

Appendix A: Construction Supplement to the State & Federal Grants Manual

Federal grant management has become more complex during the COVID-19 pandemic due to the the influx of additional federal grants such as Emergency and Secondary School Emergency Relief (ESSER) Grant Programs that can be used for construction such as HVAC projects.

The purpose of this appendix is to ensure compliance with EDGAR regulations as they related to the administration of federal grant funds for construction (34 CFR 75.600).

Elementary and Secondary School Emergency Relief (ESSER) Grant Programs

ESSER grant funding is authorized in three pieces of legislation. As a result, the ESSER programs are administered by TEA as separate grant programs. An ESSER side-by-side is under development.

ESSER grant funds were authorized under three (3) separate federal legislations. ESSER program information by federal legislation is provided below:

ESSER I Grant Program

(FAR code 266) Authorized in [Title VIII, Division B, of the Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#), signed into law in March 2020. Period of availability is March 13, 2020 (with pre-award), to September 30, 2022 (with carryover).

CRRSA ESSER II Grant Program

(FAR code 281) Authorized in [Title VIII, Division B, of the Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#), signed into law in March 2020. Period of availability is March 13, 2020 (with pre-award), to September 30, 2022 (with carryover).

ARP ESSER III Grant Program

(FAR code 282) Authorized in the [American Rescue Plan Act \(ARP\)](#), signed into law in March 2021. Period of availability is March 13, 2020 (with pre-award), to September 30, 2024 (with carryover).

ESSER-SUPP Grant Program

(Use ESSER III FAR code 283, along with a local option code to distinguish it as separate from ESSER III) The Texas Legislature authorized under TEC Section 29.930 as added by House Bill 1525, 87th Legislature, Regular Session, a portion of the state's discretionary ESSER III funding to provide additional resources to pay for unreimbursed costs due to the coronavirus pandemic and for intensive educational supports for students not performing satisfactorily.

Information related to these federal grant funds such as program guidelines, sample application, program-specific provisions and assurance, and critical event deadlines are available on the TEA Grant Opportunities webpage at: [GrantProgramDetails \(state.tx.us\)](#) [Hint: Search on keyword "ESSER".

TEA has created numerous resources to aid school districts in managing the federal grant funds such as:

- [ESSER Side-by-Side Requirements Document](#)
- [ESSER FAQ](#)
- [ESSER FAQ Submission](#)
- [ESSER Justification/Documentation of Allowable Users of ESSER Funds](#)
- [Pre-Approval for Construction, Remodeling, Alteration, Renovation, or Repair Costs](#)

The ESSER Side-by-Side guidance document includes the following allowable costs that are related to construction.

- 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.
- Developing strategies and implementing public health protocols including, to the greatest extent practicable, policies in line with guidance from the CDC for the reopening and operation of school facilities to effectively maintain the health and safety of students, educators, and other staff.
- Other allowable cost activities may also provide an opportunity for construction projects with ESSER grant funds.

The district has selected the following allowable grant activities on the grant application to support the district’s construction projects.

- Developing strategies and implementing public health protocols including, to the greatest extent practicable, policies in line with guidance from CDC for the reopening and operation of school facilities

Note. Construction costs without prior written approval from TEA are unallowable costs.

The District has/will fund the following ESSER grant-funded projects:

Project Title	Project Description	ESSER Grant Activity #	Project Cost	TEA Approval Date
Elementary Gym	Gym Close In	B9	\$600,000	01/12/2023

Federal Grant Management Provisions related to Construction with ESSER Funds

In addition to the general federal grant management provisions in the State and Federal Grant’s Manual, the following TEA guidance related to construction is provide to ensure compliance with the new federal grant funds.

According to TEA’s ESSER FAQs:

Approved construction and renovation projects must comply with applicable Uniform Guidance requirements, as well as USDE’s regulations regarding construction under 34 CFR § 76.600. As is the case with all remodeling or construction contracts using laborers and mechanics financed by federal education funds, an LEA that uses ESSER funds for minor remodeling, renovation, repair, or construction

contracts over \$2,000 must meet all Davis-Bacon Act 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).

The broad ESSA 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 (see June 21, 2021, clarification below). However, USDE discourages LEAs from using ESSER 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. These types of activities are also subject to a number of additional federal requirements, as detailed below.

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.” While construction is generally allowable, it is the responsibility of the LEA to assure that individual costs:

- 1) comply with the Cost Principles in 2 CFR Part 200, subpart E (e.g., the cost must be “necessary and reasonable” (2 CFR §§ 200.403-200.404));*
- 2) meet the overall purpose of the CARES Act, CRRSA Act, or ARP Act programs, which is “to prevent, prepare for, and respond to COVID-19”; and*
- 3) are consistent with the proper and efficient administration of those programs.*

Under these general principles, any construction activities, including renovations or remodeling, that are necessary for an LEA to prevent, prepare for, and respond to COVID-19 could be permissible, though the burden remains on grantees and subgrantees to maintain the appropriate documentation that supports the expenditure.

As noted above, an LEA using ESSER funds for remodeling, renovation, and new construction must comply with additional federal requirements. For example, these projects require prior written approval by TEA. Approved construction projects (i.e., remodeling, renovation, and new construction) also must comply with applicable Uniform Guidance requirements, Davis-Bacon Act prevailing wage requirements, and all of the Department’s applicable regulations regarding construction at 34 CFR §§ 76.600 and 75.600-75.618. Some of the relevant requirements that must be considered before a new construction project is initiated include:

- 1) Has the grantee 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 grantee 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 grantee have title or other interest in the site, including right of access, that is sufficient to ensure that the grantee 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 grantee 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 a grantee 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 grantee'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 grantee 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).*

As of 12/19/2022, this form will be submitted via the EDGAR 2.0 WorkApp.

<https://workapps.smartsheet.com/app/PV3M9RP4vpVhGfqXm9Cwc9qGR3/7QRHJfFGf34Gq>

ESSER funds may be used to make necessary improvements, for example to improve air quality and support social distancing, so that teachers and students may safely return to and continue in-person instruction. As is the case with all activities charged to ESSER, costs must be reasonable and necessary to meet the overall purpose of the program, which is "to prevent, prepare for, and respond to COVID-19". Therefore, renovation or remodeling activities that are necessary for an LEA to prevent, prepare for, and respond to COVID-19 would be permissible. This might include the 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.

These projects may (see June 21, 2021, clarification below) also be subject to prior written approval by TEA and applicable Uniform Guidance requirements, Davis-Bacon Act prevailing wage requirements and all of USDE's applicable regulations regarding construction under 34 CFR §§ 76.600 and 75.600-75.618. To request prior approval from TEA, complete and submit the ARP Construction Pre-Approval Request form.

In implementing any allowable ESSER activity, a subgrantee must follow all applicable federal, state, and local standards and policies (e.g., building codes or specifications for HVAC systems, which may be consistent with standards identified by the EPA, CDC, or World Health Organization). If an LEA uses funds for HVAC systems, USDE's regulation in 34 CFR § 75.616(c) requires the use of American Society of Heating, Refrigeration and Air Conditioning Engineers (ASHRAE) standards. The LEA might also consider using ESSER funds to establish a program for assessing and improving HVAC systems. Such a program

could also require verification that proper ventilation is occurring, such as through the use of carbon dioxide (CO₂) monitors.

Please note that the Environmental Protection Agency (EPA) has a variety of publications that can assist education leaders in improving the indoor air quality in schools. EPA resources on indoor air quality in schools can be accessed at: <https://www.epa.gov/iaq-schools>. The EPA has information available at: <https://www.epa.gov/coronavirus/air-cleaners-hvac-filters-and-coronavirus-covid-19> on some indoor air filtration devices that use bipolar ionization technology, which has the potential to create ozone. EPA states that ozone generators should not be used in occupied spaces. If choosing to use a device that incorporates bipolar ionization technology, EPA recommends using a device that meets UL 2998 standard certification (Environmental Claim Validation Procedure (ECVP) for Zero Ozone Emissions from Air Cleaners) and notes that there are many air cleaning devices that do not use bipolar ionization. In addition, the CDC provides information on improving ventilation in schools at: <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/ventilation.html> and in buildings at: <https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html>.

On June 21, 2021, USDE further clarified their FAQ regarding Construction and HVAC activities:

- TEA has the authority to define its own reasonable prior approval process required for construction, including HVAC projects, that require prior approval.
- Some HVAC projects may constitute “minor remodeling” and not be considered as construction projects requiring prior approval. Minor remodeling means minor alterations in a previously completed building for purposes associated with the coronavirus. 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 permanent building construction, structural alterations to buildings, building maintenance, or repairs. However, minor remodeling projects that constitute capital assets under the Uniform Guidance still require prior approval consistent with 2 CFR §200.439.
- TEA prior approval is not required before LEA bidding is advertised under applicable requirements.
- TEA approval can come at any point in the project timeline until reimbursement using ARP ESSER funds occurs.
- The provisions of the National Environmental Policy Act (NEPA) do not apply to construction projects funded with ESSER funds.

Therefore, TEA will require the prior approval request to be submitted before the grant application (either in the original application or an amendment containing the construction cost) is approved but will not require the prior approval request to be approved by TEA before the bid process begins or the work may have begun during the pre-award period.

Since it is an allowable activity, TEA will provide prior approval and allow ESSER funds to be used for construction.

However, the LEA is accepting multiple risks in using federal funds for construction. There is risk of future audit findings related to whether the LEA appropriately meets all the federal requirements imposed on

construction projects, and there is risk in the construction project not being completed by the end of the ESSER funding period and the LEA not being able to appropriately expend the ESSER funds that had been appropriated for the construction project on short notice.

Any allowable use of funds to be charged to the ESSER grant must be reasonable and necessary, the LEA must justify the use of funds meets the intent of the ESSER statute (which is to prevent, prepare for, or respond to the COVID-19 pandemic, including its impact on the social, emotional, mental health, and academic needs of students), and the LEA must align it to an allowable activity in the statute. USDE has clarified that ESSER I, ESSER II, and ESSER III grants may be expended for any allowable activity codified under statute in ESSER I, II, or III; making the allowable activities interchangeable among the activities that are listed in Section 18003(d) of the CARES Act, Section 313(d) of the CRRSA Act, and Section 2001(e) of the ARP Act.

In determining how to prioritize its funds, an LEA should consider how to use those funds to safely reopen schools for full-time instruction for all students, maintain safe in-person operations, advance educational equity, and build capacity. An LEA may provide services directly or enter into an agreement (e.g., a contract or interagency agreement consistent with procurement requirements or otherwise legally authorized) for allowable activities under ESSER. An LEA is not authorized to award subgrants with ESSER funds. contract or interagency agreement consistent with procurement requirements or otherwise legally authorized) for allowable activities under ESSER. An LEA is not authorized to award subgrants with ESSER funds.

Note that all renovation, including minor remodeling, HVAC, and air quality projects are considered construction by USDE and must have TEA prior approval as described above.

Per USDE guidance, LEAs may use ESSER I, ESSER II, and ESSER III grants for any of the following allowable uses.

TEA ESSER FAQs related to the use of ESSER funds to remodel restrooms to include installation of touch free toilets and sinks states that: *The remodeling costs associated with CDC health and safety recommendations could be allowable. Any other renovations charged to ESSER funds must meet the intent and purpose of the statute. Remember prior approval is required for all construction, renovation and remodeling projects.*

Other potential allowable projects may include the following is pre-approval and well documented:

- *Construction of cell towers to provide WiFi access to students throughout the district*
- *Playground equipment to promote social distancing*
- *Expansion of instructional space*

Grant Application Process:

Prior to submitting the ESSER grant application with construction costs, the Director of Business & Finance shall prepare and submit the Pre-Approval for Construction, Remodeling, Alteration, Renovation or Repair Costs form through TEA's EDGAR WorkApps smartsheet. All renovations and repairs that require pre-approval include HVAC, ventilation and air quality costs. As of 12/19/2022, this form will be submitted via the [EDGAR 2.0 WorkApp](#).

The Director of Business & Finance shall work collaboratively with the federal grant manager to ensure that all EDGAR regulations related to construction are adhered to .

The grant application shall include pre-approved construction costs in the 6600 object code class. *According to the TEA ESSER FAQs, the ESSER prior approval for a construction project would include the services of the professional engineer if it is part of the HVAC project that is being submitted for review and approval.*

Budgeting ESSER Grant Funds:

After securing the pre-approval from TEA, the Director of Business & Finance shall ensure that the construction costs are budgeted in the 6600 object code class as authorized by Financial Accountability System Resource Guide, or the granting agency, as appropriate.

According to TEA's ESSER FAQs, construction costs must be budgeted in function 81 and not function 71 (debt).

Period of Performance (Obligations)

The district shall ensure that the period of performance for the ESSER grant funds matches both the NOGA grant period and the specific quarters/fiscal years as noted on the grant application. The Accountant shall be responsible to oversee that all costs for ESSER grants are in compliance with both requirements.

The construction project manager shall be informed of the grant start and end dates.

Procurement Standards and Expenditures of Grant Funds

The district shall utilize either the [ESSER Justification/Documentation of Allowable Users of ESSER Funds](#) or a local similar form to document all ESSER grant fund expenditures. The district's purchasing procedures shall be utilized for all ESSER grant fund purchases.

In addition to compliance with EDGAR provisions related to construction, the district shall adhere to all state laws, local policies and procedures related to the procurement of construction.

In accordance with 2 CFR 200.319(d)(1)(2), the district shall ensure that the follow procurement requirements are included in all procurement specifications:

- The specifications shall provide a clear and accurate description of the technical requirements as they relate to the material, product and/or service to be provided
- The description of the project does not unduly restrict competition
- All requirements and other factors and their relative weights to be used when evaluating the bids and proposals are identified in the specifications
- Prohibition of prospective contractor's involvement in the development of the specifications, bid documents and contracts
- In accordance with 2 CFR 200.320 (b)(2), the district shall adhere to the following process to conduct technical evaluations of proposals received and the selection of the awarded contract.
- Evaluation criteria shall be included in the specifications, to include the weights of all criteria
- A team approach shall be used to obtain at least 3 individuals to review and rank the proposals/bids
- Review of proposal/bid by each member of the review team and determination of the total points based on the criteria and weights

- Aggregation of the individual ranking to determine the team ranking
- The contract shall be awarded to the responsible offeror whose proposal/bid is the most advantageous to the district with price and other factors considered
- Awards for professional services such as architects and engineers shall be based on the offeror's qualifications and an award made subject to negotiation of fair and reasonable fees.

The Superintendent shall lead the evaluation team process. The Director of Business & Finance shall also ensure that no conflict of interest exists with any of the evaluation team members involved in the review and selection of the vendor.

Davis Bacon Act:

According to TEA's ESSER FAQs: The LEA must maintain sufficient source documentation to show compliance with the Davis-Bacon Act requirement such as certified payrolls.

All construction procurement documents must be in compliance with the Davis Bacon Act. Documentation must be maintained the support compliance with Davis Bacon Act during the procurement process. Documentation may include:

- Prevailing wages documentation in the construction specifications
- Davis Bacon Act job site posting requirements
- Weekly payroll reports with every project drawdown (AIA reports)
- Conducting interviews of construction workers/employees listed in the payroll certification records to ensure accuracy.

Domestic Preference for Procurement (commonly referenced as Buy America):

A Buy America preference, as defined in section I of guidance introduced by the U.S. Executive Office in a memorandum No. M-22-11, only applies to the iron and steel, manufactured products, and construction materials used for the infrastructure project under an award. The requirements of this guidance memorandum are to ensure that "none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States."

If an agency has determined that no funds from a particular award under a covered program will be used for infrastructure, a Buy America preference does not apply to that award. Similarly, for a covered program, a Buy America preference does not apply to non-infrastructure spending under an award that also includes a covered project. A Buy America preference applies to an entire infrastructure project, even if it is funded by both Federal and non-Federal funds under one or more awards.

Use of Design-Build Delivery Method

According to the TEA ESSER FAQs: Since this process is consistent with state procurement requirements, we default to federal thresholds in determining compliance with federal procurement. Accordingly, if the overall contract is under \$250,000, then it is likely that the design build process could meet the informal federal procurement requirements, as it only requires two quotes in support of the reasonableness of the award and the process solicits budget information from potential vendors.

If the overall contract exceeds \$250,000, then to meet federal procurement requirements the district would need to comply with 2 CFR §200.320(b). Generally, sealed bids are preferred for construction contracts (200.320(b)(1)), but

here, if the resulting agreement is cost-reimbursement, it would require the open proposal process in 2 CFR §200.320(b)(2). In either circumstance, price must be used as a selection factor (only architect/engineer professional services can be procured based only on qualifications, with price negotiated afterwards). And of course, the federal terms and conditions must be included, such as Davis Bacon, etc. But assuming the design-build process does not rely only on qualifications, but uses price information to select the winning proposal, then the process should meet federal requirements.

LEAs who may have utilized design-build without pricing information prior to this guidance should contact the Department of Grant Compliance and Administration at GrantSupport@tea.texas.gov.

According to 36.209, the grantee would need to obtain approval from TEA. 36.209 Construction contracts with architect-engineer firms. No contract for the construction of a project shall be awarded to the firm that designed the project or its subsidiaries or affiliates, except with the approval of the head of the agency or authorized representative. Subpart 36.3 – Two-Phase Design-Build Selection Procedures.

Please refer to AU-Q142 for further information.

Use of Manager at Risk Method

Under the manager at risk method. The owner chooses the construction manager. Prior to the bid stage. The district should competitively procure the manager. The grantee can make a case of sole source. It would a be a noncompetitive procurement under a failed subcontractor, then the methods for noncompetitive would apply 2 CFR 200.320(c)

Property Standards and Management

All assets purchased with ESSER grant funds shall be added to the district's asset inventory records in compliance with EDGAR. The funding source, such as ESSER I, II or III shall be part of the asset records. The ESSER-funded assets shall be labeled with federal grant program. The district may purchase assets with ESSER grant funds. Assets purchased with ESSER federal grant funds will be subject to the EDGAR Property Standards, including the inventory requirements.

Cost Principles – Allowable Costs

Although there is great flexibility with the use of the ESSER grant funds, the district shall ensure that all grant expenditures are allowable under the Federal Cost Principles (2 CFR 200 – Subpart E), the grant application program assurances, the granting agency's policies, and the district policies and procedures. Specifically, the allowable costs shall be in compliance with the ESSER grant application and the statutorily allowed activities.

Before payment is made for construction projects, the Director of Business & Finance shall verify that all required documentation such as certified payroll is reviewed and approval to support construction costs. The Accountant and CFO shall ensure that all costs reclassified to an ESSER grant fund meet all grant award and EDGAR regulations.

The Director of Business & Finance shall complete and submit a Davis Bacon Act Certification form with every AIA payment request form to the Accounts Payable department.

Contract Monitoring

The Director of Business & Finance shall be responsible to monitor and maintain oversight all construction projects funded with federal grant funds. The Director of Business & Finance shall oversee that the contractors perform in accordance with the terms, conditions and specifications of their contracts and purchase orders.

The construction performance review shall include performing onsite technical inspections and completion of certified percentage data reports such as work completed, materials stored, etc.

The Director of Business & Finance shall also verify that all billed work has been completed before a payment is made to the vendor and that the invoice (AIA payment form) contains all required documentation such as the certified payrolls.