

# Frequently Asked Fiscal Questions Related to ESSER and GEER, Includes Construction Related Questions

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**Prepared By:** Division of School Business Services

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## Contents

Purpose of this Document: .....	5
Allowable Costs .....	6
1. How do we determine if something is an allowable cost for the ESSER funds? .....	6
Procurement Requirements .....	6
2. Where are the North Carolina State Procurement laws? .....	6
3. How do we decide the best procurement method to use? .....	6
4. If the project cost is more than the Covid grant funding available, can the school supplement this budget with additional funds, as long as the project is complete by the required dates of the COVID grants? .....	6
Period of Performance, Obligations, and Liquidations .....	7
5. Confirm ESSER funds need to be encumbered by Sept 2024 deadline? .....	7
6. How is “encumbered” defined? .....	7
7. Does the work need to be done by the Sept 2024 deadline? Is there a liquidation period considered to be included in the performance period such that work can be performed during the liquidation period? .....	8
8. If our work isn’t completed by the Sept 2024 deadline, can we get an extension and what would be needed in the extension request? .....	8
Inventory/Equipment .....	9
9. What if the equipment purchased or modified with ESSER Funds is no longer being used for its intended purpose? .....	9
10. What purchases, made with ESSER funds, need to be inventoried? .....	9
Davis-Bacon Act .....	10
11. Tell me about the Davis-Bacon Act (DBA)? .....	10
12. Do we have to pay all personnel working on ESSER-construction related projects DBA Wages (e.g., maintenance staff, school volunteers, other personnel doing construction-related work. ....	10
13. How often do Davis-Bacon reports need to be submitted? .....	10
14. Does Davis-Bacon require employees to be paid weekly? .....	10
15. Who is responsible for collecting the Davis-Bacon reports? .....	10
16. Is there a specific form for reporting Davis-Bacon reporting? .....	10
17. What projects require Davis-Bacon compliance? .....	11
18. What language needs to be included in bid packages to satisfy Davis-Bacon? .....	11
Construction.....	11

19.	What documents are required of the General Contractor to be submitted per ESSER Requirements, beyond Davis-Bacon Prevailing Reports? .....	11
20.	Do ESSER funded projects have MWBE requirements? .....	11
21.	Do ESSER Funded Projects have MWBE Participation goals or requirements over and above those established for the project? If so, are there forms required and to whom are these to be addressed? .....	12
22.	Are there ESSER Scope of Work limitations for what can be included in the Project Budget and funded by ESSER? .....	12
23.	Does the construction work need to be done by the Sept 2024 deadline? Is there a liquidation period considered to be included in the performance period such that work can be performed during the liquidation period? .....	13
24.	If our construction work isn't completed by the Sept 2024 deadline, can we get an extension and what would be needed in the extension request? .....	13
25.	Would purchasing a HVAC Chiller and installation be considered construction? .....	13
26.	Are all HVAC services considered construction? .....	13
27.	Can ESSER funds be used for construction projects that would produce revenue (stadiums, tracks, etc.,)? .....	13
28.	What happens to income for projects that would produce revenue (stadiums, tracks, etc.,) after the period of performance? .....	13
29.	Explain the 50 year interest requirement. ....	14
30.	Explain the Federal interest filing requirement. ....	14
31.	Can a PSU obtain services for architectural and engineering services without price as a selection factor? .....	14
32.	Can a firm hired to perform A&E services also bid on the specified construction work? .....	14
33.	What do we need to do if the federally funded construction project/real property assets need to be (1) disposed of (2) modify the use of the real property changes? .....	15
	School Planning Related to Construction .....	15
34.	In addition to Design Reviews for a construction project, does NCDPI have a role in reviewing construction project budget estimates or GMP proposals? .....	15
35.	Is the NC DPI "Certificate of Review" required before work can begin in the field? Can work begin, at risk, ahead of receipt of the "certificate of review"? .....	15
	Construction Reporting Requirements .....	16
36.	What are Documentation Requirements for ESSER Construction Projects? .....	16

37. What documents are required to be remitted to NC DPI related to construction projects? .....	16
Appendix I: References to Regulations .....	17

## **Purpose of this Document:**

The purpose of this document is to provide guidance, answer Frequently Asked Questions and additional guidance that may come in the future about fiscal requirements related to the funds provided under the Elementary and Secondary School Emergency Relief (ESSER) Fund, including the American Rescue Plan ESSER (AR may be used in response to the impact of the coronavirus disease 2019 (COVID-19) pandemic on students in pre-K–12 education. (ARP ESSER) program, and the Governor’s Emergency Education Relief (GEER) Fund.

This document will be updated periodically, as updated question and answers are added.

References and hyperlink to the policies, statutes, and regulations cited are included in the appendix at the end of this document.

Other than statutory and regulatory requirements included in the document, such as those pursuant to the authorizing statute and other applicable laws and regulations, the contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. In addition, it does not create or confer any rights for or on any person.

Please be sure to consult with your Board Attorney in making decisions. DPI provides guidance based on our understanding and does not provide legal-council.

Questions regarding programmatic and allowability should be directed toward the Office of Federal Programs.

# Frequently Asked Questions Related to ESSER Spending and Construction Projects:

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## Allowable Costs

### **1. How do we determine if something is an allowable cost for the ESSER funds?**

ESSER grant expenditures must align with purpose and allowable uses in accordance with federal law in preventing, preparing for, and responding to coronavirus. Please see allowable uses outlined in the State Board approved NCDPI Allotment manual and discuss with your Federal Program Administrator under the Office of Federal Programs.

## Procurement Requirements

### **2. Where are the North Carolina State Procurement laws?**

In addition to the Uniform Guidance requirements, Local Education Agencies are required to follow North Carolina General Statute NCGS 143-128, 143-129 and NCGS 143-131.

### **3. How do we decide the best procurement method to use?**

Procurement methods depend on the dollar threshold, the funding source, and requirements of the specific grant and/or program. Depending on the dollar volume, either informal procurement method or formal purchasing methods are used, please refer to UG § 200.319 and 320. Note: § 200.319 Competition: (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.

In addition, procurement must comply with local governments procurement policy and all state and federal procurement requirements, whichever are more stringent.

### **4. If the project cost is more than the Covid grant funding available, can the school supplement this budget with additional funds, as long as the project is complete by the required dates of the COVID grants?**

Yes. Even though it is split funded please be sure to follow all the regulations set forth by the Uniform Guidance and limitations set forth by the other funding source.

## Period of Performance, Obligations, and Liquidations

### 5. Confirm ESSER funds need to be encumbered by Sept 2024 deadline?

The period of performance for ESSER and other federal and state funds can be found in the NCDPI Allotment Manual for COVID Funds that can be found on NC DPI's website. In summary:

	PRC	Period of Performance	Liquidation Period
ESSER I	163	September 30, 2022	January 28, 2023
ESSER II	171	September 30, 2023	January 28, 2024
ESSER III	181	September 30, 2024	January 28, 2025

A PSU had until September 30, 2022, to obligate ESSER I funds; this included the 12-month Tydings Amendment period. Although funds must be obligated by the end of the Period of Performance, grant activities carried out through a valid obligation of funds may continue through the liquidation date. Under § 200.344(a), ESSER and GEER funds must be liquidated within 120 calendar days of the end of the performance period.

### 6. How is “encumbered” defined?

An encumbrance by NCGS § 143C-6-23 is a “financial obligation created by a purchase order, contract, salary commitment, unearned or prepaid collections for services provided, or other legally binding agreement. A financial obligation is not an encumbrance for purposes of this section unless it (i) is in writing and has been signed by a person or entity who has authority to legally bind the grantee or subgrantee to spend the funds or (ii) was created by the provision of goods or services to the grantee or subgrantee by a third party under circumstances that create a legally binding obligation to pay for the goods or services.”

Note: Payroll cannot be encumbered. Obligations for employees do not occur until the work is performed.

The US Department of Education federal regulations at §76.707 govern when an obligation occurs with ESSER and all federal grant funds:

#### **§ 76.707 When obligations are made.**

The following table shows when a State or a subgrantee makes obligations for various kinds of property and services.

<b>If the obligation is for -</b>	<b>The obligation is made -</b>
(a) Acquisition of real or personal property	On the date on which the State or subgrantee makes a binding written commitment to acquire the property.
(b) Personal services by an employee of the State or subgrantee	When the services are performed.
(c) Personal services by a contractor who is not an employee of the State or subgrantee	On the date on which the State or subgrantee makes a binding written commitment to obtain the services.
(d) Performance of work other than personal services	On the date on which the State or subgrantee makes a binding written commitment to obtain the work.
(e) Public utility services	When the State or subgrantee receives the services.
(f) Travel	When the travel is taken.
(g) Rental of real or personal property	When the State or subgrantee uses the property.
(h) A pre-agreement cost that was properly approved by the Secretary under the cost principles in 2 CFR part 200, Subpart E - Cost Principles	On the first day of the grant or subgrant performance period.

**7. Does the work need to be done by the Sept 2024 deadline? Is there a liquidation period considered to be included in the performance period such that work can be performed during the liquidation period?**

ESSER III grant funds must be obligated by September 30, 2024, and liquidated by January 28, 2025. See question 5 for a definition of obligation and to identify the period of performance and liquidation dates for each ESSER grant.

LEA's must complete performance of grant activities, which includes the receipt of goods and completion of services including completed construction, within the period of performance. Goods and services that are obligated properly can be received and paid for through the liquidation period.

**8. If our work isn't completed by the Sept 2024 deadline, can we get an extension and what would be needed in the extension request?**

LEA's must complete performance of grant activities, which includes the receipt of goods and completion of services including completed construction, within the period of performance.



Goods and services that are obligated properly can be received and paid for through the liquidation period.

If liquidation becomes an issue after the obligation deadline, the Department of Education may consider a liquidation extension on a case-by-case basis. The liquidation extension is not guaranteed and should not be part of the intended plan for completing the delivery of obligations related to goods or services. See US Department of Education ESSER and GEER Use of Funds FAQs Question E-3.b.:

When must ESSER I, ESSER II, ARP ESSER, GEER I, and GEER II funds be liquidated?

Grantees and subgrantees, by regulation, must liquidate funds within 120 calendar days after the program's obligation date (see FAQs E-1, E-2, and E-3) per § 200.344(b). If ESSER I and GEER I funds are properly obligated by September 30, 2022, but liquidation becomes an issue after the obligation deadline, the Department may approve liquidation extension requests on a case-by-case basis upon written request of an SEA or Governor grantee, in accordance with § 200.344(b). If approved, an ESSER I or GEER I grantee may have up to 18 months beyond the end of the obligation period to liquidate funds, although longer requests may be considered for construction or extraordinary circumstances. Under a liquidation extension, the delivery of goods and some services may continue through the end of the liquidation period, so long as a timely and valid obligation had been made pursuant to § 76.707. Because the ESSER II and GEER II obligation period does not end until September 30, 2023, and the ARP ESSER obligation period does not end until September 30, 2024, the Department strongly encourages States and LEAs to obligate and liquidate ESSER II, GEER II, and ARP ESSER funds with urgency on activities that will support students' academic recovery and mental health needs. The Department will determine any process for submitting a Liquidation Extension Request for ESSER II, GEER II, and ARP ESSER funds at a later date.

## **Inventory/Equipment**

### **9. What if the equipment purchased or modified with ESSER Funds is no longer being used for its intended purpose?**

If the equipment is used as a trade-in or the PSU sells the equipment, the proceeds can offset the cost of the replacement equipment. 200.313(c)

If equipment or supplies in the aggregate value of \$5000 are no longer used for the original purpose or program, the PSU must follow disposition rules outlined in the 200.313(e) and 200.314(a).

### **10. What purchases, made with ESSER funds, need to be inventoried?**

Supplies under \$5000 (or the capitalization threshold established by the PSU if lower) - Management should have physical control over vulnerable assets such as laptops. Management should establish physical control to secure and safeguard vulnerable assets. Examples include security for and limited access to assets such as cash, securities, inventories, and equipment that might be vulnerable to risk of loss or unauthorized use. Management should periodically count and compare such assets to control records. GAO-14-704G Standards for Internal Control in the Federal Government.

Equipment over \$5000, Land, and Buildings should be managed and controlled according to § 200.313.

## Davis-Bacon Act

Answers related to Davis-Bacon Act are based on Public Law 107-217 August 21, 2002 (as amended)

### 11. Tell me about the Davis-Bacon Act (DBA)?

- a) Davis-Bacon is also known as the Construction Wage Rate Requirements Statute.
- b) The act specifies DBA wages must be paid for any construction related work paid for with Federal Funds. Applies to construction, alteration, and or repair of public buildings including painting and decorating. (29 CFR Part 5) over \$2,000.00.
- c) The requirement must be included in all contracts and subcontracts using federal funds.
- d) The requirement must be written in the contract.
- e) A poster is to be posted at the jobsite on the topic.
- f) Contractors are obligated to pay weekly and provide the school's contracting officer with a weekly certification.

### 12. Do we have to pay all personnel working on ESSER-construction related projects DBA Wages (e.g., maintenance staff, school volunteers, other personnel doing construction-related work).

Yes for construction related projects paid for with Federal funds.

### 13. How often do Davis-Bacon reports need to be submitted?

Reports must be submitted weekly by law.

### 14. Does Davis-Bacon require employees to be paid weekly?

Yes

### 15. Who is responsible for collecting the Davis-Bacon reports?

Each school should designate a contracting officer for the project. The term *Contracting Officer* means the individual, a duly appointed successor, or authorized representative who is designated and authorized to enter into contracts on behalf of the Federal agency. (29 CFR part 5.2 (e)). The contractor is responsible for collecting the information from subcontractors.

The contracting officer is responsible for collecting the Davis-Bacon reports.

### 16. Is there a specific form for reporting Davis-Bacon reporting?

General: Form WH-347 has been made available for the convenience of contractors and subcontractors required by their Federal or Federally aided construction-type contracts and subcontracts to submit weekly payrolls. Properly filled out, this form will satisfy the requirements of the Regulations, Parts 3 and 5 (29 C.F.R., Subtitle A), as to payrolls submitted in connection with contracts subject to the Davis-Bacon and related Acts.

## **17. What projects require Davis-Bacon compliance?**

Every contract in excess of \$2,000, to which the Federal Government is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government that are located in a State and which requires or involves the employment of mechanics or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics.

This is relevant to all applicable federally funded projects.

## **18. What language needs to be included in bid packages to satisfy Davis-Bacon?**

For contract language please consult with the PSU's Board attorneys.

## **Construction**

## **19. What documents are required of the General Contractor to be submitted per ESSER Requirements, beyond Davis-Bacon Prevailing Reports?**

The GC should provide documentation as required by terms and conditions of the contract with the PSU.

Further, the GC should maintain documentation to show compliance as required with the following terms and conditions:

- Domestic preferences for procurements - As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award. § 200.323
- Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms which are discussed in question #. § 200.321
- Bonding requirements. § 200.325
- Davis-Bacon Act requirements as noted in question § 200 Appendix I (D)
- Contract Work Hours and Safety Standards Act § 200 Appendix I (D)
- Debarment and Suspension responsibilities to ensure subcontractors are not on the federal suspension or debarred list § 180.220(c)
- All other contract terms and conditions as required by the contract and Appendix II of the Uniform Guidance, as applicable.

## **20. Do ESSER funded projects have MWBE requirements?**

Yes, § 200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms requires:

- (a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

- (b) Affirmative steps must include:
- (1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
- (2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
- (3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
- (4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;
- (5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
- (6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in [paragraphs \(b\)\(1\)](#) through [\(5\)](#) of this section.

**21. Do ESSER Funded Projects have MWBE Participation goals or requirements over and above those established for the project? If so, are there forms required and to whom are these to be addressed?**

Uniform Guidance does not have specific participation goals or requirements that are applicable to all PSUs. However, Uniform Guidance does require affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible. See question #.

Uniform Guidance also requires that the PSUs follow all applicable State and Federal laws related to procurement. The State of North Carolina requires goals for LEAs in building construction projects over \$300,000 with local funds; \$100,000 with state funds. G.S. 143-128.2, G.S. 143-128.4

All PSUs must maintain documentation showing evidence of the affirmative steps taken to comply with NCGS and Uniform Guidance along with the procurement history including bidding and contract documents. Please consult with your school's attorney to determine any submission requirements to the State related to NCGS.

**22. Are there ESSER Scope of Work limitations for what can be included in the Project Budget and funded by ESSER?**

When the value of the procurement for property or services under a Federal financial assistance award exceeds \$250,000, or a lower threshold established by a non-Federal entity, formal procurement methods are required. The sealed bids method is the preferred method for procuring construction per 200.320b1. If sealed bids are used, a firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. 200.320bii

In a firm fixed price contract, the PSU should prepare a contract that addresses allowable and unallowable overhead and administrative costs as it relates to changes. The contract must address the requirement to follow Uniform Guidance principles including § 200.403(b) and § 200.420.

§ 200.403(b) Be necessary and reasonable for the performance of the Federal award and be allocable thereto under these principles.

§ 200.420 provides principles to be applied in establishing the allowability of certain items involved in determining cost. Some costs outlined in this section are unallowable to all federal grants while others have limitations.

Note: The cost plus a percentage of cost and percentage of construction cost method of contracting must not be used 200.324 and time-and-materials type contracts can be used in very limited situations 300.318j.

**23. Does the construction work need to be done by the Sept 2024 deadline? Is there a liquidation period considered to be included in the performance period such that work can be performed during the liquidation period?**

See question #7

**24. If our construction work isn't completed by the Sept 2024 deadline, can we get an extension and what would be needed in the extension request?**

See question #8

**25. Would purchasing a HVAC Chiller and installation be considered construction?**

Generally, replacement of a unit is considered construction.

**26. Are all HVAC services considered construction?**

Generally, HVAC installation and replacement services are considered construction. Replacement of chillers, control systems and other peripheral equipment is considered construction. Replacement of filters or single vents would generally be considered repair and maintenance. There are other types of HVAC services that need additional consideration and could be either construction or maintenance. Please see the NC DPI Construction presentation and the EDGAR definition for construction to assist in determining whether a project is considered construction. (US Department of Education FAQ dated December 7, 2022).

**27. Can ESSER funds be used for construction projects that would produce revenue (stadiums, tracks, etc.,)?**

Usually if the Federal Award specifies how the income is to be used, those instructions should be followed. However, in the case of ESSER funds, the Federal Award does not specify in its regulations or the terms and conditions of the Federal award or give prior approval for how program income is to be used, with that, the income should be deducted from the allowable costs during the period of performance. § 200.307

**28. What happens to income for projects that would produce revenue (stadiums, tracks, etc.,) after the period of performance?**

There are no Federal requirements governing the disposition of income earned after the end of the period of performance for the Federal award unless the Federal awarding agency

regulations or the terms and conditions of the Federal award provide otherwise. The Federal awarding agency may negotiate agreements with recipients regarding appropriate uses of income earned after the period of performance as part of the grant closeout process. See the § 200.307 for additional information.

### **29. Explain the 50 year interest requirement.**

Use of federal funds for construction requires the school to either have title (own) for property, including right of access, that is sufficient to ensure the grantee will have use and possession of the facility for 50 years or the useful life of the facility, whichever is longer (§ 75.603).

### **30. Explain the Federal interest filing requirement.**

Federal Law requires the grantee file a notice of Federal interest on the property when ESSER or GEER funds are used to purchase land, construct a building, or make improvements to a building on leased property.

US Department of Education ESSER and GEER Use of Funds FAQ dated 12/07/2022 Question B-6.e. requires the school “Will record the Federal interest in the title of real property in accordance with awarding agency directives and will include a covenant in the title of real property acquired in whole or in part with Federal assistance funds to assure nondiscrimination during the useful life of the project.” Until further details are available on the specifics of this filing, please consult with your board attorney.

### **31. Can a PSU obtain services for architectural and engineering services without price as a selection factor?**

The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby the offeror's qualifications are evaluated, and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation.

Uniform Guidance § 200.319(b) allows for the selection of architecture and engineering services where price is not a selection factor. § 200.320 (iv). The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services through A/E firms that are a potential source to perform the proposed effort.

### **32. Can a firm hired to perform A&E services also bid on the specified construction work?**

Uniform Guidance § 200.319(b) allows for the selection of architecture and engineering services where price is not a selection factor. § 200.320 (iv). The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services through A/E firms that are a potential source to perform the proposed effort.

§ 200.319(b) In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements.



**33. What do we need to do if the federally funded construction project/real property assets need to be (1) disposed of (2) modify the use of the real property changes?**

Except as otherwise provided by Federal statutes or by the Federal awarding agency, real property will be used for the originally authorized purpose as long as needed for that purpose, during which time the non-Federal entity must not dispose of or encumber its title or other interests. 200.311(b)

If the PSU modifies the use of, or changes the terms of the real property title, or other interest, the PSU must obtain permission and instructions from the awarding agency. OMB 424D Standard Form. Assurance US Department of Education ESSER and GEER Use of Funds FAQ dated 12/07/2022 Question B-6.e

If the property is disposed of or when real property is no longer needed for the originally authorized purpose, the non-Federal entity must obtain disposition instructions from the Federal awarding agency or pass-through entity. The instructions must provide for one of the following alternatives:

- (1) Retain title after compensating the Federal awarding agency...
- (2) Sell the property and compensate the Federal awarding agency....
- (3) Transfer title to the Federal awarding agency or to a third party designated/approved by the Federal awarding agency § 200.311(c)

### **School Planning Related to Construction**

**34. In addition to Design Reviews for a construction project, does NCDPI have a role in reviewing construction project budget estimates or GMP proposals?**

No, DPI School Planning conducts Design Reviews, but typically does not issue comments related to contractor Budget Estimates or GMP proposals. Once the construction project is approved by NC DPI in the grant application, NC DPI is not involved in the review and approval process for PSU procurement associated with the projects. The PSU should follow established internal controls to ensure costs are allowable per Uniform Guidance and approved as required by their applicable State and Local laws, policies, and procedures. While the proposal price does not have to be reviewed by NC DPI, costs associated with the project must be necessary and reasonable. 200.404

**35. Is the NC DPI “Certificate of Review” required before work can begin in the field? Can work begin, at risk, ahead of receipt of the “certificate of review”?**

DPI School Planning issues a Certificate of Review upon completion of the Design Review process. Projects that begin construction before Design Review completion incur increased risk of costly field changes. Prudent advanced planning and project management will incorporate required reviews into the project delivery schedule.

## Construction Reporting Requirements

### 36. What are Documentation Requirements for ESSER Construction Projects?

§ 200.318 General procurement standards.

(a) The [non-Federal entity](#) must have and use documented procurement procedures, consistent with [State](#), local, and tribal laws and regulations and the standards of this section, for the acquisition of property or services required under a [Federal award](#) or [subaward](#). The [non-Federal entity](#)'s documented procurement procedures must conform to the procurement standards identified in [§§ 200.317](#) through 200.327. Specifically, § 200.318(I) The Non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to, the following: Rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

The Davis-Bacon Act contains specific requirements, please refer to the Davis-Bacon section of this Q&A. Please refer to question 11 to 18.

### 37. What documents are required to be remitted to NC DPI related to construction projects?

A PSU must submit:

1. Design documents for review. See question #26 and 27. See NC DPI School Planning Web Site, link in appendix I
2. An assurance form OMB Standard Form 424D - Must be filed with NC DPI for each construction project. DPI will provide instructions when they are available. US Department of Education ESSER and GEER Use of Funds FAQ dated 12/07/2022
3. Report to NC DPI at least annually on:
  - i. The non-Federal entity must submit annually an inventory listing of federally owned property § 200.312
  - ii. The status of real property in which the Federal Government retains an interest. § 200.330

DPI will provide instructions when they are available.



## Appendix I: References to Regulations

Davis Bacon Act: [Davis-Bacon Act](#)

Davis Bacon Act, Department of Labor FAQ's [Department of Labor Davis Bacon FAQ's](#)

[Education Department General Administrative Regulations \(EDGAR\) \(34 CFR 75.600-75.615\)](#)

[GAO-14-704G Standards for Internal Control in the Federal Government](#)

NC DPI School Planning [NC DPI School Planning](#)

NCGS [143-128](#), [143-129](#) and NCGS [143-131](#)

[OMB Form 424D](#)

[State Board of Education Approved COVID Allotment Manual](#)

[Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards \(2 CFR 200\)](#)

[US Department of Education ESSER and GEER Use of Funds FAQs](#)