Permissible Uses of CARES Act Grant Funds by Airport Sponsors

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If there is anything to be learned from the FAA's distribution of the $10 billion in funds allocated to airports in the Coronavirus Aid, Relief, and Economic Security (CARES) Act, it is that allocating billions of dollars in just a few weeks is more difficult than it sounds. On March 27, 2020, the CARES Act was signed into law as Public Law No. 116-136. The CARES Act is aimed at mitigating the effects of the COVID-19 pandemic on most segments of American business and infrastructure. Title XII of the Act specifically supports airports by directing the FAA to make $10 billion available based on each airport's level of operations and debt. However, when it came to calculating each airport's share of the pie, the FAA botched the process by employing a formula that allocated massive amounts to some smaller airports while snubbing larger, busier airports.

In April, the FAA attempted to correct the problem by capping each airport's CARES Act funding at four times the airport's annual operating budget. The FAA then issued guidance stating that grant funds not used within four years are "subject to recovery by the FAA," and designated a four year "period of performance" pursuant to 2 C.F.R. section 200.309. In other words, if you don't use it, you lose it. But just as the FAA has experienced hiccups distributing the grant funds, airport sponsors will inevitably encounter thorny regulatory issues as they attempt to spend millions of dollars in new grant funding while navigating their compliance obligations under the CARES Act. This begs the question, "What are permissible uses of CARES Act grant funds by airport sponsors?"

The FAA has explained that CARES Act funds may be used "for any purpose for which airport revenues may be lawfully used." The general rule is that revenues generated by a public airport may only be expended for the capital and operating costs of: (1) the airport; (2) the local airport system; or (3) other facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property. (*See* 49 U.S.C. §§ 47107(b)(1) and 47133(a).)

Permissible expenditures of CARES Act grant funds that are particularly noteworthy in the wake of COVID-19 include:

- **Payroll**
- **Legal Fees** (including the costs of COVID-19 related litigation, Part 16 actions, and legal fees incurred to protect the airport's interests in bankruptcy proceedings initiated by tenants or other airport users)
- **Debt Servicing**
- **Prepayment of Long Term Contracts** (for example: shuttle services, security, fire and police services, and janitorial services)
- **Promotion of the Airport**
- **New Airport Development Projects** (to use CARES Act grant funds for development or construction contracts awarded after March 27, 2020, airport sponsors should contact their local Airports District Offices since additional requirements will apply to such funds)
- **Purchasing Avigation/Aviation Easements** (subject to 49 U.S.C. §§ 47107(b) and (k)(2), which require that the expenditure is an operating cost that reflects the value received; note that this may also be considered "airport development" subject to additional requirements)
- **Ground Access Projects** (these are considered airport development projects which are permissible but subject to additional requirements)

After applying for CARES Act grant funds, airport sponsors will be required to submit documentation such as payroll receipts and invoices in order to submit payment requests through the Department of Transportation's eInvoicing system. Further, the FAA has clarified that "grants for operating expenses may not include activities prior to January 20, 2020."

Notably, the statutory scheme permits sponsors to use airport revenue for other facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property. "Owned" means that the airport owner or operator holds legal title to the facilities for which airport revenue is used. (*See* FAA Bulletin 1: Best Practices – Surface Access to Airports (2006).) "Operated" means that the local or state government or authority that owns or operates the airport is legally responsible for the operation of the facility and operates the facility either with its own employees or through a management contract with another public agency or a private firm. (*See id.*) "Directly and substantially related to the air transportation of passengers," is a standard that the FAA interprets on a case-by-case basis with a focus on whether the project or facility is intended primarily for users of the airport. For example, as applied to a ground access project, "directly and substantially related to the air transportation of passengers," means that the project is intended primarily for the use of airport passengers (air passengers, airport employees, airport visitors), *i.e.*, it is designed and constructed for ground transportation to the airport, and is projected to be used primarily by airport passengers. (*See id.*)

The use of airport revenue for purposes other than airport capital or operating costs is generally considered "revenue diversion" and is prohibited by federal law. (*See* Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696, 7720 [FAA Revenue Use Policy].) Likewise, the use of CARES Act grant funds for purposes not permitted by the statutory scheme could subject the airport sponsor to FAA enforcement actions or other administrative penalties.

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