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## Federal Procurement Requirements Apply When Using ESSER Funds for Construction Projects

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As of March 2021, the federal government has authorized three rounds of COVID relief grant funding through the Elementary and Secondary School Emergency Relief (ESSER) Fund (i.e., ESSER I, enacted on March 27, 2020; ESSER II, enacted on December 27, 2020; and ESSER III, enacted on March 11, 2021). Local educational agencies (LEAs) have until September 30, 2024, to spend ESSER III funds. With the flood of funds that have come in since March 2020, questions have arisen related to their use in construction projects. This article focuses on the use of ESSER funds for construction projects based on the questions we have received to date in that area. However, LEAs should be aware that the federal procurement regulations apply when procuring any property or services with federal funds.

Based on the California Department of Education's (CDE) Frequently Asked Questions for capital expenditures for federal stimulus funding (FAQs), ESSER funds are authorized for construction projects, as long as the project in question is needed to prevent, prepare for, and respond to COVID-19. Allowable uses of ESSER funds also specifically include testing, repairing, and upgrading projects to improve air quality in school buildings. Additionally, according to the CDE's FAQs, school districts may use ESSER funds for related construction costs resulting from an eligible project, including all California Building Standards Code compliance, such as structural, fire and life safety, access compliance and energy code compliance.

LEAs using funds through ESSER III are required to have an ESSER III Expenditure Plan adopted by their governing board on or before October 29, 2021 and submitted to the county office of education within five days of adoption. The Expenditure Plan must describe how the LEA plans to use ESSER III funds to improve the academic, social, emotional, and mental health of students, and/or to curtail achievement and learning inequality deepened by the COVID-19 pandemic. As we near the October 29, 2021, deadline for submitting an ESSER III Expenditure Plan, there are some important considerations for local agencies to be aware of when using ESSER funds for construction projects.

### 1. Federal procurement regulations apply to contracts funded by ESSER

In general, recipients and subrecipients of federal awards must comply with Part 200 of Title 2 of the Federal Code of Regulations, known as the Uniform Guidance. This is the

basis for the CDE's advice that, when using ESSER funds, local agencies must follow federal procurement requirements in place during the grant period of the funding source that is being used.

Per the federal procurement rules, local agencies must use a formal procurement method when the value of the property or services to be procured exceeds \$250,000. Formal procurement methods include either a sealed bid process, which is preferred for construction projects, or a competitive proposal process, which is generally used when conditions are not appropriate for the use of sealed bids.

When the value of the property or services to be procured does not exceed \$250,000, local agencies may use an informal procurement method to expedite the completion of the transactions and minimize the associated administrative burden and cost.

The specific requirements for both informal and formal procurement methods under the federal rules are highly technical. The federal regulations also contain some exceptions where noncompetitive procurement may be allowed, but those exceptions are limited. As such, local agencies should consult the Uniform Guidance and legal counsel to ensure compliance and to determine if an exception could apply to the local agency's specific situation.

## **2. Expenditures of ESSER funds must also comply with state requirements.**

Local agencies must have and use their own documented procurement procedures, consistent with state, local and tribal laws and regulations for the acquisition of property or services to be procured under a federal award or subaward. In other words, when LEAs use ESSER funds for a construction project, they must comply with both the federal procurement requirements and with state law.

## **3. ESSER funds can be used for purchases that have already been made, subject to some limitations and requirements.**

ESSER funds can be used for pre-award costs dating back to March 13, 2020, when the COVID-19 national emergency was declared. However, when using ESSER funds for a purchase that has already been made, the purchase must have been during the grant period (i.e., March 13, 2020 to September 30, 2022) and all federal requirements must have been met with respect to the bidding process and construction regulations. The LEA must also show that the purchase was necessary, reasonable, and allocatable in response to COVID-19.

## **4. Additional federal regulations apply to construction projects.**

LEAs must also follow applicable federal construction regulations, such as safety and health standards, energy conservation, and Davis-Bacon prevailing wage rules. Additionally, the federal rules require that any contract for the procurement of services or property contains, if applicable, addressing the following provisions:

- Administrative, contractual, and legal remedies
- Equal Employment Opportunity
- Davis-Bacon Act
- Work Hours and Safety Standards Act
- Clear Air Act

- Debarment and Suspension
- Byrd Anti-Lobbying Amendment

## Takeaways

ESSER funds are permitted to be used for a construction project if the project is needed to prevent, prepare for, and respond to COVID-19. When using ESSER funds for construction projects, LEAs must ensure that they comply with the federal procurement requirements, state law, and other applicable federal construction regulations. LEAs should consult with legal counsel to ensure compliance with these requirements and avoid an audit resulting in having to pay back the funds.

If you have any questions about the use of ESSER funding for construction projects, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcasts](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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