

Although construction is an allowable use of ESSER funds, the U.S. Department of Education discourages use of ESSER funds as such for several reasons delineated in the [ESSER and GEER FAQ Document](#) (see page 24). As noted in the FAQ, any LEA using ESSER or GEER funds for remodeling, renovation, and new construction must comply with additional federal requirements. Approved construction projects (i.e., remodeling, renovation, repairs, and new construction) must comply with applicable [Uniform Guidance requirements](#), [Davis-Bacon prevailing wage requirements](#), and all of the U.S. Department of Education's applicable regulations regarding construction at [34 CFR §§ 76.600](#) and [75.600-75.618](#), as well as OMB Standard Forms [24B](#) and [D](#) (Assurances for Non-Construction and Construction Programs). Construction must occur within the award period for the grant (beginning after 3/13/20 and completed by 9/30/22 for ESSER I, 9/30/23 for ESSER II, and 9/30/24 for ESSER III).

The following requirements must be met to receive approval to use ESSER funds for construction. LEAs must maintain appropriate documentation to demonstrate that these requirements have been met.

Reasonable and Necessary

Construction must be reasonable and necessary to respond to, prepare for, or prevent the spread of COVID-19. [See 2 CFR §§ 200.403-200.404]

Prior Written Approval

All construction projects require prior written approval from the State Educational Agency (CDE) [See Title VII of the ESEA and 2 CFR § 200.439(b)].

CDE's prior written approval process consists of a fully fleshed-out budget line item that includes a description of the project, date project began/is to begin, and projected completion date, submitted as part of the ESSER I, II, or III application. LEAs are allowed to submit just the construction-related budget line(s) to request prior written approval. LEAs are permitted to ask for a retroactive prior written approval for COVID-19 related construction projects that began after March 12, 2020, but before the release of ESSER II funds at the end of December 2020 (before CDE and LEA's knew construction was allowable). When doing so, LEAs have the responsibility to ensure that completed projects comply with all the applicable regulations delineated in this guidance document.

Davis-Bacon Act

As is the case with all construction contracts using laborers and mechanics financed by Federal education funds, an LEA that uses ESSER or GEER 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.)

It is the LEA's responsibility to ensure that prevailing wages were paid for all labor costs prior to requesting to use ESSER funds for such construction.

All Construction Regulations under Part 75 (34 CFR §§ 75.600-75.618)

The following Part 75 requirements must be considered and, if applicable, met before requesting use of ESSER funds for construction purposes:

- 1) Has the LEA 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) Has the LEA 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) Does the LEA have title or other interest in the site, including right of access, that is sufficient to ensure that the LEA 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) Can the LEA 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) Can the LEA complete the project in a reasonable time period and consistent with the approved plans and specifications (34 CFR § 75.606);
- 6) 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) Do the LEA'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) Does the LEA 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)?

Insurance and Disposition of Property

If ESSER and GEER funds are used for construction, grantees and subgrantees should also be aware that real property and equipment acquired or improved under a federal award must be appropriately insured and grantees must consult 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].

Buy American Act (Construction Projects after November 12, 2020)

Construction projects may be subject to the Buy American Act, if funded under ESSER II or ARP ESSER III. This act requires that to the extent practicable, preference be given to the purchase, acquisition, or use of goods, products, or materials produced in the United States [See [2 CFR §200.322](#)].

Monitoring

Because the SEA (CDE) is responsible for ensuring that its LEA grantees are meeting all applicable requirements that are detailed in 34 CFR §§ 75.600-75.618, as well as in OMB Standard Forms 24B and D, use of ESSER funds for construction purposes will be part of the ESSER monitoring process.