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PROFESSIONALS IN SURETY BONDING

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THE SURETY & FIDELITY ASSOCIATION OF AMERICA

Broadband Equity, Access, and Deployment (BEAD) Program

Surety Bond Information Kit

Broadband Equity, Access, and Deployment (BEAD) Program Surety Bond Information Kit

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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;

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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**.

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BEAD SURETY BOND - SINGLE OBLIGEE

No. ___________

____ ("Principal"), with primary place of business at _____________________________, and ___________________________ ________("Surety) a company having a certificate of authority to conduct surety insurance business issued in the jurisdiction of the agency awarding a subgrantee agreement, are held and firmly bound unto the________________________________ [Name of State Broadband Office] ("Obligee"), in the maximum penal sum of ______________ Dollars ($________________) ("Penal Sum").

WHEREAS, the above named Principal, has been awarded a subgrantee agreement, name_______________, project______________________, subgrant no. _____________, under the _________________________________ program [name of state program] (collectively, "Project"), under the applicable provisions of ____ ____________________________________ [insert the pertinent state regulatory or statutory section reference], implementing the Broadband Equity, Access, and Deployment ("BEAD") Program, by Obligee under its selection process and is required to furnish security in the form of a surety bond to secure performance solely of the infrastructure build-out portion of the subgrantee agreement, as further described in the following specific subgrantee agreement provisions and exhibits:____

____ (the "Work").

For purposes of this Surety Bond, Work associated with this Project shall be deemed completed to a particular address location within the Project area when the Principal provides speed and latency tests from that address location to the Obligee that demonstrate Principal is providing Qualifying Broadband, as defined in the scope of the Work. No other contractual obligations of the subgrantee agreement shall be covered by this bond.

In accordance with the BEAD Notice of Funding Opportunity, qualifying broadband to an address location that is not a Community Anchor Institution (CAI) means the broadband

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service that the Principal provides under the Project that has (i) a speed of not less than 100 Mbps for downloads; and (ii) a speed of not less than 20 Mbps for uploads; and (iii) latency less than or equal to 100 milliseconds; Qualifying Broadband to a CAI means broadband service that Principal provides under the Project that has (i) a speed of not less than 1 Gbps for downloads and uploads alike and (ii) latency less than or equal to 100 milliseconds.

NOW, THEREFORE, it is the condition of this Bond that, once the Principal completes the Work, as explained above, the Surety's obligations under this Surety Bond will terminate. Otherwise, the Surety's obligations shall remain in full force and effect. The Obligee may not invoke the provisions of this Surety Bond if the Obligee is in material breach of its obligations under the subgrantee agreement.

Regardless of the number of years this Surety Bond is in force or of the number of claims made under this Surety Bond, the Surety's aggregate liability under this Surety Bond shall not exceed the maximum Penal Sum stated above.

SURETY OBLIGATIONS If the Principal is in default pursuant to the terms of the subgrantee agreement regarding the said Work, and the Obligee has so declared the Principal in default, the surety promptly may remedy the default or shall:

1. Complete the Principal's obligations regarding said Work, with the consent of the Obligee, through the Principal; or

2. Arrange for completion of the Principal's obligations regarding said Work through another entity acceptable to the Obligee, and the Surety shall make sufficient funds available to the successor entity to pay for completion of the Principal's obligations up to the maximum Penal Sum of the Bond; or

3. Reimburse the Obligee the reasonable costs to complete the Principal's obligations regarding said Work, not to exceed the maximum Penal Sum of the Bond, less the subgrant amount balance.

DISPUTES All disputes regarding this Bond shall be instituted in a federal district court in the jurisdiction in which the Principal is performing its obligations under the subgrantee agreement referenced herein and shall be commenced within one year after the Principal's default. If this provision is prohibited by law, the minimum period of limitation available to sureties in the jurisdiction shall be applicable.

AMENDMENT The Penal Sum of this Bond shall automatically be reduced as Work completion milestones are met by the Principal in accordance with the applicable surety bond provisions of the subgrantee agreement.

This Bond is entered this ________ day of __________________, 20___.

SURETY

By

Print Name:

Title:

(Attach Power of Attorney)

Witness:

PRINCIPAL

By

Print Name:

Title:

Witness:

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BEAD SURETY BOND – DUAL OBLIGEES

No. ___________

____ ("Contractor/Principal"), with primary place of business at ____ _____________, and ____ ("Surety), a company having a certificate of authority to conduct surety insurance business issued in the jurisdiction of the project and listed as a certified surety in Circular 570 issued by the U.S. Department of the Treasury, are held and firmly bound unto the____________________ ______________________ [insert Name of Subgrantee Agreement Awardee] and to _______ _______________________________ [insert Name of State Broadband Office], as Obligees, in the maximum penal sum of _____________________ Dollars ($___________________) ("Penal Sum"), which shall be the aggregate liability of the Surety under this Surety Bond to the Obligees.

WHEREAS, the above named Contractor/Principal, has entered into a contract, contract name___________________________, date__________________________, no. ____________, ("Contract") generally for__________________________, hereinafter ("Work)" with the _________________________[insert Obligee/Name of Subgrantee Agreement Awardee], which received an award of a subgrantee agreement under the _________________________________ [insert name of state program] program, under the applicable provisions of ____ __ [insert the pertinent state regulatory or statutory section reference], implementing the Broadband Equity, Access, and Deployment ("BEAD") Program, by _____________________ [insert Obligee/Name of State Broadband Office] under its selection process and is required in the subgrantee agreement to furnish construction and other services for broadband infrastructure as further described in the following specific provisions and exhibits,____, which are incorporated by reference into the Contract and this Surety Bond as the Work of the Contractor/Principal. Work shall be deemed completed to a particular address location when speed and latency tests from that address location to the Obligees that demonstrate qualifying broadband, as defined in the Contract. In accordance with the BEAD Notice of Funding Opportunity, qualifying broadband to an address location that is not a

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Community Anchor Institution (CAI) means the broadband service that has (i) a speed of not less than 100 Mbps for downloads; and (ii) a speed of not less than 20 Mbps for uploads; and (iii) latency less than or equal to 100 milliseconds; qualifying broadband to a CAI means broadband service that has (i) a speed of not less than 1 Gbps for downloads and uploads alike and (ii) latency less than or equal to 100 milliseconds.

NOW, THEREFORE, it is the condition of this Surety Bond that, once the Contractor/Principal completes the Work, as referenced above, the Surety's obligations under this Surety Bond will terminate. Otherwise, the Surety's obligations shall remain in full force and effect. The Obligees may not invoke the provisions of this Surety Bond if any Obligee fails to make payments to the Contractor/Principal in accordance with the terms of the Contract and/or fails to perform any of the other obligations under the Contract.

SURETY OBLIGATIONS If the Contractor/Principal is in default pursuant to the terms of the Contract regarding the said Work, and an Obligee has so declared the Contractor/Principal in default, the surety promptly may remedy the default or shall:

1. Complete the Contractor/Principal's obligations regarding said Work, with the consent of the Obligees, through the Contractor/Principal; or

2. Arrange for completion of the Contractor/Principal's obligations regarding said Work through another entity acceptable to the Obligees, and the Surety shall make sufficient funds available to the successor entity to pay for completion of the Contractor/Principal's obligations up to the maximum Penal Sum of the Surety Bond; or

3. Reimburse the Obligee the reasonable costs to complete the Contractor/Principal's obligations regarding said Work, not to exceed the maximum Penal Sum of the Surety Bond, less the contract amount balance.

DISPUTES All disputes regarding this Bond shall be instituted in a federal district court in the jurisdiction in which the Contractor/Principal is performing its obligations under the Contract referenced herein and shall be commenced within one year after the Contractor/Principal's default. If this provision is prohibited by law, the minimum period of limitation available to sureties in the jurisdiction shall be applicable.

AMENDMENT Aggregate liability of Surety to Obligees is limited to the penal sum stated above and the Penal Sum of this Bond shall automatically be reduced as Work completion milestones are met by the Contractor/Principal in accordance with the applicable surety bond provisions of the Contract.

This Bond is entered this ________ day of ___________________, 20___.

SURETY

By

Print Name:

Title:

(Attach Power of Attorney)

Witness:

PRINCIPAL

By

Print Name:

Title:

Witness:

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SURETY INDUSTRY RECOMMENDED SUBGRANTEE AGREEMENT BOND PROVISIONS

Subgrantee Agreement Template Language for 100% Penal Sum Bond

PERFORMANCE BOND. Subgrantee shall furnish a performance bond in the amount of 100% of the subaward amount ("Penal Sum"). The bond shall be issued by an insurance company authorized to write surety bonds in [STATE] and holding a Certificate of Authority from the U.S. Secretary of Treasury as an acceptable surety on federal bonds as identified in the Department of Treasury Circular 570. The Penal Sum of the bond shall be reduced in the following manner:

- Upon demonstrating to the [Eligible Entity] that it has completed the Work to 40 percent of the address locations to be served by the project (as set forth in Appendix ____), the Penal Sum shall be reduced to 60% of the sub-award amount.
- Upon demonstrating to the [Eligible Entity] that it has completed the Work to 60 percent of the address locations to be served by the project (as set forth in Appendix ____), the Penal Sum shall be reduced to 40% of the sub-award amount.
- Upon demonstrating to the [Eligible Entity] that it has completed the Work to the extent that 80 percent of the address locations to be served by the project (as set forth in Appendix ____), the Penal Sum shall be reduced to 20% of the sub-award amount.
- Upon demonstrating to the [Eligible Entity] that it has completed the Work to 100 percent of the address locations to be served by the project (as set forth in Appendix ____), the Penal Sum shall terminate or until the period of performance of the subaward has ended, whichever occurs first.

The bond shall be issued pursuant to either of the following formats:

1. ***If Subgrantee Furnishes the Bond*** The bond shall be in favor of [ELIGIBLE STATE ENTITY] and shall be conditioned on the completion of the work as set forth and defined in Appendix ____ of this [Subgrantee Agreement] ("the "Work"); and shall not extend to any other obligations set forth in the [Subgrantee Agreement].

2. ***If Subcontractor of Subgrantee Furnishes the Bond*** The bond shall be in favor of [ELIGIBLE STATE ENTITY] and [Subgrantee] as dual obliges and shall be conditioned on the completion of the work set forth in the contract between the Subgrantee and the Contractor.

Subgrantee Agreement Template Language for 10% Penal Sum Bond

PERFORMANCE BOND. Subgrantee shall furnish a performance bond in the amount of 10% of the sub-award amount ("Penal Sum"). The bond shall be issued by an insurance company authorized to write surety bonds in [STATE] and holding a Certificate of Authority from the U.S. Secretary of Treasury as an acceptable surety on federal bonds as identified in the Department of Treasury Circular 570. The Penal Sum of the bond shall be reduced in the following manner:

- Upon demonstrating to the [Eligible Entity] that it has completed the Work to 100 percent of the address locations to be served by the project (as set forth in Appendix ____), the Penal Sum shall terminate or until the period of performance of the subaward has ended, whichever occurs first.

The bond shall be issued pursuant to either of the following formats:

1. ***If Subgrantee Furnishes the Bond*** The bond shall be in favor of [ELIGIBLE STATE ENTITY] and shall be conditioned on the completion of the work as set forth and defined in Appendix ____ of this [Subgrantee Agreement] ("the "Work"); and shall not extend to any other obligations set forth in the [Subgrantee Agreement].

2. ***If Subcontractor of Subgrantee Furnishes the Bond*** The bond shall be in favor of [ELIGIBLE STATE ENTITY] and [Subgrantee] as dual obliges and shall be conditioned on the completion of the work set forth in the contract between the Subgrantee and the Contractor.

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BEAD BONDABILITY LETTER TEMPLATE

Recommended language:

*We understand that **[SUBGRANTEE]** is submitting or has submitted a proposal for **[BROADBAND PROJECT]** ("Project") in the approximate amount of $**[PROJECT PROPOSAL AMOUNT]**. This letter confirms that **[SURETY]** has authorized single performance bond requests up to **[BOND AMOUNT]** for **[SUBGRANTEE]** for this Project. It is important to understand that, as is customary within the surety industry, the issuance of any bonds is always contingent upon a satisfactory underwriting review at the time a request for bonds is made. This review may include but is not limited to acceptable terms, conditions, documents, bond forms, confirmation of an acceptable financing source and payment provisions, and **[SUBGRANTEE]** continuing to satisfy other underwriting considerations.*

*Any arrangement for bonds required by the contract is a matter between **[SURETY]** and **[SUBGRANTEE]**, and therefore, we assume no liability to you or third parties if we do not execute these bonds for any reason. Furthermore, this letter shall not be construed as an agreement to provide bonds for any particular project but is provided as an indication of the surety's current position on the specific request received from **[SUBGRANTEE]**.*