

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

ACTION: Policy Notice

SUMMARY:

The Infrastructure Investment and Jobs Act (Infrastructure Act), enacted in November 2021, supplies funding for robust investment in American infrastructure projects. The Infrastructure Act includes the Broadband Equity, Access, and Deployment (BEAD) Program, which provides \$42.45 billion of funding to achieve reliable, affordable, and universal high-speed Internet coverage throughout the United States. *See* Infrastructure Investment and Jobs Act of 2021, Division F, Title I, Section 60102, Public Law 117-58, 135 Stat. 429 (Nov. 15, 2021). The U.S. Department of Commerce, in keeping with its mission to create the conditions for economic growth and opportunity for all communities, is ready to lead the building of equitable access to high-speed Internet coverage in the United States.

The National Telecommunications and Information Administration (NTIA), as the agency responsible for administering the BEAD program, provides herein guidance on the implementation of exceptions, adjustments, and clarifications to certain provisions of the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance)*, codified at 2 CFR Part 200, and the application of related provisions of the *Uniform Guidance* to the BEAD Program. This Policy Notice is not a substitute for the terms and conditions of specific awards. Should this Policy Notice and the BEAD award terms differ, the terms and conditions of a specific BEAD award govern.

Policy Notice: Tailoring the Application of the *Uniform Guidance* to the BEAD Program

The National Telecommunications and Information Administration (NTIA) provides herein guidance on the implementation of exceptions, adjustments, and clarifications to certain provisions of the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance)*, codified at 2 CFR Part 200, and the application of related provisions of the *Uniform Guidance* to the Broadband Equity, Access and Deployment (BEAD) Program. This Policy Notice is not a substitute for the terms and conditions of specific awards. Should this Policy Notice and the BEAD award terms differ, the terms and conditions of a specific BEAD award govern.

Background and Overview

The BEAD Program was established through the Infrastructure Investment and Jobs Act, also known as the Bipartisan Infrastructure Law. Under the statute, NTIA is responsible for administering \$42.45 billion in grants to the States, Territories, and the District of Columbia (Eligible Entities) with the principal focus of ensuring that every American has access to affordable, reliable high-speed Internet service.

The *Uniform Guidance* is the Federal Government’s framework for grants management, providing rules and requirements for Federal financial assistance awards and subawards. The Department of Commerce (DOC) adopted the *Uniform Guidance* in 2 CFR 1327.101, thereby giving it regulatory effect over DOC financial assistance awards. The DOC also publishes Financial Assistance Standard Terms and Conditions (ST&Cs) that build upon the *Uniform Guidance*. Moreover, while the *Uniform Guidance* applies on its face only to “non-Federal entities,”¹ which are defined as states, local governments, Indian tribes, institutions of higher education, and nonprofit organizations, the regulations expressly provide that Federal awarding agencies may apply subparts A through E to for-profit entities, among others.² In turn, the DOC ST&Cs extend application of these subparts to commercial entities.³ Subparts A through E of the *Uniform Guidance* thus apply to NTIA grant awards and subawards issued to both non-Federal entities and commercial entities, unless specified otherwise in the terms and conditions of a specific award.

¹ See 2 CFR 200.100 (“This part establishes uniform administrative requirements, cost principles, and audit requirements for Federal awards to non-Federal entities...”); 2 CFR 200.1 (defining Non-Federal entity as “a State, local government, Indian tribe, Institution of Higher Education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient.”)

² 2 CFR 200.101(a)(2) (“Federal awarding agencies may apply subparts A through E of this part to Federal agencies, for-profit entities, foreign public entities, or foreign organizations, except where the Federal awarding agency determines that the application of these subparts would be inconsistent with the international responsibilities of the United States or the statutes or regulations of a foreign government.”).

³ See Preamble to the DOC ST&Cs, which provides that “unless otherwise provided by the terms and conditions of this DOC financial assistance award, Subparts A through E of 2 C.F.R. Part 200 and the Standard Terms are applicable to for-profit entities.”

Following publication of the BEAD Notice of Funding Opportunity (NOFO),⁴ various stakeholders identified provisions of the *Uniform Guidance* that they argued would deter participation of Internet service providers (ISPs) in the BEAD Program and/or increase administrative costs without concomitant benefit. NTIA subsequently issued a *Request for Comment (RFC)* earlier this year to provide an opportunity for public comment on various aspects of those provisions identified by stakeholders.⁵ After receiving more than 60 comments, and with a record that includes input from governors’ offices, state broadband offices, and private industry stakeholders, among others, NTIA is issuing this Policy Notice addressing the issues raised in the *RFC* and NTIA’s record.

Scope and Applicability

This Policy Notice applies to BEAD subawards for which the major purpose of the subaward is a broadband infrastructure “project,” as the term project is defined in the Section I.C.(t) in the NOFO.⁶ For the sake of clarity, broadband infrastructure projects include:

- last-mile broadband deployment projects, as that term is used in Section IV.B.7.a.ii. of the BEAD NOFO, with the exception that projects for which the major purpose is training or workforce development are not considered broadband infrastructure projects for the purposes of the exceptions addressed in this Policy Notice;
- projects to deploy Middle Mile Infrastructure, as that term is defined in Section I.C.(o) of the BEAD NOFO; and
- projects to deploy Internet and Wi-Fi infrastructure within a multi-family residential building.⁷

⁴ NTIA, Notice of Funding Opportunity, Broadband Equity, Access, and Deployment Program at 86, § VII.D.1-2 (2022). Capitalized terms not defined herein will be ascribed the definitions in the NOFO.

⁵ NTIA, Request for Comment, Tailoring the Application of the Uniform Guidance to the BEAD Program (2023).

⁶ NOFO at § I.C.(t) (“The term ‘project’ means an undertaking by a subgrantee to construct and deploy infrastructure for the provision of broadband service. A ‘project’ may constitute a single unserved or underserved broadband-serviceable location, or a grouping of broadband-serviceable locations in which not less than 80 percent of broadband-serviceable locations served by the project are unserved locations or underserved locations.”); *see also* 47 USC 1702(a)(2)(K) (defining project as “an undertaking by a subgrantee under this section to construct and deploy infrastructure for the provision of broadband service.”). For the sake of clarity, the major purpose test does not apply for determining whether a project is an “infrastructure project” for purposes of compliance with the Build America, Buy America Act (BABA). *See* 2 CFR 184.3 (defining “infrastructure project” for purposes of BABA as any activity related to the constructions, alteration, maintenance, or repair of infrastructure in the United States, regardless of whether infrastructure is the primary purpose of the project).

⁷ *See* BEAD NOFO at §§ IV.B.7.a.ii.

In contrast, this Policy Notice does not apply to subawards for which the major purpose of the subaward is a non-deployment use, as that term is used in Section IV.B.7.a.iii. of the BEAD NOFO.⁸

The major purpose of a subaward is a broadband infrastructure project(s) if more than 50% of the estimated total costs under the subaward are necessitated by the broadband infrastructure project(s) activities of the subaward. Eligible Entities are responsible for initially determining whether the major purpose of a subaward is a broadband infrastructure project, and thus whether the exceptions, adjustments, and clarifications summarized herein apply. Eligible Entities must identify in their Final Proposals those fixed amount subawards whose major purpose is a broadband infrastructure project, and keep NTIA apprised of any changes to such determinations. NTIA also reminds stakeholders that NTIA retains the authority to review subrecipients agreements and revise determinations regarding the major purpose of a subaward.

Program Income

The *Uniform Guidance* defines program income as earned income “that is directly generated by a supported activity or earned as a result of the Federal award during the period of performance.”⁹ In the *RFC*, NTIA observed that Congress established competitive subrecipient selections processes as the principle means for disbursing subawards, and NTIA reasoned that the opportunity to retain program income may help increase participation in the BEAD Program, which in turn would maximize the benefits of the competitive subrecipients processes.¹⁰ NTIA further noted that the ability to retain program income may address a core problem for which the BEAD Program was created to solve, namely, the lack of a sustainable business case to expand and improve broadband services to unserved and underserved areas.¹¹

For these reasons, NTIA provides here that, in the case of subawards whose major purpose is a broadband infrastructure project, BEAD subrecipients may retain program income without restriction. As a result, subrecipients may retain program income, such as income derived from the servicing and use of supported networks and connections (e.g., wholesale revenues, end-user subscription revenues, etc.), for profit. NTIA reiterates, however, that this additional flexibility for the use of program income does not change the BEAD Program’s prohibition on Eligible Entities or subrecipients claiming profit and fees as allowable costs.¹² Proposed subrecipient budgets thus may not include profit, fees, or similar charges.

⁸ BEAD NOFO at § IV.B.7.a.iii.

⁹ See definition of “Program income” in 2 CFR 200.1.

¹⁰ *RFC* at 8-9.

¹¹ *Id.* at 9.

¹² See BEAD NOFO at § V.H.2.b. (“A profit, fee, or other incremental charge above the actual cost incurred by an Eligible Entity or subgrantee is not an allowable cost under this Program.”).

Fixed amount subawards and cost principles

In general, the *Uniform Guidance* provides that subrecipients must follow the Federal cost principles in determining which costs incurred under a subaward are allowable.¹³ However, the cost principles do not apply as compliance requirements to fixed amount subawards.¹⁴ Instead, the cost principles or other pricing information are used as a guide when budgeting for the work that will be performed under the fixed amount subaward.¹⁵

The *Uniform Guidance* provides that pass-through entities may issue fixed amount subawards if “the project scope has measurable goals and objectives and if adequate cost, historical, or unit pricing data is available to establish a fixed amount award based on a reasonable estimate of actual cost.”¹⁶ Fixed amount awards generally cannot be used in programs which require mandatory cost sharing or match.¹⁷ Moreover, pass-through entities may only provide fixed amount subawards with prior written approval from the Federal awarding agency, and only up to the Simplified Acquisition Threshold, which is \$250,000.¹⁸

In the *RFC*, NTIA recognized that the BEAD competitive subrecipient selection processes are likely to result in fixed amount subawards for broadband infrastructure projects that have measurable goals and objectives.¹⁹ Moreover, NTIA noted that the NOFO’s requirements for fair and open subgrantee selection will help deliver adequate cost data necessary to establish fixed amount subawards that are based on a reasonable estimate of actual costs.²⁰ And further, NTIA observed that potential subrecipients will have significant incentives during the competitive selection processes to estimate their costs conservatively.²¹

For these reasons, and with the approval of OMB, NTIA provides here that, subject to the condition identified below, Eligible Entities may issue fixed amount subawards where the major purpose of the subaward is a broadband infrastructure project(s). Subrecipients may issue such fixed amount subawards without further NTIA approval, regardless of whether the value of the sub-award exceeds \$250,000, and notwithstanding whether the subaward includes a non-Federal match from the subrecipient that is being used to satisfy the Eligible Entity’s statutory match requirement.

¹³ See 2 CFR Subpart E—Cost Principles.

¹⁴ See 2 CFR 200.401(a)(3); see also 2 CFR 200.1, 200.201.

¹⁵ See 2 CFR 200.201(b)(1).

¹⁶ *Id.*

¹⁷ 2 CFR 200.201(b)(2).

¹⁸ 2 CFR 200.333.

¹⁹ *RFC* at 11.

²⁰ *Id.*

²¹ *Id.*

Consistent with the clarification provided by the Department of the Treasury in its recent guidance regarding broadband infrastructure projects funded by the State and Local Fiscal Recovery Funds and Capital Projects Fund,²² NTIA clarifies that Eligible Entities may elect to treat subawards as fixed amount subawards even if the Eligible Entity requires subrecipients to submit evidence of costs. Eligible Entities thus may treat subawards providing for a maximum payment amount that is based on a reasonable estimate of actual cost (*see* 2 CFR 200.201(b)(1)) as fixed amount subawards, even if the subaward agreement also provides that payments to the subrecipient will be limited to actual costs after review of evidence of costs.

Subrecipients that receive fixed amount subawards pursuant to this Policy Notice are not required to comply with the cost principles under the *Uniform Guidance*.²³

Because fixed amount subawards must be based on a reasonable estimate of actual cost, the authority to issue fixed amount subawards is conditioned upon a requirement that the Eligible Entity monitors the reasonableness of the subrecipient costs. Measures to validate that fixed amount subawards reasonably approximate the actual cost of broadband infrastructure projects would include, but are not limited to, requiring subrecipients to periodically report their expenses using Generally Accepted Accounting Principles or other standard accounting practices, or monitoring the relative proportion of costs across the following key spending areas: professional services (e.g., engineering, environmental and historic preservation permitting, legal expenses, etc.); construction services (e.g., digging trenches, erecting towers, blowing fiber, constructing and improving buildings, etc.); outside plant, towers, and poles (e.g., fiber plan, conduit, towers, poles, emergency power generational equipment, etc.); network and access equipment (e.g., broadband routing equipment, broadband transport equipment, network broadband access equipment, wireless base stations, antennas, etc.); operating equipment (e.g., office furniture and fixtures, work equipment and vehicles, etc.); customer premise equipment; contingency funds; and all other expenses.

NTIA further reiterates that the additional flexibility provided here does not change the BEAD Program's prohibition on Eligible Entities or subrecipients claiming profit and fees as allowable costs.²⁴ Moreover, payments to subrecipients under fixed amount subgrants shall be made on a reimbursement basis in accordance with terms of the subgrants. *See* NOFO Sec. IV.C.1.b. Pursuant to 2 CFR 200.201(b)(1), acceptable forms of payment include, but are not limited to: (a) partial payments of agreed amounts upon meeting milestones or other triggering events identified in the subgrant; (b) payments on a unit price basis, for a defined unit or units, at a defined price or prices identified in the subgrant; or (c) a single payment upon completion of the project.

²² *See* SLFRF and CPF Supplementary Broadband Guidance, U.S. Department of the Treasury, May 17, 2023, (Treasury Guidance) <https://home.treasury.gov/system/files/136/SLFRF-and-CPF-Supplementary-Broadband-Guidance.pdf>.

²³ *See* 2 CFR 200.401(a)(3).

²⁴ *See* BEAD NOFO at § V.H.2.b.

Pursuant to 2 CFR 200.201(b)(3), the subrecipient must certify in writing to the Eligible Entity at the end of the Federal award that the broadband infrastructure project funded under the fixed amount subaward was completed. Accordingly, a subrecipient receiving a fixed amount subaward must certify to the Eligible Entity that the broadband infrastructure project was placed into service, as defined in 47 USC 1702(h)(4)(C) for last-mile broadband deployment projects, or in the subrecipient agreement for all other broadband infrastructure projects, by the end of the Eligible Entity's period of performance.²⁵

NTIA will issue additional guidance or technical assistance on how Eligible Entities should calculate match contributions from subrecipients of fixed amount subawards for purposes of satisfying the Eligible Entity's statutory match requirement.

Procurement Standards for Fixed Amount Subawards

The *Uniform Guidance* generally imposes procurement rules on recipients and subrecipients that use Federal assistance funds to obtain property or services.²⁶ An underlying objective of these rules is to ensure that procurement processes sufficiently guard against waste, fraud, and abuse.

At the same time, the *Uniform Guidance* permits agencies to apply less restrictive requirements when making fixed amount subawards.²⁷ Under this authority, NTIA provides here that subrecipients receiving fixed amount subawards pursuant to this Policy Notice are excepted from complying with the procurement standards contained in 2 CFR 200.318-320 and 200.324-326.²⁸

Property Standards for Fixed Amount Subawards

The *Uniform Guidance's* property standards, in conjunction with the DOC ST&Cs, provide NTIA with a framework for holding subrecipients accountable and ensuring that BEAD investments deliver for the American people. This framework provides standards and procedures for ownership, title, use, management, and disposition of property acquired or improved under a Federal award.

In applying the *Uniform Guidance's* property standards to the BEAD Program, NTIA's overarching goals are to ensure that subawards are used for their intended purposes; to prevent unjust enrichment of subrecipients; and to minimize administrative burdens that could materially impact the incentives of traditional and non-traditional broadband providers to participate in the

²⁵ As established in Section 1702(h)(4)(C), subgrantees that receive BEAD Program funds for the deployment of broadband infrastructure under the authority granted in 1702(f)(1) must deploy the planned broadband infrastructure and begin providing services to each customer that desires broadband service within the project area not later than four years after the date on which the subgrantee receives the subgrant from the Eligible Entity. An Eligible Entity may seek to extend the period of performance by up to one year. *See* BEAD NOFO at § IV.C.2.b.i.

²⁶ *See* 2 CFR 200.318-327.

²⁷ *See* 2 CFR 200.102(c).

²⁸ 2 CFR 200.318-321, 200.324-326.

program and modernize networks over time. To advance these goals, NTIA proposed in the *RFC* certain exceptions and clarifications to the property standards.

NTIA provides here that the following requirements will apply to broadband infrastructure projects under fixed amount subawards. In the case of a subaward that is not a fixed amount subaward, the subrecipient must follow the property standards provided by 2 CFR 200.310-316.

Title to real property or equipment acquired or improved pursuant to a BEAD fixed amount subaward (Project Property) vests in the subrecipient upon acquisition, subject to the following exception and clarifications that apply for the duration of the Federal Interest Period (as defined below):

- 1) Subrecipients must follow their existing commercial practices for managing equipment in the normal course of business, and must use inventory controls indicating the applicable Federal interest and loss prevention procedures. This requirement is in lieu of the requirements contained in 2 CFR 200.313(d), pursuant to an exception from OMB. Subrecipients that do not have existing commercial practices for managing equipment in the normal course of business must comply with 2 CFR 200.313(d).
- 2) Subrecipients must comply with the use and equipment disposition requirements of 2 CFR § 200.313(c)(4) and 313(e) as follows:
 - a. Subrecipients acquiring replacement equipment under 2 C.F.R. § 200.313(c)(4) may treat the equipment to be replaced as “trade-in” even if the subrecipient elects to retain full ownership and use over equipment. As with trade-ins that involve a third party, the subrecipient will have to record the fair market value of the equipment being replaced in its Tangible Personal Property Status Reports to the DOC to ensure adequate tracking of the Federal percentage of participation in the cost of the grant funded activities. The subrecipient will also be responsible for tracking the value of the replacement equipment, including both the Federal and non-Federal share.
 - b. Subrecipients may sell, lease, or transfer Project Property only after (a) securing the agreement of the successor or transferee to comply with these requirements and the acknowledgement of the successor or transferee of the Federal Interest in the subject Project Property, and (b) obtaining consent to the sale or transfer from NTIA. NTIA will provide additional information concerning the review and approval process for transactions involving Project Property in subsequent guidance.
 - c. Subrecipients must notify the Grantee and NTIA upon the filing of a petition under the U.S. Bankruptcy Code, whether voluntary or involuntary, with respect to the subrecipient or any affiliate that would impact the subrecipient’s ability to perform in accordance with its subgrant.
- 3) Subrecipients must record liens or other appropriate notices of record, acceptable in form and substance to the Grants Officer, to indicate that Project Property has been acquired or improved with a Federal award and that use and disposition conditions apply to the

property. Please refer to the BEAD General Terms and Conditions and Specific Award Conditions for specific requirements. NTIA will issue further guidance regarding this requirement and post standard forms of liens, covenants, and intercreditor agreements to implement this arrangement.

- 4) Subrecipients may encumber Project Property only after provision of notice to NTIA and to the Grants Officer, and subject to a requirement that the DOC receives either a first priority security interest (preferred) or a shared first priority security interest in the Project Property such that, if the Project Property were foreclosed upon and liquidated, the DOC would be entitled to receive, on a pari-passu basis with other first position creditors, the portion of the current fair market value of the property that is equal to the DOC's percentage of contribution to the project costs. For example, if the DOC had contributed 50% of the project costs, the DOC would receive, on a pari-passu basis, 50% of the current fair market value of the Project Property when liquidated. NTIA will address the notice requirement for encumbrances in future guidance.

In addition, pursuant to exceptions approved by OMB, the property standards set forth in 2 CFR 200.314 -315 for supplies and intangible property, respectively, shall not apply to fixed amount subawards.

Subrecipients must comply with 2 CFR 200.316. Pursuant to this section and in recognition that the BEAD Program is being executed for the benefit of the public being served by the broadband infrastructure projects, for the duration of the Federal Interest Period (as defined below), the subrecipient must hold Project Property in trust for the beneficiaries of the BEAD broadband infrastructure project. Moreover, subrecipients must comply with the insurance requirements of 2 CFR 200.310. A subrecipient also must comply with 2 CFR 200.312 to the extent any Federally owned real property or equipment is used by the subrecipient.

Eligible Entities may impose additional conditions at their discretion and consistent with the requirements and objectives of the BEAD Program.

Federal Interest Period

The *Uniform Guidance* requires real property and equipment acquired or improved with a subgrant to be held in trust for the beneficiaries of the BEAD Program.²⁹ The Federal interest in all real property or equipment acquired or improved as part of a subgrant for which the major purpose is a broadband infrastructure project will continue for 10 years after the year in which the subgrant for a project has been closed out in accordance with 2 CFR 200.344. For example, for all subgrants closed out in 2027, regardless of the month, the Federal Interest Period will last until December 31, 2037.

Audit Requirements

Under the *Uniform Guidance*, all non-Federal entity subrecipients that expend \$750,000 or more in Federal award funds, in the aggregate across all subawards, during their fiscal year are subject to the audit requirements in subpart F. Non-Federal entity subrecipients are required to submit

²⁹ See 2 CFR 200.316.

single audits or program-specific audits to the Federal Audit Clearinghouse, the government-wide repository for audits of financial assistance programs.

Commercial entity subrecipients are not subject to Subpart F but are subject to the audit requirements as stipulated in the award or sub-award between a Federal awarding agency and a recipient.³⁰ And pursuant to 2 CFR 200.501(h), Eligible Entities have an obligation to ensure compliance by commercial entity subrecipients. Under that provision, methods to ensure compliance for Federal awards made to commercial entity subrecipients may include pre-award audits, monitoring during the agreement, and post-award audits.

NTIA, the DOC Office of Inspector General, or another authorized Federal agency may conduct an audit of an award at any time.

NTIA will issue additional guidance in the near future addressing the submission of audits.

Eligible Entities may contact NTIA to discuss questions regarding this Policy Notice.

³⁰ Section D.01.c. of DOC ST&Cs applies to commercial entity subrecipients. Under that provision, entities that are not subject to Subpart F of 2 CFR Part 200 (*e.g.*, commercial entities) that expend \$750,000 or more in grant funds during their fiscal year must submit to the Grants Officer either: (i) a financial related audit of each DOC award or subaward in accordance with Generally Accepted Government Auditing Standards; or (ii) a program-specific audit for each award or subaward in accordance with the requirements contained in 2 CFR 200.507.