WISPA | BROADBAND WITHOUT BOUNDARIES

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Best Practices in BEAD Contracts

As NTIA approves states' BEAD Final Proposals, the end of the grantmaking process for this $42.45 billion program is near. Over the coming years, states will face the new challenges of monitoring and compliance to ensure that all funded projects are completed successfully and on time. However, one major hurdle remains to be crossed between approval and execution: ensuring that every provisional awardee signs a contract with the state that will allow construction to begin.

It is not a foregone conclusion that every provisional awardee will in fact become a subgrantee: indeed, there is risk that provisional subgrantees may find the terms of the contract provided by the state too onerous to sign, walking away from potentially multimillion-dollar projects and leaving thousands of unserved or underserved Broadband Serviceable Locations (BSLs) stranded.

This Best Practices guide identifies four key areas states should address in their final contract language to enhance the opportunities for program success:

- Allowing for a single agreement to cover a subgrantee's multiple project areas in the state,
- Encouraging compliance and remediation over undue enforcement and clawback,
- Adopting reasonable termination guidelines, and
- Qualifying non-compliance.

The goal of this memo is to support states in finalizing contracts to ensure they offer subgrantees state sufficient flexibility to meet evolving program rules and the realities of constructing broadband networks while avoiding one-sided language that could increase implementation risk and lead to delay. These recommendations are informed by a broad review of subgrant agreement language being considered by all 50 states and input from WISPA members and other small and medium-sized providers that will be central to the success of the BEAD program.

Allowing for Single Agreements for Multiple Project Areas

Reporting requirements represent a significant ongoing regulatory burden through the life of a BEAD project. This fact is compounded where one subgrantee has been awarded BEAD funding for multiple project areas in a state. To reduce the reporting burden on subgrantees and increase efficiency of the state's reviews of periodic reports, states should offer subgrantees the ability to combine their multiple project areas into a single subgrant agreement and single project.

Combining contractual obligations into a single reporting structure offers benefits to both the state and its subgrantees: consolidation enables the subgrantee to better and more efficiently manage labor and resources for deployment. For state broadband offices, combined reporting allows easier and more efficient evaluation of periodic reports and reduces the burden of administration and compliance review.

This streamlining should be optional, as applicants did not know in advance the project areas they would be awarded and application proposals may not have contemplated a combined reporting structure. However, where feasible, this additional flexibility offers potentially significant savings in staff time and resources for both subgrantees and state officials.

Structure Default and Cure Provisions to Encourage Compliance

BEAD contracts must balance the state's interest in compliance with appropriate incentives for subgrantees to cure defects before enforcement actions are taken. Contracts that tilt assumed outcomes toward punitive actions may introduce too much uncertainty and risk for an awardee to accept. Instead, states can offer balanced terms through appropriate processes designed to encourage compliance and perfromance.

As a first requirement, contracts should include a clear cure period for defects the state identifies: in BEAD contracts, this should be at least 30 days running from written notice. Where a subgrantee is taking corrective action within the 30-day cure period, it should be extended to a date and on terms to which the parties agree. If these efforts are not successful, then the state should be free to impose reasonable conditions such as more frequent reporting and monitoring. The state should only reserve the right to terminate a contract in whole or in part where these lesser remedial efforts have failed. In their draft subgrant agreements, many states have adopted this "waterfall" approach to compliance, but not all have proposed cure periods. Finally, clawback amounts for termination upon default should be proportionate to the level of deployment as of the effective date of termination – unclear contract language creates the potential for clawbacks to go further, to include funds for work already done, if not made clear at signing.

Implement Appropriate Termination Provisions

If not made clear, the circumstances under which the state can terminate a BEAD contract raise risk thresholds to potentially unacceptable levels for provisional awardees. States must use discretion to create contracts that minimize the risk of capricious or unanticipated terminations to ensure subgrantees have appropriate certainty.

While the contract should be clear that a state can terminate an award if funding is not appropriated, the state should not be permitted to terminate a contract for convenience or when it is in the public interest, unless mandated by law or Executive Order. Given the objectives of the BEAD program and the size of the public and private investments, termination for convenience clauses introduce substantial risk. If termination for convenience is required by state law or Executive Order, the contract must state that (1) the subgrantee owns the network at termination,

(2) the parties will work in good faith on any wind-down and transitional matters, and (3) the federal interest would no longer apply.

Concomitantly, subgrantees should have the right to terminate under several circumstances. Firstly, partial termination should be permitted where a portion of the locations in the project area cannot be served due to permitting or other issues beyond a subgrantee's control. Over the last four years of BEAD policy development, states have recognized the significant hurdles posed by local permitting regimes; in addition, federal permitting issues and challenges obtaining access to private easements and Tribal consent remain significant concerns that lie outside of a subgrantee's direct control. Subgrantees should be able to partially terminate a project where these factors significantly delay project completion.

Subgrantees should also be able to partially terminate an agreement if a portion of the BSLs in a project area are already served at 100/20 Mbps before the subgrantee deploys to those locations and the locations have not been de-obligated. Footnote 44 of the BEAD Restructuring Policy Notice requires states to remove locations based on FCC Fabric updates during the period of performance to prevent overbuilding served locations. That policy should carry through if the subgrantee can present evidence that an existing broadband provider is already servicing those BSLs.

In both of these termination scenarios, any reduced amount of grant funding should be negotiated between the state and the subgrantee based on cost estimates and other relevant factors.

<u>Qualify Non-Compliance and Non-Performance Appropriately</u>

Overall, non-compliance and non-performance should be qualified by materiality, and discretion should be qualified by "reasonableness." Contracts that do not use a materiality standard or qualify "reasonable" discretion as a basis for enforcement actions create a perception that a subgrantee is vulnerable to capricious enforcement that creates a higher degree of uncertainty than a subgrantee may be able to reasonably bear.

Conclusion

The risk of provisional awards being declined due to unacceptable or unbalanced contract language poses serious risks to timely BEAD project launches and deployment. However, this risk can be mitigated through language that balances a state's needs to govern a complex grant program with a subgrantee's need for certainty and clarity in the four areas identified in this memo. States must use the current moment to carefully review their draft contracts to examine the four criteria WISPA identifies as potential impediments.