



Spending ESSER Funds on Construction

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Established Elementary and Secondary School Emergency Relief (ESSER) Fund

- Coronavirus Aid, Relief, and Economic Security (CARES) Act (ESSER 1)
 - “to prevent, prepare for and respond to the coronavirus”
- Coronavirus Response and Relief Supplemental Appropriations Act (CRRSAA) (ESSER 2)
 - “to prevent, prepare for and respond to the coronavirus”
- The American Rescue Plan Act of 2021 (ARP) (ESSER 3 or ARP ESSER)
 - ARP: “to carry out this section”; subject to local planning requirements, stakeholder input



Can I fund a single project with ESSER I, II or III funds or a combination of funds?

- **Yes, but** these are separate grants!
 - Must maintain separate accounting 34 CFR 76.760
 - Track allocability



Construction/Renovations

Can I charge **construction** costs to ESSER funds? (e.g., building outdoor classroom space)

- Yes! (CARES)
 - Generally, education funds are prohibited from construction unless the statute explicitly allows it. CARES Act does not mention construction.
 - But, ED argues that “any activity under ESEA” includes Impact Aid, and Impact Aid authorizes construction costs. Accordingly, ED believes ESSER funds may be used for construction costs needed to prevent, prepare for and respond to the Coronavirus.

Can I charge **construction** costs to ESSER funds?

- Yes! (CRRSAA/ARP):
- School facility repairs and improvements to enable operation of schools to reduce risk of virus transmission and exposure to environmental health hazards, and to support student health needs.
- Inspection, testing, maintenance, repair, replacement, and upgrade projects to improve the indoor air quality in school facilities, including mechanical and non-mechanical heating, ventilation, and air conditioning systems, filtering, purification and other air cleaning, fans, control systems, and window and door repair and replacement.

New ESSER FAQs – May 26, 2021

- Any of the ESSER funds may be used to support all of the allowable uses of funds listed in any of the ESSER Programs (A-1)

https://oese.ed.gov/files/2021/05/ESSER.GEER_FAQs_5.26.21_745AM_FINALb0cd6833f6f46e03ba2d97d30aff953260028045f9ef3b18ea602db4b32b1d99.pdf

Also in ARP ESSER Fact Sheet (March 2021)

- https://oese.ed.gov/files/2021/03/FINAL_ARP-ESSER-FACT-SHEET.pdf

Can I charge **new construction** costs to ESSER funds?

ESSER FAQ B-6

“Yes ... However, the Department **discourages** LEAs from using ESSER and GEER funds for new construction because this use of funds may **limit** an LEA’s ability to **support other essential needs or initiatives**. Remodeling, renovation, and new construction are often **time-consuming**, which may not be workable under the shorter timelines associated with ESSER and GEER funds.”





Can I charge **construction** costs to ESSER funds?

- Yes, but many requirements must be met!
 - ✓ Prior written approval from SEA (200.439)
 - ✓ General cost principles (reasonable, necessary, allocable)
 - ✓ Procurement requirements
 - ✓ Construction regulations 76.600 (including Davis-Bacon wage requirements)
 - ✓ Timely implementation!! (CARES- 2022, CRRSAA- 2023, ARP- 2024)

What Rules
Apply?



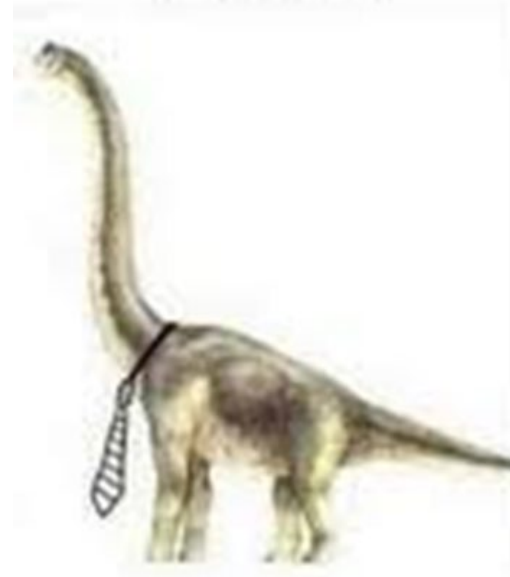
What is construction?

- Construction – ?
- Minor Remodeling – means minor alterations in a previously completed building. The term also includes the extension of utility lines. The term does not include building construction, structural alterations to buildings, building maintenance, or repairs. (34 CFR 77.1)
- Maintenance and Repair Costs – incurred for utilities, janitorial services, repair, etc. or upkeep of a building and equipment which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition. (2 CFR 200.452)
- Equipment and other Capital Expenditures – additions, renovations, improvements to land, buildings, or equipment which materially increase their value or useful life. (2 CFR 200.439; 200.1)

Construction v.
Remodeling v.
Capital
Expenditures v.
Maintenance

IF A BRACHIOSAURUS WORE A TIE, WOULD HE WEAR IT

LIKE THIS



OR LIKE THIS





76.600 – Where to find construction regulations

A state or subgrantee shall comply with the rules on construction that apply to applications and grantees under 34 CFR 75.600 – 75.627.

State performs functions of Secretary (Sec. 75.602 (preservation of historic sites) and Sec. 75.605 (approval of drawings and specifications))



75.600 – Use of a grant for construction

Sections 75.601 – 75.615 applies to an applicant that requests funds for construction

ED Construction Regulations (75.600-617)

- Environmental impact
- Preservation of historic sites
- Title (to grantee)
- Availability of cost-sharing
- Beginning the construction
- Completing the construction
- Designing facilities
- Cultural activities
- Safety and health standards
- Accessibility
- Avoidance of flood hazards
- Supervision/inspection by grantee
- Relocation assistance
- Grantee must have operational funds
- Operation and maintenance
- Energy conservation
- Compliance with Coastal Barrier Resources Act

Construction Requirements

ESSER FAQ B-6

“Approved construction projects (i.e., remodeling, renovation, and new construction) also must comply with applicable Uniform Guidance requirements, Davis-Bacon prevailing wage requirements, and all of the Department’s applicable regulations regarding construction at 34 CFR §§ 76.600 and 75.600-75.618.”

Construction Requirements (cont.)

ESSER FAQ B-6

- Environmental impact assessed
- National Register of Historic Places
- Title sufficient for use and possession for useful life (50 yr.)
- Approval of final plans before advertised or bidding
- Complete within time period and with plans and specifications
- Functional, economical and not elaborate in design compared to other facilities in the area
- Plans comply with federal, state and local health and safety and accessibility standards
- Sufficient operational funds to operate and maintain after construction is complete

Construction Requirements (cont.)

ESSER FAQ B-6

- Ultimately Governor or SEA is responsible for LEA's compliance with:
 - Labor standards
 - Flood hazards
 - Historic preservation
 - Health and safety
 - Energy conservations
 - Coastal barrier resources



Can I charge **renovation and improvements** to a school facility to ESSER funds?

ESSER FAQ B-7

- Includes: replacing old carpet with tile, bringing unused space into compliance for social distancing, creating more space for social distancing, replacement, repairer, upgrading HVAC systems, window and door repair and replacement, etc.



Can I charge **renovation and improvements** to a school facility to ESSER funds? (cont.)

ESSER FAQ B-7

- Yes, but ... same requirements apply as for construction.
- “These projects are also subject to prior written approval ... and applicable UG requirements, Davis-Bacon prevailing wage requirements and all of the Dept’s ***applicable*** regulations regarding construction at 34 CFR 76.600 and 75.600-75.618.”



Is it Construction?

Replacing carpet with hard surface floors.

Not construction.



New fence around outdoor classroom area

Depending on the extent of the fence, most likely not a structural change to facilities. Likely capital improvement.



Installation of new HVAC system.

ED includes HVAC installation in discussion of construction costs.



Installing “room dividers” within previously completed building to increase social distancing

Under HEERF guidance, not construction because no “structural alteration to the building”



Is more to safeguard your health
ing, no infection



Touchless toilets and sinks

Likely minor remodeling, improvement

Touchle

Replacing Windows

Likely meet the definition of capital improvement requiring prior approval from the state.



Purchasing modular units / trailer to implement social distancing.

Not construction; equipment purchase.



Can I charge buses (other **equipment**) to ESSER?

- Proceed with caution.
- Must tie the purchase to the coronavirus (e.g., necessary for social distancing measures)
- Must consider other, less expensive alternatives (leasing? Travel vouchers?)
- Must have prior approval from the state. (2 CFR 200.439)



Can I charge **construction/renovation** costs to ESSER funds?



- Replacing a leaky roof that is the source of increased moisture inside a school building;
- Construction of additional classrooms to increase social distancing and reduce class size;
- Bringing unused facilities up to code in order to utilize them for additional classroom space so that class sizes may be reduced;
- Replacing windows to improve indoor air quality;
- Renovations that would allow for the creation of a separate waiting room for sick students;
- The construction of secure waiting area in school lobby so that guests may be screened prior to being admitted to a main school facility.

What other requirements must be considered?



Competition 200.319

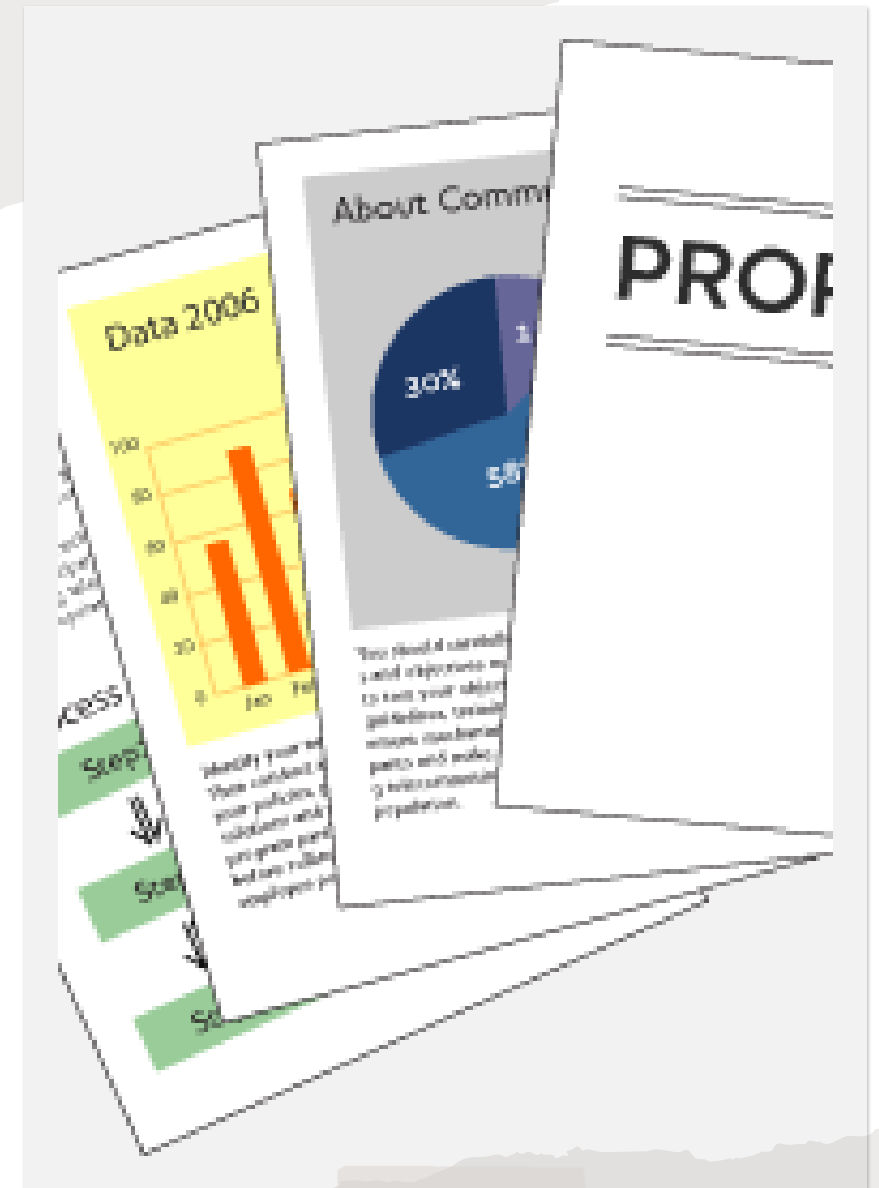
(a) All procurement transactions for the acquisition of property or services required under a Federal award must be conducted in a manner providing full and open competition consistent with the standards of this section and §200.320.

...

(f) Noncompetitive procurement can only be awarded in accordance with 200.320(c).

Noncompetitive Proposals 200.320(c)

- Appropriate only when:
 - **Micro-purchases**
 - The item is only available from a single source;
 - **There is a public emergency for the requirement that will not permit delay resulting from publicizing a competitive solicitation;**
 - The Federal awarding agency or pass-through expressly authorizes noncompetitive procurement in response to a written request from non-Federal entity; or
 - After soliciting a number of sources, competition is determined inadequate.



A/E Contracts

Are architectural and engineering (A/E) services exempt from federal procurement requirements? Not quite...

- “When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.” 200.319
- “May use competitive proposal procedures for qualifications-based procurement of architectural/engineering professional services”
 - Can only be used in procurement of A/E professional services; not to purchase “other types of services through A/E firms that are a potential source to perform the proposed effort.” 200.320(b)(2)(iv)

Previously planned projects/ contracts – can ESSER pay part?

- Avoid acquisition of unnecessary or duplicative items (consolidating or breakout out procurement to obtain more economical purchase)
- Use excess and surplus property in lieu of purchasing new equipment and property, whenever such use is feasible and reduces project costs

Previously planned projects/ contracts – can ESSER pay part? (cont.)

- It depends...
 - Other considerations: Prior approval, 200.439; contract terms and conditions; **Davis-Bacon Wage requirements**; project timelines; “necessary, reasonable and allocable”; “prevent, prepare for and respond to the coronavirus”
 - *ED email: must comply with Davis-Bacon; may have some flexibility between March 13, 2020 – CARES awards.*

Davis Bacon Act

Applies to all federal contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works.

- Includes:
 - Construction
 - Alteration
 - Repairs
 - Painting & decorating, etc.

Rule: Must pay workers no less than the locally prevailing wage & fringe benefits for corresponding work in the area. (Department of Labor)

Where can I find information about prevailing wage requirements?

- <https://www.dol.gov/agencies/whd/governmentcontracts/construction/regions>

Cost Price Analysis – 200.324

- Required for every procurement action over \$250,000
 - “[A]s a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.”
- Profit must be negotiated as a separate element of the price
 - Complexity of the work; risk borne by contractor; contractor’s investment; amount of subcontracting; quality of record; industry rates
- “Cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.”

2 CFR 200.327/ Appendix II to Part 200

- Contracts *must* contain applicable provisions in Part 200 Appendix II
- What's in appendix II?
 - Davis-Bacon Act
 - Contract Work Hours and Safety Standards Act
 - Clean Air Act
 - Federal Water Pollution Control Act
 - Byrd Anti-lobbying Amendment

Reporting on Real Property 2 CFR 200.330

- Must report to the pass-through on the status of the property acquired with federal funds annually (unless different time period established) for 15 years
 - Equipment is inventoried according to 2 CFR 200.313.

Q&A Sessions for LEAs

- Please complete this form to submit questions for Brustein & Manasevit:
https://stateoftennessee.formstack.com/forms/lea_grant_oversight_pd_questions





Questions

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