

MEMORANDUM

TO: Joy Hofmeister, State Superintendent of Public Instruction

FROM: Brad Clark, General Counsel

DATE: July 15, 2021

RE: Elementary and Secondary School Emergency Relief Fund (ESSER) – Use of Funds

The Oklahoma State Department of Education, Office of Legal Services, has been requested to provide an analysis of allowable activities and uses of funds under the federal Coronavirus relief funds. More specifically, whether construction activities are allowable uses of the ESSER emergency relief grants funds provided through the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the Coronavirus Response and Relief Supplemental Appropriations (CRRSA) Act and/or the American Recovery Plan (ARP).

Within each of the aforementioned federal laws, it is specifically authorized that ESSER funds may be used for “any activity authorized by the ESEA [Elementary and Secondary Education Act] of 1965.” *See* Section 18003(d)(1) of the CARES Act, Section 313(d)(1) of the CRRSA Act, Section 2001(e)(2)(A) of the ARP Act; *see also* Title VII of the ESEA and 2 CFR § 200.439(b)(1). Under the ESEA’s Impact Aid program, a local educational agency (LEA) may use funds provided thereunder for construction activities¹. As such and consistent with the requirements below, as an allowable activity under the ESEA’s Impact Aid program, LEAs may lawfully use ESSER funds for construction activities. Complementary to the Impact Aid analysis, additional provisions of federal pandemic relief laws provide support for the authorization of construction activities with federal relief funds. Under the CRRSA Act and the ARP, LEAs are authorized to use relief funds for “[s]chool facility repairs and improvements to enable operation of schools to reduce risk of virus transmission and exposure to environmental health hazards, and

¹ The Impact Aid definition of “construction” is: a) the preparation of drawings and specifications for school facilities; (B) erecting, building, acquiring, altering, remodeling, repairing, or extending school facilities; (C) inspecting and supervising the construction of school facilities; and (D) debt service for such activities.” ESEA section 7013(3), 20 U.S.C. § 7713(3).

to support student health needs.” See Section 313(d)(13) of the CRRSA Act and Section 2001(e)(2)(O). Furthermore, on May 26, 2021, the United States Department of Education issued [guidance](#) on the Elementary and Secondary School Emergency Relief (ESSER) programs. While the guidance expressly supports that LEAs may use ESSER funds for construction projects, there are requirements in Uniform Grant Guidance (UGG), USDE regulations and Oklahoma law that Oklahoma LEAs must be aware of and adhere to.²

Purpose of ESSER. As is the case with all activities charged to the ESSER funds, construction costs must be reasonable and necessary to meet the overall purpose of the program, which is to “prevent, prepare for and respond to” COVID-19. See CARES Act, CRRSA Act and ARP Act “Department of Education, Education Stabilization Fund” heading; see also 2 CFR §§ 200.403-200.405. Therefore, any construction activities, including renovations or remodeling, that would be necessary for an LEA to prevent, prepare for, and respond to COVID-19 would be permissible. This might include renovations that would permit an LEA to clean more effectively (ex: replace carpet with tile that is more easily cleaned) or creating a learning environment that may better sustain social distancing (ex: renovate or add wing of a school to be in compliance with fire and safety code in order to reopen it to create more space for students and personnel to maintain appropriate distancing).

In its May 26 guidance, the USDE notes that while the Impact Aid definition of “construction” is broad so as to expressly include “erecting and building” (i.e., new construction), LEAs are discouraged from using ESSER funds for *new* construction because:

this use of funds may limit and LEAs ability to support other essential needs or initiatives. Remodeling, renovation, and new construction are often time-consuming, which may not be workable under the shorter timelines associated with ESSER and GEER funds. See Guidance, at p. 24 (B-6).³

The OSDE agrees with the USDE’s guidance with respect to the discouragement of using these funds for *new* construction and emphasizes that repairs and improvements to facilities is 1 of 15 authorized uses of ESSER funds. As such, districts are urged to consider uses of funds for purposes that are directly related to student instruction and health and safety in responding to COVID-19. Beyond this, there are additional requirements that must be adhered to for any construction project paid for with ESSER funds.

Assurances. As a condition of receipt and continued authorizations to use ESSER funds, LEAs submitted to the OSDE and USDE a set of assurances, including that the LEA will comply with all applicable Federal, State and local laws, regulations, standards and policies. For purposes of construction, an example would be adherence to the applicable health and safety (building) codes.

² In addition to the requirements under federal law, Oklahoma law was recently amended to authorize a school district to place in an established building fund monies allocated through the CRRSA Act and/or the ARP Act. 70 O.S. § 1-118 (Senate Bill 1037, 2021).

³ LEAs should also give consideration to B-7 (improvements to school facilities and improvements to indoor air quality) and B-8 (modular units).

Prior approval. 34 CFR § 76.600. Federal regulations require OSDE’s prior written approval of certain costs, such as the purchase of real property, equipment (general⁴ and specific⁵) and other capital expenditures⁶ and travel costs. *See* 2 CFR §§ 200.407, 200.436 and 200.439.

Procurement and prevailing wage. While the Buy American Act does not apply to ESSER funds, awards made under the ARP Act and CRRSA Act are subject to procurement requirements in federal regulations, including the domestic preferences for procurements under federal grants that are subject to UGG. *See generally* 2 CFR §200.318-326; *see specifically* 2 CFR § 200.322 relating to domestic preferences for procurements under Federal grants made after November 12, 2020.

In addition, an LEA that uses ESSER funds for minor remodeling, renovation, repair, or construction contracts over \$2,000 must meet all [Davis-Bacon](#) prevailing wage requirements and include language in the contracts that all contractors or subcontractors must pay wages that are not less than those established for the locality of the project (prevailing wage rates). (See 20 U.S.C. 1232b Labor Standards.)

Construction specific regulations. Federal regulations, at 34 CFR § 76.600 and 75.600-75.618, require recipients of federal funds to give consideration and take action on certain matters prior to initiating a construction project. Examples of these requirements include:

1. **Environmental impact assessment.** Has the grantee completed an environmental impact assessment before initiating the construction and fully considered any potential environmental ramifications before proceeding with the project (34 CFR § 75.601);
2. **National Register of Historic Places.** Has the grantee considered the probable effects of proposed construction on any district, site, building, or structure that is included or eligible for inclusion in the National Register of Historic Places (34 CFR § 75.602)
3. **Title and right of access.** Does the grantee have title or other interest in the site, including right of access, that is sufficient to ensure that the grantee will have use and possession of the facility for 50 years or the useful life of the facility, whichever is longer (34 CFR § 75.603);

⁴ General Purpose Equipment is defined to mean “equipment which is not limited to research, medical, scientific or other technical activities. Examples include office equipment and furnishings, modular offices, telephone networks, information technology equipment and systems, air conditioning equipment, reproduction and printing equipment, and motor vehicles. *See* 2 CFR § 200.1

⁵ Special purpose equipment is defined to mean equipment which is used only for research, medical, scientific, or other technical activities. Examples include microscopes, x-ray machines, surgical instruments, and spectrometers. *See* 2 CFR § 200.1.

⁶ Capital expenditures is defined to mean “expenditures to acquire capital assets or expenditures to make additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations, or alterations to capital assets that materially increase their value or useful life.” *See* 2 CFR § 200.1 Further, “capital assets” includes “land, buildings (facilities), equipment, and intellectual property (including software) whether acquired by purchase, construction, manufacture, exchange, or through a certain lease structures.” *Id.*

4. Time – plans, advertising, bids and construction. Can the grantee begin the approved construction in a reasonable time period and have the final plans been approved before the construction is advertised or placed on the market for bidding (34 CFR § 75.605);
5. Time – completion of project. Can a grantee complete the project in a reasonable time period and consistent with the approved plans and specifications (34 CFR § 75.606);
6. Project design. Is the construction functional, economical, and not elaborate in design or extravagant in the use of materials as compared to other facilities in the State or other applicable geographic area (34 CFR § 75.607);
7. Safety and accessibility. Do the grantee’s plans and designs for the facilities comply with applicable Federal, State and local health and safety standards, as well as Federal requirements regarding access by persons with disabilities. (34 CFR §§75.609 and 75.610); and
8. Operation and maintenance. Does the grantee have sufficient operational funds to operate and maintain the facility once the construction is complete and will the grantee operate and maintain the facility in accordance with all applicable Federal, State, and local requirements (34 CFR §§ 75.614 and 75.615).
9. Assurances. Has the grantee completed the assurances relating to labor standards, flood hazards, historic preservation, health and safety, energy conservation and coastal barrier resources. OMB Standard Forms 24B and D.
10. Insurance. Has the grantee insured the real property and equipment acquired or improved, and has the grantee consulted with the Department on disposition instructions in the event that the property or equipment is no longer needed. See, e.g., 2 CFR §§ 200.310-200.313.
11. HVAC system standards. If an LEA uses funds for HVAC systems, the Department’s regulation at 34 CFR § 75.616(c) requires the use of American Society of Heating, Refrigeration and Air Conditioning Engineers (ASHRAE) standards.

To the extent a school district is considering planning, budgeting and obligating federal relief funds for construction-related activities, OSDE strongly encourages consultation with the Office of Federal Programs and doing so in advance of planning for construction activities with ESSER funds. School districts are also strongly encouraged to consult with legal counsel and their school auditor.

I hope that this memorandum is helpful to you. Should you have any questions or want to further discuss, please do not hesitate to contact me.