



ESSER III: Funding school construction

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By now, you are likely aware that the federal government has issued three rounds of relief funding to Ohio school districts in response to the coronavirus pandemic, which many school district leaders consider a once-in-a-lifetime opportunity to address some of their facilities needs while promoting the health and safety of district students. The most recent round—created by the American Rescue Plan and referred to as ESSER III or ARP ESSER—is the largest round so far and made \$4.5 billion available to Ohio school districts. To the extent that school districts still have ESSER funds, many are wondering how and to what extent these remaining funds may be used for construction and facilities improvements. The relevant authorizing legislation expressly allows these funds to be used for repairs and improvements to school facilities to “reduce risk of virus transmission and exposure to environmental health hazards” and for performing HVAC and other improvements to “improve the indoor air quality” of school buildings.

The Ohio Department of Education (ODE) has approved a wide variety of facility improvements under this language. Examples of approved facility improvements are: (1) new construction of, or improvements to, existing outdoor facilities that will allow students the opportunity to spend part of their day in fresh air consistent with CDC recommendations; and (2) projects creating additional square footage that facilitate social distancing such as an addition to an existing building or even the construction of a new facility. However, even though these are approved uses of ESSER funds, the ODE reviews the Comprehensive Continuous

Improvement Plan (CCIP) applications for the funds with some level of scrutiny. Therefore, care must be taken when drafting CCIP applications to make clear that the project relates to reducing the risk of the virus' spread. Experienced construction counsel can assist the school district in revising CCIP applications that were submitted to ODE prior to the August 20, 2021, deadline.

Fortunately, ESSER III funds may be used to fund an improvement in conjunction with other funding sources. For example, the school district may look to use ESSER III funds in combination with a voted levy or bond issue to construct a project. Alternatively, school districts may couple these funds with a lease-purchase arrangement under R.C. 3313.375 and avoid the need to go to their voters altogether, assuming a sufficient existing cash flow. School districts should consult experienced public finance counsel to further explore these financing options. It is important to remember, however, that if ESSER III funds are used on even a portion of a project, all of the federal requirements discussed below are applicable.

School districts should be aware of the additional procurement requirements applicable to using federal funding for construction projects. For example, school districts will need to ensure the procurement of construction professionals complies with uniform guidance under federal law, along with the state law requirements that would ordinarily apply to such projects.

Also, there are a host of contractual provisions required to be included in the construction contract to fully ensure federal compliance. Typically, this is achieved by incorporating a federal law exhibit that is attached to a contract.

The Davis-Bacon Act applies to ESSER-funded or assisted contracts in excess of \$2,000 for the construction, alteration or repair (including painting and decorating) of public buildings or public works, including Ohio school district projects that are otherwise exempt from prevailing wage requirements. Davis-Bacon triggers an obligation on the contractors and subcontractors to pay federal prevailing wage. School districts are also required to review prevailing wage reports for compliance. Therefore, experienced construction counsel can assist the school district in navigating the unfamiliar waters of federally-funded construction with Davis-Bacon requirements. It is also important to note that one of the most common sticking points for auditors on ESSER-funded projects appears to be for failure to comply with the Davis-Bacon Act.

In sum, ESSER III funds have provided school districts with a unique opportunity to address some of their existing facilities needs while promoting the health and safety of district students. However, this opportunity has led to an apparent increase in audits. If school districts find themselves with an audit, our experienced construction counsel can provide assistance.

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