




Memorandum for: Lawrence E. Strickling  
Assistant Secretary for Communications and Information

From: Douglas Kinkoph   
Associate Administrator, Office of Telecommunications and  
Information Applications

Subject: Waiver of the Statutory Federal Share Requirement for the Broadband  
Technology Opportunities Program (BTOP) Award to the Los Angeles  
Regional Interoperable Communications System (NT10BIX5570158)

Date: May 1, 2015

### **ISSUE FOR DECISION**

Whether the Assistant Secretary should waive the statutory requirement that the federal share of any BTOP project may not exceed 80 percent in order to permit the Los Angeles Regional Interoperable Communications System Authority (LA-RICS) to proceed with its BTOP project with a non-federal matching share of only 15.05 percent.

### **BACKGROUND**

Section 6001(f) of the American Recovery and Reinvestment Act requires “[t]he Federal share of any project may not exceed 80 percent, except that the Assistant Secretary may increase the Federal share of a project above 80 percent if (1) the applicant petitions the Assistant Secretary for a waiver; and (2) the Assistant Secretary determines that the petition demonstrates financial need.”<sup>1</sup> Accordingly, the BTOP Round Two Notice of Funds Availability (NOFA) required awardees to either provide at least 20 percent of the total cost of the project or obtain a waiver.<sup>2</sup> The NOFA describes the conditions under which a BTOP applicant could request a waiver of the matching commitment. These conditions include requiring the applicant to petition for a waiver of the matching requirement as part of its BTOP application by submitting financial documentation that demonstrates the applicant's need for a waiver.

In BTOP Round Two, LA-RICS received a BTOP Comprehensive Community Infrastructure award of \$154,640,000. The LA-RICS project proposed to deploy a 232 site 700MHz public safety broadband network across Los Angeles City and Los Angeles County that would provide

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<sup>1</sup> American Recovery and Reinvestment Act of 2009 § 6001(f), Pub. L. No. 111-5, 123 Stat. 115, 514 (Feb. 17, 2009) (Recovery Act).

<sup>2</sup> Notice of Funds Availability and Solicitation of Applications, 75 Fed. Reg. 3792, 3799-3800, 3807 (Jan. 22, 2010) (“Second NOFA”).

the region with a modern, interoperable, public safety broadband network. The award required LA-RICS to provide a non-federal matching contribution of \$63,254,365, resulting in a non-federal share of approximately 29.03 percent of the total project budget.

On April 3, 2015, the National Oceanic and Atmospheric Administration (NOAA) Grants Office, acting on a recommendation from NTIA, placed an immediate suspension on the LA-RICS award. NOAA suspended the award because of separate motions approved by both the Los Angeles County Board of Supervisors and the Los Angeles City Council halting construction activities at certain tower sites in order to address environmental and aesthetic concerns expressed by members of the public. The suspension included a Corrective Action Plan (CAP) requiring LA-RICS to submit a revised plan that would satisfy the County and City's concerns, while also meeting the BTOP program's objectives.

On April 13, 2015, LA-RICS submitted a revised project plan in response to the CAP, which included a modified budget for the project. LA-RICS followed up with an addendum to the CAP response on April 17, which included an updated preliminary project budget and matching contribution sources. The LA-RICS revised project plan requires a match reduction. Prior to LA-RICS's current suspension and development of a new project plan, LA-RICS anticipated requesting a match reduction that would account for previously miscalculated match property, but maintain a cost share ratio of more than 20 percent. Specifically at issue, LA-RICS required a match reduction after recognizing that the methodology it used to value the real property interests it contributed to the project did not comport with BTOP or Department of Commerce grant standards.

Under the revised project plan, LA-RICS is targeting a smaller 84 site build area that provides the necessary coverage and capacity to offer reliable, interoperable communications to 34,000 first and secondary responders in LA City and LA County. Because there are fewer tower sites, LA-RICS is contributing less real property than it originally contemplated. The revised LA-RICS project also requires less fiber backhaul, and the in-kind fiber contribution from the City of Los Angeles made up a substantial portion of the prior matching share. These changes mean that LA-RICS not only requires a reduction from the original match proportionality, but given the more limited revised project scope, the reduction in required match proportionality will fall below 20 percent.

LA-RICS did not submit a petition for a waiver of the matching requirement with its original application. It has now submitted a waiver petition and financial documentation supporting its need for a partial waiver of the 20 percent matching requirement.

Program staff has determined that a reduction of the match percentage to properly budget for the updated cost valuations under the revised project plan is appropriate. LA-RICS therefore requests a reduction of its required matching contribution to 15.05 percent. Additionally, the Federal award amount will be reduced to account for the more limited scope of the LA-RICS project under its revised project plan.

The chart below summarizes the overall proposed change in the federal and non-federal share of the grant.

	<b>Current (29.03%)</b>	<b>Proposed (15.05%)</b>	<b>Difference</b>
<b>Cash</b>	\$19,584,269	\$8,020,133	(\$11,564,136)
<b>In-kind</b>	\$43,670,096	\$12,738,954	(\$30,931,142)
<b>Match = Cash + In-kind</b>	\$63,254,365	\$20,759,087	(\$42,495,278)
<b>Federal</b>	\$154,640,000	\$117,142,137	(\$37,497,863)
<b>Total Project Costs</b>	\$217,894,365	\$137,901,224	(\$79,993,141)

As a result of the requested match reduction and the reduction in the Federal contribution, the total project amount (federal BTOP grant plus LA-RICS match) would decrease from \$217,894,365 to \$137,901,224. Thus, this proposal would reduce LA-RICS’s cost match from 29.03 percent to 15.05 percent of total project costs, increasing the federal share above the statutory limit of 80 percent.

**STANDARD OF REVIEW**

The Recovery Act authorizes the Assistant Secretary to increase the Federal share of a project above 80 percent when an applicant petitions for waiver and upon a determination by the Assistant Secretary that such petition demonstrates financial need.<sup>3</sup>

The Round Two NOFA outlines the conditions under which a BTOP applicant could request a waiver of the matching commitment by demonstrating financial need.<sup>4</sup> In demonstrating financial need, an applicant should submit: (1) Documents that include the applicant’s assets, liabilities, operating expenses, and revenues from any existing operations; (2) denial of funding from a public or private lending institution; or (3) any other documents that demonstrate financial need.<sup>5</sup> The Round Two NOFA states that the petition for waiver and documentation must be set forth clearly in the application.<sup>6</sup>

Since LA-RICS did not submit its request with its original BTOP application, NTIA must first decide whether to grant a discretionary waiver of its rules under the Round Two NOFA. Section X.N. of the Round Two NOFA provides that NTIA may waive discretionary requirements of the NOFA “under extraordinary circumstances and when it is in best interest of the Federal

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<sup>3</sup> Recovery Act § 6001(f).

<sup>4</sup> Second NOFA, 75 Fed. Reg. at 3800.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

government.<sup>7</sup> The Round Two NOFA provides that NTIA may waive such discretionary requirements upon its own initiative or when requested.<sup>8</sup> The issue then is whether the grantee demonstrated financial need to meet the standard set forth in the Act for a waiver of the 80 Federal share requirement.

## ANALYSIS

The LA-RICS request meets both prongs of the test for a discretionary waiver of BTOP rules. First, the LA-RICS request demonstrates an “extraordinary circumstance.” Over the life of the award, the value of the in-kind property that LA-RICS planned to contribute to the project as match declined because LA-RICS originally anticipated that it would be able to claim the value of the property for the initial three-year period of performance for its award. LA-RICS, however, could not claim this property as an in-kind match until it had signed site access agreements with the property holders and it did not finalize these agreements until the third year of its award period. As a result, LA-RICS could only claim one year of the value of the in-kind property rather than the three years it originally planned, which significantly reduced the amount of its in-kind match contributions even before it reduced the scope of its project under its revised project plan. Moreover, the revised project scope, which reduced the number of sites LA-RICS will deploy, has further diminished its potential match sources.

LA-RICS’s match valuations relied heavily on the value of real property interests it was contributing to the program and on the value of its in-kind fiber assets. With the diminished project scope, LA-RICS no longer requires as many sites as previously contemplated or needs significant fiber assets to support the BTOP-funded network. As such, it is no longer contributing these assets to the project.

LA-RICS’s request also meets the second condition, which requires that the waiver is in the best interest of the Federal government. One of BTOP’s statutory purposes is to improve broadband access for public safety agencies.<sup>9</sup> The LA-RICS project will deliver these benefits across a similar coverage area to that originally contemplated when NTIA awarded LA-RICS its BTOP grant. As such, allowing LA-RICS to complete a revised project plan will operate in the best interest of the Federal government. As a result, I recommend that NTIA grant a waiver of the discretionary requirements of the Round Two NOFA.

In reviewing whether to grant a request for waiver of the Recovery Act’s matching requirement for a BTOP project, the Assistant Secretary must determine that the petition demonstrates financial need. LA-RICS provided a copy of its most recent financial statements, which shows that it relies on the BTOP award to cover construction costs. Further, as LA-RICS is a new entity, operating through a Joint Powers Agreement, it does not have additional funding

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<sup>7</sup> Second NOFA, 75 Fed. Reg. at 3813.

<sup>8</sup> *Id.*

<sup>9</sup> *See* Recovery Act § 6001(b).

resources prior to the construction of the network. Currently, LA-RICS does not generate any revenue. Once the network is completed, it will start collecting fees for use of the network. It also anticipates generating other revenue from member contributions, but it won't begin to receive these fees until after November 24, 2015, when the period for members to decide whether to opt-out of the LA-RICS project ends. These member fees will provide the financial resources to sustain the project going forward. LA-RICS provided its funding plan, which demonstrates the sustainability of the project after network construction.

LA-RICS has no other sources of financing to address the significant shortfall caused by removing these real property assets from its project. Further, given the limited time remaining in the award period, LA-RICS does not have much time to explore other sources of financing. Without the match reduction, the future of the LA-RICS project is in severe jeopardy. Based on this financial analysis, I believe that LA-RICS has demonstrated the requisite financial need for you to grant a waiver of the matching requirement of the Recovery Act.

**RECOMMENDATION**

Program staff have reviewed the waiver request and found that LA-RICS has demonstrated financial need and has fully explained and documented its inability to meet its matching commitment. As a result, we recommend that you (a) waive, to the extent necessary, the NOFA's discretionary requirement that a request for a matching waiver be set out in the application, and (b) grant LA-RICS's request to waive the statutory requirement that the Federal share of any BTOP project may not exceed 80 percent.

If you concur with this recommendation, please indicate by signing and dating the memorandum below.

Signature: Lawrence E. Strickling Date: 5/1/15  
Lawrence E. Strickling  
Assistant Secretary for Communications and Information