

ARPA Redux: The Director's Cut

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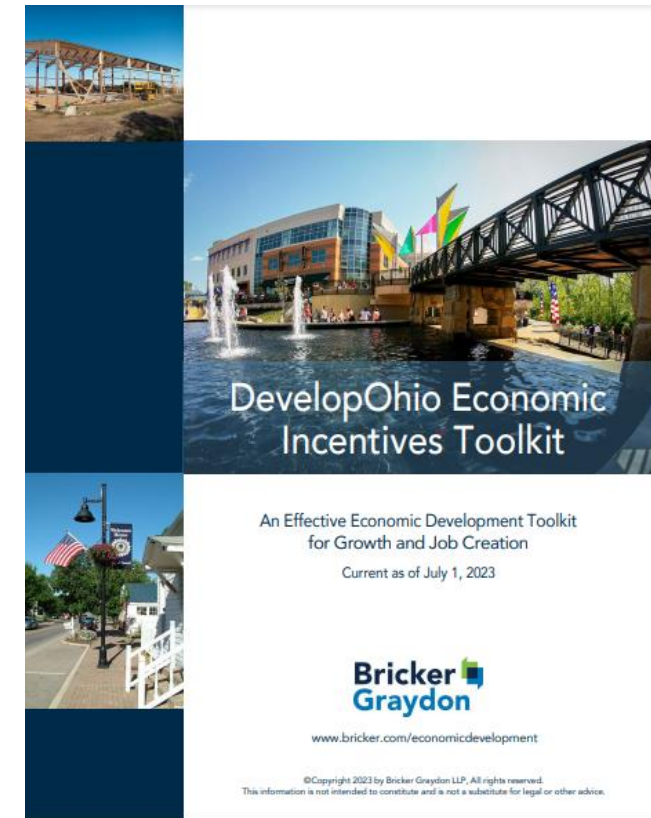
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It is not intended to be legal advice and does not
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Resource: *DevelopOhio* Toolkit

NEW UPDATES August 2022

- *DevelopOhio* blog's free resource:
 - Economic Incentives Toolkit
- First written in 2011
- User-friendly by design
 - Desk reference guide for “greenhorns” to experienced economic developers



American Rescue Plan Act

Local Fiscal Recovery Fund – Eligible use “buckets”

Sec. 603(c)(1)

- A. Respond to the COVID-19 public health emergency or its negative economic impacts
- B. Respond to workers performing essential work
- C. To provide government services to extent of reduction in revenue
- D. To make necessary investments in water, sewer, or broadband infrastructure

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1st bucket – Respond to health emergency / negative economic impacts

- Help with negative public health or economic impacts resulting from COVID-19 pandemic:
 - Virus mitigation & prevention costs
 - Mental health treatment for residents
 - Responding to increased gun violence
 - Food & housing assistance

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1st bucket – Respond to health emergency / negative economic impacts

- Help with negative public health or economic impacts resulting from COVID-19 pandemic:
 - Childcare
 - Vacant & abandoned properties
 - Parks & outdoor recreation areas

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1st bucket – Response to COVID-19 (31 CFR 35.6(b)(ii)(A)(5))

Hey, I can do that?

- **Affordable Housing development**
 - ARPA funds to renovate and/or construct specific housing units for tenants / homeowners that otherwise satisfy federal affordable housing programs
 - Treasury’s Final Rule **presumes** beneficiary **impacted** or **disproportionately impacted** by COVID-19 pandemic if:
 - Funds are used for **affordable housing programs**; and
 - Qualify for:
 - National Housing Trust Fund (12 U.S.C. 4568)
 - Home Investment Partnerships Program (42 U.S.C. 12721 *et seq.*)

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1st bucket – Response to COVID-19 (31 CFR 35.6(b)(ii)(A)(5))

Hey, I can do that? (*cont.*)

- **Affordable Housing development (*cont.*)**
 - July 27, 2022, U.S. Treasury **expanded federal affordable housing programs** beyond the HTF and HOME:
 - Public Housing Capital Fund, administered by HUD
 - Section 202 Supportive Housing for the Elderly Program, administered by HUD
 - Section 811 Supporting Housing for Persons with Disabilities Program, administered by HUD
 - Project-Based Rental Assistance (PBRA), administered by HUD
 - Multifamily Preservation & Revitalization Program, administered by USDA
 - Homeownership assistance under CDBG (at 24 CFR 570.201(n))

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1st bucket – Response to COVID-19 (31 CFR 35.6(b)(3)(ii)(A)(11)(iv))

Hey, I can do that? (*cont.*)

- **Addressing Vacant or Abandoned properties**
 - ARPA funds to renovate vacant & abandoned properties that are located within **Qualified Census Tracts** within the recipient's boundaries
 - When a vacant or abandoned building is located in a disproportionately impacted community, Treasury expressly authorizes a **range of rehabilitation expenditures** as satisfying the 2-part test

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1st bucket – Response to COVID-19 (31 CFR 35.6(b)(3)(ii)(A)(11)(iv))

Hey, I can do that? (*cont.*)

- **Addressing Vacant or Abandoned properties (*cont.*)**
 - *Rehabilitation, renovation, maintenance, or costs to secure* vacant or abandoned properties to reduce their negative impact
 - Costs associated with *acquiring and securing legal title* of vacant or abandoned properties and other costs to *position the property for current or future productive use*
 - *Removal and remediation of environmental containments* or hazards from vacant or abandoned properties
 - **Demolition** or deconstruction of vacant or abandoned buildings (including **residential, commercial, or industrial buildings**)

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1st bucket – Response to COVID-19 (31 CFR 35.6(b)(3)(ii)(A)(11)(iv))

Hey, I can do that? (*cont.*)

- **Addressing Vacant or Abandoned properties (*cont.*)**
 - Greening or cleanup of *vacant lots*, as well as other efforts to make vacant lots safer for the surrounding community
 - Conversion of vacant or abandoned properties to *affordable housing*
 - *Inspection fees and other administrative costs* incurred to ensure compliance with applicable environmental laws and regulations for demolition, greening, or other remediation activities

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1st bucket – Response to COVID-19 (Treasury FAQs, Item 4.9)

Hey, I can do that? (*cont.*)

- **Capitalizing Revolving Loan Funds (RLFs)**
 - **Affordable Housing loans**
 - Treasury's July 27, 2022 update
 - Recipient may charge to the ARPA special revenue fund the **entire amount of the loan / investment, at the time of disbursement** (with loan repayments not subject to federal program income rules)
 - Loans must have terms not less than 20 years
 - Affordable housing project being financed has an affordability period of not less than 20 years after occupancy

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1st bucket – Response to COVID-19 (31 CFR 35.6(b)(4))

Beware!

- **Capital Expenditures** under ARPA's 1st bucket of eligible use
 - Must follow **capital expenditures protocols**
 - If a particular expenditure / grant / loan \leq \$1M (i.e., Treasury's "safe harbor"):
 - Recipient write-up supporting information (i.e., answer the two-part framework) for audit file
 - If a particular expenditure / grant / loan $>$ \$1M:
 - Recipient also must prepare a Written Justification as to that financing
 - Comprised of (1) a description of the public harm addressed by capital expenditure; (2) explanation why capital expenditures are appropriate to address that harm; and (3) comparison against 2 alternative types of capital expenditures

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2nd bucket – Pay essential workers

- County can use its ARPA funds to:
 - Pay its own employees for showing up, in-person, at the job site during the quarantine
 - Pay businesses in the county to pass along to their workers who showed up during the quarantine

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3rd bucket – Provide government services

- County can use its ARPA funds to:
 - Build public infrastructure, including roads
 - Improve cybersecurity, including buying computer hardware & software
 - Fund public health services
 - Brownfield clean-up
 - School or educational services
 - Provide police, fire, and other public safety services
 - *Including retroactive reimbursement of General Fund for payroll incurred*

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3rd bucket – Provide government services

Hey, I can do that?

- Capitalizing **Revolving Loan Funds (RLFs)**
 - **Loans extended as Government Services (3rd bucket analysis)**
 - Treasury authorizes a more permissive manner of capitalizing loan funds
 - Recipient's investment to capitalize a RLF under 3rd bucket rationale deemed by Treasury to be **expended in full**, and therefore is charged in the full amount against recipient's ARPA special revenue fund account **at the time of disbursement**
 - Such loans are **not restricted as to purpose**

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4th bucket – Build water, sewer, or internet broadband infrastructure

- County can use its ARPA funds to:
 - Build water lines
 - Replace old lead water pipes
 - Fix and improve sewer lines and waste water treatment plants
 - Build new internet broadband connections for residents

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Ohio Constitution's restrictions on involvement w/ private enterprise

- **Beware!**
 - Avoid any treatment of counties' participation in ARPA-funded projects as an equity investment
 - Structure any investment by county as a loan, subject to a loan agreement
 - Ohio Constitution, Art. VIII, Sections 4, 6, 13, and 16
 - These provisions collectively govern the extent by which political subdivisions can involve themselves in, and interact with, private enterprise
 - Nonprofit exception under the Ohio Constitution allows such involvement

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Ohio Constitution's restrictions on involvement w/ private enterprise

Beware! *(cont.)*

- Art. VIII, Sec. 16 of the Ohio Constitution & R.C. 133.51
 - Sufficient authority to invest ARPA funds for purposes of adequate housing
 - Across all housing types, irrespective whether the housing units supported by ARPA funds are “affordable” or not
- Art. VIII, Sec. 13 of the Ohio Constitution
 - Sufficient authority to invest ARPA funds in economic development projects
 - 4 magic words: industry, commerce, distribution, and research
 - Any such investment sourced only from non-tax revenue
 - We view the use of ARPA allocation as such

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Follow federal Uniform Guidance (2 CFR Part 200)

Beware!

- Make certain to follow federal Uniform Guidance (2 CFR Part 200)
 - Use of ARPA funds must be in accordance with both state law & federal contracting & bidding laws
 - Recipient (county) to follow the more restrictive law

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Follow federal Uniform Guidance (2 CFR Part 200)

Beware! (*cont.*)

A. *Sealed Bids*

- Recipient may use sealed bids to comply with both state and federal law
- Under state law, use sealed bidding for most purchases in excess of \$50,000
- This is the “default” process
- Award contract to the “lowest responsible” bidder

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Follow federal Uniform Guidance (2 CFR Part 200)

Beware! (*cont.*)

B. Competitive Proposals

- In lieu of sealed bids, the Uniform Guidance allows use of a competitive proposal process
- Limited in its use of a proposal process under state law:
 - Competitive proposals cannot be used for “construction, design, demolition, alteration, repair, or reconstruction” of capital improvements
- Award contract to the firm whose proposal is “most advantageous”
 - which factors both price and technical ability

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Follow federal Uniform Guidance (2 CFR Part 200)

Beware! (cont.)

C. *Non-Competitive Procurement*

- *Express Exceptions*

- Competitive procurement not necessary where work only available from one source
- Where a “public exigency” or emergency requires a prompt procurement & prohibits delay

- *Bidding Threshold*

- Under state law, purchases < \$50,000 need not be competitively procured
- Under federal law, purchases < \$10,000 are “micropurchases” and need not be competitively procured
 - Purchases > \$10,000, but < \$250,000 require multiple price quotations

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Follow federal Uniform Guidance (2 CFR Part 200)

Beware! (cont.)


D. Cooperative Purchasing

- Uniform Guidance also expressly “encourages” non-federal entities to use cooperative purchasing agreements
- Care should be taken when using cooperative purchasing
 - Under state law, Ohio Attorney General has opined that construction services may not be procured under the general cooperative purchasing statute, R.C. 9.48, but instead must be procured through a council of governments under R.C. 167.081
 - **Ohio Auditor of State has opined that the State Term program, under R.C. 125.04, while compliant with state law, does not comply with federal law**

Questions?

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