

**DEPARTMENT OF COMMERCE**  
**National Telecommunications and Information Administration**  
**Policy Notice**  
**ACTION: Notice**

**SUMMARY:**

The Infrastructure Investment and Jobs Act (Infrastructure Act)<sup>1</sup> authorized the Broadband Equity, Access, and Deployment (BEAD) Program, which provides \$42.45 billion to achieve reliable, affordable, and high-speed Internet coverage throughout the United States. The U.S. Department of Commerce, in keeping with its mission to create the conditions for economic growth and opportunity for all communities, is working with each State of the United States, the District of Columbia, and the U.S. Territories (“Eligible Entities”) to build equitable access to universal high-speed Internet coverage through the BEAD Program.

The National Telecommunications and Information Administration (NTIA), the Department of Commerce agency responsible for administering the BEAD program, issued a Notice of Funding Opportunity (NOFO) establishing the procedures for Eligible Entities to seek BEAD funding, including the minimum steps Eligible Entities must take to satisfy their statutory obligation to ensure that subgrantees have the financial capacity to meet their commitments.<sup>2</sup> The NOFO also states that “Eligible Entities may, with the permission of the Assistant Secretary, allow prospective subgrantees that have the ability to issue public bonds (*e.g.*, municipalities) to provide comparable evidence in support of their financial capabilities.”<sup>3</sup> Through its programmatic waiver, NTIA has already provided additional avenues for satisfying this requirement by permitting the issuance of performance bonds.<sup>4</sup>

This Public Notice provides additional guidance to Eligible Entities regarding what information should be included in making such a request and the form such comparable evidence might take.<sup>5</sup> If an Eligible Entity would like to request such permission while its Initial Proposal is under NTIA consideration, it should contact its Federal Program Officer as soon as possible. The contents of that request should be consistent with the guidance provided in this document. Such a request may require revision of the Eligible Entity’s Initial Proposal.

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<sup>1</sup> Infrastructure Investment and Jobs Act of 2021, Division F, Title I, Section 60102, Public Law 117-58, 135 Stat. 429 (Nov. 15, 2021).

<sup>2</sup> Broadband Equity, Access, and Deployment Notice of Funding Opportunity (BEAD NOFO), Section IV.D.2.a.

<sup>3</sup> NOFO at 72, § IV.D.2.a.

<sup>4</sup> See NTIA, Notice of Programmatic Waiver regarding BEAD Letter of Credit Requirement (Oct. 23, 2023), available at: <https://broadbandusa.ntia.gov/funding-programs/policies-waivers/BEAD-Letter-of-Credit-Waiver> (BEAD Programmatic LoC Waiver).

<sup>5</sup> This guidance document is intended to help BEAD Eligible Entities better understand the BEAD Program requirements set forth in the Infrastructure Act and the BEAD Notice of Funding Opportunity (NOFO). This document does not and is not intended to supersede, modify, or otherwise alter applicable statutory or regulatory requirements, or the specific requirements set forth in the NOFO. In all cases, statutory and regulatory mandates, and the requirements set forth in the NOFO, shall prevail over any inconsistencies contained in this document.

## 1. Policy Notice Purpose and Background

The goal of the BEAD Program is to achieve affordable, reliable high-speed Internet coverage. To help achieve this goal, the Infrastructure Act requires, among other things, that each Eligible Entity ensure that any prospective subgrantee has the financial capacity to meet the commitments of the subgrant and any requirements of the Program.<sup>6</sup>

The BEAD NOFO details the minimum steps an Eligible Entity must take to evaluate the financial capacity of a subgrantee, including:

- (1) obtaining certifications of sufficient financial resources;
- (2) submission of an irrevocable standby letter of credit (LOC) of no less than 25 percent of the subaward amount;<sup>7</sup>
- (3) provision of audited financial statements; and
- (4) submission of pro forma business plans demonstrating sustainability.<sup>8</sup>

The BEAD NOFO acknowledges, however, that the manner in which prospective subgrantees may demonstrate their capabilities may vary. For example, the types of evidence available to municipal entities seeking to demonstrate financial capability may differ from the kinds of evidence expected of commercial enterprises. Thus, the NOFO states that “Eligible Entities may, with the permission of the Assistant Secretary, allow prospective subgrantees that have the ability to issue public bonds (e.g., municipalities) to provide comparable evidence in support of their financial capabilities.”<sup>9</sup>

This Public Notice provides additional guidance to Eligible Entities regarding what information should be included in making such a request and the form such comparable evidence might take. NTIA emphasizes that Eligible Entities must continue to require all prospective subgrantees – regardless of how the entity is organized – to certify that they are financially qualified to meet the obligations associated with a Project, that they will have available funds for all project costs that exceed the amount of the grant, and that they will comply with all Program requirements, including service milestones.<sup>10</sup> To the extent Eligible Entities disburse funds through a reimbursement method, a subgrantee must also certify that it has and will continue to have sufficient financial resources to cover its eligible costs for the Project until such time as the Eligible Entity authorizes additional disbursements.<sup>11</sup> Finally, Eligible Entities must also

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<sup>6</sup> 47 U.S.C. §1702(g)(2)(A)(ii).

<sup>7</sup> NTIA subsequently released a programmatic waiver expanding how this requirement can be satisfied. *See generally* BEAD Programmatic LoC Waiver. The BEAD Letter of Credit Waiver Notice permits the LOC requirement to be met with a performance bond valued at 100% of the subaward amount, and the LOC or performance bond may be valued at 10% of the subaward amount if the Eligible Entity issues funding on a reimbursable basis for periods of no more than six months.

<sup>8</sup> *See* BEAD NOFO Section IV.D.2.a.

<sup>9</sup> NOFO at 72, § IV.D.2.a.

<sup>10</sup> NOFO at 72, § IV.D.2.a.i.

<sup>11</sup> NOFO at 72, § IV.D.2.a.i.

continue to require all prospective subgrantees to submit business plans and related analyses that substantiate the sustainability of the proposed project.<sup>12</sup>

## **2. Alternative Evidence of Financial Capability**

NTIA recognizes that municipalities and other entities that can issue bonds may be prohibited from obtaining an irrevocable letter of credit and may not have audited financials in the traditional form. Eligible Entities are encouraged to propose alternative forms of evidence that are comparable to those enumerated in the BEAD NOFO and would meet the statutory obligation imposed on Eligible Entities to ensure the financial viability of subgrantees.<sup>13</sup> To assist Eligible Entities in meeting their statutory obligation NTIA provides the following additional guidance.

### **a. Letters of Credit**

In those circumstances in which a prospective subgrantee with the ability to issue public bonds is prohibited or otherwise unreasonably restricted from entering an LOC, Eligible Entities are encouraged to impose similar obligations that perform the same function. Through its programmatic waiver, NTIA has already provided additional avenues for satisfying this requirement by permitting the issuance of performance bonds. If a prospective subgrantee cannot meet either the original BEAD NOFO LOC requirements or the expanded options of the programmatic waiver, NTIA recommends Eligible Entities take the following steps as further discussed below:

- (1) Obtain documentation demonstrating a legal or practical impediment, other than lack of financial capacity, that prevents the prospective subgrantee from entering an LOC or obtaining a performance bond; and
- (2) Require an alternative form of evidence that shows the prospective subgrantee is financially capable of meeting its obligations under the BEAD program.

#### **i. Prohibited or Unreasonably Restricted from Obtaining LOC**

If the prospective subgrantee claims to be prohibited or otherwise unreasonably restricted from obtaining a conforming LOC or performance bond as a matter of law, it should submit a letter from counsel (in-house or external) sufficient to demonstrate the prohibition or unreasonable restriction. Examples include, but are not limited to, a requirement for a public vote of approval before obtaining the LOC or performance bond, a lack of required specific statutory authority, or proof that financial institutions and sureties in the state will not issue letters of credit or performance bonds to local government entities.

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<sup>12</sup> NOFO at 72, § IV.D.2.a.iv.

<sup>13</sup> NOFO at 72, § IV.D.

## **ii. Comparable Evidence in Support of Financial Capabilities**

For prospective subgrantees that are prohibited or unreasonably restricted from obtaining a LOC or performance bond, the Eligible Entity may allow the prospective subgrantee to establish financial capability by demonstrating substantive, if not technical, compliance with the LOC requirement. For example, the prospective subgrantee could demonstrate that its project partner or vendor is willing to secure a LOC or performance bond consistent with the NOFO (and programmatic waiver) requirements. The prospective subgrantee could also propose an alternative form of surety, such as depositing no less than 25 percent of the subaward amount into an appropriately conditioned escrow account established with a bank that meets the eligibility requirements set forth in 47 C.F.R. § 54.804(c)(2). Other examples include an appropriation worth at least 25 percent of the subaward amount expressly limited to and earmarked for funding the required commitment or a 100% match commitment from the prospective subgrantee.

These examples are not intended to be exhaustive and Eligible Entities are encouraged to propose other alternatives that meet the spirit of the NOFO (and programmatic waiver) requirements and satisfy the statutory obligation to ensure financial capacity. The Eligible Entity is ultimately responsible for assessing the financial capacity of the prospective subgrantee and must take steps to ensure the viability of the project and the success of the program.

### **b. Audited Financial Statement Alternatives**

NTIA also recognizes that certain municipalities and similar entities that have the ability to issue public bonds may not maintain financial statements in the same form traditionally maintained by commercial enterprises. In these circumstances, Eligible Entities should require submission of other financial documentation sufficient to allow evaluation of the financial capacity and viability of the prospective subgrantee. For example, municipalities will presumably maintain budgets and financial documentation reflecting expected revenues, expenses, and account balances that would demonstrate the ability of the entity to continue operations and support the operation of the proposed project. This alternative documentation should cover, at a minimum, two years of financial activities. If the prospective subgrantee has the ability to issue bonds, they may have an established bond rating from a third party that would reflect the financial viability of the entity. In some states, a municipality may be required to submit financial reports to the State or County government reflecting its ongoing operations which in turn are audited by the cognizant organization. These audited documents should be submitted if available. The Eligible Entity, however, must collect some form of evidence that the prospective subgrantee will have the financial wherewithal to take on the BEAD project and see it through to completion, including the ability to continue operations upon deployment.

### **3. Conclusion**

NTIA reiterates that the statutory obligation to assess financial capacity is imposed on the Eligible Entity. In their Initial Proposals, Eligible Entities had the flexibility to propose alternative means of assessing the financial capability of a prospective subgrantee (including where such entity is legally or practically prohibited from compliance with the BEAD NOFO requirements). Such a proposal to use alternative means will be evaluated by the Assistant Secretary. As addressed above, if an Eligible Entity would like to request such permission while its Initial Proposal is under NTIA consideration, it should contact its Federal Program Officer as soon as possible. However, in no case may an Eligible Entity approve any subgrant for the deployment or upgrading of network facilities unless it determines that the documents submitted by the prospective subgrantee demonstrate the prospective subgrantee's financial capability with respect to the proposed project.