



MEMO: 23-01

DATE: Thursday, June 29, 2023

PROGRAM: ARPA Rural Workforce Housing Land Development Program

SUBJECT: Nebraska Department of Economic Development's Guidance on to How to Address a Federal Interest in Real Property Purchased or Improved with American Rescue Plan Act (ARPA) State and Local Fiscal Recovery Funds (SLFRF) under the Nebraska Rural Workforce Housing Investment Act

*This guidance document remains effective until it is amended, superseded, or rescinded.

This guidance document is advisory in nature but is binding on the Department of Economic Development (DED) until amended. A guidance document does not include internal procedural documents that only affect the internal operations of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules and regulations made in accordance with the Administrative Procedure Act. If you believe that this guidance document imposes additional requirements or penalties on regulated parties, you may request a review of the document.

Please note that federal statutes and the Code of Federal Regulations remain the official source of regulatory information for ARPA programs and SLFRF. The Department will make every effort to keep this information current and correct errors brought to the Department's attention.

Question:

Does the Federal Government retain an interest in real property purchased with American Rescue Plan Act (ARPA) State and Local Fiscal Recovery Funds (SLFRF) via the Nebraska Rural Workforce Housing Investment Act?

Answer: Yes.

Background and History of American Rescue Plan Act

The ARPA was signed into law in March 2021 and provided \$350 billion in relief to states and local governments to combat the continued impact of the COVID-19 pandemic.¹ The U.S. Department of Treasury published the interim final rule (IFR) on May 10, 2021.² The IFR established a framework for determining the types of programs and services eligible

¹ Coronavirus State and Local Fiscal Recovery Funds 87 Fed. Reg. 4338 (Jan. 27, 2022).

² *Id.*

under this program. The ARPA's overall goal is to help support the families, businesses, and communities impacted the most by the COVID-19 pandemic.

The Treasury released the Final Rule (Final Rule) on January 6, 2022, further clarifying the eligible uses for SLFRF and addressing comments and concerns regarding how to use the SLFRF.³

The state of Nebraska received an amount of approximately \$1.04 billion dollars from the ARPA through the Coronavirus State and Local Fiscal Recovery Fund.⁴ Nebraska passed LB1014 (appropriations of the Federal Rescue Plan Act) which granted \$10,000,000.00 of ARPA SLFRF to the Department to invest in parcels of land via the Nebraska Rural Workforce Housing Investment Act (RWHIA) to improve housing stability in rural counties in Nebraska.⁵

Eligible Uses of the SLFRF Funds according to the Final Rule

Specifically, the ARPA provides that the SLFRF funds may be used:

- (A) To respond to the public health emergency or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;
- (B) To respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers;
- (C) For provision of government services to the extent of the reduction in revenue due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year prior to the emergency; and,
- (D) To make necessary investments in water, sewer, or broadband infrastructure.⁶

The Final Rule states that recipients may use funds for capital expenditures that support an eligible COVID-19 public health or economic response.⁷ Recipients may use funds to

³ *Id.*

⁴ Nebraska Department of Economic Development. (2022, July 26). Nebraska Department of Economic Development (DED): American Rescue Plan Act (ARPA) Funding Update. Nebraska Department of Economic Development. NEBRASKA DEPARTMENT OF ECONOMIC DEVELOPMENT (DED): AMERICAN RESCUE PLAN ACT (ARPA) FUNDING UPDATE - Nebraska Department of Economic Development.

⁵ State of Nebraska. (2022). *Rural Workforce Housing Land Development Program Manual* at 4.

⁶ Coronavirus State and Local Fiscal Recovery Funds 87 Fed. Reg. 4338 (Jan. 27, 2022).

⁷ *Id.* at 4339.

build certain affordable housing, childcare facilities, schools, hospitals, and other projects consistent with the Final Rule and the Supplementary Information.⁸

Further, the Final Rule presumes that an expanded set of households or communities are “impacted” or “disproportionately impacted” by the pandemic, thereby allowing recipients to provide responses to a broad set of households and entities without requiring further analysis.⁹

History of the Nebraska Rural Workforce Housing Investment Act (RWHIA)

The Rural Workforce Housing Land Development Program is an authorized use of funding from the Coronavirus State and Local Fiscal Recovery Fund (SLFRF) through the ARPA.¹⁰

The RWHIA was designed to provide state government with resources needed to respond to the COVID-19 pandemic and its economic effects and to build a stronger economic recovery.¹¹ The funds granted under this program allow under Neb. Rev. Stat. § 81-1226:

- (i) Laying of drinking water transmission lines;
- (ii) Rehabilitation, renovation, maintenance, or costs to secure vacant or abandoned properties in disproportionately impacted communities;
- (iii) Costs associated with acquiring and securing legal title of vacant or abandoned properties in disproportionally impacted communities and other costs to position the property for current or future use for the RWHIA;
- (iv) Removal and remediation of environmental contaminants or hazards from vacant or abandoned properties in disproportionately impacted communities, when conducted in compliance with applicable environmental laws or regulations;
- (v) Demolition or deconstruction of vacant or abandoned buildings in disproportionately impacted communities; and
- (vi) Costs associated with inspection fees and other administrative costs incurred to ensure compliance with applicable environmental laws and

⁸ *Id.*

⁹ *Id.*

¹⁰ State of Nebraska. (2022). *Rural Workforce Housing Land Development Program Manual* at 4.

¹¹ *Id.*

regulations for demolition or other remediation activities in disproportionately impacted communities.¹²

Analysis of Eligible Use under SLFRF “Responding to the public health and negative economic impacts of the pandemic.”

Each eligible use category has separate and distinct standards for assessing whether a use of funds is eligible. Uses that are not specifically named as eligible in the final rule may still be eligible in two ways.¹³ First, under the revenue loss eligible use category, where recipients have broad latitude to use funds for government services up to their amount of revenue loss due to the pandemic.¹⁴ Second, the eligible use category for responding to the public health and negative economic impacts of the pandemic provides a non-exhaustive list of eligible uses. This means that there can be uses for funds that are not specifically enumerated.¹⁵

The ARPA established three categories within the eligible use of “to respond to the public health emergency with respect to COVID-19 or its negative impacts...” including (1) public health responses for those impacted by the pandemic, including the general public; (2) responses to the economic impacts that were experienced by those impacted as a result of the pandemic; and (3) additional services either as a public health response or a response to the negative economic impacts of the pandemic, for disproportionately impacted communities.¹⁶

RWHIA Negative Economic Impact and Disproportionately Impacted Group

The grants awarded under the RWHIA is an eligible use under the negative economic impacts with respect to the coronavirus public health emergency.¹⁷ This response is an enumerated eligible use for a presumed impacted or disproportionately impacted households under 31 C.F.R. 35.6(b)(3)(ii)(A)(5).¹⁸

Under the RWHIA, eligible Applicants are incorporated municipalities located within the forty-one (41) rural counties determined by the Department to be disproportionately impacted by the pandemic. “Disproportionately Impacted” rural counties are those that experienced disproportionate public health or economic outcomes from the pandemic when compared to other rural Nebraska Counties.¹⁹ The Department defined as a

¹² *Id.*

¹³ Coronavirus State and Local Fiscal Recovery Funds 87 Fed. Reg. 4339 (Jan. 27, 2022).

¹⁴ *Id.* at 4340.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ State of Nebraska. (2022). *Rural Workforce Housing Land Development Program Manual* at 4.

¹⁸ *Id.* at 6.

¹⁹ *Id.*

disproportionately impacted class of communities, certain rural counties whose labor force was disproportionately impacted by the pandemic.²⁰ These counties were identified as those having a decrease in labor force, or workforce, over the last decade which decrease was exacerbated by the COVID-19 pandemic; median household incomes below the state median; and a higher per capita share of housing cost-burdened households.²¹

Subrecipient Requirements under SLFRF

Those receiving grants (“Awardees”) under the RWHIA are subrecipients.²² A subrecipient is an entity that receives a subaward to carry out a project funded by SLFRF on behalf of the State.²³ A subrecipient is subject to subrecipient monitoring and reporting requirements. Subrecipients must comply with the same requirements the State must comply with such as the treatment of eligible uses of funds, procurement, and reporting requirements under 2 CFR Part 200.²⁴

The Treasury maintains the monitoring and subrecipient reporting requirements outlined in the final rule.²⁵ Per 2 CFR 200.101(b)(2) of the Uniform Guidance, the terms and conditions of federal awards flow down to subawards to subrecipients.²⁶ Therefore, non-federal entities, as defined in the Uniform Guidance, must comply with the applicable requirements in the Uniform Guidance regardless of whether the non-federal entity is a recipient or subrecipient of the federal award.²⁷ This includes requirements such as the treatment of eligible uses of funds, procurement, and reporting requirements.²⁸ If a recipient is providing funds to the individual or entity for the purpose of carrying out a SLFRF program or project on behalf of the recipient, the entity will be a subrecipient, subject to the monitoring and reporting requirements.²⁹

Applying SLFRF funds to the purchase of Real Property

Any purchase of equipment or real property with SLFRF funds must be consistent with the Uniform Guidance at 2 CFR Part 200, Subpart D, unless stated otherwise by the Treasury.³⁰

²⁰ *Id.* at 7.

²¹ *Id.*

²² State of Nebraska. (2022). *Rural Workforce Housing Land Development Program Manual* at 5.

²³ *Id.*

²⁴ *Id.*

²⁵ Coronavirus State and Local Fiscal Recovery Funds 87 Fed. Reg. 4394 (Jan. 27, 2022).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ State of Nebraska. (2022). *Rural Workforce Housing Land Development Program Manual* at 17.

2 CFR 200.311 Real Property states the following:

- (a) **Title.** Subject to the requirements and conditions set forth in this section, title to real property acquired or improved under a Federal award will vest upon acquisition in the non-Federal entity.
- (b) **Use.** Except as otherwise provided by Federal statutes or by the Federal awarding agency, real property will be used for the originally authorized purpose as long as needed for that purpose, during which time the non-Federal entity must not dispose of or encumber its title or other interests.
- (c) **Disposition.** When real property is no longer needed for the originally authorized purpose, the non-Federal entity must obtain disposition instructions from the Federal awarding agency or pass-through entity. The instructions must provide for one of the following alternatives:
 - (1) Retain title after compensating the Federal awarding agency. The amount paid to the Federal awarding agency will be computed by applying the Federal awarding agency's percentage of participation in the cost of the original purchase (and costs of any improvements) to the fair market value of the property. However, in those situations where the non-Federal entity is disposing of real property acquired or improved with a Federal award and acquiring replacement real property under the same Federal award, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.
 - (2) Sell the property and compensate the Federal awarding agency. The amount due to the Federal awarding agency will be calculated by applying the Federal awarding agency's percentage of participation in the cost of the original purchase (and cost of any improvements) to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the Federal award has not been closed out, the net proceeds from sale may be offset against the original cost of the property. When the non-Federal entity is directed to sell property, sales procedures must be followed that provide for competition to the extent practicable and result in the highest possible return.
 - (3) Transfer title to the Federal awarding agency or to a third party designated/approved by the Federal awarding agency. The non-Federal entity is entitled to be paid an amount calculated

by applying the non-Federal entity's percentage of participation in the purchase of the real property (and cost of any improvements) to the current fair market value of the property...

SLFRF Final Rules FAQ 13.16 further addresses the real property disposition question. It states:

Question 13.16 asks, "What are the use and disposition requirements for assets purchased with SLFRF funds?"

The relevant portion of the answer reads as follows:

During the period of performance, a recipient may use property, supplies, or equipment purchased or improved with SLFRF funds for a purpose other than the purpose for which it was purchased or improved if such other purpose is also consistent with the eligible use requirements. If a recipient changes the use of an asset to an ineligible use or sells the asset prior to the end of the period of performance, then the recipient must follow the disposition procedures in the Uniform Guidance. See 2 CFR 200.311, 200.313, 200.314, and 200.315.

After the period of performance, the property, supplies, or equipment must be used consistent with the purpose for which it was purchased or improved or for any other eligible purpose in the same category as the purpose reported to Treasury as of the final reporting period...

Recipients are responsible for being able to substantiate their determinations on whether the use of an asset is authorized and maintain a record of that determination in accordance with the requirements set forth in the financial assistance agreement accepted in connection with their award. Recipients are not required to seek or obtain the approval of Treasury prior to changing the use within the parameters of the authorized purpose.

Period of performance is defined as "the total estimated time interval between the start of an initial Federal award and the planned end date, which may include one or more funded portions, or budget periods. Identification of the period of performance in the Federal award per § 200.211(b)(5) does not commit the awarding agency to fund the award beyond the currently approved budget period."³¹

³¹ Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. 78 FR 78608 at 78616 (2013).

According to the ARPA, the SLFRF must be used for costs incurred on or after March 3, 2021. Funds must be obligated by December 31, 2024, to December 31, 2026.³² The time period during which recipients can spend SLFRF funds is the period of performance.

Thus, during the period of performance, real property purchased or improved with SLFRF funds that is converted to an ineligible use or is sold as an asset prior to the end of the period of performance is subject to 2 CFR 200.311 disposition guidelines. However, according to FAQ 13.16, after the period of performance, the real property must continue to be used for the purpose it was purchased or improved for or any other eligible purpose in the same category as the purpose reported to Treasury. As such, if the use of the property is changed to an ineligible use or to a different category than reported to Treasury, Treasury must be reimbursed.

Real property purchased and improved using SLFRF funds, and then sold to private parties as would be done for the RWHIA program, would no longer be used for the originally intended purpose, as the homes would be owned by private parties. Even after period of performance, the federal government would have an interest in the property, and the money contributed from SLFRF funds would need to be returned to the Treasury upon sale of the property to private parties.

Guidance

Due to the above stated requirements for use of real property purchased or improved with SLFRF funds, any real property purchased or improved with SLFRF funds must continue to be used for eligible uses both during the period of performance and afterwards. While there is an allowance for a slight shift in the use of the real property after the period of performance, it does not allow for the property to be used for uses outside its final eligible use category as reported to Treasury. If that type of use should occur, Treasury must be reimbursed. Under RWHIA the real property will be improved and sold to private parties after improvement of the land. Because the use of the land after sale and after the period of performance does not fall under the original eligible purpose category, the federal government holds an interest in the properties purchased under this program. As such, the government's interest in this land should be written and tracked by filing the written notice of interest in the county public records.³³ Once the private parties purchase these properties, the funds from the sale will be used to pay the Treasury back and the federal interest on the real property should be released.

END OF GUIDANCE MEMORANDUM

³² Coronavirus State and Local Fiscal Recovery Funds 87 Fed. Reg. 4426 (Jan. 27, 2022).

³³ An example of a Notice of Federal Interest is attached as Exhibit "A."

Exhibit "A"

How to Record a Notice of Federal Interest (NFI)

General

1. Within the United States, except Hawaii, the NFI must be filed in the county or district office in which the facility is located. Often this is the County Court Clerk, Probate Office or the Register of Deeds. In the State of Hawaii, the NFI must be filed with the State Department of Land and Natural Resources, Bureau of Conveyances.
2. Please understand that local governments may have different formatting requirements. It is important to check with the office before filing, as it may save you an extra trip.
3. The county government will provide a copy of the recorded NFI with the county stamp, with a date, and either receipt information, or the final reference number (book and page, file, etc.).

NFI Document¹

1. The grant number must reference to the appropriate Grant No, i.e., CXXCSXXXXX.
2. The description of the project should clearly describe the new construction project, or alteration and renovation. The NFI does not apply to moveable equipment (though equipment does have Federal Interest, as do alteration and renovation projects below the NFI filing threshold).
3. The legal description should be preferably the full legal description of the property in the deed. However, Township and Range, or Map, Block, and Lot number will be accepted. A physical address may be included, but does not constitute a legal description in itself.
4. The restrictive language of the template may not be modified.
5. The signatory of the NFI should be the owner of the property. This indicates the owner's consent to have a lien filed on the property.
6. The NFI must then be notarized and embossed with a notary seal.
7. The NFI must then be recorded with the county government.

¹ A sample NFI is available at <http://bphc.hrsa.gov/policiesregulations/capital>.

Example of a Correctly Filed NFI
[Page 1]

STATE OF ALABAMA

A COUNTY

Correct Grant No. and
purpose of award.

NOTICE OF FEDERAL INTEREST

On June 25, 2009, the Health Resources and Services Administration awarded Grant Number [redacted] Inc. The grant provides funds for the construction of What Health Services' What Health Center, which is located on the land described below in A County, Alabama:

SEE EXHIBIT "A" ATTACHED HERETO AND INCORPORATED HEREIN BY THIS REFERENCE.

The Notice of Award for this grant includes conditions on use of the aforementioned property and provides for a continuing Federal interest in the property. Specifically, the property may not be (1) used for any purpose inconsistent with the statute of any program regulations governing the award under which the property was acquired; (2) mortgaged or otherwise used as collateral without the written permission of the Associate Administrator, Office of Federal Assistance Management (OFAM), Health Resources and Services Administration (HRSA); or (3) sold or transferred to another party without the written permission of the Associate Administrator, OFAM, HRSA. These conditions are in accordance with the statutory provisions set forth in the American Recovery and Reinvestment Act, Title 45 CFR part 74 or 92 as applicable, the HHS Grants Policy Statement, and other terms and conditions of award.

These grant conditions and requirements cannot be nullified or voided through a transfer of ownership. Therefore, advance notice of any proposed change in usage or ownership must be provided to the Associate Administrator, OFAM, HRSA.

Correct restrictive information

WHAT HEALTH SERVICE

By: X
X

Its President and CEO

Date: July 17, 2009

Signed by the
property owner (in this
case, the grantee)

Recorded with the County
Records Office

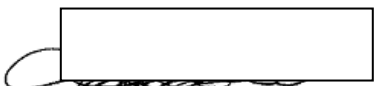
Recorded In RPB BK 25 PG 62, 07/22/2009 02:16:33 PM Recording Fee 15.50, TOTAL 15.50
Jerry C. Pow, Probate Judge, H. County, Alabama

Example of a Correctly Filed NFI
[Pages 2 and 3]

STATE OF ALABAMA
A COUNTY

On this the 17th day July, 2009, before me, the undersigned, a Notary Public for the State of Alabama at Large, personally appeared before me and is known to be the person who executed this instrument on behalf of said What Health Service, and acknowledged to me that he executed the same as the free act and deed of said Corporation.

Witness my hand and official seal.


Notary Public
My Commission Expires: 4/21/2012

PPB 23 62

↑
Notarized

↑
Recorded with
the County
Records Office

EXHIBIT "A"

A parcel of land 230' x 15' beginning at the NE corner of Lot #6, Blk 4, Bloc Height, Then W and S ROW of First Avenue, 230'(S), Then S 145', Then W 20', Then S 22'(S). Then E 15'(S), Then N 50', Then E 220', Then N with W ROW of School Street, 158' (S) to POB. West Bloc, Alabama Book 2 Page 37.

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↑
Correct Legal
Description

PPB 23 62