

Summary of Proposed Treasury Guidance for SLFRF/CPF Broadband Projects

On March 28, 2023, the Treasury Department issued and invited comments on proposed compliance guidance applicable to broadband projects funded through SLFRF¹ or CPF² awards (“Proposed Guidance”). NRECA, working with the *Keller & Heckman Telecommunications Practice Group*, provide this summary of the new guidance.

The Proposed Guidance addresses a variety of important questions relating to the use of SLFRF and CPF funds for broadband projects, including:

- The crucial distinction between ISPs acting as “contractors” vs. “subrecipients”;
- The proper treatment of ISP revenue as “program income”;
- How ISPs can obtain title to grant-funded infrastructure;
- The scope of the Federal Interest in grant-funded property;
- Requirements for transfer of grant-funded property to a third party;
- Procurement requirements (must a contract be put out for bid?); and
- Audits and monitoring requirements.

If Treasury adopts the Guidance generally as proposed, it could have significant ramifications for grant-funded broadband projects around the country. Comments are due by April 11.³

I. The Fundamentals: Part 200 Uniform Guidance and the “Contractor”/“Subrecipient” Question

Overriding Part 200 “Uniform Guidance”. Recipients of federal grants are generally subject to an extensive body of rules located at [2 CFR Part 200](#). Known as the “Uniform Guidance” or “Part 200,” it applies across federal agencies, and establishes default rules applicable to federal grant recipients relating to such issues as procurement, the treatment of funded property, grants management, reporting, auditing, and a range of other grant compliance topics.

However, federal agencies are allowed to implement rules that depart from Part 200 in some respects. Treasury’s Proposed Guidance would implement various clarifications to – or exclusions from – the default Part 200 rules for at least some grant-funded broadband projects.

ISP as “Subrecipient” vs. “Contractor”. CPF and SLFRF grant recipients may provide subawards or contracts for the construction of eligible broadband projects. For example, a local government that receives ARPA SLFRF funds might use the funds to support a broadband development project, and might select an ISP to help implement it.

The Proposed Guidance relies heavily on the distinction between a grant recipient’s ISP being characterized as a “contractor,” or as a “subrecipient.” Whether an ISP in a grant-funded project is a “subrecipient” or a

¹ The [Coronavirus State and Local Fiscal Recovery Fund](#), authorized under the American Rescue Plan Act.

² The [Capital Projects Fund](#).

³ Comments may be submitted to capitalprojectsfund@treasury.gov.

“contractor” is to be determined in accordance with Part 200: [Section 200.331](#) provides a list of factors to consider in making the decision – and it may not always be obvious.

Under the Proposed Guidance, the compliance rules applicable to a “subrecipient” ISP and a “contractor” ISP would vary considerably: If a recipient treats the ISP as a “subrecipient,” the recipient and ISP would be subject to the Proposed Guidance’s provisions – not the Part 200 provisions – relating to program income, cost principles, procurement, audits, and monitoring requirements (each of which are described in further detail below). If, on the other hand, a recipient treats the ISP as a “contractor,” the recipient and ISP need to follow the Part 200 rules relating to contractors, including procurement provisions, and other provisions of the Proposed Guidance that may apply in a more limited way, if at all.

II. Specific Guidance

Program Income. “Program income” refers to income generated by a grant-funded project. In a grant-funded broadband project, for example, program income may include revenue received by the ISP from the provision of broadband service to end users.

The default rule under Part 200 is that “program income must be deducted from the award amount unless the awarding agency provides otherwise.”⁴ Naturally, a strict application of this rule would create serious challenges for a grant-funded broadband project.

The Proposed Guidance departs from the Part 200 default rule with respect to program income. For ISPs treated as subrecipients, the Proposed Guidance makes a very clean pronouncement: “Income generated by ISPs from subawards will not be considered program income and ISPs may use such income without restriction.”

For ISPs treated as contractors, it is more complicated, but the outcome is likely the same: The Proposed Guidance states that “Recipients may agree to permit” such ISPs to retain income generated by the ISP “provided that such an agreement is consistent with the state’s procurement requirements or, in the case of a local or Tribal government, is consistent with the Uniform Guidance provisions on procurement. Such income earned by contractors is not considered program income and thus may be used by the contractor without restriction.”⁵

Cost Principles and Procurement Practices. As the Proposed Guidance explains, “in general, [Part 200] provides that subrecipients must follow the procurement rules and cost principles in determining which costs incurred by subrecipients may be covered using the award. These requirements apply to non-federal entities as well as for-profit subrecipients.”

Since the inception of the SLFRF and CPF programs, recipients and potential recipients have raised significant questions relating to Part 200 procurement requirements and cost principles. For example, the default rules under Part 200 suggest that recipients, and in turn, all subrecipients, may not engage contractors to perform work without first putting the procurement out to bid. With many recipients and subrecipients having longstanding relationships with suppliers and service partners, this requirement promised to introduce significant additional cost and delay.

⁴ Proposed Guidance, at p.1

⁵ Note that this permission must come from the “Recipient.” In the case of a State recipient making a subaward to a subrecipient, the State would apparently need to explicitly agree to allow the contractor ISP to retain the income.

The Proposed Guidance squarely addresses these and other procurement-related issues. In short, under the Proposed Guidance, subrecipients receiving “fixed-amount subawards”⁶ would not be required to apply the cost principles and procurement requirements of Part 200 at all.

Note that this determination would not apply to ISPs characterized as contractors, nor would it apply to subawards not made for a fixed amount. Recipients and subrecipients must therefore follow the procurement rules of the Uniform Guidance in the selection of ISPs acting as contractors (2 CFR 200.318) and must comply with all Part 200 grant funding requirements (2 CFR 200 Appendix II).

ISP Ownership of Grant-Funded Property and the “Federal Interest”. Treasury proposes an alternative to the Part 200 rules relating to the ownership and treatment of property acquired or improved under a federal award. The approach set forth in the Proposed Guidance would in general apply only to broadband infrastructure installed under fixed amount subawards. (For ISPs characterized as contractors, the Proposed Guidance is unclear, and arguably contradictory, as to whether the Part 200 property provisions would apply. Treasury hopefully will clarify further in the final version.)

Before proceeding, it is worth recalling how NTIA addressed these issues under the Broadband Technology Opportunities Program (BTOP) in 2009-10. Under the BTOP rules, (a) the grant-funded property was subject to a federal property interest (the “Federal Interest”) for the duration of its statutory useful life period (in the case of fiber optic cable, 20 years); (b) recipients were required to record the Federal Interest; (c) recipients could not encumber property that was subject to the Federal Interest; and (d) recipients could not close on a transaction involving the sale of grant-funded property still subject to the Federal Interest without first obtaining a waiver from NTIA and NOAA, which could take six months or longer.

Thankfully, Treasury’s Proposed Guidance is much friendlier to grant recipients and ISP subawardees:

- *Limited Federal Interest Period.* For projects substantially completed by December 31, 2026, the Federal Interest in SLFRF- or CPF-funded broadband infrastructure would last only until December 31, 2034. Unlike Part 200 and prior funding programs (i.e., BTOP), the duration of the Federal Interest would not depend on the useful life of the asset.
- *No Lien / Recordation Required.* The Proposed Guidance states that ISPs will not be required to “record liens or other notices of record.”
- *Streamlined Consent for Transfer.* Unlike NTIA rules applicable to BTOP grants, which required recipients to submit a prescriptive and detailed petition for waiver and obtain approval from two federal agencies prior to transferring grant-funded property, Treasury has proposed a more streamlined approach. Under the Proposed Guidance, a subrecipient that has obtained title to grant-funded property may sell the property after (a) providing notice to Treasury, and (b) securing the agreement of the transferee that it acknowledges the Federal Interest and will comply with applicable requirements. Notably, the Proposed Guidance does not state that Treasury must *approve* a proposed transfer: if the final guidance retains a notice-only approach, ISP subrecipients will have much more flexibility to transfer grant-funded assets than under previous programs.

The Proposed Guidance clarifies issues surrounding ISP ownership of grant-funded property. It states that recipients “may provide in their agreement with an ISP (*whether the ISP is treated as a subrecipient or*

⁶ The “fixed amount subaward” concept is meaningful because, according to Treasury, “[t]he Uniform Guidance permits agencies to provide an exception from the cost principles and procurement requirements in the case of fixed-amount subawards.” Proposed Decision, at 2.

contractor) that title to real property or equipment acquired or improved under the award vests in the ISP, subject to the condition that, for the duration of the Federal Interest Period, the ISP and any successors or transferees”⁷:

1. Use the property for the authorized purposes of the project;
2. Continue to provide Internet service to the service area at the initial agreed-upon standard (or better, presumably);
3. Participate in federal low-income broadband access subsidy programs (presumably ACP, or a successor);
4. Comply with insurance requirements in section [200.310](#);
5. Comply with equipment use and management requirements in sections [200.313\(c\)\(4\)](#) and [\(d\)](#) (commercial inventory controls, loss prevention procedures, etc), “provided that such inventory controls indicate the applicable federal interest”;
6. Maintain records of real property “that include an indication of the applicable federal interest” (note that this does not go so far as to state that a lien is required);
7. May dispose of project property when no longer needed to operate the network (equipment upgrades, etc), provided the upgrade provides the same level of service, “and that such upgraded property is subject to the same requirements provided in this guidance as other Project Property”;
8. May otherwise sell project property, “only after provision of notice to Treasury that identifies the successor or transferee and after securing the agreement of the successor or transferee to comply with these requirements and the acknowledgement of the successor or transferee of the federal property interest”; and
9. Notify the recipient and Treasury upon filing of a petition in bankruptcy with respect to the ISP or its affiliates.

Except as provided above, “property standards in [2 CFR 200.311](#) and [200.313](#), [200.314](#), and [200.315](#) shall not apply.” Note again, however, that a subaward that is not in a fixed amount must follow the property standards in [2 CFR 200.310-316](#).

Encumbering Project Property. Under the Proposed Guidance, ISPs may encumber project property if Treasury receives a first lien position ensuring that, if the property was liquidated, Treasury would receive “the portion of the fair market value of the property that is equal to Treasury’s percentage contribution to the project costs.” While the Proposed Guidance does not explicitly say so, this requirement would presumably apply only in the case of project property for which the Federal Interest has not expired.

Audit Requirements. Audit obligations for SLFRF- and CPF-funded ISPs would differ significantly depending on whether the ISP is characterized as a “contractor” or a “subrecipient,” and, for subrecipients, whether the subrecipient is a “for profit” entity or “non-federal entity”:

- Contractor ISPs would not be subject to audit requirements under Part 200 ([subpart F](#)) with respect to funds received from the project. However, “recipients must oversee contractors to ensure that they perform in accordance with their contracts.”
- Subrecipient ISPs:
 - Subpart F of Part 200 (“Audit Requirements”) does not apply to for-profit subrecipients. However, Treasury’s proposal may result in audit requirements applied to for-profit

⁷ Proposed Decision, at p. 3 (emphasis added).

subrecipients via the *recipient's* obligation to ensure compliance, under [2 CFR 200.501\(h\)](#): “[M]ethods [for recipients] to ensure compliance for Federal awards made to for-profit subrecipients may include pre-award audits, monitoring during the agreement, and post-award audits. This provision may be satisfied by the submission of an audit or other documentation that covers multiple subawards and multiple federal programs.” (emphasis in original)

- Subrecipients that are non-federal entities – defined under Part 200 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”⁸ – must “submit single audits or program-specific audits....”
 - Two additional points are worth noting with respect to audit obligations of non-federal entity subrecipients utilizing SLFRF funds: First, the SLFRF audit requirement applies only to subrecipients that have expended more than \$750,000 in Federal award funds during their fiscal year.⁹ Second, Treasury has adopted a streamlined “[Alternative Compliance Examination Engagement](#)” process for qualifying SLFRF recipients and subrecipients: If a given subrecipient’s total award is at or below \$10 million, and other federal awards (not including SLFRF funds) are less than \$750,000 during the fiscal year, they can use the streamlined process, rather than the more cumbersome “single audit” process.

As a final comment, we must reiterate that the summary provided above is based on *proposed* guidance from Treasury, and not final guidance. Interested parties, particularly those that would be adversely affected by the proposed guidelines, should consider submitting comments to the Department of Treasury on or before April 11, 2023, via email to capitalprojectsfund@treasury.gov.

⁸ [2 CFR § 200.1](#).

⁹ U.S. Treasury Department, Coronavirus State and Local Fiscal Recovery Funds Guidance on Recipient Compliance and Reporting Responsibilities, v. 5.0, September 20, 2022, at p. 12.

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