

**Broadband Public/Private  
Partnerships: A Means to Provide  
Internet Access to the  
Under or Non-served**

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## **Broadband Public/Private Partnerships: A Means to Provide Internet Access to the Under or Non-served**

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### **Broadband**

- ▶ Should be a necessary component of any community's economic development planning.
- ▶ Local communities typically promote broadband to improve productivity and reduce costs in schools, healthcare institutions, public safety, energy management and other vital functions.
  - ▶ Education
  - ▶ Smart farming
  - ▶ Job searches
  - ▶ Tele-health
  - ▶ On-line sales



## Pursuing Broadband Public Private Partnerships

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- ▶ Communities develop or support broadband partnerships for a variety of reasons:
  - ▶ Certain communities, especially in rural areas, may confront significantly higher development costs due to low population density, lengthier middle-mile networks or challenging terrain – a partnership can share capital costs, enhance revenue potential and remove regulatory barriers to expedite deployment.
  - ▶ In other cases, communities create partnerships to foster high-speed, affordable broadband solutions for government and community facilities (e.g. schools, libraries).
  - ▶ Although local, state or federal funding may be available, it rarely covers the entire cost of a project.
  - ▶ A partnership with private, commercial operators can complement public funding opportunities with private capital, while also bringing in technical expertise.



## Broadband Public Private Partnerships

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- ▶ An effective broadband partnership spreads the risks and costs related to necessary capital investment, execution challenges and adoption hurdles between the public and private sector.
- ▶ There are three main models:
  - ▶ Private sector-led: a commercial operator (private or non-profit) builds, owns and operates the network;
  - ▶ Government-led and private supported: a public entity (e.g. state, county or city government, municipal electric utility or rural coop) owns the network and private partners construct, operate and/or maintain the network in exchange for financial and in-kind support;
  - ▶ Joint Ownership: a commercial operator and the public enterprise/government entity jointly invest in the network and share capacity, contributing a mix of financial, in-kind and other support to the project.



## Procurement

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There are several options with respect to the procurement of such public-private partnerships for broadband services.

- ▶ Low-bid under GML § 103
  - ▶ If a municipality intends to own any infrastructure improvements relating to broadband services, it can utilize the competitive procurement procedures set forth under Section 103 of the General Municipal Law.
  - ▶ These procedures apply to standard municipal infrastructure contracts and require the award of a contract to go to the lowest responsible bidder.
  - ▶ As discussed below, however, these requirements may not be applicable to broadband services given their highly technical nature, as well as the hybrid nature of such contracts.



## Procurement

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- ▶ Professional Services
  - ▶ Case law indicates that GML § 103's low-bid requirements likely would be inapplicable with respect to the provision of broadband services.
    - ▶ Contracts involving professional services are generally exempt from competitive procurement requirements. See People ex rel. Smith v. Flagg, 17 N.Y. 584 (1858).
  - ▶ Courts have held that where there is an integration of scientific and technical skills, as well as professional judgment, such services constitute professional services that are not subject to GML § 103's low-bid procurement requirements.
  - ▶ The provision of broadband services, given its highly technical nature, would appear to fall under this category.
    - ▶ Broadband services would entail the design and engineering of lines to provide such services, establishing the needs for the municipality for fiber-optics, mapping, and other technical matters that plainly require special or technical skill, training or expertise for purposes of the professional services exemption.



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## Procurement


- ▶ Hybrid Transaction
  - ▶ In addition, the provision of broadband services and equipment is of a hybrid nature that would not be subject to low-bid procurement requirements.
  - ▶ The true intent of any such procurement would be to provide broadband services for a municipality, not the purchase of equipment.
  - ▶ As explained in a State Comptroller's opinion, "[w]hile an agreement may be hybrid in nature and involve some services that do not constitute professional services, the [professional services] exception generally will apply if the essential character, or predominant part, of agreement as a whole is for professional services that are 'inextricably integrated' with the remaining parts of the agreement." See 2007 Opns St Comp, No. 2007-1; see also 1988 State Opns St Comp, No. 88-35.
  - ▶ Further, in Citiwide News v. NYCTA, 62 N.Y.2d 464 (1984), for example, the Court of Appeals held that a hybrid transaction, consisting of the sale of a license to operate and maintain newsstands along with the rehabilitation and construction of newsstands was not a "contract for public work" because the essential character of the contract was the operation and maintenance of the newsstands, and the rehabilitation and construction of newsstands was only incidental thereto. Thus, the Court concluded that competitive bidding requirements were inapplicable under those circumstances. Similar to the circumstances in Citiwide, the provision of broadband infrastructure would only be incidental to the essential nature of broadband services.



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## Procurement Processes Essential Components of Procurement Documents

- Introduction
- Project Overview, Description & Objectives
- Scope of Services
- Description of Existing Network
- Submission Requirements, Protocol, Process and Schedule
- Pre-Submittal Meeting and Site Visit
- Clarification Requests
- Respondent Interviews
- Evaluation Criteria
- Reference Documents
- Questions
- Terms & Conditions
- Forms/Appendices



## Procurement Processes

### Essential Components of Procurement Documents

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- Requested information may include:
  - Basic corporate information and history
  - Financial information
  - Technical capability
  - Product information
  - References
  - Similar project examples
    - Scope/size/purpose



## Procurement Processes

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### Request for Proposals (RFP)

Include conceptual design  
criteria

- Performance specifications
- Technical specifications  
(General)

Identify key business terms

- Term sheet
- Contract principles
- Negotiable/non-negotiable  
terms

Draft agreement

Pricing Form

Performance Bond

Form of guaranty



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## Contract Components

- ▶ Essential Provisions
  - ▶ Provision of services – fully define scope
  - ▶ Design review and/or approval
  - ▶ Construction schedule
  - ▶ Owner approval of subcontractors
  - ▶ Third party and utility agreements
  - ▶ Insurance
  - ▶ Risk allocation and warranties
  - ▶ Dispute resolution
  - ▶ Choice of law



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## Performance: ensuring the deal

- ▶ Guaranteed buildout schedule
- ▶ Acceptance standards
- ▶ Construction guarantees
- ▶ Operational guarantees
- ▶ Performance incentives
- ▶ Performance bonds
- ▶ Guaranteed pricing to new consumers





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## Lessons Learned

- ▶ Set up a committee of different stakeholders to plan the broadband partnership parameters and primary goals of the project
- ▶ Start early on the data mapping of your community, using your own resources (tax rolls, census data, as well as State and FCC resources)
- ▶ Establish a legal contract before funds are transferred and project buildout occurs
- ▶ During network deployment, the community should consider engaging an independent firm to manage the project and provide objective status reports



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## Federal and State Funding

- ▶ Unprecedented level of Federal and State investment and grant opportunities for broadband infrastructure and related technologies.
- ▶ \$80 Billion plus has been made available through a myriad of different programs that are constantly changing and being updated.
- ▶ The various programs are administered by different arms of Federal, State and local governments, and in some cases have different objectives, beyond closing the "Digital Divide" in America.



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## Federal and State Funding

- ▶ Infrastructure Investment and Jobs Act (2021)
  - ▶ Broadband Access
    - ▶ Originally to provide \$65 billion to help ensure Americans have access to reliable high-speed internet
    - ▶ The legislation was intended to lower process for internet service and help close the digital divide, so that Americans can afford internet access.
    - ▶ Part of an \$1.2 trillion infrastructure investment program, with a primary focus on transportation, energy and water sectors
    - ▶ Broadband Equity, Access and Development (BEAD) Funding 2022
    - ▶ Administered by individual states under the direction of the Commerce Department
    - ▶ Emphasis on "under-served" areas, such as rural electric coops, municipal governments and non-profits providing service
    - ▶ \$14.2 billion used to make the Emergency Broadband Benefit program permanent under the Affordable Connectivity Program, helping low-income households



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## Federal and State Funding

- ▶ Reconnect Loan and Grant Program (2021)
  - ▶ Program (\$1.3 billion annually) overseen by USDA Rural Development, which defines e-Connectivity as providing increased productivity, improved operations, enhanced healthcare (tele-health) options, education (remote learning) opportunities and competitive entrepreneurship.
  - ▶ State and local governments and Indian Tribes are eligible – must be rural and lack sufficient access to broadband service.
  - ▶ Reconnect loans and grants provide funds for the costs of construction, improvement or acquisition of facilities or equipment – recipient of funding must own the build-out.
  - ▶ Applicants must propose to build a network capable of providing service to all premises in the proposed funded service area.



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## Federal and State Funding

- ▶ American Rescue Plan Act (ARPA) (2021) created the Coronavirus State and Local Fiscal Recovery Fund (\$350 billion total), a portion of which is being used by State and Local Governments for expanding broadband access.
- ▶ Overseen by the Department of Treasury, the final rule significantly broadens eligible broad band infrastructure investments to address challenges with broad band access, affordability and reliability.
- ▶ Recipients may fund high-speed broadband infrastructure in areas of need , such as areas without access to adequate speed, affordable options, or where connections are inconsistent or unreliable.



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## Federal and State Funding


- ▶ Coronavirus Capital Projects Fund (CCPF)
- ▶ \$10 billion available for broadband projects critical in nature, providing connectivity for those who lack it, highlighted and amplified by the COVID-19 pandemic.
- ▶ Provides flexibility for state and local governments to make other investments in critical community hubs or other capital assets that provide access jointly to work, education and health monitoring.



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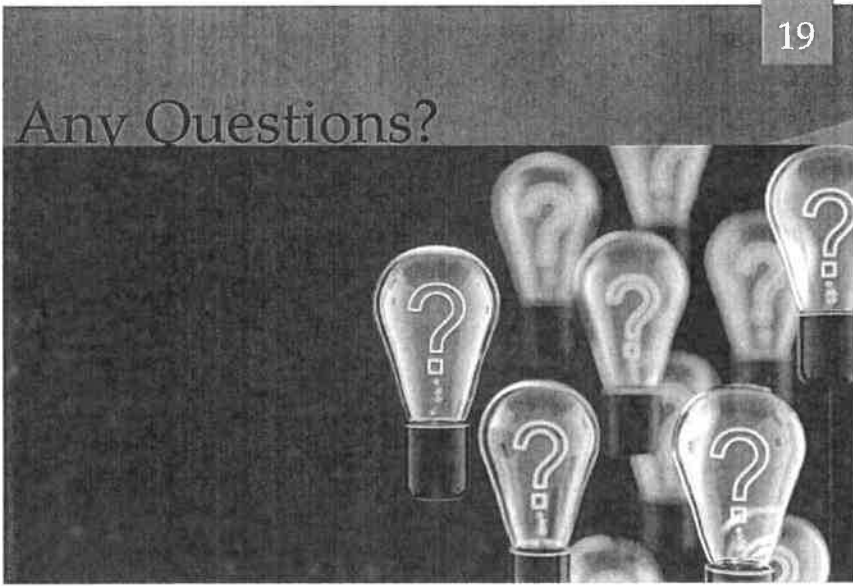
## Federal and State Funding

- ▶ New York Connect ALL Program – announced in 2022 \$1 billion + to deliver affordable internet access to millions of New Yorkers, bolster digital equity and transform the state’s digital infrastructure.
- ▶ No funds have been made available yet, -- the program has been largely focused on digital mapping
- ▶ Recent \$100 million grant to New York actually from the CCPF



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## Any Questions?



## Contact Information

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