



ESSER & HVAC: What school districts need to know

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By this point in time, it will come as no surprise to school districts that they are the recipients of federal grant funding through the Elementary and Secondary School Emergency Relief (ESSER) Fund. As of late March 2021, school districts have received two rounds of this funding, known as ESSER I and ESSER II, respectively, and a third round of funding (ESSER III) is right on the horizon. As a result, school districts are identifying the best ways to spend these incoming funds.

The authorizing [federal legislation](#) specifically permits the use of ESSER for “testing, repairing, and upgrading projects to improve air quality in school buildings.” Many school districts have identified an interest in using their ESSER funds for HVAC improvement projects.

There are, however, some important things that school districts must keep in mind when using these funds.

1. The procurement must comply with state law.

This requirement is likely familiar to school districts, but should always be kept in mind. As a political subdivision, the school district must always comply with state procurement law. The “default” procurement for school districts is provided in Section 3313.46 of the Revised Code, which requires the school district to use sealed bids for contracts to “repair” or “improve” school buildings, including HVAC improvement projects. However, other state statutes establish alternative procurement methods the school district may use. For example, Section 167.081 of the Revised Code allows school districts to utilize cooperative purchasing through a council of governments in lieu of bidding the project itself. The school district 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.

2. The procurement must comply with federal law.

Because the ESSER funding is federal grant money, the school district 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 the school district to use either a sealed bidding process or a competitive proposal process. These options line up with the sealed bidding process of R.C. 3313.46, 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 HVAC contractor must itself have complied with the requirements of the Uniform Guidance; it is ultimately the school district’s responsibility to confirm this federal compliance. As discussed above, the cooperative purchasing program utilized must also comply with the requirements of state law.

3. Federal prevailing wage will apply to the project.

Finally, another federal law is implicated. The Davis-Bacon Act applies to all contracts exceeding \$2,000 for the “construction, alteration, or repair” of public buildings that are funded, either in whole or in part, with federal funds. The Davis-Bacon Act requires the HVAC contractor to pay locally prevailing wages to their laborers. Additionally, the Davis-Bacon Act mandates that specific contractual provisions be included in the contract between the school district and the HVAC contractor.

Using ESSER funding for HVAC improvements is a great way for school districts to improve the air quality in their buildings to safeguard their students, staff and the community. However, using these funds does impose two sets of procurement laws with which the school district must comply, both of which could be subject to review by auditors. School districts should work with legal counsel experienced in both state and federal procurement law to ensure that the selection of an HVAC contractor, the contract with that contractor, and the authorizing board resolution are in compliance with all applicable law and appropriately documented.

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