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ARPA Final Rule - The “B-Sides Collection”: Funding Capital Projects

Much has been written by various prognosticators regarding the January 6, 2022, release by the U.S. Treasury of its Final Rule as to the use by state and local governments of federal stimulus funding under the American Rescue Plan Act (ARPA).¹ One head-turning change under the new guidance is the Treasury presuming up to \$10 million in revenue has been lost by each local government due to the public health emergency. Recipients are permitted to use up to that amount (not to exceed their respective awards) to fund “government services.”² The U.S. Treasury itself has published a [high-quality overview](#) describing the Final Rule’s guidance.

Here, we embark on a concept borrowed from the music recording industry. Rather than rehash key takeaways from the Final Rule (the “A-side” singles heard on Top 40 radio, if you will), we intend to share our takes on some of the lesser publicized aspects of the new ARPA guidance (the “B-sides”).

We’re launching this series of articles here by reviewing in detail an aspect of Local Fiscal Recovery Funds that garner a great amount of attention from our clients: funding capital projects.

Counties, metropolitan cities and non-entitlement units of local government (i.e., non-metro cities and townships in Ohio) may use their ARPA Local Fiscal Recovery Fund payments under four buckets of use set forth in the statute.³ Among the listed eligible uses, the first and third buckets are relevant in the context of capital projects: “a) To respond to the public health emergency...; c) For the provision of government services to the extent of the reduction in revenue due to the COVID-19 public health emergency”.⁴

As a response to the COVID-19 public health emergency (i.e., the 1st bucket), a capital project could be funded, in whole or in part, by ARPA funds, subject to heightened reporting and justification procedures written into the Final Rule.

Under this 1st bucket of eligible use analysis, the Final Rule presumes certain enumerated uses — relating to building improvements — as reasonably proportional responses to the pandemic. One such use is the “installation and improvement of ventilation systems in congregate settings... or other public facilities”.⁵

Continuing with the 1st bucket analysis, the Final Rule makes a clear distinction that capital projects, in and of themselves, are not presumed to be reasonably proportional responses to the COVID-19 emergency.⁶ Having said that, ARPA funds indeed may be deployed to certain capital expenditures as responses to the pandemic.⁷

First, local governments must satisfy the U.S. Treasury’s two-part framework: (1) there must be a negative public health impact resulting from or exacerbated by COVID; and (2) the local government’s response must be designed to address the identified health impact, which such response must be “reasonably proportional” (i.e., the scale of the response as compared to the scale of the harm).⁸

Second, if a project has total capital expenditures of less than \$1 million (i.e., Treasury's "safe harbor"), the local government must write-up sufficient supporting information (i.e., answer the two-part framework) for its audit file as to those funded components. If a project is equal to or more than \$1 million, the local government also must prepare a written justification for the funded components.⁹

Along these lines, local government recipients may consider deploying their ARPA funds to HVAC improvements in public facilities (presumed eligible use), or undertake capital projects that involve building improvements and new facility construction, so long as such projects satisfy the U.S. Treasury's justification and reporting protocols.

As a provision of government services (i.e., the 3rd bucket), a local government may instead choose to deploy its ARPA funds to parts (or the entirety) of a capital project as a government service, according to its determined amount of lost revenue.

In so doing, the jurisdiction may deploy up to \$10 million to the provision of government services, which Treasury defines generally as "services provided by the recipient governments... unless Treasury has stated otherwise".¹⁰

But such broad swath of activities remain subject to the Final Rule's restrictions on use, which are applicable to every ARPA dollar spent.¹¹

Finally, local governments must encumber their ARPA funds under capital projects no later than December 31, 2024, with full pay-out on such encumbrances (i.e., purchase orders) by December 31, 2026.

Procurement considerations to guide federal stimulus expenditures

Local governments must keep in mind some key notions when using these funds. First, procurements must comply with applicable state and local laws. The sealed bidding process is always a good option. However, other state statutes establish alternative procurement methods that may be used. For example, Section 167.081 of the Ohio Revised Code allows local governments to utilize cooperative purchasing through a council of governments in lieu of bidding the project itself. Local governments may also use alternative delivery models, such as construction manager at risk or design-build, which have their own statutory procurement methods to be followed.

Second, because this funding is through federal grants, procurements must also comply with *federal law*. Federal regulations, known as the Uniform Guidance, provide their own procurement methods that must be followed when non-federal entities use federal funds. Fortunately, the federal requirements are fairly analogous to Ohio law. For example, for purchases exceeding \$250,000, the Uniform Guidance requires local governments to use either a sealed bidding process or a competitive proposal process. These options line up with state and local sealed bidding processes, or the competitive proposal processes in the construction manager at risk or design-build statutes.

Additionally, the Uniform Guidance permits — and in fact expressly "encourages" — the use of cooperative purchasing programs. However, the underlying contract between the cooperative purchasing program and the contractor must itself have complied with the requirements of the Uniform Guidance. It is ultimately the local government's responsibility to confirm this federal compliance. Additionally, as discussed above, the cooperative purchasing program utilized must also comply with the requirements of state law.

Interestingly, the U.S. Treasury has been clear that federal Davis-Bacon Act wage requirements are

inapplicable to projects whose federal funding is comprised solely with ARPA Local Fiscal Recovery Funds (although, if a state has a prevailing wage law – and Ohio does – that state’s prevailing wage requirements still apply).¹²

Finally, local governments must remember that capital projects may require compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970,¹³ particularly in those projects involving vacant or abandoned properties.¹⁴

¹ H.R. 1319, Public Law 117-2.

² 31 CFR 35.6(d)(1).

³ See ARPA, Title IX Sec. 603(c)(1)(A) through (D).

⁴ U.S. Treasury, Final Rule, Supplementary Information, at pages 4-5 (emphasis added).

⁵ 31 CFR 35.6(b)(3)(i)(A).

⁶ See U.S. Treasury, Final Rule, Supplementary Information, at page 57.

⁷ Id., at pages 190 – 205.

⁸ See 31 CFR 35.6(b)(1); see also U.S. Treasury, Final Rule, Supplementary Information, at pages 21 – 22, and at page 194.

⁹ See 31 CFR 35.6(b)(4); see also U.S. Treasury, Final Rule, Supplementary Information, at page 194.

The written justification is comprised of (1) a description of the public harm to be addressed by the capital expenditures; (2) an explanation why such capital expenditures are appropriate to address that harm; and (3) a comparison against two alternative types of capital expenditures (see U.S. Treasury, Final Rule, Supplementary Information, at pages 196 – 198). This document must be either kept in the audit file or filed with the U.S. Treasury (see 31 CFR 35.6(b)(4); see also U.S. Treasury, Final Rule, Supplementary Information, at pages 204 – 205).

¹⁰ See U.S. Treasury, Final Rule, Supplementary Information, at page 259.

¹¹ Id. at page 260. The Final Rule’s restrictions on use are divided into (1) statutory restrictions under ARPA: offsetting the local government’s reduction in net tax revenue; and (extraordinary) deposits into pension funds; and, (2) other restrictions: debt service and replenishing reserves; settlements and judgments; and general restrictions (efforts that contradict the effort to contain COVID-19; conflicts of interest and ethics rules; and other federal, state and local laws).

¹² See U.S. Treasury FAQs, updated as of November 15, 2021, Item 6.17. Projects that are funded with other federal funds, in addition to ARPA, must comply with Davis-Bacon Act requirements.

¹³ 42 U.S.C. 4601, and Department of Transportation regulations at 49 CFR Part 24.

¹⁴ See U.S. Treasury, Final Rule, Supplementary Information, at pages 136-137.

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