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BACKGROUND AND SUMMARY

Surety Industry Working Group

The National Association of Surety Bond Producers (NASBP)[1] and The Surety & Fidelity Association of America (SFAA)[2] have prepared the following package of materials to address the announcement of the National Telecommunications & Information Administration (NTIA) of the U.S. Department of Commerce to allow surety bonds as an alternative form of security to letters of credit (LOCs) for the Broadband Equity Access and Deployment (BEAD) Program.

Surety bonds offer an alternative form of security to LOCs

A surety bond is a three-party contract in which one party (a surety company) guarantees or promises in favor of a second party (called the "obligee" such as a state broadband office) the successful performance of an obligation by a third party (called the "principal" such as an internet service provider (ISP) or its construction contractor). For example, for federal construction contracts exceeding $150,000, the Miller Act (40 USC 3131, et, seq.) requires, among other things, that prime contractors furnish performance bonds to protect public contracting authorities against contract defaults.

Surety bonds are a time-tested means of financial risk transfer and provide an alternative and heightened form of performance security to bank LOCs. A surety bond assures that the bonded principal (ISP or contractor) is qualified to perform the obligations in the award. The first form of protection, prequalification, is the result of the surety's review of the financial strength and capabilities of the principal in determining whether to issue a bond. A surety company will furnish a bond only to those that it believes can perform successfully. Thus, the bond obligee (the state broadband office) benefits from the surety's prequalification. In comparison, a LOC is issued by a bank and secured by deposited funds; the bank does not perform an evaluation of the depositor's ability to perform the obligations of the award.

NTIA issues waiver options to LOCs

To address concerns raised by small ISPs which were having difficulty securing LOCs, in November of 2023, NTIA issued a waiver to modify the requirement for subgrantees of all Eligible Entities in the following ways, as it relates to surety bonds (other changes were addressed in the waiver):

- **Allow Performance Bonds -** to permit a subgrantee to provide a performance bond equal to 100% of the BEAD sub-award amount in lieu of a letter of credit; provided that the bond is issued by a company holding a certificate of authority as an acceptable surety on federal bonds as identified in the Department of Treasury Circular 570;

1 NASBP is a national trade association whose membership includes firms employing licensed surety bond producers placing bid, performance, payment, and other bonds throughout the United States and its territories.

2 SFAA is a national trade association of more than 400 insurance companies that write 98 percent of surety and fidelity bonds in the U.S. SFAA is licensed as a rating or advisory organization in all states, and it has been designated by state insurance departments as a statistical agent for the reporting of fidelity and surety experience.

- **Allow Eligible Entities to Reduce the Obligation Upon Completion of Milestones** - to allow an Eligible Entity to reduce the amount of the performance bond below 100% over time, upon a subgrantee meeting deployment milestones specified by the Eligible Entity; and
- **Allow for an Alternative Performance Bond Percentage** - to allow the initial amount of the performance bond to be 10% of the sub-award amount during the entire period of performance when an Eligible Entity issues funding on a reimbursable basis consistent with Section IV.C.1.b of the NOFO and reimbursement is for periods of no more than six months each.

Surety Working Group Bonds

After NTIA's waiver announcement, NASBP and SFAA formed a Surety Working Group to develop performance bond forms and model language to facilitate the use of surety bonds to meet BEAD Program security requirements. The Surety Working Group developed two different performance bond forms; model language for state broadband offices to insert into award agreements; and a sample letter template to provide state broadband offices with initial information about an ISP's or its construction contractor's "bondability."

BEAD Performance Bond Forms

BEAD performance bonds were developed to address two separate situations. They are as follows:

One bond form addresses situations when the ISP (the subgrantee) can qualify for bonding and furnishes the bond directly to the state broadband office (the grantee). In this instance, the ISP is the bonded principal, and the obligee (state broadband office) is the entity that is protected should the ISP fail to meet its award agreement obligations. The bond secures the completion of the construction of the system (and not other obligations that may be in the award agreement.)

The second bond form addresses situations where the contractor to the ISP that is building out the broadband system is better suited to qualify for bonding. In this case, the contractor furnishes the bond for the benefit of the ISP and the state broadband office, which are considered dual obligees. In this instance, the construction contractor is the bonded principal, and the dual obligees are the entities that are financially protected should the contractor fail to meet its contractual obligations to the ISP. The bond secures the performance of the work set forth in the contract between the ISP and the contractor.

Model Award Agreement Language

The Surety Working Group model language is intended to be inserted into award agreements to set the terms of BEAD performance bonds. This model language mimics the language of the BEAD bond forms and establishes partial release of bond amounts based on achieving certain deployment percentage milestones.

“Bondability” Letter Template

A letter, called a “bondability” letter, can be requested by a state broadband office to verify the ISP or its construction contractor has an established surety relationship. The letter may provide certain helpful information, such as, for example, the length of the surety’s relationship with the company and the surety company’s willingness to consider issuing a performance bond on behalf of the ISP or its construction contractor. This letter, however, is informational only and does not commit the surety company to issue the actual performance bond. The performance bond itself is the legally enforceable security. A sample bondability letter is provided to demonstrate what constitutes an acceptable format for such a letter to the surety industry.

Final Considerations

As a hallmark of public procurement, surety bonds are widely used and accepted forms of performance security. They provide a viable option for qualified companies that receive federal grant monies for the development of broadband infrastructure and that wish to offer a form of security other than a bank letter of credit.

Contact Information

If your office has any questions concerning the surety bonds or the bondability letter or wishes to receive these documents as Microsoft Word files, please contact either Larry LeClair, Director, Government Relations with the National Association of Surety Bond Producers at **lleclair@nasbp.org** or Julie Alleyne, VP of Policy and General Counsel with The Surety & Fidelity Association of America at **jalleyne@surety.org**.