

This guidance document is not an all-inclusive list of Federal, state, and local construction requirements. CDE strongly recommends LEAs consult with an attorney regarding any construction project.

An 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 [424B](#) 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).

Definition of Construction

The definition of construction is based on the definition provided in the [USDE FAQ](#):

The broad Impact Aid definition of "construction" includes new construction as well as remodeling, alterations, renovations, and repairs under which many activities related to COVID-19 would likely fall.

The Impact Aid program statute defines "construction" as "(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).

Additionally, in determining whether activities should be considered construction, please consider whether the activity results in a permanent structural change, prolongs the life of or changes the value of property, or would require special skills to conduct the work.

The following requirements must be met prior to receiving 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. When doing so, LEAs have the responsibility to ensure that completed projects comply with all the applicable regulations delineated below.

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). **Please keep in mind that DBRA applies to contracts with mechanics, plumbers, or other laborers, even outside of construction projects. Therefore, LEAs must ensure that prevailing wages are paid in contracted services.** See [U.S. Department of Labor](#) for additional information, resources, and trainings.

- See [SAM.gov](#)
 - Search by county by selecting Colorado from the dropdown menu on the [Wages website](#)
- 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 by the contractor prior to requesting to use ESSER funds for such construction.

An LEA that is using Federal education funds to support a construction project must include all applicable contract clauses found in [29 CFR 5.5](#). The LEAs must also maintain contractor certified payroll records and submit these records to the State.

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);

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); and

9) Has the LEA designed and constructed facilities to maximize the efficient use of energy (34 CFR §§ 75.616)?

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].

Unnecessary and Duplicative Items

The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach [See 2 CFR §§ 200.318].

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](#)].

Cost Price Analysis

The grantee must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold (\$250,000), including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals [See 2 CFR §200.324].

Applicable Provisions

The non-Federal entity's contracts must contain the applicable provisions described in appendix II to this part, including but not limited to Equal Employment Opportunity, the Contract Work Hours and Safety Standards Act, and the Clean Air Act [See 2 CFR §§ 200.327].

Reporting on Real Property

The Federal awarding agency or pass-through entity must require a non-Federal entity to submit reports at least annually on the status of real property in which the Federal Government retains an interest, unless the Federal interest in the real property extends 15 years or longer. In those instances where the Federal interest attached is for a period of 15 years or more, the Federal awarding agency or pass-through entity, at its option, may require the non-Federal entity to report at various multi-year frequencies (e.g., every two years or every three years, not to exceed a five-year reporting period; or a Federal awarding agency or pass-through entity may require annual reporting for the first three years of a Federal award and thereafter require reporting every five years) [See 2 CFR §§ 200.330].

Filing a Notice of Federal Interest



An LEA using federal education funds to support a construction or renovation project must record a Notice of Federal Interest in the official real property records for the jurisdiction in which the facility is located as soon as possible after the approval from the state educational agency (SEA, i.e., Colorado Department of Education) to construct or renovate the facility. Please see CDE's [guidance document on filing a Notice of Federal Interest](#) for more information.

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 424B and D, use of ESSER funds for construction purposes will be part of the ESSER monitoring process.