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Considerations for County Investments in Broadband

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For many years counties have expressed interest in expanding broadband access to their residents. Following the passage of the American Rescue Plan Act (ARPA) earlier this year, substantial resources are available for counties to invest in broadband infrastructure. CCAO provides the following information for members to consider as they explore broadband expansion strategies, particularly in relation to the state broadband expansion program.

Ohio Residential Broadband Expansion Grant Program

Of particular interest to counties is the Ohio Residential Broadband Expansion Grant Program. The program was established in May 2021, with the goal of expanding broadband service to unserved and underserved areas of the state. Under the program, grant applications are submitted by internet service providers to the Ohio Department of Development. Projects are scored on a competitive basis, with the highest scoring projects receiving state funding. For the biennium, \$270 million is available for state broadband expansion grants. The application period for broadband providers opened September 6, 2021 and will close on November 8, 2021.

As part of a grant application, municipalities, townships and counties may contribute general or other discretionary funds or in-kind contributions in support of the project application. Broadband providers, individuals, organizations and companies may also make such contributions. These contributions to a project application are entirely discretionary. Such contributions are factored into the project scoring criteria. Thus, those applications with contributions may score more competitively than similarly situated applications without contributions.

Under the state broadband expansion program, counties also may identify residential addresses of unserved and underserved areas of the county and pass a resolution instructing the BroadbandOhio to solicit applications from internet service providers for the grant program. These resolutions are discretionary and are not required for a broadband provider to submit an application to serve an area within the county. Internet service providers are not required to respond to the solicitations for grant applications.



County ARPA fund considerations for state broadband grant program

Although the Office of Broadband Ohio has indicated that local governments may provide American Rescue Plan Act (ARPA) - Local Fiscal Recovery Funds as a financial contribution toward a residential broadband project, counties should exercise caution in doing so for several reasons:

1. The ARPA regulations require a higher minimum upload and download speed than the state program.
2. Before providing funds, the county will need to make a choice as to whether to treat a broadband provider as a contractor or subrecipient under the federal Uniform Guidance regulations. (See the checklist in 2 CFR 200.331)
3. Counties may have additional opportunities to partner with the state for broadband expansion, such as through the Capital Projects Fund included in ARPA. The state of Ohio must apply to Treasury by December 27, 2021, in order to receive its \$268.6 million share of these funds. The state must have a grant plan approved by Treasury before spending the funds.

Broadband speeds

The Ohio Residential Broadband Expansion Program requires minimum speeds of 25 Mbps download and 3 Mbps upload. On the other hand, U.S. Treasury FAQ 6.5 states the following with respect to ARPA funds:

The Interim Final Rule requires eligible projects to reliably deliver minimum speeds of 100 Mbps download and 100 Mbps upload. In cases where it is impracticable due to geography, topography, or financial cost to meet those standards, projects must reliably deliver at least 100 Mbps download speed, at least 20 Mbps upload speed, and be scalable to a minimum of 100 Mbps download speed and 100 Mbps upload speed. Projects must also be designed to serve unserved or underserved households and businesses, defined as those that are not currently served by a wireline connection that reliably delivers at least 25 Mbps download speed and 3 Mbps of upload speed.

In the supplementary information to the Interim Final Rule, Treasury also states that:

To meet the immediate needs of unserved and underserved households and businesses, recipients are encouraged to focus on projects that deliver a physical broadband connection by prioritizing projects that achieve last mile connections (*Federal Register*, Vol. 86, No. 93. 5/17/2021, p. 26806).

It is advisable that the county discuss these requirements with a prospective broadband provider before promising the use of ARPA funds as a financial

contribution. Also, the provider must be made aware that federal law prohibits the purchase of telecommunications equipment from Huawei Technologies or ZTE Corporation, or any subsidiary or affiliate of these entities.

Contractor or Subrecipient Status

The ARPA statute and Treasury ARPA regulations allow recipients to make investments in broadband. Unlike water and sewer systems, which generally are publicly-owned, broadband networks generally are privately-owned. This means that a typical procurement process for the construction or renovation of a public improvement may not be optimal or even applicable to broadband construction. The ARPA regulations are silent as to whether the provision of funds for the construction of a broadband network should be accomplished through a grant or a contract. It is clear, however, that federal Uniform Guidance does apply (Treasury FAQ 9.3). Uniform Guidance provides two options when funds are transferred to another organization by a federal grant recipient: the entity receiving the transferred funds must be treated either as a contractor or a subrecipient.

Subrecipients are organizations that help to carry out the objectives of a federal program and have their performance measured in relation to those objectives. If the county pursues this option, the county is considered a “pass-through entity” under federal law and must fulfill certain specific obligations with respect to notifying the subrecipient about its obligations and requirements under the law (see 2 C.F.R. 200.332). An agreement with the subrecipient must describe all applicable compliance requirements. The broadband provider would then become responsible for following federal procurement rules in its own contracting. Compliance would have to be documented by the county.

If the county decides to make funds available to a broadband provider on the basis of a contractual arrangement, the procurement process required by federal Uniform Guidance requires full and open competition when a recipient is selecting contractors. The selection process for the Residential Broadband Expansion Grant Program does not meet the procurement standards of the Uniform Guidance. It is a grant program in which providers apply for funding from the state. Although grants are competitively scored at the state level, the grant award process does not invite bids for a specific set of projects with well-defined scope as would take place in a competitive procurement process. Therefore, the county will have to select a contractor or contractors through a competitive process before promising a financial contribution to a specific applicant under the state program.

When engaging in a contract with a broadband provider, counties should seek the advice of the county prosecutor as to whether the procurement meets the definition of a public improvement, in which case state bidding laws must be followed. Otherwise, federal law allows informal methods of procurement to be used if the price for the contract is below the “simplified acquisition threshold” (SAT) of \$250,000. Above this level, sealed bids or requests for proposals must be used. Supplies or services that meet the definition of “micro-purchases” under \$10,000 may be awarded without soliciting competitive price or rate quotations, but only if the recipient considers the price to be reasonable based on research, experience, purchase history, or other information, and documents the conclusion for audit purposes. The county may increase the micro-purchase threshold up to \$50,000 if it

performs an annual self-certification and provides certain supporting documentation. For purchases above the micro-purchase threshold but below \$250,000, the county has to obtain price or rate quotations from a sufficient number of sources. In rare instances, federal law allows a single source exception to competitive bidding thresholds with adequate justification.

If the cost is above the Simplified Acquisition Threshold, the county must use sealed bids or a RFP process, and perform an independent cost or price analysis before receiving the bids or proposals. When a contract is executed, it must contain certain terms required by the Uniform Guidance.

It is also possible that a county could use funds identified through an ARPA revenue loss calculation as a match for the state broadband program. Treasury FAQ 3.8 gives recipients “broad latitude” to use funds for the provision of government services, including infrastructure, and Ohio House Bill 2 explicitly allows local governments to use general or discretionary revenue sources to make a financial contribution to the broadband grant program. This approach may enable a more standard grant-making process without formal procurement, but counties are advised to consult with legal counsel before proceeding.

Questions about broadband funding considerations can be directed to CCAO Senior Policy Analyst [Jon Honeck](#) and CCAO Policy Analyst [Adam Schwiebert](#).