

Navigating the BEAD Weeds IN-KIND CONTRIBUTIONS

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Navigating the BEAD Weeds

IN-KIND CONTRIBUTIONS

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EXECUTIVE SUMMARY

- NTIA has provided little guidance about the scope of allowable in-kind contributions for use in BEAD. These contributions could be extremely useful in helping applicants meet and exceed the 25% match requirement. Indeed, the greater the match proposed by an applicant, the greater its chances, in theory, of securing an award given the significant weight that NTIA and states have placed on reducing the amount of BEAD funding allocated to each project.
- Guidance is critical because the rules governing in-kind contributions in federal grant programs are complex. Moreover, in the absence of guidance, vendors, consultants, and others may encourage prospective subgrantees to be overinclusive of in-kind contributions in their applications to bolster their chances of winning grants. Indeed, with state broadband offices (SBOs) being understaffed and overwhelmed with BEAD planning and implementation, they might be unable to filter out inappropriate or erroneously valued in-kind contributions, underscoring the likelihood that, in the absence of additional guidance on this matter, some applicants might look to in-kind contributions as an (unfair) competitive advantage.
- The following analysis provides a high-level examination of in-kind contributions (**Section 1**), unpacks the rules governing them (**Section 2**), identifies examples of potentially allowable in-kind-contributions in BEAD (**Section 3**), and highlights a range of considerations and open issues that applicants should account for when determining whether to include a contribution in their application (**Section 4**).
- From this analysis, it appears that the universe of potentially allowable in-kind contributions for BEAD could be broad and might include any contribution/donation by an applicant that is:
 - Shown to directly benefit the proposed project;
 - Specifically identified with the proposed project;
 - Reasonable;
 - Not used in other Federal grant programs;
 - Allocable (i.e., it is possible to determine the value of the contribution and assign the appropriate percentage of that value to the BEAD project);
 - Necessary; and
 - Properly valued.

1. INTRODUCTION

BEAD requires prospective subgrantees to provide at least a 25% match in support of their proposed project.¹ Every state has structured their scoring to reward proposals with more points if they require less BEAD funding because of a higher match. Other things being relatively equal, an application that seeks BEAD funding to cover 50% of a project's costs (due to a 50% match) will likely “win” versus a proposal that seeks BEAD funding to cover 75% of the costs.

Cash will likely be the primary source of matching for many applicants, but in-kind contributions – *i.e.*, “non-cash donations of property, goods or services” – are also permissible sources for matching purposes.²

1.1. OVERVIEW OF IN-KIND CONTRIBUTIONS

What qualifies as an in-kind contribution? NTIA notes that, for federal programs like BEAD, the extent to which a contribution qualifies is governed by 2 C.F.R. Part 200, specifically § 200.306 – Cost Sharing or Matching.³ NTIA has offered some examples of contributions that *might* be permissible if they satisfy the Part 200 criteria. These examples fall into two categories.

The first category, which appears to encompass a broad range of contributions from applicants, includes: “employee or volunteer services; equipment; supplies; indirect costs; computer hardware and software; and use of facilities.”⁴

The second category is denoted as broadband-specific and includes: “access to rights of way; pole attachments; conduits; easements; or access to other types of infrastructure.”⁵

1.2. GUIDANCE AND DISCUSSION TO-DATE

Available guidance from NTIA, which is limited, suggests that determining whether a particular in-kind contribution is acceptable under the prevailing rules is complex and will likely be determined on a case-by-case basis by states.

The dearth of analysis on this issue has opened the door to consultants, vendors, and others encouraging prospective BEAD subgrantees to embrace an expansive approach to in-kind contributions. Some have encouraged applicants to explore every means of leveraging existing assets (*e.g.*, the appraised value of a municipal utility's entire electric plant) for use as an in-kind contribution, an approach that would result in nearly any asset being included in an application as an in-kind contribution.⁶

This mindset was captured best by a longtime consultant, who observed that “since it looks like [SBOs] are going to be rushing the grant application process, it's worth claiming as many legitimate in-kind matches as possible to help with the initial grant scoring.”⁷

1.3. STRIKING A BALANCE

If unscrupulous or under-educated applicants embrace this expansive – and potentially erroneous – definition of in-kind contributions, then SBOs might very well be too overwhelmed to filter out all the proposed uses of this alternative matching vehicle that exceed the scope of Part 200. If this occurs, then applicants that might not otherwise receive grants could be victorious in BEAD because they have proposed a very high match.

Whether some applicants might seek to artificially inflate their match with dubious in-kind contributions remains to be seen. Indeed, there are significant incentives against such actions because, if the applicant succeeds in winning a subgrant, then it must follow through on its promise to build a network with the funds. If certain in-kind contributions fail to offset deployment costs or they otherwise fail to contribute meaningful value to a project, then the subgrantee might be left with inadequate funding to complete the network.

Ultimately, allowable in-kind contributions could be a boon to all applicants. Identifying which contributions are allowable, however, is complex and could discourage some ISPs from exploring whether and how they might leverage these additional assets to offset their BEAD proposals.

To assist in these explorations, the following (1) provides a high-level overview of the laws and policies surrounding in-kind contributions; (2) identifies potential in-kind contributions that might be available to applicants; and (3) highlights a range of considerations and open issues that should be accounted for when identifying potential in-kind contributions for BEAD.

2. THE LAW OF IN-KIND CONTRIBUTIONS

For many years, federal grant programs and other awards were governed by an array of regulations and guidance documents issued by the Office of Management and Budget (aka “circulars”). This piecemeal approach to governing federal awards prevailed during BTOP, the last major NTIA-administered broadband grant program.⁸ However, beginning in 2015, these rules and regulations were combined into what is now known as Part 200 Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (aka Uniform Guidance or UG).⁹

The Department of Commerce, which houses NTIA, has adopted the Uniform Guidance and extended its application to commercial entities.¹⁰ In December 2023, NTIA issued guidance regarding its “tailored” approach to applying the Uniform Guidance to the BEAD program.¹¹ In this document, NTIA exempted subgrantees from certain requirements included in the Uniform Guidance and offered clarifications regarding the applicability of other aspects of the UG.

In particular, the guidance noted that BEAD subgrantees will generally be exempt from the UG's cost principles.¹² Typically, the UG requires funding recipients to adhere to the cost principles when budgeting and expending funds. This helps to ensure that funds are spent on allowable items that further a particular project. In the BEAD context, however, NTIA has decided to exempt subgrantees from these stringent principles and will only use them as a "guide when budgeting for the work that will be performed."¹³ NTIA reckons that (1) most broadband-related costs are well known and (2) the competitive nature of the application process will serve as a means of identifying and removing unreasonable or unnecessary costs for a proposed project.¹⁴

It does not appear that this guidance extends to BEAD matches and the use of in-kind contributions to satisfy those requirements. Indeed, NTIA noted that it will likely 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."¹⁵

Regarding in-kind contributions, the UG states that "any shared costs or matching funds and all contributions, including cash and third-party in-kind contributions, must be accepted as part of the non-Federal entity's cost sharing or matching when such contributions meet all of the following criteria:

1. Are verifiable from the non-Federal entity's records;
2. Are not included as contributions for any other Federal award;
3. Are necessary and reasonable for accomplishment of project or program objectives;
4. Are allowable under [subpart E of this part](#);
5. Are not paid by the Federal Government under another Federal award, except where the Federal statute authorizing a program specifically provides that Federal funds made available for such program can be applied to matching or cost sharing requirements of other Federal programs;
6. Are provided for in the approved budget when required by the Federal awarding agency; and
7. Conform to other provisions of this part, as applicable."¹⁶

Most of these criteria are straightforward. "Subpart E" in the above refers to the Cost Principles section of the UG. As previously noted, NTIA appears to have exempted BEAD participants from strict application of the Cost Principles, but they will nevertheless be used as a guide.

3. IDENTIFYING THE POTENTIAL SCOPE OF PERMISSIBLE IN-KIND CONTRIBUTIONS

During their administration of ARPA funds for broadband projects (via the SLFRF and CPF programs), several states provided guidance regarding their treatment of in-kind contributions. In the BEAD context, states appear to have authority to craft rules for the review and approval of in-kind contributions so long as they are consistent with NTIA guidance. As such, it is useful to review their prior approach to these contributions to understand the scope of potentially allowable contributions for BEAD.

As a first step, applicants will have to determine the budget for their proposed BEAD project. Their budget will encompass the capital costs associated with building the proposed network. Applicants must contribute at least 25% of those costs in the form of cash and/or in-kind contributions. This means that in-kind contributions must be used to offset capital costs.

3.1. IN-KIND CONTRIBUTIONS IN KANSAS CPF GRANTS

In the context of the CPF, Kansas offered the following definition of permissible in-kind contributions (Louisiana offered similar guidance during GUMBO 1.0¹⁷). This definition offers a useful starting point for identifying potential contributions in the BEAD context.

“Contributions may be in the form of real property, services, equipment, and supplies. Eligible costs are capital expenses directly related to a qualified broadband project, including design, engineering, materials, supplies, equipment, permitting and construction of “last-mile” infrastructure expenses...The goods and services contributed should directly benefit and be specifically identified with the proposed project. Contributions must be reasonable, allocable, and necessary, and shall not exceed the current fair market value of the property at the time of the donation to the project.”¹⁸

Kansas went on to provide the following examples of “acceptable in-kind contributions” in the CPF context.¹⁹ These examples reflect specific provisions of the UG and offer insight into potentially allowable in-kind contributions for BEAD.

Table 1 - Examples of Acceptable In-Kind Contributions for CPF Projects (Kansas)

Acceptable In-Kind Contribution	Examples	Basis of Valuation
Equipment	Routers, tower radios, optical nodes, transmitters, receivers, etc.	Actual cost of purchase (Net Book value) or the lowest cost available for retail purchase (Fair Market Value)
Real Property	Donated land, including land with improvements, structures, and buildings (e.g., rights of-way, towers, and poles).	Current fair market value of the property, even if it exceeds the certified value at the time of the donation to the project, as long as recipients provide sufficient justification
Materials	Fiber optic cables, conduits, cabinets, strand, lashing wire, etc.	Actual cost of purchase (Net Book value) or the lowest cost available for retail purchase (Fair Market Value)
Vehicle Rental	Bucket truck, pickup truck, transport trailer, etc.	Rental rate equivalent to the average cost per day at fair market price specific for that locality, multiplied by the number of days used
Equipment Rental	Lasher, trencher, excavator, etc	Rental rate equivalent to the average cost per day at fair market price specific for that locality, multiplied by the number of days used
Professional Services	Engineering services, design services, project management services, etc.	Normal rates consistent with fair market value for the specific services in the area.

3.2. DETERMINING WHAT IS ALLOWABLE

It appears that the universe of potentially allowable in-kind contributions for BEAD could be vast and might include any contribution/donation by an applicant that is:

- Shown to directly benefit the proposed project;
- Specifically identified with the proposed project;
- Reasonable;
- Not used in other Federal grant programs;

- Allocable (i.e., it is possible to determine the value of the contribution and assign the appropriate percentage of that value to the BEAD project²⁰);
- Necessary; and
- Properly valued.

Applying these principles to some of the examples offered by vendors for leveraging assets as in-kind contributions renders them much less valuable. For example, one entity has suggested that an electric cooperative could leverage its \$30M in ROW value in support of a BEAD application.²¹ In reality, a co-op that wishes to leverage its ROW in this manner would likely have to allocate a much smaller percentage of that value as an in-kind contribution to reflect the portion of ROW that the broadband system would occupy.

For ISPs that purchase materials with private investment (e.g., an ISP works with a vendor to stock up on fiber and related equipment), these materials likely would qualify as an in-kind contribution. However, only the value of the materials specifically dedicated to a BEAD project would likely pass muster as a contribution. So, if an ISP spent \$1M to buy 1,000 widgets (\$1,000/widget) for use in building broadband networks, but a specific BEAD project required only 2 widgets, the potential in-kind contribution value of widgets to that project would be \$2,000.

4. CONSIDERATIONS & OPEN ISSUES

Several considerations and issues vis-à-vis the use of in-kind contributions for BEAD remain unaddressed. These include:

Formal guidance. It is unclear when NTIA will offer additional guidance on matches and the use of in-kind contributions to meet those requirements.

Whether in-kind contributions can be applied across different project areas (PAs)/states. Some states require prospective subgrantees to submit separate applications for each PA they wish to pursue. The UG notes that contributions cannot be “included as contributions for any other Federal award.” It is unclear whether this will limit the use of certain in-kind contributions for BEAD to single instances or if they can be applied across multiple applications.

How to properly value in-kind contributions. The UG’s cost principles offer important guidance for valuing these contributions. In general, it appears that using fair market value for most contributions is a best practice. However, there may be a variety of other contributions for which valuation proves difficult. It appears that the UG allows NTIA and the states to develop more precise cost schedules to guide these determinations. Whether this more granular guidance will be provided remains to be seen, especially in the light of the very tight deadlines facing states once they launch their BEAD program.

How to properly document in-kind contributions and proposed valuations. It is likely that NTIA and the states will detail these requirements in forthcoming subgrantee application materials.

Understanding the practical impacts of providing in-kind contributions to a BEAD project. These contributions are essentially donations that are being used in place of cash in a match. If a utility donates a portion of its poles to support broadband deployment, will it be able to recoup those foregone revenues from lease fees in its electric rate base? If a municipality donates access to a portion of its ROW, will it be able to retain ownership of that piece of property? If a municipality or utility donates access to poles or other ROW, to what extent might foregone access fees be used to calculate the value?

Whether BEAD applicants can contribute infrastructure or materials funded, in whole or in part, by ARPA and/or RDOF funds. The UG states that in-kind contributions cannot be “not included as contributions for any other Federal award.” This would seem to allow for infrastructure and materials built/purchased with resources from other federal awards. Additional guidance from NTIA would be helpful.

The extent to which proposed in-kind contributions can be challenged. Some states have indicated that they will make core elements of BEAD proposals public for review and comment. To the extent an applicant has included an in-kind contribution that appears to exceed accepted parameters, which is likely given the erroneous guidance being offered by some vendors, it will be critical for stakeholders to have arguments and data at the ready for disputing these bogus contributions. Robust challenges of dubious in-kind contribution matches will help to promote fair competition among applicants and reduce waste, fraud, and abuse of BEAD funds.

All in-kind contributions included in BEAD applications should be thoroughly vetted by legal counsel to ensure that they align with federal and state criteria. Even though vendors and others are encouraging applicants to be overinclusive vis-à-vis in-kind contributions in the apparent hope that some might elude SBOs during hasty review processes, it is critical that prospective applicants apply more thorough vetting of these potential matching contributions. Over-estimating the value of certain in-kind contributions will result in fewer BEAD funds, which could strain network deployment.

NOTES

¹ BEAD NOFO at p. 20-21, NTIA, <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf/>.

² BEAD NOFO at p. 22.

³ <https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/section-200.306>.

⁴ BEAD NOFO FAQ v5.0 at p. 48, NTIA, https://broadbandusa.ntia.doc.gov/sites/default/files/2023-11/Broadband_Equity_Access_Deployment_Program_Frequently_Asked_Questions_Version_5.0.pdf.

⁵ Id.

⁶ See, e.g., [BEAD Hidden Truth: Your rural electric co-op is \(probably\) sitting on a matching funds goldmine \(ready.net\)](https://ready.net/blog/2024/03/04/bead-hidden-truth-your-rural-electric-co-op-is-probably-sitting-on-a-matching-funds-goldmine)

⁷ Doug Dawson, *In-Kind Contributions for BEAD Grants*, Nov. 27, 2023, POTS and PANS, <https://potsandpansbyccg.com/2023/11/27/in-kind-contributions-for-bead-grants/>.

⁸ See, e.g., https://www2.ntia.doc.gov/files/BTOP_Fact_Sheet_Matching_Contributions_January_2011.pdf.

⁹ See, e.g., <https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/introductionpart200.pdf>.

¹⁰ *Policy Notice: Tailoring the Application of the Uniform Guidance to the BEAD Program*, at p. 2, NTIA (Dec. 2023), https://broadbandusa.ntia.doc.gov/sites/default/files/2023-12/BEAD_Policy_Notice_of_Uniform_Guidance_Part_200_Exceptions_Related_Issues.pdf.

¹¹ Id.

¹² Id. at p. 5-6.

¹³ Id. at p. 5.

¹⁴ Id.

¹⁵ Id. at p. 7.

¹⁶ 2 CFR § 200.306(b), <https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/section-200.306>.

¹⁷ In-Kind Contribution Guidance, Connect LA, <https://connect.la.gov/media/km2hw3lb/in-kind-guidance.pdf>.

¹⁸ In-Kind Match Guidance, KS Dept. of Commerce (Aug. 2022) https://www.kansascommerce.gov/wp-content/uploads/2022/04/In-Kind-Match-Guidance-CPF-Aug2022_ckredits.pdf.

¹⁹ Id.

²⁰ The full definition of “allocable costs” is available at 2 CFR § 200.405, <https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-E/subject-group-ECFRea20080eff2ea53/section-200.405>.

²¹ BEAD Hidden Truth: Your Rural Electric Co-Op is (Probably) Sitting on a Matching Funds Goldmine, March 4, 2024, <https://ready.net/blog/2024/03/04/bead-hidden-truth-your-rural-electric-co-op-is-probably-sitting-on-a-matching-funds-goldmine>.