

ESSER Funds for Construction Come With Strings

Many districts are contemplating using ESSER Funds for certain building, remodeling, or related projects. While districts have the ability to use ESSER Funds on such projects, districts should be aware that the use of ESSER Funds, in whole or in part, for construction, alterations, or repairs of public buildings requires compliance with the federal Davis-Bacon prevailing wage law for projects of \$2,000 or more.

Because Wisconsin's prevailing wage law was repealed in 2017, many districts have forgotten about the prevailing wage laws or are not as familiar with them as they used to be. There are federal prevailing wage laws which still exist and while they do not frequently apply to school district projects, they can. ESSER funded projects are one such situation.

If districts are working with architects or engineers, many of those entities are familiar with the Davis-Bacon prevailing wage requirements and include the necessary notices or materials in the applicable bid and contract documents. However, for districts doing projects on their own, they should be aware that they are required to place the Davis-Bacon prevailing wage requirements in the bidding and contract materials. Districts (or their contractors) are also required to post Davis-Bacon wage determinations on job sites.

If a district fails to include the proper notice language in the contract documents, contractors who bid on the project or perform work on the project without paying the prevailing wage rates could make a claim against a district for failure to provide the notice if they paid their employees less than the required prevailing wage for the work performed. Essentially, a district could end up owing a contractor the difference between what the contractor paid its employees for performing the work and what it should have paid its employees for performing the work.

PAYMENT AND PERFORMANCE BONDS

In addition to prevailing wage requirements, any time a district enters into a construction contract, state statutes require that it obtain both a performance and a payment bond for that work. (There is a waiver process for projects under \$148,000, but districts must have written standards and criteria in place before deciding to waive any bonds on a project exceeding \$16,000).

Finally, districts should make sure they are complying with their own internal bidding or procurement policies for any such work. While districts are exempt from state competitive bidding laws, which apply to all other municipal entities, they still should utilize and abide by whatever policies the district may have

implemented over the years.

If you have any questions about any of these issues as you contemplate or proceed with a building project using ESSER Funds, please feel free to reach out to a Boardman Clark attorney who can assist you with these issues.

PRIMARY AUTHOR

Douglas E. Witte

(608) 283-7529

DWITTE@BOARDMANCLARK.COM

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|----------------------|----------------|---------------------------|----------------|--------------------------|----------------|
| ■ Michael J. Julka | (608) 286-7238 | ■ Richard F. Verstegen | (608) 283-7233 | ■ Matthew W. Bell | (608)286-7239 |
| ■ William L. Fahey | (608) 286-7234 | ■ David P. Weller | (608)286-7235 | ■ Christopher T. Schmidt | (608) 286-7157 |
| ■ Eileen A. Brownlee | (608) 822-3251 | ■ Jennifer S. Mirus | (608) 283-1799 | ■ Brian P. Goodman | (608) 283-1722 |
| ■ Douglas E. Witte | (608) 283-7529 | ■ Rhonda R. Hazen | (608) 283-1724 | ■ Daniel T. Fahey | (608) 286-7216 |
| ■ Steven C. Zach | (608) 283-1736 | ■ M. Tess O'Brien-Heinzen | (608) 283-1798 | ■ Eric B. Hagen | (608) 286-7225 |

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