**USING ESSER FUNDS FOR CONSTRUCTION, MINOR REMODELING, AND REPAIRS AND MAINTENANCE**

**Overview**

This guide is intended to provide an overview of the process and requirements for approving facilities projects, including construction, using ESSER I, II, and III grant funds. Notably, ESSER grant funds, unlike most federal entitlement grants, allow for construction and facilities improvement expenses because CARES Act (ESSER I), CRRSA (ESSER II), and ARP (ESSER III)[[1]](#footnote-1) incorporate all allowable uses of funds under ESSA, which allows construction in Title VII, Impact Aid. See [34 cfr § 75.533](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/subject-group-ECFR5b0424c51575a58/section-75.533).

As a baseline, however, any construction or facilities-related project, like any ESSER expenditure, must be:

1. an allowable activity,
2. necessary, reasonable, and allocable to the grant, and,
3. to prevent, prepare for or respond to COVID-19 and its impacts.

**How is construction defined?**

***Construction*** is not defined by ESSER. DESE defines construction on a case-by-case basis with reference to the following factors (all factors in paragraph 1 are not required for a determination of construction):

1. The scope of the proposed project:
	1. For buildings or structures, whether the project involves buildings and structures being erected, or altered or extended in height or area;
	2. Whether the project requires demolition of buildings or substantial structures;
	3. Whether the project involves major changes to the underlying structure of a building, whether temporary or permanent, or major changes to landscaping or topography;
	4. Whether building permits are required for the work;
	5. The timeline for the project; and/or
	6. The total budget for the project (including funds from all sources).
2. Whether the project constitutes maintenance, repairs, or minor remodeling as defined below.

**Minor remodeling, maintenance, and repairs are not considered construction.**

***Minor remodeling*** means minor alterations in a previously completed building. The term also includes the extension of utility lines, such as water and electricity, from points beyond the confines of the space in which the minor remodeling is undertaken but within the confines of the previously completed building. The term does not include building construction, structural alterations to buildings, building maintenance, or repairs. [34 CFR § 77.1](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=29297f1f0cfb3bcf0a0ad4415d863b4b&term_occur=999&term_src=Title:34:Subtitle:A:Part:77:77.1)

***Maintenance and repairs*** means costs incurred for utilities, insurance, security, necessary maintenance, janitorial services, repair, or upkeep of buildings and equipment (including Federal property unless otherwise provided for) which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition. Excerpted from [2 CFR §200.452](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-E/subject-group-ECFRed1f39f9b3d4e72/section-200.452).

**What is DESE’s process for construction/facilities project approval and oversight?**

**Approval:** The approval process has two steps.

1. **Step One – For each project**:
	1. Complete and submit a capital expenditure (capex)/construction form with your application, which contains:
		1. Information about the project, description, location, duration, relation to COVID-19. Please submit a separate form for each project;
		2. Information and assurances regarding state and federal procurement and construction laws and regulations to which the project must adhere;
		3. Include Documentation as follows:
			1. for applicants who have not gone to bid/procurement:
				* a copy of your written procurement policy and procedures that reflects federal procurement requirements ([2 CFR §§200.317-326](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d?toc=1)).
			2. for applicants with projects that have already gone through the procurement process:
				* copies of the final bid/contract/purchase order (for all expenditures),
				* plan(s) demonstrating all required approvals, certifications, and signoffs (for construction projects),
				* building permits (for construction projects),
				* and any other requested documents and information related to the project.
	2. Your federal grant liaison will provide an email indicating that your project has received Step 1 approval with the approval of your ESSER II or III grant and will indicate whether the project is considered construction, minor remodeling, or maintenance/repairs.

**Consequences of Step One Approval:** Your budget for the project will be provisionally approved, subject to submission of final bid and, for construction projects, stamped project plans and building permits if not submitted at Step 1, as well as subject to complying with all regulations and processes contained in the assurances applicable to the project.

**Final bid/contract/purchase order and, for construction projects, stamped project plans, as well as building permits must be submitted prior to seeking reimbursement from any ESSER grant (.pdf or .jpeg are acceptable). Failure to provide these documents before claiming reimbursement could result in disapproval of project and require the return of federal funds.**

1. **Step Two and Oversight**:
	1. Districts must submit copies of:
		1. For **all facilities projects** (maintenance, repair, minor remodeling or construction):
			* + the final bid/contract/purchase order
		2. For **those projects determined to be construction**:
			* + plan(s) demonstrating all required approvals, certifications, and signoffs,
				+ building permits,
				+ and any other requested documents related to the project.
	2. Districts must revise construction/Capex/facilities approval form to include any changes to the project since Step 1 approval, as well as amending grant budgets, if necessary; and,
	3. Districts must provide additional assurances and submit a Request for Final Approval form.
	4. Assurances on the Request for Final Approval will include your district’s affirmative requirement to notify DESE when any aspect of the project to be paid with federal grant funds is materially changed in design (from the submitted plans in a. above) or in cost (as indicated in your grant budget). Failure to timely notify DESE of these changes may result in disqualification of these costs from reimbursement through your grant.
	5. Your federal grant liaison will provide an email indicating that your project has received Step 2 approval once your submission of documents is complete and has been accepted by DESE.
	6. **Note:**  Any documents (e.g., contracts, purchase orders, final bid documents) submitted to DESE with Requests for Final approval or as follow-up to a Capital Expenditure approval are being reviewed verify that the scope and cost of the project that was approved as part of the initial budget approval process.  Compliance with all other statutory and regulatory requirements associated with the project remain the responsibility of the district and will be reviewed as part of the monitoring/audit process.

**Consequences of Step Two Approval:** Once all materials have been submitted by the district and accepted by DESE, the district may draw down federal funds from ESSER grants, as budgeted, for approved project expenses subject to compliance with all assurances given by the district in conjunction with approval of this project (Steps 1 and 2).

**Reminder: All project claims for reimbursement are limited to expenses obligated within the period of availability for each grant (ESSER I (through September 30, 2022), ESSER II (through September 30, 2023), and ESSER III (through September 30, 2024)).**

**What special rules relate to ESSER-funded construction projects?**

Summarized below are the key federal regulations for construction and facilities projects. Districts should consult with building experts and attorneys with knowledge of federal, state, and local requirements for construction and procurement as well as circumstances of each project to ensure a fully compliant, successful project.

1. **EDGAR.** The United States Department of Education (USED) has regulations entitled Education Department General Education Requirements (EDGAR), which contain specific requirements for **projects that DESE determines to be construction** using federal funds ([34 CFR §76.600](https://www.ecfr.gov/current/title-34/subtitle-A/part-76/subpart-F/subject-group-ECFR0c65e40eca00876/section-76.600), [34 CFR §§ 75.600-617](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.600)). These requirements are summarized below:
2. **Preservation of Historic Sites** **(**[**34 CFR § 75.602**](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.602)**)**. All applicants must indicate whether the proposed construction project on any district, site, building, structure or object that is 1) included in the National Register of Historic Places or 2) eligible for inclusion in the National Register of Historic Places.

**TIP:** Information onreview by the Massachusetts Historic Commission (MHC) for federal and state historic preservation compliance can be found on the website of the Secretary of the Commonwealth of Massachusetts [here](https://www.sec.state.ma.us/mhc/mhcrevcom/revcomidx.htm). This website indicates that the MHC will respond to all project notification forms (requests for review) within 30 days.

1. **Title to Construction Site** **(**[**34 CFR § 75.603**](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.603)**)**. A district must have and be able to demonstrate title or other interest to the site where the construction is taking place, including right of access, that is sufficient to ensure the grantee’s undisturbed use and possession of the site for 50 years or the useful life of the facilities, whichever is longer.

**TIP:** This requirement cannot be satisfied if the *grantee* is not the holder of title or other interest. For example, if the property is owned by a legally separate entity, federal funds may not be used to conduct construction on the property, even if the separate entity is supportive of the grantee, unless the grantee has sufficient interest in the property to satisfy the above requirement.

1. **Availability of cost-sharing funds** **(**[**34 CFR § 75.604**](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.604)**).** Districts must ensure that they have and can demonstrate, if necessary, that they have sufficient funds available to meet costs of the construction project that are not covered with federal grant funds.
2. **Completing the construction** **(**[**34 CFR § 75.606**](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.606)**).** Districts must complete the construction in accordance with the application and approved drawings and specification within a reasonable time. DESE reserves the right to require “as built” construction plans as a condition of receiving final project reimbursement.

**TIP: USED has stated that construction activities must be obligated within the period of availability for each ESSER grant** (ESSER I, through September 30, 2022; ESSER II, through September 30, 2023, and ESSER III (ARP), through September 30, 2024). To meet this requirement, districts should be careful to allow for completion of federally funded components of construction within respective periods of availability.

1. **General considerations for design and construction (**[**34 CFR § 75.607**](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.607)**).** The construction must be functional, economical, and not elaborate in design or extravagant in the use of materials compared to other facilities.
2. **Compliance with health and safety standards (**[**34 CFR § 75.609**](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.609)**).** Districts must observe standards under the Occupational Safety and Health Act of 1970, or state and local codes if more stringent, when planning for and designing facilities.
3. **Access for persons with disabilities** **(**[**34 CFR § 75.610**](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.610)**).** Districts must comply with federal regulations on access by persons with disabilities applying to construction and alteration of facilities (residential facilities, 24 CFR Part 40; nonresidential facilities, 41 CFR subpart 101-19.6).

**TIP:** See also Massachusetts [regulations](https://www.mass.gov/law-library/521-cmr) regarding construction and making public buildings and facilities accessible to persons with disabilities. [521 CMR §1.00](https://www.mass.gov/law-library/521-cmr) et seq.

1. **Avoiding flood hazards** **(**[**34 CFR § 75.611**](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.611)**).** In planning construction projects, districts should evaluate flood hazards and, as far as practicable, avoid uneconomic, hazardous, and/or unnecessary use of flood plains in connection with construction (see [43 FR 6030](https://archives.federalregister.gov/issue_slice/1978/2/10/6018-6055.pdf#page=13)).
2. **Supervision and inspection (**[**34 CFR § 75.612**](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.612)**).** Districts must maintain competent architectural supervision and inspection at the construction site to ensure that the construction project conforms to approved drawings and specifications.
3. **Operational funds** ([**34 CFR § 75.614**](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.614)**).** Districts must ensure that they have sufficient funds to effectively operate and maintain the constructed project.
4. **Operation and maintenance** ([**34 CFR § 75.615**](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.615)**).** Districts must operate and maintain constructed projects in accordance with applicable federal, state, and local requirements.
5. **Energy conservation (**[**34 CFR § 75.616**](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.616)**).** Districts must design and construct facilities, to the extent feasible, to maximize the efficient use of energy and must comply with the following [American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) standards](https://www.ashrae.org/technical-resources/standards-and-guidelines/read-only-versions-of-ashrae-standards):

(1) ASHRAE-90 A-1980 (Sections 1-9)

(2) ASHRAE-90 B-1975 (Sections 10-11)

(3) ASHRAE-90 C-1977 (Section 12)

1. **Compliance with Coastal Barrier Resources Act** **(**[**34 CFR § 75.617**](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.617)**).** Districts may not use federal grant funds to build within the Coastal Barrier Resources system.

**Note:** USED has determined that [34 CFR §75.601](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.601), requiring an **environmental impact statement, does not apply to district construction projects for federal compliance** (state requirements may still require an impact statement). In addition, districts do not need to have final working drawings and specifications approved by DESE prior to bidding or advertising the project ([34 CFR § 75.605](https://www.ecfr.gov/current/title-34/subtitle-A/part-75/subpart-E/section-75.605)). See, Elementary and Secondary School Relief (ESSER) program, [*Use of Funds FAQs School Construction*, Office Hours slide presentation](https://oese.ed.gov/files/2021/06/HVAC_Use-of-funds-F06-17-2021.pdf) (June 17, 2021).

1. **Uniform Guidance.** The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance) are found in the Code of Federal Regulations at [2 CFR Part 200](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200?toc=1) and see also, [Appendix II](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/appendix-Appendix%20II%20to%20Part%20200) (contracting provisions). **The Uniform Guidance contains provisions that apply to procurement and contracting for *all purchases with federal grant funds*, unless limited by the language of the regulation**. The key contracting requirements are listed below. *A few select procurement considerations* are also described below. For a comprehensive overview of federal procurement requirements, see [DESE’s Resource Guide on Procurement Using Federal Grant Funds](https://www.doe.mass.edu/federalgrants/esser/procurement-guide.docx).
2. **Procurement Considerations**
	1. **Business preferences (**[**2 CFR § 200.321**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d/section-200.321)**).** Districts should retain minority business, women's business enterprises, and labor surplus area firms when possible.
	2. **Domestic preference (**[**2 CFR §200.232**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d/section-200.322)). Districts should, to the greatest extent practicable, demonstrate a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States**. Contracts for work or products using federal funds must contain these requirements.**
3. **Contract requirements for contracts using federal funds. *Note that these provisions apply to all contracts being paid with federal funds, not just construction, unless specifically limited by the individual regulation*.**
	1. **Remedies for breach (**[**2 CFR 200, Appendix II(A)**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/appendix-Appendix%20II%20to%20Part%20200)**)**. If the contract amount exceeds $250,000, it must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms and provide for sanctions and penalties.
	2. **Termination** **(**[**2 CFR 200, Appendix II(B)**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/appendix-Appendix%20II%20to%20Part%20200)**)**. If the contract amount exceeds $10,000, it must address termination for cause and for convenience, including the manner by which it will be effected and the basis for settlement.
	3. **Equal Employment Opportunity (**[**2 CFR 200, Appendix II(C)**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/appendix-Appendix%20II%20to%20Part%20200)**)**. Any federally assisted construction contract (see [41 CFR §60.1](https://www.law.cornell.edu/cfr/text/41/60-1.3)) must include an equal employment opportunity clause provided in [41 CFR §60-1.4(b)](https://www.ecfr.gov/current/title-41/subtitle-B/chapter-60/part-60-1/subpart-A/section-60-1.4#p-60-1.4(b)).
	4. **Davis-Bacon Act, Prevailing Wage** **(**[**2 CFR 200, Appendix II(D)**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/appendix-Appendix%20II%20to%20Part%20200)**)**. For all prime construction contracts in excess of $2,000 involving federal funds, districts must include a provision in the contract requiring compliance with the Davis-Bacon Act (payment of federally determined prevailing wages) and related regulations ([40 USC §3141 *et seq*](https://www.dol.gov/whd/regs/statutes/dbra.htm). and [29 CFR Parts 1, 3, 5, 6 and 7](https://www.dol.gov/dol/cfr/Title_29/Chapter_I.htm))**,** as well as the [Copeland “Anti-Kickback” Act](https://webapps.dol.gov/elaws/elg/kickback.htm) (40 USC §3145).

**Tip**: For information on the United States Department of Labor prevailing wages, visit <https://www.dol.gov/whd/programs/dbra/index.htm>. Massachusetts also has prevailing wage requirements for all public construction projects lasting longer than one year. [Mass. Gen. Laws ch. 149, § 27.](https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section27) For information on Massachusetts’ requirements, see the Massachusetts Department of Labor’s [*Topical Outline of Massachusetts Prevailing Wage Law*](https://www.mass.gov/doc/prevailing-wage-topical-index/download) (May 14, 2021). For construction projects using federal funds, the higher of the wage rates between Massachusetts prevailing wage and federal (Davis-Bacon) prevailing wages will apply.

* 1. **Contract Work Hours and Safety Standards** **(**[**2 CFR 200, Appendix II(E)**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/appendix-Appendix%20II%20to%20Part%20200)**)**. For any contract over $100,000 involving a mechanic or laborer a provision must be included for paying these workers pursuant to a 40-hour week and overtime as set forth in the Contract Work Hours and Safety Standards Act, 40 USC §3702, §3704 and 29 CFR Part 5.
	2. **Rights to Inventions** **(**[**2 CFR 200, Appendix II(F)**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/appendix-Appendix%20II%20to%20Part%20200)**).** Certain contracts made with nonprofit organizations or small business must comply with 37 CFR Part 401 with regard to rights to any inventions.
	3. **Clean Air Act** **(**[**2 CFR 200, Appendix II(G)**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/appendix-Appendix%20II%20to%20Part%20200)**).** If the contract amount exceeds $150,000, it must include clauses requiring compliance with the Clean Air Act and the Federal Water Pollution Control Act.
	4. **Suspension and Debarment**. **(**[**2 CFR 200, Appendix II(H)**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/appendix-Appendix%20II%20to%20Part%20200)**).** Districts may not contract with any party listed on the governmentwide [exclusions in the System for Award Management (SAM)](https://sam.gov/content/exclusions).
	5. **Anti-Lobbying** **(**[**2 CFR 200, Appendix II(I)**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/appendix-Appendix%20II%20to%20Part%20200)**).** For contracts exceeding $100,000, districts must require bidders to submit an anti-lobbying certification compliant with the Byrd Anti-Lobbying Amendment (31 USC § 1352).
	6. **Cost/Price Analysis** **(**[**2 CFR § 200.324(a)**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d/section-200.324#p-200.324(a))**)**. If the contract amount (including contract modifications) exceeds $250,000 (SAT), districts must perform a cost or price analysis.
	7. **Profit Negotiation** **(**[**2 CFR 200.324(b)**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d/section-200.324#p-200.324(b))**).** For a contract in which there is no price competition and in all cases where cost analysis is performed, districts must negotiate profit as a separate element of the price.
	8. **Contract Oversight (**[**2 CFR 200.318(b)**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d/section-200.318#p-200.318(b))**).** Districts must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
	9. **Conflicts of Interest (**[**2 CFR 200.318(c)(1)**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d/section-200.318#p-200.318(c)(1))**).** Districts must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engage in the selection, award, and administration of contracts.
	10. **Bonding Requirements (**[**2 CFR §200.326**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d/section-200.326)**).** For construction or facility improvement contracts exceeding $250,000 (SAT), DESE may accept the district’s bonding policy and requirements if it determines the Federal interest is adequately protected. If not, districts must require a bid guarantee of 5% of the contract price, a performance and payment bonds of 100% of the contract price.
	11. **Insurance Coverage (**[**2 CFR §200.310**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR8feb98c2e3e5ad2/section-200.310)**).** Districts must insure real property and equipment acquired or improved with federal funds with coverage equivalent to their other property.
	12. **Real Property Acquired or Improved** **(**[**2 CFR §200.311**](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR8feb98c2e3e5ad2/section-200.311)**).** Real property acquired or improved with federal funds must be used for its original authorized purpose and may not be disposed of or encumbered. When the property is no longer needed for its original purpose,the district must seek instructions for disposition of the property, which shall be one of three options that compensates or returns the property to USED.
	13. **Other**. Districts should review OMB Standard Forms 24B and D (Assurances for [Non-Construction](https://www.nist.gov/system/files/documents/tip/SF-424b.pdf) and [Construction Programs](https://www.epa.gov/sites/default/files/2020-06/documents/sf424d-v1.1_fill-sign.pdf)) for additional federal requirements that may apply to their construction projects.

*This document does not constitute legal advice nor is it a substitute for consulting with your own counsel and district experts to ensure that your district complies with all applicable federal requirements as they should be interpreted and applied to your particular project(s) and expenditures*.

1. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136 (March 27, 2020), and further funded under the Coronavirus Response and Relief Supplemental Appropriations (CRRSA) Act, 2021, Pub. L. No. 116-260 (December 27, 2020) and the American Rescue Plan (ARP) Act of 2021, Pub. L. No. 117-2 (March 11, 2021). [↑](#footnote-ref-1)