



UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications
and Information
Washington, D.C. 20230

JAN 11 2012

The Honorable Todd J. Zinser
Inspector General
United States Department of Commerce
1401 Constitution Avenue, N.W.
Washington, DC 20230

Dear Mr. Zinser:

This letter responds to your follow-on review dated January 10, 2012, related to the Broadband Technology Opportunities Program (BTOP), entitled *Misrepresentations Regarding Project Readiness, Governance Structure Put at Risk the Success of the San Francisco Bay Area Wireless Enhanced Broadband (BayWEB) Project*. I provide a point-by-point response below to the concerns the Office of Inspector General (OIG) has raised about statements made two years ago and the due diligence NTIA performed before deciding in July 2010 to award this grant. As you point out, and as I agree, this project has faced challenges from the start. Accordingly, I urge you and all of the parties involved in this project to work with NTIA on solving the issues that face the project **today** so that it can bring the benefits of a public safety broadband network to the citizens of the Bay Area consistent with prudent management of taxpayer dollars.

Improving Public Safety Broadband is a Key Statutory and Administration Priority

Public safety crises, such as the September 11, 2001 attacks and natural disasters like Hurricane Katrina, highlight both the importance – and the unfortunate shortcomings – of interoperable public safety communications. The nation has struggled to overcome challenges to implementing and deploying efficient and effective interoperability solutions for public safety in the voice context for decades.¹ The emergence of wireless broadband technologies and innovative broadband-based applications for public safety use in recent years now provides significant opportunities to move beyond the interoperability shortcomings of public safety voice communications and vastly improve the nation's public safety capabilities.²

While the BTOP public safety broadband awards and other Administration and Congressional initiatives since that time have recently spurred new levels of consensus in the public safety

¹ See generally The White House – The Benefits of Transitioning to a Nationwide Wireless Broadband Network for Public Safety (June 2011) available at <http://www.whitehouse.gov/sites/default/files/uploads/publicsafetyreport.pdf>.

² See *id.* at 10-11.

broadband community, such cohesion is relatively new.³ For example, the Project 25 Initiative (P25) began in the late 1980s to develop the then-cutting edge digital voice technology as an interoperable solution for public safety voice communications. Although the program is much improved now, lack of compatible equipment and expensive devices plagued it for over a decade.⁴ The autonomous licensing of public safety systems contributed critically to this problem.⁵ On 9/11, uncoordinated police and fire command communications structures contributed to the tragic lack of communications at the World Trade Center.⁶ And the situation has not significantly improved after ten years.⁷ For this reason, public safety agencies have advocated legislation creating a nationwide governance structure for the new broadband technology at 700 MHz, which BayWEB is piloting.⁸ NTIA supports this goal, but its realization requires a legislative mandate and nationwide implementation.

The American Recovery and Reinvestment Act (Recovery Act) provided both a funding source and a framework for testing ideas that would allow the Administration to determine the best approach to facilitate a successful nationwide public safety broadband network. One of the express statutory purposes of BTOP was to improve access to, and use of, broadband for public

³ See, e.g., President Obama Details Plan to Win the Future through Expanded Wireless Access (Feb. 10, 2011) available at <http://www.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access>; S. 911, 112th Cong., 1st Sess., (2011)(S.911); S. 1323, 112th Cong., 1st Sess., (2011). Early adopters of public safety broadband technology have advocated joint efforts for common nationwide administration of certain technical requirements key to long-term interoperability. Comments of Early Adopters, FCC Docket No. 06-229 (filed Dec. 20, 2011), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021751387>. However, lack of overarching governance and stable funding remain challenges to these incipient efforts.

⁴ U.S. Gov't Accountability Office, *First Responders: Much Work Remains to Improve Communications Interoperability* at 4 (2007), available at <http://www.gao.gov/new.items/d07301.pdf>.

⁵ See, e.g., Weiser, P.J. and D. Hatfield. "In Pursuit of a Next Generation Network for Public Safety Communications." *CommLaw Conspecus*, at 111 (2007) available at http://commlaw.cua.edu/res/docs/06_Weiser_97-143.pdf. See generally DHS SAFECOM, "Interoperability," available at <http://www.safecomprogram.gov/interoperability/Default.aspx>.

⁶ See, e.g., *The 9/11 Commission Report* (July 2004) at 291-92, available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf>; "9/11, Ten Years Later," APCO International, available at <http://psc.apointl.org/2011/09/06/911-10-years-later/> (major finding of 9/11 Commission Report was that New York City agencies considered themselves autonomous and did not work together effectively). See also "DC Police Decision Jeopardizes Interoperability," Center for Health and Homeland Security, University of Maryland, available at <http://www.mdchhs.com/blog/dc-police-decision-jeopardizes-interoperability> (criticizing District of Columbia Police Department decision to encrypt communications because surrounding jurisdictions cannot afford to mirror); Frost & Sullivan, "Interoperable Communications for First Responders," available at <http://www.corp.att.com/stateandlocal/docs/Interop.pdf> (1982 plane crash into Fourteenth Street bridge revealed inability of Virginia, Maryland and District of Columbia jurisdictions to coordinate); Federal Emergency Management Agency, National Incident Management System, Training Session 18, document available via Google search ("Another thing of the not-too-distant past, and unfortunately sometimes the present, is the infighting between public safety agencies (police, EMS and fire) and traffic management agencies (transportation, public works, public transit) and our differing views on the goals for a traffic accident" (quoting New York State fire official).

⁷ "The State of Interoperability Ten Years After 9/11," Public Safety Communications (Sept. 7, 2011) available at <http://psc.apointl.org/2011/09/07/the-state-of-interoperability-10-years-after-911/> ("So where does communications interoperability stand 10 years after 9/11? Not much further than we were on Sept. 10, 2001.").

⁸ See, e.g., Testimony of Jeffrey D. Johnson, Chief Executive Officer, Western Fire Chiefs Association, Before the House Committee on Energy and Commerce, Subcommittee on Communications and Technology (May 25, 2011), available at <http://republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/052511/Johnson.pdf>.

safety agencies.⁹ In May 2010, very late in the BTOP pre-award process, the Federal Communications Commission (FCC) granted waiver authority to certain entities to use the 700 MHz public safety broadband spectrum, which provided a timely opportunity for NTIA to fund an initial set of 700 MHz public safety projects.¹⁰ Thus, NTIA was able to award seven 700 MHz public safety grants to allow us to investigate the novel issues and problems that may arise with a nationwide interoperable public safety broadband network and to learn from different approaches to 700 MHz projects through BTOP.

NTIA has realized throughout this process that the cutting-edge 700 MHz interoperable wireless broadband public safety pilot projects are complex and challenging to implement. There is no question that a strong governance model related to 700 MHz public safety broadband networks is key to creating a strong and successful national interoperable network for public safety purposes. The governance framework related to interoperable networks is a risk element. Given public safety communications' history, the least risky approach for NTIA in the grant program would have been to do nothing. But NTIA believes it had a broader responsibility to move these types of projects forward to solve a long-standing and critical national problem and an opportunity to do so responsibly through the Recovery Act.

Given the Challenges Associated with Implementing BTOP and the History of Public Safety, NTIA Exercised Common Sense in Its Due Diligence

Both NTIA and grant applicants faced challenges associated with BTOP. The Recovery Act was enacted on February 11, 2009 and required NTIA to create a new grant program consistent with statutory requirements, accept competitive applications, and award over \$4 billion dollars in grant funds within 19 months. This, in turn, required potential awardees to plan and organize project proposals within extremely constrained timeframes. In particular, for the second round of BTOP funding, which included the BayWEB project, NTIA released the Notice of Funds Availability (NOFA) on January 22, 2010, and opened the application window on February 16, 2010 with a filing deadline of March 26, 2010. These timeframes put significant pressure on all involved, but they were necessary to meet the statutory timeframes and objective of spurring the nation's economic recovery.

Given the circumstances, NTIA's challenge was to administer the program under tight deadlines, addressing significant due diligence responsibilities while delivering the program on time. To that end, NTIA developed a broad-ranging and multi-factored application review process.¹¹ Certainly, NTIA had an important role to exercise due diligence over the applications and, in doing so, devoted resources to evaluating the **material** representations in the applications, including performing detailed assessments of the application's proposed project benefits and service areas; analyzing the project's technical viability; analyzing the project's budget and financial sustainability; reviewing audit findings and credit checks; evaluating potential

⁹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 Section 6001(b)(4) (2009). (Recovery Act).

¹⁰ Notice of Funds Availability; Reopening of Application Filing Window for Broadband Technology Opportunities Program Comprehensive Community Infrastructure Projects, 75 Fed Reg 27984 (May 19, 2010).

¹¹ See BTOP Quarterly Status Report (Feb. 2010) at 3 *available at* http://www.ntia.doc.gov/files/ntia/publications/btop_quarterlyreport_03032010.pdf (containing an overview of the application review process.)

environmental and historic preservation impacts of the project; validating the proposal's feasibility, consistency, and accuracy; and reviewing information supplied by existing service providers to evaluate the existing level of broadband service in the project area.

In conducting due diligence, NTIA did not expect applications to be completely mistake-free. It was reasonable to expect some minor level of inaccuracy, to expect applicants to frame their plans in the context of best-case scenarios, and for some claims to be overcome by events or require modification in the light of changing circumstances on the ground. NTIA diligently examined claims that were material to the project's success, but could not possibly have investigated and verified each and every unchallenged assertion and claim during the application review process. To do so would have come at the cost of failing to meet the statutory award deadline of September 30, 2010 and the statutory purposes of the Recovery Act. This is particularly true where, as was the case with BayWEB, NTIA staff interacted with jurisdictions who gave the agency no reason during due diligence to believe anything might have been amiss or might have required further investigation.

Under the circumstances, NTIA created a highly efficient and effective grant program. Indeed, the OIG previously praised BTOP's pre-award application review process as "vigorous."¹² The pre-award review process has been largely validated by time, as seen in the high-quality projects funded, the benefits already being realized by the American people, and the low rate of project failure to date.

NTIA Did Not Rely on Any of the Statements Questioned by the OIG

The three categories of statements questioned by the OIG raise no new issues. NTIA fully examined these matters after receiving specific complaints from the County of Santa Clara and the City of San Jose in the fall of 2010, long after NTIA had announced the award to Motorola. NTIA concluded, in a letter dated February 24, 2011, that it had conducted thorough due diligence on the proposed project and had not relied on any of the claimed misrepresentations as a basis for awarding the project.¹³ A quick review of each of the categories identified by the OIG demonstrates that none constitutes a material misrepresentation in the context of all that NTIA knew about the project and the challenges it would likely face through implementation.

Governance Structure. NTIA agrees with the OIG that challenges related to completing the governance structure experienced by the Bay Area communities may have contributed to an initial delay in the construction of the project. But it is not accurate to suggest that statements made in the application about the status of the governance structure misled NTIA into awarding the grant. Beyond the application's strengths as it went through BTOP's established competitive grants process, the overall application and the unique characteristics of the Bay Area made it a good fit as a 700 MHz pilot project. NTIA knew that a great deal of additional work would be needed to get the governance right and was not led astray by claims or statements made in the

¹² *NTIA Must Continue to Improve its Program Management and Pre-Award Process for its Broadband Grants Program Final Report No. ARR-19842-1* at 7 (April 2010).

¹³ See Letter to Mr. Jeffrey Smith, County Executive, Santa Clara and Hon. Chuck Reed, Mayor of San Jose from NTIA Assistant Secretary Lawrence E. Strickling (Feb. 24, 2011) (NTIA Response Letter).

BayWEB application. Given the timeframes and circumstances surrounding BTOP in general and the ability to fund 700 MHz projects in particular, NTIA did not assume the Bay Area had everything figured out and thus did not rely on the statements that OIG asserts were false or inaccurate.

The standard OIG seems to be imposing on this project – that it should have had an ironclad governance structure put in place during the two-month application window – is not realistic, not appropriate, and does not reflect the decade of struggles that characterized public safety after 9/11. Moreover, the need for additional work to finalize the governance structure, while certainly a management risk, did not pose a significant financial risk for the misuse of taxpayer dollars, particularly given the overall context that the cost of building the needed nationwide network is expected to be upwards of \$6.5 billion.¹⁴ As this was a threshold issue, if the parties could not come together on governance, it was likely that only a small amount of federal dollars would be spent on the project – a conclusion borne out by the fact that, to date, only one percent of the award’s federal funds have been expended on the project. On the other hand, if the public-private partnership model proves successful, significant progress will have been made toward finding solutions and best practices for the much-needed national interoperable public safety wireless broadband network.

Shovel Ready Sites. Next, the OIG questions certain statements in the application relating to project sites being “shovel ready.” However, as the OIG concedes, these statements cannot be condemned as an intentional or legal misrepresentation because neither the Recovery Act nor our NOFA required sites to be “shovel ready.” Indeed, NTIA did not even define the term in the operative documents for the program. Moreover, as stated in the February 24, 2011 letter, “we consider site upgrades to be a normal part of the scope of funded projects,” and NTIA did not award the BayWEB project grant “in reliance on every site’s being already fully-equipped for the new network.”¹⁵

Authority to Use Broadband Spectrum. Finally, the OIG questions the application’s claims regarding the BayRICS Policy Group’s authority and involvement with respect to the 700 MHz spectrum to be used in the project. But as NTIA pointed out a year ago, “as it was a matter of public record, we were aware of the identity of the applicants seeking an FCC waiver to use the 700 MHz spectrum” in the Bay Area.¹⁶ In fact, as the OIG points out, NTIA did extensive due diligence on this issue before making the decision to award the grant, so the agency could not possibly have been misled by any unclear statements in the application. Each of the three cities that submitted the FCC spectrum waiver request submitted a separate letter to NTIA committing to authorize the Alameda County Sheriff’s Office to enter into the requisite lease agreement. On June 4, 2010, the City of Oakland wrote:

If the BayWEB application is successful and awarded the BTOP grant, the City of Oakland (the “City”) will participate in the BayWEB project. More specifically, the City will enter into the requisite lease agreement with the Public Safety Spectrum Trust Corporation (“PSST”) so that the 700 MHz spectrum shall be

¹⁴ American Jobs Act of 2011, S. 1549 and H.R. 12 available at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.12:>.

¹⁵ See NTIA Response Letter at 2.

¹⁶ *Id.*

used for the public safety system described in the BayWEB BTOP application. Alternative, if permitted by the PSST, the City may authorize, pending legal review and Council approval, the Alameda County Sheriff's Office, as executive sponsor and Regional Mutual Aid Coordinator for Region 2, the Northern California Coastal Region, on behalf of the BayRICS ("BayRICS") to enter into the requisite lease agreement.¹⁷

On June 9, 2010, the City and County of San Francisco wrote:

This letter is to confirm that the City and County of San Francisco will enter into – or, if permitted by the PSST, authorize the Sheriff to enter into – an appropriate lease agreement with the PSST for the 700 MHz public safety spectrum in the San Francisco Bay Area for the use by and benefit of the ten counties that comprise the Bay Area UASI. In addition, if Motorola's BTOP grant is awarded, the City and County of San Francisco will join with the Sheriff to enter into additional agreements with Motorola that will allow Motorola to build, own, operate, and maintain the proposed public safety system, which public safety entities in the ten counties that comprise the Bay Area UASI will utilize to provide services consistent with their lease agreement with the PSST.¹⁸

Even the City of San Jose, which only after we announced the grant award surfaced the concerns addressed now by the OIG, wrote very specifically on June 7, 2010 as follows:

If this application is successful and Motorola is awarded the BTOP grant funds, the City of San Jose (the "City") plans to participate in the BayWEB project. More specifically, the City will negotiate in good faith to enter into the requisite lease agreement with the Public Safety Spectrum Trust Corporation ("PSST") so that the 700 MHz spectrum may be used for the public safety system described in Motorola's BTOP application.¹⁹

Given these strong statements of support, and given the urgency felt by communities and federal agencies to make progress on public safety networks across the nation, NTIA felt confident then – and remains confident now – that the BayWEB project will be able to use the 700 MHz spectrum. The OIG now suggests that NTIA should have waited to verify that formal authorization was granted by the cities before moving forward with its award decision. However, as the OIG notes, each of the letters was conditioned on the award of the grant to Motorola, so postponing the award decision would itself have delayed resolution of this issue.

¹⁷ Letter from Oakland City Administrator Dan Lindheim to Joseph Bissonnette of NTIA (June 4, 2010).

¹⁸ Letter from City and County of San Francisco Police Department Assistant Chief/Chief of Staff Morris Tabak to Joseph Bissonnette of NTIA (June 9, 2010).

¹⁹ Letter from San Jose Deputy City Manager Deanna J. Santana to Joseph Bissonnette of NTIA (June 7, 2010).

Concerns Raised Regarding the February 2010 RFP Process

OIG's follow-on report addresses concerns raised by Santa Clara and San Jose regarding Motorola's involvement in the BayWEB project.²⁰ The OIG ultimately determined that the problem was "largely one of perception." This conclusion in essence affirms the investigation conducted over a year ago by the California Emergency Management Agency (CalEMA).²¹ Moreover, nothing in BTOP rules required any applicant to submit to any review or selection process by any or all of the Bay Area communities prior to submitting its application.

NTIA Agrees That Letters of Support of Potential BTOP Projects from Public Officials Must be Put in Context, But Disagrees that Its Reliance on Such Letters Contributed to Deficiencies in the Application Process

NTIA stands behind its consideration of letters of support from public officials as part of the BTOP application review process. Such expressions of broad support from well-known and trusted public entities were valuable, and NTIA reasonably had confidence that these letters provided strong indications of each community's commitment to a project's success.

NTIA does agree with OIG that such letters must be put in their proper context and, further, believes it did so. As discussed above, the BTOP due diligence process was multi-faceted and determinations to make BTOP awards were based on a variety of factors. Letters of support alone were not determinative of a decision to award a project. That said, we do not agree with the OIG's suggestion now that NTIA should have required letters of support for BTOP applications to contain more specific fiscal and/or political commitments. The outpouring of support shown for the BayWEB project helped give NTIA the necessary confidence to proceed with the project, knowing that governance would be a continuing issue. Also, as previously noted, at the time of the decision to award, NTIA had no indication from Santa Clara and San Jose that they had concerns with the project. In fact, their letters of support, both in the application and provided during due diligence, reflected just the opposite.

NTIA is Focusing on Post-Award Project Administration and Oversight

NTIA believes that the most efficient, effective, and best use of program resources at this time is to focus on post-award project administration and oversight. NTIA implemented a rigorous monitoring and oversight plan for BTOP grants to ensure projects are completed on time, stay within budget, and deliver the promised benefits to the communities they serve. NTIA has achieved a substantial level of oversight, awardee education, and technical assistance despite having limited federal staff and budget to perform this work. The agency's oversight plan is both rigorous and cost-effective, with annual administrative expenses representing less than one percent per year of the amount of the total grant portfolio.

²⁰ Significantly, although the events, about which Santa Clara and San Jose raised concerns now occurred in early 2010, neither Santa Clara nor San Jose raised this issue with NTIA in the application process or during our due diligence contacts with these communities in the summer of 2010.

²¹ See Letter from Brendan A. Murphy, Director of Grants Management, California Emergency Management Agency to Laura Phillips, Executive Director, Bay Area Urban Area Security Initiative (Oct. 14, 2010).

The OIG previously has characterized the BTOP post-award monitoring framework as reasonable.²² NTIA continually works to improve its project monitoring and oversight and has incorporated all suggestions made to date by OIG to its satisfaction.²³ Indeed, the BayWEB project receives the highest level of monitoring and significant staff attention under the BTOP post-award framework. Additionally, taking NTIA's role as steward of taxpayer funds seriously, the agency has worked to ensure that minimal federal grant funds are expended as Motorola continues to work with the Bay Area jurisdictions to finalize the critical Build, Own, Operate, and Maintain (BOOM) agreement with the local public safety authorities.

In conclusion, it is important to our national agenda to continue to try to solve the challenges of public safety communications using the tools at hand, such as Recovery Act grants. NTIA's approval of the BayWEB grant, made after appropriate due diligence, was based on a full appreciation of all material facts available at the time. Now, NTIA must continue to focus its efforts and resources on the challenges existing today in the post-award context. NTIA will continue to work with you as it carries out this important program to expand broadband capabilities in the United States, create jobs, and lay a new foundation for economic growth in America. If NTIA may be of further assistance, please contact Milton Brown, NTIA's Liaison to the OIG, at (202) 482-1853.

Sincerely,



Lawrence E. Strickling

cc: Ann Eilers, Principal Assistant Inspector General for Audit and Evaluation
Anthony Wilhelm, Deputy Associate Administrator, Office of Telecommunications and Information Applications, NTIA
Milton Brown, NTIA Audit Liaison
Chris Rose, Senior Auditor, Recovery Act Task Force, OIG
Aimee Meacham, NTIA

²² OIG, *NTIA Has an Established Foundation to Oversee BTOP Awards but Better Execution of Monitoring is Needed* at 13 (Nov. 11, 2011).

²³ *See id.* at 16.