calloused observers also expected that, having later committed to an autumn award date, the BIP and BTOP folks would have been driven to get something out by September, October or even November, if for no other reason than to keep their street cred. The difficulty seems to be that they made the application process so cumbersome, but nevertheless got so many applicants, that it's taking months to sift through all the requests. Surprisingly, when millions of dollars in free money are put up for grabs, lots of people ask for it.

BIP and BTOP are now moving seriously into Phase II of the first round. Phase II is like that part of the Miss America pageant where the field is reduced to ten swimsuit clad lovelies with preternaturally gleaming smiles, only here no Miss Congeniality points are awarded. At the same time, the administrators are thinking ahead toward the next round of applications. It had already been widely reported that the number of rounds would be reduced from three to two. The next round is supposed to be opened early in 2010, which means that the rules and procedures governing that round need to be established pronto. The folks in charge have therefore released a "Request for Information" with a very abbreviated comment date seeking input on both the procedures that should apply to the next round and what funding criteria should be substantively applied. Would-be applicants should take heed, since changes in both of these categories could have a serious impact on their chances of obtaining funding.

Procedures Applicants in Round I lodged numerous complaints about the volume of unnecessary and burdensome information that was demanded. The administrators seem to have realized that a lot of information was required of newly-created applicant entities which was worthless. The requirement that service areas be defined at the micro-level of

census blocks also struck many applicants as needlessly burdensome. Much of the information required in Phase I might be more appropriate to either Phase II or even the point of closing on funding rather than in the initial application. This category of information would include legal opinions, lien searches, boilerplate certifications, and other information irrelevant to the selection process.

Importantly, the administrators released on October 30 a guidance sheet clarifying how the environmental and historical preservation rules apply to these applications. There had been some question about whether applicants proposing construction projects in connection with their applications had to show compliance with these rules in Phase I, Phase II, or some later Phase. It seemed, frankly, absurd to require 2,200 applicants to undertake expensive and time-consuming environmental review projects for thousands of sites that would never be built if the stimulus money was not awarded. BIP and BTOP have now clarified that the Environmental Questionnaire covering sites where significant construction is to be undertaken need not be submitted until Phase 2. But even then applicants have only 10-30 days to get the information in. Since environmental and historical review projects usually take a minimum of 60 days to complete, the administrators have left a window open for applicants to explain why they don't have environmental sign off on all sites within the 30 days. Again, though, because it only makes sense to undertake these onerous procedures for sites that are really going to be built, it might make more sense for this review process to be deferred to the pre-closing period.

On the other hand, the administrators realized that in some cases they need more information. For example, where applicants are comprised of multiple participants, it had been unclear how much information was required regarding the non-lead participants. Similarly, the process whereby incumbents could challenge the showings of applicants without any opportunity for rejoinder seemed unfair. The cloak of secrecy over the applications also seemed unnecessary, except in the rare case where proprietary information was involved. Changes in all of these areas have been proposed.

Another big area for improvement would be answering "frequently asked questions". In Round I, the government released a list of FAQ and the answers to those questions. But over the next few weeks numerous other questions arose which were answered by the staff in e-mails but not made available to all other applicants. It seems that it would not only have ensured consistency but cut down on the multitude of questions posed to the staff to update the FAQ responses more frequently.

Substantive Issues BIP and BTOP also did some soul-searching about how the money should be distributed. There had been considerable flack about their definition of "remote" areas (50 miles from any urbanized area) as being too restrictive, and a revision

of that definition certainly seems to be in the offing. More broadly, they are looking at whether funding should be prioritized for (1) “comprehensive community” projects where broadband services are integrated with anchor institutions like community colleges, libraries, public safety institutions, and health care facilities, (2) regional development projects where broadband services are part of larger economic development plans for job creation and infrastructure build-out, and (3) projects targeted at specifically needy populations like the elderly or Indian tribes.

In addition, they heard considerable criticism of the definitions used for “unserved”, “underserved”, and “broad-band” – all fundamental concepts in this process. Changes in any of these categories could dramatically alter areas of eligibility. The degree to which proposals are “cost effective” is also under review, occasioned by the realization that projects for the most remote and underserved areas are often the least “cost effective” yet are still worthy of funding in furtherance of the objectives of the Act.

Finally, they are re-visiting the issue of whether or when facilities built with stimulus money may later be sold. The original rules severely constrained post-grant sales. BIP and BTOP are now open to making those restrictions more flexible, provided awardees are not “unjustly enriched.”

Deadline No one disputes that there is plenty of room for improvement in this process, but the time to get your suggestions in is short. The deadline is ***November 30***, with the Thanksgiving holiday falling right in the middle – so prospective applicants must act fast if they want to have a role in shaping the direction of the final funding round.