

BEFORE THE DEPARTMENT OF ADMINISTRATION  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM ) NOTICE OF AMENDMENT  
2.13.407, pertaining to applicant priority )  
and criteria for awarding 9-1-1 grants )

TO: All Concerned Persons

1. On November 22, 2019, the Department of Administration published MAR Notice No. 2-13-593 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 2075 of the 2019 Montana Administrative Register, Issue Number 22.

2. The department has amended ARM 2.13.407 as proposed, but with the following changes from the original proposal, new matter underlined:

2.13.407 APPLICANT PRIORITY AND CRITERIA FOR AWARDING GRANTS (1) and (2) remain as proposed.

(3) The 9-1-1 Advisory Council shall provide grant award recommendations to the department utilizing the criteria provided listed in (2). All grant determinations are made in the department's discretion, in consultation with the 9-1-1 Advisory Council, subject to the statutory preference in 10-4-306(3), MCA. A grant award may be made even if the applicant does not meet all of the criteria listed in (2); however, it must be clear from the application that the applicant is requesting funds to support an allowable project or expense identified in 10-4-306(2), MCA.

(4) and (5) remain as proposed.

3. The department received oral testimony and written comments from interested parties. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses follows:

Comment #1: A commenter urged the department to amend ARM 2.13.407 to define "working with" to aid in applying the statutory preference in 10-4-306(3)(a), MCA, to award grants in favor of "private telecommunications providers or by local government entities that host public safety answering points by working with a private telecommunications provider." In the alternative, the commenter suggested the department should amend ARM 2.13.407 to assign a higher priority to grant requests from private telecommunications providers.

Response #1: The commenter's requests are beyond the scope of this rulemaking, which is limited to clarifying criteria for awarding grants. The department will seek the 9-1-1 Advisory Council's input regarding further defining the phrase "working with" in rule. In any event, the department could not assign a higher priority to requests from private providers, because that would negate the mandate in 10-4-306(3)(a), MCA, to give equal preference to "requests by private telecommunications

providers or by local government entities that host public safety answering points by working with a private telecommunications provider." Administrative rules cannot contradict statute.

Comment #2: A commenter noted some of the proposed criteria would not apply to all eligible applicants. The commenter also suggested the proposed amendments should differentiate between applications that do not meet the proposed criteria as the result of choices made by the applicant and applications that could not meet the criteria under any circumstances.

Response #2: The criteria are intended to be flexible as indicated in (3). As demonstrated in the rule text and the statement of reasonable necessity, the department acknowledges the possibility that an application could satisfy the statutory requirements for grant eligibility without meeting all the criteria listed in (2). One reason the criteria should be flexible is to allow grants to be awarded where applications deemed worthy of funding by the 9-1-1 Advisory Council and the department under the statutory eligibility provisions meet some but not all the criteria listed in administrative rule. For example, the department and 9-1-1 Advisory Council should be permitted to make a grant award, notwithstanding the criterion in (2)(d), if the project would address an eligible need identified in 10-4-306(2), MCA, despite the fact that the project or need is ongoing or requires more than two years to complete.

Comment #3: A commenter suggested some of the new criteria proposed in (2) are more likely to apply to local government entities than private telecommunications providers and questioned whether (2)(e) should apply to private providers.

Response #3: The department agrees that some of the criteria may apply more often either to local governments or private providers; however, the criteria needed to be broad enough to apply to either depending on the circumstances. As indicated in the rule text and the statement of reasonable necessity, the department acknowledges the possibility that an application could satisfy the statutory requirements for grant eligibility without meeting all the award criteria listed in (2). For example, the department and 9-1-1 Advisory Council should be permitted to make multiple grant awards to a single applicant, notwithstanding the criteria in (2)(e), if the proposed projects would address eligible needs identified in 10-4-306(2), MCA, despite the fact that each project may require a separate application, resulting in multiple applications being submitted by a single applicant.

Comment #4: A commenter also suggested the proposed criterion in (2)(h) could be beyond the department's rulemaking authority because the statute does not cap grant amounts based on the amount of funds available in the grant cycle.

Response #4: Under 10-4-108(1)(b), MCA, the department has the authority and responsibility to adopt rules regarding criteria for awarding grants. The department believes the criterion in (2)(h) falls within its rulemaking authority. Subsection (2)(h) allows the 9-1-1 Advisory Council and the department to consider whether a

project's anticipated cost is more than 33% of the total amount of grant funding available. The criterion does not prevent the department from awarding funds to an applicant that requests more than 33% of the available funds. The proposed amendment does not contradict statute or prevent the department from awarding grants as envisioned in 10-4-306, MCA. In 10-4-306(1), MCA, the legislature established a competitive grant program. With a competitive grant program, where funding is limited, not all eligible applications will be funded, fully or partially. The 9-1-1 Advisory Council and the department, by necessity, must exercise discretion to award funds on an equitable basis when the amount of funds requested by eligible applicants exceeds the amount of funds available during the grant cycle. Proposed (2)(h) is consistent with the discretion inherently vested in the grantor in a competitive grant program. Nonetheless, with the flexibility afforded by the proposed amendment in (3), if a single application requests funding beyond 33% of available funds and the project is eligible for funding, the department would not be prevented from considering the grant application and could award a grant beyond 33% of available funds if one or more of the other criteria in (2) were met.

Comment #5: A commenter objected to adding the statewide 9-1-1 plan criterion in (2)(i) because the statewide plan, in current form, does not make specific recommendations for procuring a next generation 9-1-1 platform. The commenter expressed concern that absent specific recommendations in the statewide 9-1-1 plan for procuring a next-generation 9-1-1 platform, the state's implementation of a next-generation 9-1-1 platform may be disjointed.

Response #5: The commenter's requests are beyond the scope of this rulemaking, which is limited to clarifying criteria for awarding grants. Because the department did not propose adopting rules regarding the content of the statewide 9-1-1 plan in this rulemaking, the department cannot include them at this time. The department believes support in the statewide 9-1-1 plan is an appropriate consideration, with or without specific recommendations for a next generation 9-1-1 platform. While the plan addresses next-generation 9-1-1 technologies, the plan addresses many other aspects of emergency telecommunications systems in the state. The plan includes an inventory of existing local government public safety answering point (PSAP) capabilities and needs and could be used by the 9-1-1 Advisory Council and department to direct grant funds to areas of greatest need (subject to the statutory requirements and preferences). Regarding next-generation 9-1-1 under 10-4-108(2), MCA, the department is required to adopt rules regarding technology standards to ensure PSAPs meet minimum 9-1-1 service levels and to create baseline next-generation 9-1-1 principles to facilitate deployment of baseline next generation 9-1-1. The standards adopted by the department pursuant to 10-4-108(2), MCA, will be informed by the statewide 9-1-1 plan and should promote an integrated approach to next-generation 9-1-1. The department will adopt such standards in a separate rule proposal. It is not the function of the statewide plan itself to dictate specific components of next generation 9-1-1.

Comment #6: A commenter suggested that funds in the account for distribution to local and tribal government entities provided for in 10-4-304(2)(a), MCA should be

primarily used to fund local governments' "deployment of 9 1 1 systems" and that funds in the grant account provided for in 10-4-304(2)(b), MCA, while available to both local government entities and private telecommunications providers, should be prioritized for providers.

Response #6: This comment is beyond the scope of this proposed rulemaking. Although the department respects the commenter's opinion, the statutes do not specify that funds collected in the account established in 10-4-304(2)(a), MCA are earmarked for deployment of local government 9-1-1 systems. Pursuant to 10-4-107(2)(h), MCA, the department was required to "establish allowable uses of funds by local and tribal governments that host public safety answering points that receive distributions pursuant to 10-4-305." The department has established such allowable uses in rule at ARM 2.13.314 and distributes funds to local governments in accordance with the ARM and the requirements in 10-4-305, MCA.

Regarding the 9-1-1 grant account, the department must make funds available to both local government entities that host a public safety answering point and to private telecommunications providers as provided in 10-4-306(1), MCA. In doing so, the department applies the statutory preference stated in 10-4-306(3), MCA, which gives first priority to "requests by private telecommunications providers or by local government entities that host public safety answering points by working with a private telecommunications provider" and second priority to "requests by local government entities that host public safety answering points."

Comment #7: One commenter noted similarities between the discretionary criterion in ARM 2.13.407(2)(b) and the statutory mandate in 10-4-306(2), MCA. Given the similarity, the commenter sought clarification that an applicant would be required to meet the funding eligibility requirement in 10-4-306(2), MCA, notwithstanding the statement in ARM 2.13.407(3) allowing the department to award a grant "even if the applicant does not meet all of the criteria listed in (2)."

Response #7: The department has added language at the end of (3) to clarify that it must be clear from the application that the applicant is requesting funds to support an allowable project or expense identified in 10-4-306(2), MCA. All applicants must demonstrate their project or expense is eligible for funding under 10-4-306(2), MCA. When making an award, in the context of comparing applications that are eligible under 10-4-306(2), MCA, the department may consider the degree of impact on planning, implementation, operation, or maintenance of 9-1-1 systems, 9-1-1 services, or both as provided in ARM 2.13.407(2)(b).

By: /s/ John Lewis  
John Lewis, Director  
Department of Administration

By: /s/ Don Harris  
Don Harris, Rule Reviewer  
Department of Administration

Certified to the Secretary of State January 21, 2020.